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# STUDY ON APPROPRIATE WAREHOUSING AND COLLATERAL MANAGEMENT SYSTEMS IN SUB-SAHARAN AFRICA

VOLUME III - REVIEW OF APPLICABLE LAWS



# **STUDY ON APPROPRIATE WAREHOUSING AND COLLATERAL MANAGEMENT SYSTEMS IN SUB-SAHARAN AFRICA**

**VOLUME III - REVIEW OF APPLICABLE LAWS**

## **Prepared for**

Agence Française de Développement (AFD)  
Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA)  
International Fund for Agricultural Development (IFAD)

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## Foreword

Farmers throughout the developing world face considerable challenges in accessing finance, and this can often influence their decision-making. For instance, even if they know they should not sell soon after harvest, when prices are typically low, they are often forced to sell because they need the cash to meet their family basic needs.

These challenges must be addressed with financing solutions tailored to the different actors of the agricultural value chain. Warehouse receipt financing enables the post-harvest part of the value chain to function more efficiently and is a potentially useful tool for helping farmers access to funding. This is the core subject of this report. If farmers have access to warehouse receipt finance, it gives them flexibility in timing their sales. Instead of selling their crops to meet immediate cash-flow needs, they can store them and pledge them as collateral for a loan, and postpone selling to a later date when prices are supposed to be higher.

From the financier's perspective, warehouse receipts, when used as collateral, can facilitate lending to farmers. Warehouse receipt finance also makes it possible for processors to fund the stock they need for their operations throughout the year and for exporters to optimise the timing of their expected sales. In addition, it gives international banks a way of bringing loans to customers at interest rates that tend to be lower than those offered by local banks.

Warehouse receipt finance is a far ancient financing technique that has been found on Mesopotamian clay tablets. It played an important role in the financing of agriculture and agricultural processing in the USA and Europe. It is widely used across the developing world - but mostly for the financing of import and export operations. In recent years, there has been much effort by governments (supported by their development partners) to extend its use to national food value chains. This has proved difficult, partly because local financiers - the most logical candidates for financing national and regional trade flows - are usually unfamiliar with this approach and are wary of the political, legal and regulatory conditions that surround its use.

In late 2013, the Agence Française de Développement (AFD), the Technical Centre for Agricultural and Rural Cooperation (CTA) and the International Fund for Agricultural Development (IFAD) issued a tender for a study to review the scope for warehouse receipt finance in Africa and help formulate policies and strategies for its expansion. The Platform for Agricultural Risk Management

(PARM), funded by the European Commission, Italian Development Cooperation, IFAD and AFD, and hosted by IFAD, also contributed to finance this study.

A large, multidisciplinary team investigated the situation on the ground in nine African countries (Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Madagascar, Mozambique, Niger, Senegal and Uganda), identified bottlenecks to the wider use of various forms of warehouse receipt finance and formulated proposals for action. The team consisted of practitioners, including international and local experts from legal, banking and warehouse management backgrounds from the nine countries. This publication aims to be a standard reference document on warehouse receipt finance in Africa for many years to come.

The authors of the report focus on four main types of finance:

- **Type A: Community inventory credit** for smallholder farmers, often supported by microfinance institutions (MFIs), which re-finance their operations with commercial banks. Stocks are normally held under a double-padlock arrangement in community stores or domestic buildings, with the keys to one lock held by the producers' organisation (PO) or group of farmers, and the other by the MFI.
- **Type B: Private warehouses.** Financing against commodities stored in a *private* warehouse under the control and responsibility of a collateral manager (CM). This can include a *field warehouse*, where the goods are held in the borrower's store, which is temporarily leased to the CM.
- **Type C: Public warehouses.** Financing against commodities stored in a *public* warehouse. This is a warehouse that is open to depositors from the general public; it does not mean that the warehouse belongs to the State; indeed most public warehouses are privately owned.
- **Type D: Lending against the security of current or future production.** In this case, the funding agencies lend against a documented security representing current or future production, such as the *Cedulas de Produtos Rural* (agricultural bonds) popularised in Brazil.

All these forms are well adapted for certain purposes. In many ways, they complement each other.

AFD, CTA and IFAD/PARM hope that this publication will inspire action on the ground by policy-makers to remove obstacles and create an enhancing

regulatory environment; by banks to use opportunities created by the use of warehouse receipt systems; by farmers and other stakeholders in agriculture to become better prepared to use innovative financing mechanisms; and by development partners to give warehouse receipt finance its proper place in their agricultural development programmes. As the discussions in this publication show, warehouse receipt finance is feasible in Africa, and its strengths are already recognised by a number of agricultural lenders and borrowers. The time is ripe to create the conditions for up-scaling this approach and democratising access to this tested financing tool for agricultural growers and companies.

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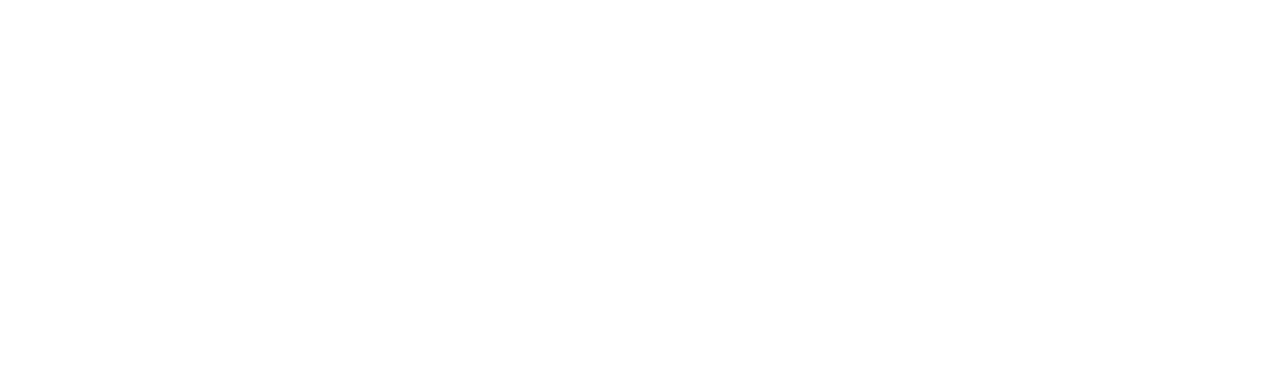
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# SECTION A: A

## Overview of review and summary of findings



# 1. Introduction

## 1.1 Instructions

- 1.1.1 This Review of Applicable Laws and Regulations (the legal review) has been prepared by Sullivan & Worcester UK LLP (S&W) and J Coulter Consulting Ltd (J Coulter) (together, the authors) for Agence Française de Développement (AFD), the Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA) and the International Fund for Agricultural Development (IFAD) (together, the funding agencies) as part of a study into warehousing and collateral management systems in sub-Saharan Africa (the study).
- 1.1.2 The legal review forms Volume III of the final report prepared by the authors for the study and submitted to the funding agencies on 7 September 2014 (the final report). This version of the legal review replaces the version submitted to the funding agencies on 15 April 2014, entitled Interim Report: Review of Applicable Laws and Regulations.
- 1.1.3 The legal review provides a detailed review of applicable laws and regulations in relation to warehouse receipt financing and other forms of commodity-based financing in Burkina Faso, Cameroon, Ghana, Côte d'Ivoire, Madagascar, Mozambique, Niger, Senegal and Uganda (the subject countries). The legal review focuses on the current legal position in the subject countries (up to date as of 15 April 2014) and it analyses the key legal factors relevant to the subject of the study. The key conclusions from the legal review are developed further in Volume I (Key Findings) of the final report, where they are considered in the context of the wider institutional due diligence carried out for the study and the authors make their combined legal and institutional recommendations in relation to the study.

## 1.2 Scope of the legal review: requirements of the terms of reference

The scope of the legal review is set out in Section 3.2 of the terms of reference for the study provided by the funding agencies (the terms of reference) which is Annex 1 of Volume I. Section 3.2 of the terms of reference is copied at Annex 1 (Section 3.2 of the Terms of Reference).

## 1.3 Methodology

### Typology and key legal concepts

1.3.1 The authors used the terms of reference and initial desk research to create a typology of financing methods likely to be of highest relevance in the subject countries. The four types of financing referred to in this legal review are as follows:

#### Typology of financing types

**Type A** Community-based inventory credit systems for small farmers.

**Type B** Private warehouses. Financing against commodities stored in a private warehouse under the control and responsibility of a collateral manager, or monitored by a stock monitor. This could include field warehouses.

**Type C** Public warehouses. Financing against commodities stored in a public warehouse (i.e., open to depositors from the general public).

**Type D** Lending against the security of current or future production.

1.3.2 The scope of the typology and its legal and institutional aspects is explored in further detail in Volume I of the final report. Annex 2 (Typology of financing methods) of this legal review contains further details of the typology. An overview of key legal concepts relevant to the legal due diligence in the subject countries is set out at Annex 3 (Overview of key legal concepts) of this legal review.

### Gathering local information

1.3.3 Using the typology as a reference point, S&W created an initial discovery questionnaire for the local legal consultants with expertise in the legal systems of the subject countries to gain an overview of the relevant legal environment. Details of the legal consultants who have contributed to this legal review can be found at Annex 2 of Volume I (Details of authors and consultants).

1.3.4 From the initial findings, S&W provided the local legal consultants with detailed further questions tailored to each subject country. The findings from this question and answer process were used to prepare the individual country reports for each subject country, which can be found at Section B (Country reports) of this legal review.

## **2. Conclusions of the legal review and recommendations**

At the beginning of each individual country report is an executive summary of the relevant legal environment together with S&W's conclusions and recommendations from a legal perspective, in consultation with the local legal consultants, for how the legal regime could be adapted to encourage commodity-based financing.

Annex 5 (Summary of findings of legal review) contains a table summarising the findings in the subject countries, with reference to the terms of reference. Volume I of the final report, in particular, Section 7.7 (Key legal findings) and Annex 3 (Legal annex), includes the conclusions from the legal review and Section 8 (Recommendations) discusses how these conclusions can be used to encourage warehouse financing in the subject countries.

## **3. Preparation of the country reports**

Each country report has been prepared by S&W (with contributions from J Coulter and Nicholas Budd) based on the legal advice provided by the relevant Africa and Madagascar-based consultants, names of who are set out in Volume I, Annex 2 (Details of authors and consultants). These consultants have reviewed and approved the content of the relevant country report(s) as of 15 April 2014.

## **4. Note on language of the final report**

At the request of the funding agencies, the final report, including this legal review, are to be published in both French and English. This legal review was originally written in English. Please note that, to the extent that there are any inconsistencies between the English version of this legal review and any non-English version, the English version shall take precedence.





# SECTION B:

## Country reports





# Block 1: Burkina Faso

## Key legal points:

- There is no specific warehouse receipt legislation in place, but warehouse financing does take place in reliance on ordinary principles of contract law.
- Limited legal regulation of warehouses, warehouse operators and collateral managers.
- Key legal barriers include: (1) non-negotiability of warehouse receipts; (2) lack of legislative and regulatory structure for warehouses, warehouse operators and collateral managers; and (3) the cost of registering security and delays in the registration process.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing legal framework

- 1.1.1 Warehouse financing has a large role to play in the financing of smallholder farmers in Burkina Faso. Although there is no specific legislation in place governing warehouse financing, it is conducted in reliance on normal contractual arrangements.
- 1.1.2 Both smallholder farmers and other value-chain players have the power to borrow and to provide security over their goods, which allows them to participate in warehouse financing projects in their own right. However, much of the financing to smallholder farmers in Burkina Faso is structured around loans to producer organisations (POs), including cooperatives, which then on-lend to smallholder farmers. The goods are normally controlled jointly by the PO and the financier in a warehouse secured by two padlocks, with each party holding keys to separate locks. The store may only be opened in the presence of a representative of both parties, though in practice the financier may decide to cede its key to an agent (which may be a federation of POs). The loan from the financier to the PO will be collateralised against goods owned by the smallholder farmers who will receive funding from the PO.
- 1.1.3 The legal framework for taking security over goods is governed by supranational legislation passed by OHADA (as defined below). Security over goods takes the form of pledges which need to be registered in

order to establish priority of security. Burkinabe law does recognise the right of a secured party to give effect to a pledge by taking possession of the goods (either actual or constructive) as opposed to registering it. However, failure to register the pledge will have an impact on the ranking of the secured party's security.

- 1.1.4 Key legal barriers to extending the use of warehouse receipt financing include:
- (a) the lack of a legal framework for such financing, both in terms of specific warehouse legislation and in terms of regulation of warehouse operators and collateral managers
  - (b) the non-negotiability of warehouse receipts which impacts on the ease of selling and transferring title to goods
  - (c) a requirement to pay *ad valorem* stamp duty and registration costs when registering security.

## 1.2 Proposals to introduce warehouse receipt legislation

There are currently no proposals to introduce warehouse receipt legislation for Burkina Faso (as of 15 April 2014). However, the Ministry of Economy and Finance has commissioned a study to investigate and identify possible legal and regulatory reforms to promote warehouse financing, collateral management and inspection services.

## 1.3 Analysis of current status and feasibility of different financing methods

- 1.3.1 As noted in paragraph 1.1.2 above, much of the financing to smallholder farmers in Burkina Faso is conducted under Type A (as defined in the typology), increasingly known in the OHADA region as *warrantage communautaire*. This form of financing is often conducted with minimal reliance on the existing legal framework. For example, although some microfinance institutions do take security over the financed goods, many financiers are happy not to take 'legal' security; instead they rely on practical security such as using the double padlock system.

- 1.3.2 Local peer pressure and accountability to the relevant microfinance institution are key to keeping Type A financing on track and legal issues have not proved central to its success or failure. However, the legal framework becomes increasingly relevant as Type A becomes more market-oriented and/or takes on features of Type B or Type C (both as defined in the typology) financing (for example, increased use of collateral managers).
- 1.3.3 The existing legal framework would support both Type B and Type C methods of financing whereby goods are stored in a warehouse (either public or private), usually under the control of a collateral manager and secured in favour of the financier by way of pledge. This is reflected in the fact there is also a significant amount of Type B financing of agricultural commodities in Burkina Faso, involving collateral managers, agribusiness and farmers. There is also some use of Type C financing, but this is limited by comparison to Types A and B.
- 1.3.4 Although both these methods of financing can be implemented under the existing legal framework, the absence of any defined regulation of warehouse operators and collateral managers means that there can be concerns for financiers about accepting the risk of non-payment by the borrower and the risk of non-performance or fraud by a warehouse operator or collateral manager.
- 1.3.5 The concept of field warehousing is not expressly recognised under Burkinabe law, but it can be implemented in reliance on existing contractual principles and land law concerning leases.
- 1.3.6 Microfinance institutions are active in Burkina Faso and have a role to play in financing smallholder farmers, either directly or indirectly through POs. By contrast, although Burkinabe law allows for the creation of security over future goods, the implementation of Type D (as defined in the typology) financing is unlikely to be successful at present due to a lack of legal and institutional infrastructure needed to make this viable.

## **2 Conclusions and interim recommendations**

- 2.1.1 Although much of the financing in Burkina Faso is based on Type A financing, with limited recourse to the legal framework in place, the

current use of Type B financing emphasises that there is a need for a better legal and institutional framework to govern the warehouse financing and minimise the risks involved.

- 2.1.2 Warehouse legislation, including recognition of warehouse receipts as documents of title, would be helpful given the interests of the more market-oriented producers and in view of the initiatives and ambitions of some POs and at least one of the collateral managers.
- 2.1.3 Any warehouse legislation passed should focus on issues such as the recognition of warehouse receipts as documents of title, the negotiability of warehouse receipts, the licensing and regulation of warehouse operators and collateral managers and the respective liabilities of participants in the warehouse financing structure.
- 2.1.4 Such legislation should probably be introduced at OHADA level if possible given the wider opportunities this would provide for the OHADA region. However, if this is unfeasible, legislation at national level could be considered. While specific warehouse finance legislation would create a clearer legal framework for this method of financing, drafting and negotiating this is likely to be time consuming. There is moreover a need for learning-by-doing, so as to avoid heavy-handed interventions that simply diminish the vitality of incipient service providers. The blanket requirement for insurance in the Securities Act is a small example of this.
- 2.1.5 In light of this situation, consideration could be given to implementing legislative changes on an incremental basis, with the focus first on establishing a regulatory body responsible for monitoring and sanctioning the activities of warehouse operators and collateral managers in Burkina Faso.
- 2.1.6 Closer scrutiny of the activities of these entities would help to reduce the risks that financiers face when dealing with such entities (such as mismanagement, non-performance, fraud, and insolvency); it would improve confidence in the creditworthiness of warehouse financing.

# Legal analysis

## 1 Overview of the legal system

Burkinabe law is primarily based on a civil law system (a consequence of Burkina Faso's time as a French colony from the end of the 19th century to the second half of the 20th century) with a strong influence from customary laws and practices. Burkina Faso is also a Member State of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA); it is therefore subject to the supranational laws established by the OHADA Treaty in relation to business law.

## 2 Overview of existing warehouse financing initiatives

One of the key recent warehouse financing initiatives in Burkina Faso is the *warrantage communautaire*. The initiative is designed to encourage lending to smallholder farmers by microfinance institutions. The initiative is concerned with the practicalities of providing financing to smallholder farmers and it is not expected that any direct legislative action will occur as a result of this initiative.

## 3 Legislation relevant to warehouse receipt financing

### 3.1 Legislative framework for warehouse receipt financing

- 3.1.1 Burkina Faso does not have specific legislation governing warehouse receipt financing. However, warehouse financing is conducted in Burkina Faso, relying instead on normal contractual rules to govern the relationships between the relevant parties to the financing (such as, the relationship between the borrower/depositor and the warehouse operator and the relationship between the borrower/depositor and the financier).
- 3.1.2 Although there is no specific warehouse receipt law, the provisions of the OHADA Uniform Act on Securities dated 15 December 2010 (the Securities Act) contain some provisions similar to those that may be found in specific warehouse receipts legislation.

- 3.1.3 The Securities Act provides that a borrower may grant security over goods to its financier as collateral for its borrowings. The Securities Act does not contain any restrictions on the types of entity that may grant security over goods. This means that security over goods can be granted by a wide range of entities in Burkina Faso, including smallholder farmers, producer companies and cooperatives.
- 3.1.4 The secured goods may be held directly by the financier or may be held by a third party warehouse operator or collateral manager as appointed by the borrower and the financier.
- 3.1.5 Various collateral managers are operational in Burkina Faso including SNTB, Expertis SA, Auxigages and SEGAS-B.
- 3.1.6 Reliance on the provisions of the Securities Act, which allows for financing against goods held with a third party, highlights that, even in the absence of specific warehouse receipts legislation, there is a legal framework for conducting warehouse financing in Burkina Faso. This financing can be structured in line with either of Type B or Type C of the listed typologies depending on where and with whom the secured goods are stored.
- 3.1.7 Further information on the Securities Act is provided in paragraph 5 (Security) below.

## **3.2 Compliance bodies**

Given the absence of specific legislation on warehouse financing, there are no regulatory or compliance bodies for monitoring existing warehouse financing practices.

## **3.3 Status of warehouse receipts**

- 3.3.1 Warehouse receipts may be issued either by a warehouse operator or by a collateral manager. Under Burkinabe law, the warehouse receipt serves as confirmation that the warehouse operator is storing, or the collateral manager is holding and monitoring, the goods covered by the warehouse receipt.
- 3.3.2 The warehouse receipt is not a negotiable document of title and the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party. On this basis, the

holder of a warehouse receipt may use the warehouse receipt as evidence to show that it has ownership over the stored goods, but the simple fact of holding possession of the warehouse receipt is not sufficient to prove ownership in itself.

- 3.3.3 There are no specific requirements under Burkinabe law as to the information that these warehouse receipts should contain. However, it is likely that any collateral management agreement will stipulate the information that a collateral manager will have to include in any warehouse receipt it issues under that collateral management agreement.
- 3.3.4 Warehouse receipts are currently issued in paper form, but there is nothing under Burkinabe law to prevent them from being issued in electronic form if required.
- 3.3.5 Where a third party has purchased goods that are subject to a warehouse receipt, that third party will in practice have to provide both the warehouse receipt and a copy of the sale and purchase agreement in order to secure the release of the goods from the warehouse. Where the secured goods have been pledged to a financier, the third-party purchaser will need to provide the warehouse receipt, the pledge form and confirmation that the financier has been repaid (either by the borrower or directly by the purchaser) in order to secure the release of the goods from the warehouse.

## **3.4 Field warehousing: legal recognition and requirements**

- 3.4.1 There is no specific legislation on field warehousing in Burkina Faso. However, field warehousing could be used by reliance on more generic legislation relating to leases of land. The OHADA Uniform Act on the General Commercial Law (the Commercial Act) contains provisions dealing with lease agreements. These confirm that a person may take a lease of land or premises for commercial, industrial, professional, or artisanal purposes.
- 3.4.2 On the basis of the provisions in this Act, a lease of land by a field warehousing company or warehouse operator or collateral manager or a financier from the borrower for the purposes of storing and monitoring the goods would be recognised as valid. This would allow financing to take place in line with Type B of the listed typologies.



- 3.4.3 In the absence of any express legal requirements for field warehousing, the more measures that the lessee takes to establish its rights over the leased land and its control over the stored goods, the stronger case it will have to show from a practical perspective that a field warehousing arrangement has been established. These measures could include creating physical boundaries around the leased area, controlling who has access to the leased area and labelling the stored goods with details of the pledge, the borrower and the financier.

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

- 4.1.1 The legal status of smallholder farmers, cooperatives, or other forms of POs would not, as a matter of Burkinabe law, prevent them from using warehouse financing.
- 4.1.2 A large proportion of the warehouse financing in Burkina Faso is structured around loans by financiers to POs who are then responsible for on-lending to smallholder farmers. A loan from a financier to a PO will usually be secured against goods stored in warehouses. These goods will be owned by the smallholder farmers who will receive the on-loans from the PO. These goods will be pledged to the financier at the time of, or just prior to, the financing being made available to the PO.

### **4.2 Legal status of farmers and farmers' organisations**

- (a) Individual farmers

Individual farmers are private individuals; they are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name. They have the power to sue and be sued in their own name. There are no restrictions on the type of contract that they can enter into (provided that these do not contravene Burkinabe law) and there are no restrictions on the type of security interests that they can grant.

- (b) Cooperative societies

Cooperative societies have legal personality under the provisions of the OHADA Uniform Act on Cooperatives dated 10 December 2010 (the

Cooperatives Act). They are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name; they have the power to sue and be sued in their own name. Under the Cooperatives Act, cooperatives have the power to undertake any activities that are in the best interests of its members. Further powers of a cooperative are set out in its constitutional document which is known as a *statuts*.

Notable cooperatives in Burkina Faso are the *Confédération Paysanne du Faso* (referred to as CPF) and the *Fédération des Producteurs et Productrices Agricoles du Burkina Faso* (referred to as FEPAB). FEPAB undertakes borrowing on behalf of smallholder farmers.

(c) Formal and informal representative bodies and trade organisations

There are a number of both formal and informal trade organisations for farmers in Burkina Faso. Formal trade organisations can have one of three legal statuses: a cooperative, a federation, or a union. These include the CPF and FEPAB referenced in paragraph (b) above.

Informal trade organisations do not have a legal status (and so cannot enter into legal agreements or sue or be sued in their own name), but they can use lobbying power to represent their members.

### **4.3 Legal status of and requirements for warehouse operators and collateral managers**

4.3.1 There are limited legal requirements for warehouse operators and collateral managers in Burkina Faso. Articles 13 and 14 of the Commercial Act and Article 97 of the OHADA Uniform Act on Companies Law require the registration of all Burkinabe companies with the company registry in Burkina Faso. Similarly, Article 74 of the Cooperatives Act requires that all Burkinabe cooperatives register with the cooperative registry in Burkina Faso.

4.3.2 Warehouse operators and collateral managers must also have insurance in place to cover any goods they are storing and/or monitoring. This insurance should as a minimum position cover risk of theft, fire and partial or complete damage of the goods.

4.3.3 Article 121 of the Securities Act states that any pledge agreement between a financier and a borrower must provide details of the insurer

that is providing cover against the risks identified in paragraph 4.3.2. As such, the financier should ensure that either the Borrower has this insurance in place or that the goods are stored with a warehouse operator or collateral manager that has this level of insurance in place.

4.3.4 However, while such a requirement may be appropriate for financing using Type B or Type C, it is often not appropriate for Type A financing. Indeed, some microfinance institutions do not require insurance to be in place over the goods unless they are of a stipulated value or quantity.

4.3.5 The conflict between the legal security requirements for insurance and the position adopted by some financiers when using Type A financing is another reason why financiers may prefer to take practical security as opposed to legal security for Type A financing.

## **4.4 Regulation of warehouse operators and collateral managers**

There are no regulatory bodies responsible for monitoring the activities of warehouse operators and collateral managers. However, the activities of warehouse operators and collateral managers are regulated to a certain extent by market practice and, in the case of *warrantage communautaire*, by peer pressure within village communities.

## **4.5 Rights of a secured creditor in an insolvency**

4.5.1 In the event that the borrower becomes insolvent, the ranking of a secured creditor will be determined in accordance with Article 226 of the Securities Act. In descending order, the ranking of priority is as follows:

- (a) the creditors having legal expenses incurred in the process, leading to the sale of the property and to the distribution of the assets
- (b) the creditors of the incurred expenses for the custody of the debtor's property in the interest of creditors with older debts
- (c) the creditors of highly preferred wages
- (d) the creditors with a general lien subject to registration or a pledge, each according to the rank of his registration/enforceability to third parties

- (e) the creditors with a special personal property lien
- (f) the creditors with a general lien not subject to a registration
- (g) the unsecured creditors.

4.5.2 A financier that has taken a pledge over goods will therefore have fourth ranking security in the event of the borrower's insolvency provided that the pledge has been perfected (as discussed further in paragraph 5.4 (Perfection and registration of security) below). Where two or more persons have security over the same goods, the ranking of priority between those persons will depend on which security interest was perfected first (as discussed further in paragraph 5.5 (Priority/ranking of security) below).

4.5.3 Financiers must also use caution when lending to borrowers who are in financial difficulty. Article 67 of the OHADA Uniform Act on Insolvency dated 10 April 1998 (the Insolvency Act) provides that any transactions entered into by a borrower (including undertaking further borrowing or granting security) will be considered automatically void and of no legal effect if they are entered into during the period of suspicion.

4.5.4 The period of suspicion starts from the date on which the borrower ceases to pay its debts as they fall due and it ends on the date that the court authorises the start of insolvency proceedings against the borrower.

4.5.5 The purpose of Article 67 of the Insolvency Act is to protect the rights of existing creditors and to ensure that the borrower is not able to dispose of its assets to the detriment of its creditors. However, it also means that any financier taking security during the period of suspicion runs the risk of that security being declared void by the courts under the terms of Article 67 of the Insolvency Act. The financier would then find itself holding the ranking of an unsecured creditor as set out in paragraph 4.5.1 above.

4.5.6 In the event of the insolvency of a third party storing the secured goods (whether a warehouse operator or a collateral manager), creditors of that third party would not have any legal right to seize the stored goods.

## **5 Security**

### **5.1 Taking security over stored commodities and warehouse receipts**

- 5.1.1 Under Article 126 of the Securities Act, it is possible to take security interests over a number of different assets including security over goods, security over receivables, and security over bank accounts.
- 5.1.2 Warehouse financing in Burkina Faso is structured on the basis that security is provided over the goods that are being financed (although this is not always the case, particularly with Type A financing). Security is taken over goods by way of pledge. Security cannot be granted over documents representing or relating to goods such as bills of lading or warehouse receipts.
- 5.1.3 The pledge must be granted under the terms of a written pledge agreement (the pledge agreement) between the grantor of the pledge (the pledgor) and the beneficiary of the pledge (the pledgee). The pledge agreement must specify the nature of the secured goods, their quantity, and the debt that the pledge is securing.

### **5.2 Creation of security over future goods**

- 5.2.1 The pledgor can grant security to the pledgee over future goods that it does not yet own. The future goods may be described generically in the pledge agreement (i.e., by type or quality) and the pledge will become binding over these future goods as soon as they come into the pledgor's ownership. There is no need for the pledge agreement to be re-registered when the pledge takes effect over future goods.
- 5.2.2 The pledgor can also grant security to the pledgee over goods that are not yet in existence. For example, it may grant security over agricultural crops while they are growing in the fields. Again, these goods may be described generically (i.e., by location or by quality) and the pledge will become binding over these goods as soon as they come into existence.

### **5.3 Commingling and fungibility**

- 5.3.1 A warehouse operator or collateral manager may release fungible goods that are subject to a pledge other than to the pledgor or pledgee

(or a transferee of the pledgee) provided that the goods are replaced with substitute goods on a like-for-like basis. This allows the warehouse operator or collateral manager to release and replace fungible goods that would otherwise deteriorate in quality if left stored for a prolonged period of time.

- 5.3.2 Releasing goods covered by a pledge gives rise to the requirement to de-register the goods from the scope of the pledge agreement with the *Registre du Commerce et du Crédit Mobilier* (the RCCM) (known as *radiation*). Replacing goods covered by a pledge agreement gives rise to the requirement to re-register the pledge agreement with the RCCM. However, these requirements are often not complied with, either due to ignorance as to their existence of the requirement or because compliance with them is administratively burdensome and costly in the case of re-registering. The consequences of non-compliance with these requirements are discussed in the following paragraphs.
- 5.3.3 Replacing or releasing fungible goods on this basis does not affect the validity of any pledge granted over them provided that the pledging clause in the pledge agreement was drafted in a generic manner. This would be the case, for example, if the pledging clause provides a pledge over a fixed number of bags of commodity of a certain quality or grade but without any further identification.
- 5.3.4 On the other hand, replacing or releasing fungible goods may be an issue if the pledge agreement grants the pledge over specifically identifiable goods. This would be the case, for example, if the pledging clause is drafted to cover specific goods stored with specific lot numbers or identification codes. In this situation, the financier may find itself having to enforce its pledge over the goods as against a third party, which may be problematic. Issues of enforcement as against third parties are discussed further in paragraph 6.2 (Enforcement of security over commodity against third parties) below.

## **5.4 Perfection and registration of security**

- 5.4.1 There are two ways in which the pledge may be effective under Burkinabe law. The first method is to register the pledge agreement as provided for under Article 52 of the Securities Act. The pledge agreement must be registered at the RCCM and it may be registered with the RCCM in paper or electronic form.

- 5.4.2 There is no mandatory timeframe for registering the pledge agreement with the RCCM, but a delay in registration may impact on the financier's ranking of security as discussed in paragraph 5.5 (Priority/ranking of security) below.
- 5.4.3 Either of the pledgor or the pledgee may register the pledge agreement with the RCCM. In practice, the pledgee may prefer to take responsibility for this given the consequences of any delay or failure to register the pledge agreement.
- 5.4.4 Stamp duty is payable for pledges perfected by registration; this must be paid to the relevant tax authority prior to registration of the pledge agreement with the RCCM. Stamp duty is calculated against either the loan amount or the value of the pledged goods, depending on which is the higher value. In practice, the value of the pledged goods should always be higher than the loan amount they secure and stamp duty will be calculated against this figure. The rate of stamp duty payable is variable on a case-by-case basis and it will be advised by the tax authority to the party seeking to register the agreement. It is advisable to approach the RCCM in advance and provide details of a financing in order to find out the stamp duty that will be payable, as there is no published guidance on this. The RCCM will refuse to register any pledge agreement where stamp duty has not been paid.
- 5.4.5 A registration fee must also be paid to the RCCM when registering the pledge agreement. Again, the fee payable will vary on a case-by-case basis and the clerks of the RCCM will advise the relevant registration fee for each pledge agreement.
- 5.4.6 Failure to register the pledge agreement with the RCCM means that the pledge will be void as against an insolvency practitioner of the pledgor or as against other creditors of the pledgor. However, the pledge will still be effective as between the pledgor and the pledgee.
- 5.4.7 The RCCM maintains a register of all security registered with it that is publicly available. Any person wishing to search the register to see if any security has been registered over specific goods must submit an information request to the RCCM. The RCCM then has two days from receipt of the request to deliver a certificate stating whether any security has been registered over the goods concerned.

- 5.4.8 Following registration of the pledge agreement, the RCCM will issue a document known as the *bordereau de gage de stocks* (the pledge form). This document will specify details of the pledge, its registration date at the RCCM and the unique identification number assigned to it by the RCCM.
- 5.4.9 The pledge form serves as confirmation that the relevant pledge agreement has been successfully registered with the RCCM. It does not transfer ownership in the goods and it is not a document of title.
- 5.4.10 However, issuance of the pledge form is conditional on the RCCM being satisfied that there is insurance cover over the secured stocks against any risk of theft, fire, partial or complete damage. Details of the insurance cover in place should be included within the pledge agreement. Article 121 of the Securities Act states that any pledge agreement that does not indicate the name of the insurer that provides the required cover will be null and of no legal effect. However, this Article does not appear to be strictly applied in practice.
- 5.4.11 The pledge form will be issued to the pledgor, who is then responsible for endorsing the pledge form to the pledgee. The endorsement confers on the pledgee the quality and rights of a secured creditor. The pledgee may in turn subsequently endorse the pledge form to a third party, who will then obtain the rights of a secured creditor in relation to the pledged goods.
- 5.4.12 Endorsement should be made in writing (either on the back of the pledge form or on an attachment to the pledge form) and should state the endorsee's name and be signed by the endorser. In this way, any person in possession of a pledge form should be able to show that they are the legitimate bearer through a chain of previous endorsements.
- 5.4.13 There is no requirement to enter into a new pledge agreement or to notify the RCCM each time the pledge form is transferred to a new third party.
- 5.4.14 The second method of ensuring that the pledge is effective is to transfer possession of the secured goods to the pledgee. The pledgee can show that it has possession of the goods in one of two ways.
- 5.4.15 Firstly, the pledgee can take actual possession of the secured goods by storing them in a warehouse or storage facility that the pledgee owns or



has control over. This is referred to as having *actual possession* of the goods. This form of possession is not common as it places a burden on the pledgee to store and monitor the goods which it may not be best placed to do.

- 5.4.16 The alternative is for the pledgee to appoint a collateral manager to store and monitor the secured goods on its behalf. This is known as *constructive possession* and it is the usual way of demonstrating that the pledgee has possession of the secured goods.
- 5.4.17 Provided that the pledgee can show that it has possession (either actual or constructive) of the secured goods, the pledge will be effective as against the pledgor, an insolvency practitioner of the pledgor or as against other creditors of the pledgor. The priority of creditors who have competing pledges over the same goods is discussed in paragraph 5.5 (Priority/ranking of security) below.
- 5.4.18 It is unclear whether stamp duty is payable in respect of pledges that are perfected by taking possession (whether actual or constructive). Whether stamp duty is payable in respect of any given pledge agreement would need to be discussed with the relevant tax authority in Burkina Faso.
- 5.4.19 In practice, many creditors adopt the second approach when taking security over goods in Burkina Faso. The main reasons for this are a lack of knowledge about the registration regime and the time that it takes to successfully register security with the RCCM (which can routinely be up to 60 days).

## **5.5 Priority/ranking of security**

- 5.5.1 The ranking of creditors who have taken security over goods is set out in full in paragraphs 4.5.1 and 4.5.2 above.
- 5.5.2 Where more than one person has a pledge over the same goods, the order of priority will be determined by the order in which each pledge was perfected. Where the competing pledges have each been registered, priority will be determined by which pledge agreement was registered first with the RCCM.
- 5.5.3 In the event that none of the secured parties have registered their pledge agreements, priority will then be determined by which secured party has possession (either actual or constructive) of the relevant goods.

- 5.5.4 Where one pledge has been perfected by registration and another pledge has been perfected by taking possession, the order of priority will be determined by looking at whether possession of the goods in question was taken before the registration process was completed at the RCCM. If it was, then the possessory pledge will have priority. If registration at the RCCM was completed before possession of the secured goods was taken by the competing creditor, then the registered non-possessory pledge will have priority.
- 5.5.5 The scenarios set out in paragraphs 5.5.2 to 5.5.4 (inclusive) are subject in each case to the issue of whether the creditor taking the second pledge knew, or could reasonably have known, of the existence of the first pledge. If the second creditor did know, or should reasonably have known, of the existence of the first pledge, then the second pledge will rank behind the first, irrespective of whether it was perfected first in time.

## **5.6 True sale versus secured lending**

- 5.6.1 Repurchase agreements are not used as a method of financing in Burkina Faso. Although there is no legislation prohibiting these types of agreements, it is unlikely that they will be recognised as valid under Burkinabe law and they may well be recharacterised as a loan. The financier may then find itself having the status of an unsecured creditor if it had not taken security over the goods or had not registered that security.
- 5.6.2 However, a further limitation on the use of such agreements is that financial institutions do not have the power under Burkinabe law to buy and sell commodities. This means that financial institutions would not be able to enter into the types of ownership arrangement provided for under repurchase agreements.

# **6 Enforcement**

## **6.1 Enforcement of security over commodity against the borrower**

- 6.1.1 The times when the pledge will become enforceable by the pledgee will be set out in the pledge agreement (each an event of default) and will include failure by the borrower to pay any sum on its due date.
- 6.1.2 If the pledgee wishes to enforce the pledge following an event of default, it must first serve a demand on the pledgor to resolve the event of

default (e.g., by paying the unpaid amount). If the pledgor fails to resolve the event of default within eight days of receiving the demand, the pledgee may apply to the court to enforce its pledge over the goods.

- 6.1.3 The court will issue a writ of execution allowing the pledgee to enforce the sale of the pledged goods. The pledgee will then receive a share of the proceeds of the sale in accordance with its priority ranking as set out in paragraph 4.5.1. Obtaining a writ of execution can vary in terms of difficulty, time and cost. The main determining factors will be the complexity of the case and the efficiency of the court.
- 6.1.4 Alternatively, the pledgor and the pledgee may agree that, on an event of default, ownership of the goods is transferred from the pledgor to the pledgee. This means that the pledgee would not need to obtain a writ of execution from the court before selling the pledged goods. This is the most popular method of dealing with the goods following an event of default. However, the pledge of agreement must provide the pledgee with the power to sell the goods in order for this to be effective.

## **6.2 Enforcement of security over commodity against third parties**

- 6.2.1 If the pledgor were to sell the pledged goods to a third party, the pledgee would in theory be able to enforce its security over the goods as against the third-party purchaser. However, any third party purchaser will have a defence to the pledgee's claims if it can show that it purchased the goods in good faith.
- 6.2.2 In this case, the burden would be on the pledgee to show that the third party purchaser had acted in bad faith. It should be noted that the simple fact that the third party purchaser knew of the existence of the pledge does not mean that it acted in bad faith when purchasing the goods. Similarly, there is no requirement on a third party purchaser to check with the RCCM concerning whether there is any security over the goods it is intending to buy. This highlights the importance to the financier of having possession (actual or constructive) or appropriate control over the goods to avoid any issues with third-party purchasers.

## 6.3 Enforcement in the courts

- 6.3.1 Any disputes may be submitted for resolution in the Burkinabe courts. The case will initially be heard by a court of first instance which will issue its judgment on the dispute. The parties to the dispute have the right to appeal this decision to the appeal court provided that any appeal is lodged within two months of the judgment being issued or, if later, of the judgment being notified to the parties. Any appeal must be brought on different grounds to those that were rejected by the previous court.
- 6.3.2 The parties to a dispute may also appeal the decision of the appeal court to the supreme court of Burkina Faso. This is the superior court and its decisions are final and non-appealable. The same two month timeframe and procedure applies to appeals from the appeal court to the supreme court.
- 6.3.3 The speed with which a dispute is resolved by the courts will vary depending on the complexity of the matter. However, in general, the court process is slow in Burkina Faso.
- 6.3.4 Burkinabe law does provide for a fast track procedure before the courts (known as the *procédure des référés*). This can be used in cases of urgency which will be decided on a case-by-case basis by the presiding court.
- 6.3.5 Judgments issued under this procedure are appealable in the manner set out in paragraphs 7.3.1 and 7.3.2, but any appeal must be started within 15 days of the judgment being issued or, if later, the date on which the parties are notified of the judgment.

## 6.4 Arbitration alternative dispute resolution mechanisms

- 6.4.1 The OHADA Uniform Act on Arbitration dated 11 March 1999 (the Arbitration Act) expressly provides for the resolution of disputes by arbitration. The Arbitration Act applies to any arbitration proceedings in Burkina Faso, whether these relate to Burkinabe law or foreign law and provides that arbitration is open to all persons with legal personality.

- 6.4.2 Arbitration is often chosen as the preferred method of dispute resolution for domestic and international commercial disputes. There are no fixed timeframes or costs for arbitration proceedings, but these will often be favourable when compared to court proceedings.
- 6.4.3 The main arbitral body for arbitration proceedings in Burkina Faso is the *Centre d'Arbitrage, de Médiation et de Conciliation de Ouagadougou*. Parties may choose to submit their disputes to this arbitral body, or alternatively, they can use the *Cour Commune de justice et d'arbitrage* which is the principal arbitral body for OHADA and is based in Abidjan, Côte d'Ivoire.

## **6.5 Enforcement of foreign court judgements and arbitral awards**

- 6.5.1 Foreign court judgments will only be applied in Burkina Faso after a Burkinabe court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Burkinabe court will consider whether the foreign court judgment contravenes any matters of Burkinabe public policy. However, the Burkinabe court will not reopen the dispute or reconsider the merits of the case when doing so.
- 6.5.2 Burkina Faso is a treaty member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It will therefore recognise and enforce arbitral awards issued by other treaty members subject to a Burkinabe court issuing an exequatur decision. Burkina Faso will also recognise arbitral awards from non-treaty member countries subject to a Burkinabe court issuing an exequatur decision.
- 6.5.3 The court will issue an exequatur decision provided that the foreign arbitral decision does not contravene Burkinabe public policy. The speed with which an exequatur decision is issued will depend on the complexity of the foreign arbitral award.

# Block 1: Niger

## Key legal points:

- There is no specific warehouse receipt legislation in place, but warehouse financing does take place in reliance on ordinary principles of contract law.
- Limited legal regulation of warehouses and warehouse operators.
- Key legal barriers include: (1) non-negotiability of warehouse receipts, (2) high registration costs for security documentation and (3) lack of legislative and regulatory structure for warehouses, warehouse operators and collateral managers.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing legal framework

- 1.1.1 Warehouse financing has a large role to play in the financing of smallholder farmers in Niger. Although there is no specific legislation in place governing warehouse financing, this is conducted in reliance on normal contractual arrangements.
- 1.1.2 Smallholder farmers have the power to borrow and to provide security over their goods which allows them to participate in warehouse financing projects in their own right. However, much of the financing to smallholder farmers in Niger is structured around loans to producer organisations (POs), including cooperatives, which then on-lend to smallholder farmers. The goods are normally controlled jointly by the PO and the financier in a warehouse secured by two padlocks, with each party holding keys to separate locks. The store may only be opened in the presence of a representative of both parties, though in practice, the financier may decide to cede its key to an agent (which may be a federation of POs). The loan from the financier to the PO will be collateralised against goods owned by the smallholder farmers who will receive funding from the PO.

1.1.3 The legal framework for taking security over goods is governed by supranational legislation passed by OHADA (as defined below). Security over goods takes the form of pledges which need to be registered in order to establish priority of security. Nigerien law does recognise the right of a secured party to give effect to a pledge by taking possession of the goods (either actual or constructive) as opposed to registering it. However, failure to register the pledge will have an impact on the ranking of the secured party's security.

1.1.4 Key legal barriers to extending the use of warehouse receipt financing include:

- (a) the lack of a legal framework for such financing, both in terms of specific warehouse legislation and in terms of regulation of warehouse operators and collateral managers
- (b) the non-negotiability of warehouse receipts which impacts on the ease of selling and transferring title to goods
- (c) a requirement to pay *ad valorem* stamp duty and registration costs when registering security.

## 1.2 Proposals to introduce warehouse receipt legislation

There are currently no proposals to introduce warehouse receipt legislation for Niger (as of 15 April 2014).

## 1.3 Analysis of current status and feasibility of different financing methods

1.3.1 As noted in paragraph 1.1.2 above, much of the financing to smallholder farmers in Niger is conducted under Type A (as defined in the typology), increasingly known in the OHADA region as *warrantage communautaire*. This form of financing is often conducted with minimal reliance on the existing legal framework. For example, although some microfinance institutions do take security over the financed goods, many financiers are happy not to take 'legal' security and instead rely on 'practical' security such as using the double padlock system.

- 1.3.2 Instead, local peer pressure and accountability to the relevant microfinance institution are key to keeping Type A financing on track and legal issues have not proved central to its success or failure. However, the legal framework becomes increasingly relevant as Type A becomes more market-oriented and/or takes on features of Type B or Type C (both as defined in the typology) financing (for example, increased use of collateral managers).
- 1.3.3 The existing legal framework would support both Type B and Type C methods of financing whereby goods are stored in a warehouse (either public or private), usually under the control of a collateral manager and secured in favour of the financier by way of pledge. This is reflected in the fact there is also a significant amount of Type B financing of agricultural commodities in Niger, involving collateral managers, agribusiness and farmers.
- 1.3.4 Although both these methods of financing can be implemented under the existing legal framework, the absence of any defined regulation of warehouse operators and collateral managers means that there can be concerns for financiers about accepting the risk of non-payment by the borrower and the risk of non-performance or fraud by a warehouse operator or collateral manager.
- 1.3.5 The concept of field warehousing is not expressly recognised under Nigerien law, but it can be implemented in reliance on existing contractual principles and land law concerning leases.
- 1.3.6 Microfinance institutions are active in Niger and have a role to play in financing smallholder farmers, either directly or indirectly through cooperatives. By contrast, although Nigerien law allows for the creation of security over future goods, the implementation of Type D financing (as defined in the typology) is unlikely to be successful at present due to a lack of legal and institutional infrastructure needed to make this viable.

## **2 Conclusions and interim recommendations**

- 2.1.1 Although much of the financing in Niger is based on Type A financing, with limited recourse to the legal framework in place, the current use of Type B financing emphasises that there is a need for a better legal and institutional framework to govern the warehouse financing and minimise the risks involved.



- 2.1.2 Any warehouse legislation passed should focus on issues such as the negotiability of warehouse receipts, the licensing and regulation of warehouse operators and collateral managers and the respective liabilities of participants in the warehouse financing structure.
- 2.1.3 Given Niger's financial difficulties, it may be that any legislation passed should be implemented at OHADA level as opposed to at a local level. While specific warehouse finance legislation would create a clearer legal framework for this method of financing, drafting and negotiating this is likely to be time consuming. There is moreover a need for learning-by-doing, so as to avoid heavy-handed interventions that simply diminish the vitality of incipient service providers. The blanket requirement for insurance in the Securities Act is a small example of this.
- 2.1.4 In light of this, consideration could be given to implementing legislative changes on an incremental basis, with the focus first on establishing a regulatory body responsible for monitoring and sanctioning the activities of warehouse operators and collateral managers in Niger.
- 2.1.5 Closer scrutiny of the activities of these entities would help to reduce the risks that financiers face when dealing with such entities (such as mismanagement, non-performance, fraud and insolvency) and it would improve confidence in the creditworthiness of warehouse financing.
- 2.1.6 In addition to legislative changes, there is also a need to improve the institutional framework in Niger. In particular, the absence of an arbitral body in Niger is a significant weakness in the enforcement process which is exacerbated by the significant delays that can be encountered when litigating through the courts. As such, there should be a focus on establishing an appropriate arbitral body for Niger and considering ways in which the existing enforcement regime can be made more efficient.
- 2.1.7 Consideration should also be given to the current stamp duty and registration fee system for registering security with the tax authorities and the RCCM. These are significant costs in the context of warehouse financing and they can act as a deterrent not just to following the existing laws for taking and registering security but also for providing this form of finance in the first place.

# Legal analysis

## 1 Overview of the legal system

Nigerien law is primarily based on a civil law system (a consequence of Niger's time as a French colony in the 20th century) with a strong influence from Islamic law and customary laws and practices. Niger is also a Member State of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) and it is therefore subject to the supranational laws established by the OHADA Treaty in relation to business law.

## 2 Overview of existing warehouse financing initiatives

There have been a number of warehouse financing initiatives in Niger in recent times which have met with varying degrees of success. Recent initiatives include the Inputs Project which was run by the United Nations Food and Agriculture Organization (FAO) between 1999 and 2007 and the Project for the Intensification of Agriculture through reinforcement of Community Input Stockists (IARBIC) which was promoted by the Ministry of Agricultural Development and took place between 2009 and 2011.

IARBIC was funded by the European Union which provided € 6 million of financing to encourage the intensification of agricultural production in Niger. The project was open to individual producers, producer organisations, microfinance institutions, commercial banks and supporting agencies (including FAO) and it was focused on eight regions of Niger (Agadez, Dosso, Diffa, Maradi, Tahoua, Tillabéry, Niamey and Zinder).

Although, it is not expected that any direct legislative action will occur as a result of this initiative, documentary and good practice guides have been developed as a result of these initiatives.

## 3 Legislation and laws relevant to warehouse receipt financing

### 3.1 Legislative framework for warehouse receipt financing

3.1.1 Niger does not have specific legislation governing warehouse receipt financing. However, warehouse financing is conducted in Niger, relying instead on normal contractual rules to govern the relationships between

the relevant parties to the financing (such as, the relationship between the borrower/depositor and the warehouse operator and the relationship between the borrower/depositor and the financier).

- 3.1.2 Although there is no specific warehouse receipt law, the provisions of the OHADA Uniform Act on Securities dated 15 December 2010 (the Securities Act) contain some provisions that may be found in specific warehouse receipts legislation.
- 3.1.3 The Securities Act provides that a borrower may grant security over goods to its financier as collateral for its borrowings. The Securities Act does not contain any restrictions on the types of entity that may grant security over goods. This means that security over goods can be granted by a wide range of entities in Niger including smallholder farmers and POs.
- 3.1.4 The secured goods may be held directly by the financier, or they may be held by a third party warehouse operator or collateral manager as appointed by the borrower and the financier.
- 3.1.5 Reliance on the provisions of the Securities Act, which allows for financing against goods held with a third party, highlights that, even in the absence of specific warehouse receipts legislation, there is a legal framework for conducting warehouse financing in Niger. This financing can be structured in line with either of Type B or Type C of the listed typologies depending on where and with whom the secured goods are stored.
- 3.1.6 Further information on the Securities Act is provided in paragraph 5 (Security) below.

## **3.2 Compliance bodies**

Given the absence of specific legislation on warehouse financing, there are no regulatory or compliance bodies for monitoring existing warehouse financing practices.

## **3.3 Status of warehouse receipts**

- 3.3.1 Article 1923 of the Nigerien Civil Code 1803 (the Civil Code) states that any voluntary deposit of goods for storage with a warehouse operator or collateral manager must be evidenced in writing. This requirement is

satisfied by the issuance of a warehouse receipt by the warehouse operator or collateral manager confirming that it is storing, or in the case of the collateral manager, that it is holding and monitoring, the goods covered by the warehouse receipt.

- 3.3.2 This warehouse receipt is not a negotiable document of title and the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party. On this basis, the holder of a warehouse receipt may use the warehouse receipt as evidence to show that it has ownership over the stored goods, but the simple fact of holding possession of the warehouse receipt is not sufficient to prove ownership in itself.
- 3.3.3 Article 1923 of the Civil Code does not contain any specific requirements as to the information that these warehouse receipts should contain. However, it is likely that any collateral management agreement will stipulate the information that a collateral manager will have to include in any warehouse receipt it issues under that collateral management agreement.
- 3.3.4 The Civil Code does not stipulate the form that a warehouse receipt must be in and these are currently issued in paper form. However, warehouse receipts could be issued electronically in line with the provisions of the OHADA Uniform Act on General Commercial Law dated 15 December 2010 (the Commercial Act) if required.
- 3.3.5 Where a third party has purchased goods that are subject to a warehouse receipt, that third party will in practice have to provide both the warehouse receipt and a copy of the sale and purchase agreement in order to secure the release of the goods from the warehouse. Where the secured goods have been pledged to a financier, the third-party purchaser will need to provide the warehouse receipt, the pledge form and confirmation that the financier has been repaid (either by the borrower or directly by the purchaser) in order to secure the release of the goods from the warehouse.

### **3.4 Field warehousing: legal recognition and requirements**

- 3.4.1 There is no specific legislation on field warehousing in Niger. However, field warehousing could be used by reliance on more generic legislation relating to leases of land. The Commercial Act contains provisions

dealing with lease agreements. These confirm that a person may take a lease of land or premises for commercial, industrial, professional, or artisanal purposes.

- 3.4.2 On the basis of the provisions in this Act, a lease of land by a field warehousing company or warehouse operator or collateral manager or a financier from the borrower for the purposes of storing and monitoring the goods would be recognised as valid. This would allow financing to take place in line with Type B of the listed typologies.
- 3.4.3 In the absence of any express legal requirements for field warehousing, the more measures that the lessee takes to establish its rights over the leased land and its control over the stored goods, the stronger case it will have to show from a practical perspective that a field warehousing arrangement has been established. These measures could include creating physical boundaries around the leased area, controlling who has access to the leased area and labelling the stored goods with details of the pledge, the borrower and the financier.

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

- 4.1.1 In its current state, warehouse financing in Niger is open to both individual producers and POs. However, it appears that there is a two-fold distinction between the approach to obtaining financing for goods and the marketing of the goods for onward sale.
- 4.1.2 In terms of financing, the majority of smallholder farmers access financing through their relevant PO which will often join with other POs to form one large cooperative union or federation. This entity will then borrow from the financier and on-lend to individual farmers. The relevant producer organisation will then be responsible for collecting repayment from each farmer and transferring this to the financier.
- 4.1.3 A loan from a financier to a cooperative will usually be secured against goods stored in warehouses. These goods will be owned by the smallholder farmers who will receive the on-loans from the cooperative. These goods will be pledged to the financier at the time of, or just prior to, the financing being made available to the cooperative.

## 4.2 Legal status of farmers and farmers' organisations

### (a) Individual farmers

Individual farmers are private individuals and they can enter into legal agreements (including loan agreements, sale and purchase agreements, and security agreements) in their own name. They have the power to sue and be sued in their own name. There are no restrictions on the type of contract that they can enter into (provided that these do not contravene Nigerien law) and there are no restrictions on the type of security interests that they can grant.

### (b) Cooperative societies

Cooperative societies have legal personality under the provisions of the OHADA Uniform Act on Cooperatives dated 10 December 2010 (the Cooperatives Act). They are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name and they have the power to sue and be sued in their own name. Under the Cooperatives Act, cooperatives have the power to undertake any activities that are in the best interests of its members. Further powers of a cooperative are set out in its constitutional document which is known as a *statuts*.

Notable cooperatives in Niger are the *Fédération des unions des Coopératives de producteurs de Riz* (referred to as FUCOPRI), the *Fédération des Unions des Groupements Paysans* (referred to as FUGPN - MOORIBEN) and the *Fédération Nigérienne des Organisations Professionnelles Agricoles* (referred to as SA'A). These are three of the cooperatives that undertake borrowing on behalf of smallholder farmers.

### (c) Formal and informal representative bodies and trade organisations

There are a number of trade organisations for farmers in Niger. These can have one of three legal statuses: an association, a federation, or a union. The largest and most influential of the existing trade organisations in Niger is the *Plateforme paysanne du Niger* (the PFPN). The PFPN has the legal status of an association; it derives its powers from two pieces of Nigerien legislation: Ordinance No 84-06 of 1 March 1984 and Decree No 84-49 of 1 March 1984. The PFPN is made up of 25 farmer organisations.

### **4.3 Legal status of and requirements for warehouse operators and collateral managers**

- 4.3.1 There are limited legal requirements for warehouse operators and collateral managers in Niger. Articles 13 and 14 of the Commercial Act and Article 97 of the OHADA Uniform Act on Companies Law require the registration of all Nigerien companies with the company registry in Niger. Similarly, Article 74 of the Cooperatives Act requires that all Nigerien cooperatives register with the cooperative registry in Niger.
- 4.3.2 Warehouse operators and collateral managers must also have insurance in place to cover any goods they are storing and/or monitoring. This insurance should as a minimum position cover risk of theft, fire and partial or complete damage of the goods.
- 4.3.3 Article 121 of the Securities Act states that any pledge agreement between a financier and a borrower must provide details of the insurer that is providing cover against the risks identified in paragraph 4.3.2. As such, the financier should ensure that either the Borrower has this insurance in place or that the goods are stored with a warehouse operator or collateral manager that has this level of insurance in place.
- 4.3.4 However, while such a requirement may be appropriate for financing using Type B or Type C, it is often not appropriate for Type A financing. Indeed, some microfinance institutions do not require insurance to be in place over the goods unless they are of a stipulated value or quantity.
- 4.3.5 The conflict between the legal security requirements for insurance and the position adopted by some financiers when using Type A financing is another reason why financiers may prefer to take 'practical' security as opposed to 'legal' security for Type A financing.

### **4.4 Regulation of warehouse operators and collateral managers**

- 4.4.1 There are no regulatory bodies responsible for monitoring the activities of warehouse operators and collateral managers. In general, the activities of warehouse operators and collateral managers are regulated to a certain extent by market practice and peer pressure.

4.4.2 However, the Civil Code may be applied to the operations of warehouse operators and collateral managers. The Civil Code states that any person receiving goods on deposit (the depositary) must comply with the following obligations:

- (a) the depositary must provide proper care of the goods in his custody, exercising the same level of care as if the goods belonged to it
- (b) the depositary is not responsible for accidents caused by force majeure, unless the depositary has been given notice to return the deposited goods in advance of the force majeure event
- (c) the depositary cannot use the goods without the express or presumed consent of the depositor
- (d) the depositary must respect the secrecy of any goods that have been submitted to it if they have been deposited in a closed safe
- (e) the depositary shall return the deposited goods in the same state as they were in when they were deposited. Any damage caused to the goods (other than damage caused by the depositary) shall be at the cost of the depositor
- (f) the depositary shall only return the deposited goods to the depositor or to the person indicated to receive the deposited goods
- (g) the depositary cannot claim or hold itself out to be the owner of the deposited goods.

4.4.3 If a depositary were to breach any of these obligations, the depositor would have a contractual claim for damages against the depositary.

## **4.5 Rights of a secured creditor in an insolvency**

4.5.1 In the event that the borrower becomes insolvent, the ranking of a secured creditor will be determined in accordance with Article 226 of the Securities Act. In descending order, the ranking of priority is as follows:

- (a) the creditors having legal expenses incurred in the process, leading to the sale of the property and to the distribution of the assets



- (b) the creditors of the incurred expenses for the custody of the debtor's property in the interest of creditors with older debts
- (c) the creditors of highly preferred wages
- (d) the creditors with a general lien subject to registration or a pledge, each according to the rank of his registration/enforceability to third parties
- (e) the creditors with a special personal property lien
- (f) the creditors with a general lien not subject to a registration
- (g) the unsecured creditors.

4.5.2 A financier that has taken a pledge over goods will therefore have fourth ranking security in the event of the borrower's insolvency, provided that the pledge has been perfected (as discussed further in paragraph 5.4 (Perfection and registration of security) below). Where two or more persons have security over the same goods, the ranking of priority between those persons will depend on which security interest was perfected first (as discussed further in paragraph 5.5 (Priority/ranking of security) below).

4.5.3 Financiers must also use caution when lending to borrowers who are in financial difficulty. Article 67 of the OHADA Uniform Act on Insolvency dated 10 April 1998 (the Insolvency Act) provides that any transactions entered into by a borrower (including undertaking further borrowing or granting security) will be considered automatically void and of no legal effect if they are entered into during the period of suspicion.

4.5.4 The period of suspicion starts from the date on which the borrower ceases to pay its debts as they fall due and ends on the date that the court authorises the start of insolvency proceedings against the borrower.

4.5.5 The purpose of Article 67 of the Insolvency Act is to protect the rights of existing creditors and to ensure that the borrower is not able to dispose of its assets to the detriment of its creditors. However, it also means that any financier taking security during the period of suspicion runs the risk of that security being declared void by the courts under the terms of Article 67 of the Insolvency Act. The financier would then

find itself holding the ranking of an unsecured creditor as set out in paragraph 4.5.1 above.

- 4.5.6 In the event of the insolvency of a third party storing the secured goods (whether a warehouse operator or a collateral manager), creditors of that third party would not have any legal right to seize the stored goods.

## **5 Security**

### **5.1 Taking security over stored commodities and warehouse receipts**

- 5.1.1 Under Article 126 of the Securities Act, it is possible to take security interests over a number of different assets including security over goods, security over receivables and security over bank accounts.
- 5.1.2 Warehouse financing in Niger is structured on the basis that security is provided over the goods that are being financed (although this is not always the case, particularly with Type A financing). Security is taken over goods by way of pledge. Security cannot be granted over documents representing or relating to goods such as bills of lading or warehouse receipts.
- 5.1.3 The pledge must be granted under the terms of a written pledge agreement (the pledge agreement) between the grantor of the pledge (the pledgor) and the beneficiary of the pledge (the pledgee). The pledge agreement must specify the nature of the secured goods, their quantity and the debt that the pledge is securing.

### **5.2 Creation of security over future goods**

- 5.2.1 The pledgor can grant security to the pledgee over future goods that it does not yet own. The future goods may be described generically in the pledge agreement (i.e., by type or quality) and the pledge will become binding over these future goods as soon as they come into the pledgor's ownership. There is no need for the pledge agreement to be re-registered when the pledge takes effect over future goods.
- 5.2.2 The pledgor can also grant security to the pledgee over goods that are not yet in existence. For example, it may grant security over agricultural crops while they are growing in the fields. Again, these goods may be

described generically (i.e., by location or by quality) and the pledge will become binding over these goods as soon as they come into existence.

### 5.3 Commingling and fungibility

- 5.3.1 A warehouse operator or collateral manager may release fungible goods that are subject to a pledge other than to the pledgor or pledgee (or a transferee of the pledgee) provided that the goods are replaced with substitute goods on a like-for-like basis. This allows the warehouse operator or collateral manager to release and replace fungible goods that would otherwise deteriorate in quality if left stored for a prolonged period of time.
- 5.3.2 Releasing goods covered by a pledge gives rise to the requirement to de-register the goods from the scope of the pledge agreement with the *Registre du Commerce et du Crédit Mobilier* (the RCCM) (known as *radiation*). Replacing goods covered by a pledge agreement gives rise to the requirement to re-register the pledge agreement with the RCCM. However, these requirements are often not complied with, either due to ignorance as to their existence of the requirement or because compliance with them is administratively burdensome and costly in the case of re-registering. The consequences of non-compliance with these requirements are discussed in the following paragraphs.
- 5.3.3 Replacing or releasing fungible goods on this basis does not affect the validity of any pledge granted over them provided that the pledging clause in the pledge agreement was drafted in a generic manner. This would be the case, for example, if the pledging clause provides a pledge over a fixed number of bags of commodity of a certain quality or grade but without any further identification.
- 5.3.4 On the other hand, replacing or releasing fungible goods may be an issue if the pledge agreement grants the pledge over specifically identifiable goods. This would be the case, for example, if the pledging clause is drafted to cover specific goods stored with specific lot numbers or identification codes. In this situation, the financier may find itself having to enforce its pledge over the goods as against a third party which may be problematic. Issues of enforcement as against third parties are discussed further in paragraph 6.2 (Enforcement of security over commodity against third parties) below.

## 5.4 Perfection and registration of security

- 5.4.1 There are two ways in which the pledge may be effective under Nigerian law. The first method is to register the pledge agreement as provided for under Article 52 of the Securities Act. The pledge agreement must be registered at the RCCM and may be registered with the RCCM in paper or electronic form.
- 5.4.2 There is no mandatory timeframe for registering the pledge agreement with the RCCM, but a delay in registration may impact on the financier's ranking of security as discussed in paragraph 5.5 below.
- 5.4.3 Either of the pledgor or the pledgee may register the pledge agreement with the RCCM. In practice, the pledgee may prefer to take responsibility for this given the consequences of any delay or failure to register the pledge agreement.
- 5.4.4 Stamp duty is payable for pledges perfected by registration; this must be paid to the relevant tax authority prior to registration of the pledge agreement with the RCCM. Stamp duty is charged at a rate of 0.25% and is calculated against the loan amount secured by the pledge agreement. The RCCM will refuse to register any pledge agreement where stamp duty has not been paid to the relevant tax authority.
- 5.4.5 Stamp duty must also be paid on the pledge agreement with the RCCM. This is charged at the rate of FCFA 1,200 per page of the agreement. Furthermore, a registration fee must also be paid to the RCCM when registering the pledge agreement. This is a fixed fee of FCFA 10,000.
- 5.4.6 Failure to register the pledge agreement with the RCCM means that the pledge will be void as against an insolvency practitioner of the pledgor or as against other creditors of the pledgor. However, the pledge will still be effective as between the pledgor and the pledgee.
- 5.4.7 The RCCM maintains a register of all security registered with it that is publicly available. Any person wishing to search the register to see if any security has been registered over specific goods must submit an information request to the RCCM. The RCCM then has two days from receipt of the request to deliver a certificate stating whether any security has been registered over the goods concerned.

- 5.4.8 Following registration of the pledge agreement, the RCCM will issue a document known as the *bordereau de gage de stocks* (the pledge form). This will specify details of the pledge, its registration date at the RCCM and the unique identification number assigned to it by the RCCM.
- 5.4.9 The pledge form serves as confirmation that the relevant pledge agreement has been successfully registered with the RCCM. It does not transfer ownership in the goods and it is not a document of title.
- 5.4.10 However, issuance of the pledge form is conditional on the RCCM being satisfied that there is insurance cover over the secured stocks against any risk of theft, fire, partial or complete damage. Details of the insurance cover in place should be included within the pledge agreement. Article 121 of the Securities Act states that any pledge agreement that does not indicate the name of the insurer that provides the required cover will be null and of no legal effect. However, this Article does not appear to be strictly applied in practice.
- 5.4.11 The pledge form will be issued to the pledgor who is then responsible for endorsing the pledge form to the pledgee. The endorsement confers on the pledgee the quality and rights of a secured creditor. The pledgee may in turn subsequently endorse the pledge form to a third party who will then obtain the rights of a secured creditor in relation to the pledged goods.
- 5.4.12 Endorsement should be made in writing (either on the back of the pledge form or on an attachment to the pledge form), and it should state the endorsee's name and be signed by the endorser. In this way, any person in possession of a pledge form should be able to show that they are the legitimate bearer through a chain of previous endorsements.
- 5.4.13 There is no requirement to enter into a new pledge agreement or to notify the RCCM each time the pledge form is transferred to a new third party.
- 5.4.14 The second method of ensuring that the pledge is effective is to transfer possession of the secured goods to the pledgee. The pledgee can show that it has possession of the goods in one of two ways.

- 5.4.15 Firstly, the pledgee can take actual possession of the secured goods by storing them in a warehouse or storage facility that the pledgee owns or has control over. This is referred to as having *actual possession* of the goods. This form of possession is not common as it places a burden on the pledgee to store and monitor the goods which it may not be best placed to do.
- 5.4.16 The alternative is for the pledgee to appoint a collateral manager to store and monitor the secured goods on its behalf. This is known as *constructive possession* and is the usual way of demonstrating that the pledgee has possession of the secured goods.
- 5.4.17 Provided that the pledgee can show that it has possession (either actual or constructive) of the secured goods, the pledge will be effective as against the pledgor, an insolvency practitioner of the pledgor, or as against other creditors of the pledgor. The priority of creditors who have competing pledges over the same goods is discussed in paragraph 5.5 (Priority/ranking of security) below.
- 5.4.18 It is unclear whether stamp duty is payable in respect of pledges that are perfected by taking possession (whether actual or constructive). Whether stamp duty is payable in respect of any given pledge agreement would need to be discussed with the relevant tax authority in Niger.
- 5.4.19 In practice, many creditors adopt the second approach when taking security over goods in Niger. The main reasons for this are a lack of knowledge about the requirement to register security with the RCCM and the time that it takes to successfully register security with the RCCM (which is usually around 60 days).

## **5.5 Priority/ranking of security**

- 5.5.1 The ranking of creditors who have taken security over goods is set out in full in paragraphs 4.5.1 and 4.5.2 above.
- 5.5.2 Where more than one person has a pledge over the same goods, the order of priority will be determined by the order in which each pledge was perfected. Where the competing pledges have each been registered, priority will be determined by which pledge agreement was registered first with the RCCM.

- 5.5.3 In the event that none of the secured parties have registered their pledge agreements, priority will then be determined by which secured party has possession (either actual or constructive) of the relevant goods.
- 5.5.4 Where one pledge has been perfected by registration and another pledge has been perfected by taking possession, the order of priority will be determined by looking at whether possession of the goods in question was taken before the registration process was completed at the RCCM. If it were, then the possessory pledge will have priority. If registration at the RCCM was completed before possession of the secured goods was taken by the competing creditor, then the registered non-possessory pledge will have priority.
- 5.5.5 The scenarios set out in paragraphs 5.5.2 to 5.5.4 (inclusive) are subject in each case to the issue of whether the creditor taking the second pledge knew, or could reasonably have known, of the existence of the first pledge. If the second creditor did know, or should reasonably have known, of the existence of the first pledge, then the second pledge will rank behind the first, irrespective of whether it was perfected first in time.

## **5.6 True sale versus secured lending**

- 5.6.1 Repurchase agreements are not used as a method of financing in Niger. Although there is no legislation prohibiting these types of agreements, it is unlikely that they will be recognised as valid under Nigerien law and they may well be recharacterised as a loan. The financier may then find itself having the status of an unsecured creditor if it had not taken security over the goods or had not registered that security.
- 5.6.2 However, a further limitation on the use of such agreements is that financial institutions do not have the power under Nigerien law to buy and sell commodities. This means that financial institutions would not be able to enter into the types of ownership arrangement provided for under repurchase agreements.

## **6 Enforcement**

### **6.1 Enforcement of security over commodity against the borrower**

- 6.1.1 The times when the pledge will become enforceable by the pledgee will be set out in the pledge agreement (each an event of default) and they will include failure by the borrower to pay any sum on its due date.
- 6.1.2 If the pledgee wishes to enforce the pledge following an event of default, it must first serve a demand on the pledgor to resolve the event of default (e.g., by paying the unpaid amount). If the pledgor fails to resolve the event of default within eight days of receiving the demand, the pledgee may apply to the court to enforce its pledge over the goods.
- 6.1.3 The court will issue a writ of execution allowing the pledgee to enforce the sale of the pledged goods. The pledgee will then receive a share of the proceeds of the sale in accordance with its priority ranking as set out in paragraph 4.5.1. Obtaining a writ of execution can vary in terms of difficulty, time and cost. The main determining factors will be the complexity of the case and the efficiency of the court.
- 6.1.4 Alternatively, the pledgor and the pledgee may agree that, on an event of default, ownership of the goods is transferred from the pledgor to the pledgee. This means that the pledgee would not need to obtain a writ of execution from the court before selling the pledged goods. This is the most popular method of dealing with the goods following an event of default. However, the pledge of agreement must provide the pledgee with the power to sell the goods in order for this to be effective.

### **6.2 Enforcement of security over commodity against third parties**

- 6.2.1 If the pledgor were to sell the pledged goods to a third party, the pledgee would in theory be able to enforce its security over the goods as against the third-party purchaser. However, any third-party purchaser will have a defence to the pledgee's claims if it can show that it purchased the goods in good faith.
- 6.2.2 In this case, the burden would be on the pledgee to show that the third-party purchaser had acted in bad faith. It should be noted that the



simple fact that the third-party purchaser knew of the existence of the pledge does not mean that it acted in bad faith when purchasing the goods. Similarly, there is no requirement on a third-party purchaser to check with the RCCM as to whether there is any security over the goods it is intending to buy. This highlights the importance to the financier of having possession (actual or constructive) or appropriate control over the goods in order to avoid any issues with third-party purchasers.

### **6.3 Enforcement in the courts**

- 6.3.1 Any disputes may be submitted for resolution in the Nigerien courts. The case will initially be heard by a court of first instance which will issue its judgment on the dispute. The parties to the dispute have the right to appeal this decision to the appeal court provided that any appeal is lodged within two months of the judgment being issued or, if later, of the judgment being notified to the parties. Any appeal must be brought on different grounds to those that were rejected by the previous court.
- 6.3.2 The parties to a dispute may also appeal the decision of the appeal court to the supreme court of Niger. This is the superior court and its decisions are final and non-appealable. The same two month timeframe and procedure applies to appeals from the appeal court to the supreme court.
- 6.3.3 The speed with which a dispute is resolved by the courts will vary depending on the complexity of the matter. However, in general, the judicial process in Niger is slow, and there can be delays in issuing judgments.
- 6.3.4 The Nigerien civil procedure code does provide for a fast track procedure before the courts (known as the *procédure des référés*). However, this procedure can only be used in limited circumstances such as in an emergency or where a preliminary judgment is required in relation to the enforcement of a judgment or a writ of execution. Judgments issued under this procedure are appealable in the manner set out in paragraphs 6.3.1 and 6.3.2.

### **6.4 Arbitration alternative dispute resolution mechanisms**

- 6.4.1 The OHADA Uniform Act on Arbitration dated 11 March 1999 (the Arbitration Act) expressly provides for the resolution of disputes by arbitration. The Arbitration Act applies to any arbitration proceedings

in Niger, whether these relate to Nigerien law or foreign law; it provides that arbitration is open to all persons with legal personality.

- 6.4.2 Arbitration is often chosen as the preferred method of dispute resolution for domestic and international commercial disputes. There are no fixed timeframes or costs for arbitration proceedings under the Arbitration Act and, in theory, arbitration proceedings are usually favourable when compared to court proceedings.
- 6.4.3 However, there is no arbitral body for arbitral proceedings in Niger. This means that any Nigerien law disputes subject to resolution by arbitration will be dealt with in the *Cour Commune de justice et d'arbitrage*. This is the principal arbitral body for OHADA and it is based in Abidjan, Côte d'Ivoire.
- 6.4.4 The absence of an arbitral body in Niger can be a significant limitation on using arbitration as a method of dispute resolution in Niger. Given the delays that can be encountered in enforcement procedures through the courts, the absence of an arbitral body in Niger is a key weakness in the enforcement mechanism in Niger.

## **6.5 Enforcement of foreign court judgements and arbitral awards**

- 6.5.1 Foreign court judgments will only be applied in Niger after a Nigerien court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Nigerien court will consider whether the foreign court judgment contravenes any matters of Nigerien public policy. However, the Nigerien court will not reopen the dispute or reconsider the merits of the case when doing so.
- 6.5.2 Niger is a treaty member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It will therefore recognise and enforce arbitral awards issued by other treaty members subject to a Nigerien court issuing an exequatur decision. Niger will also recognise arbitral awards from non-treaty member countries subject to a Nigerien court issuing an exequatur decision.
- 6.5.3 The court will issue an exequatur decision provided that the foreign arbitral decision does not contravene Nigerien public policy. The speed with which an exequatur decision is issued will depend on the complexity of the foreign arbitral award.



# Block 1: Senegal

## Key legal points:

- There is no specific warehouse receipt legislation in place, but warehouse financing does take place in reliance on ordinary principles of contract law.
- Limited legal regulation of warehouses, warehouse operators and collateral managers.
- Key legal barriers include: (1) non-negotiability of warehouse receipts issued; (2) lack of legislative and regulatory structure for warehouses, warehouse operators and collateral managers; and (3) high registration fees for security documentation.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing legal framework

- 1.1.1 Warehouse financing has a large role to play in the financing of smallholder farmers in Senegal. Although there is no specific legislation in place governing warehouse financing, this is conducted in reliance on normal contractual arrangements.
- 1.1.2 Smallholder farmers have the power to borrow and to provide security over their goods, which allows them to participate in warehouse financing projects in their own right. However, much of the financing to smallholder farmers in Senegal is structured around loans to farmers' cooperatives which then on-lend to smallholder farmers. The loan from the financier to the cooperative will be collateralised against goods owned by the smallholder farmers who will receive funding from the cooperative.
- 1.1.3 The legal framework for taking security over goods is governed by supranational legislation passed by OHADA (as defined below). Security over goods takes the form of pledges which need to be registered in order to establish priority of security. Senegalese law does recognise the right of a secured party to give effect to a pledge by taking possession of the goods (either actual or constructive) as opposed to

registering it. However, failure to register the pledge will have an impact on the ranking of the secured party's security.

- 1.1.4 Key legal barriers to extending the use of warehouse receipt financing include:
- (a) the lack of a legal framework for such financing, both in terms of specific warehouse legislation and in terms of regulation of warehouse operators and collateral managers
  - (b) the non-negotiability of warehouse receipts which impacts on the ease of selling and transferring title to goods
  - (c) the time and cost incurred when registering security.

## **1.2 Proposals to introduce warehouse receipt legislation**

There are currently no proposals to introduce warehouse receipt legislation for Senegal (as of 15 April 2014).

## **1.3 Analysis of current status and feasibility of different financing methods**

- 1.3.1 The existing legal framework would support both Type B and Type C methods of financing (both as defined in the typology) whereby goods are stored in a warehouse (either public or private), usually under the control of a collateral manager and secured in favour of the financier by way of pledge.
- 1.3.2 Although both these methods of financing can be implemented under the existing legal framework, the absence of any defined regulation of warehouse operators and collateral managers means that there can be concerns for financiers about accepting the risk of non-payment by the borrower and the risk of non-performance or fraud by a warehouse operator or collateral manager.
- 1.3.3 The concept of field warehousing is not expressly recognised under Senegalese law, but it can be implemented in reliance on existing contractual principles and land law concerning leases.

- 1.3.4 There is scope for financing by microfinance institutions in Senegal which could be conducted either directly or indirectly through cooperatives. By contrast, although Senegalese law allows for the creation of security over future goods, the implementation of Type D financing (as defined in the typology) is unlikely to be successful at present due to a lack of legal and institutional infrastructure needed to make this viable.

## **2 Conclusions and interim recommendations**

- 2.1.1 Warehouse financing in Senegal currently takes place in reliance on a limited legal framework and minimalist regulatory regime. Although warehouse financing is utilised, primarily under Type B or Type C, the scope for expanding its use is limited by the deficiencies in the legal and regulatory environment.
- 2.1.2 The situation could be improved by introducing specific warehouse legislation. This legislation should focus on issues such as the negotiability of warehouse receipts, the licensing and regulation of warehouse operators and collateral managers and the respective liabilities of participants in the warehouse financing structure.
- 2.1.3 While specific warehouse finance legislation would create a clearer legal framework for this method of financing, drafting and negotiating, it is likely to be time consuming. In light of this, consideration could be given to implementing legislative changes on an incremental basis, with the focus first on establishing a regulatory body responsible for monitoring and sanctioning the activities of warehouse operators and collateral managers in Senegal.
- 2.1.4 Closer scrutiny of the activities of these entities would help to reduce the risks that financiers face when dealing with such entities (such as mismanagement, non-performance, fraud, and insolvency) and it would improve confidence in the creditworthiness of warehouse financing.
- 2.1.5 The cost of registration of security documentation is also a significant barrier to certain borrowers wanting to access warehouse financing and consideration should be given to reducing this or dispensing with it completely.

## Legal analysis

### 1 Overview of the legal system

Senegalese law is primarily based on a civil law system (a consequence of Senegal's time as a French colony during the end of the 19th century and the early 20th century) with a strong influence from Islamic law and customary laws and practices. Senegal is also a Member State of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) and it is therefore subject to the supranational laws established by the OHADA Treaty in relation to business law.

### 2 Overview of existing warehouse financing initiatives

The *facilité alimentaire* project is a recent warehouse financing initiative undertaken in Senegal. The initiative was launched by the Senegalese Government in December 2009 with financial backing from the European Union. The project ran until 30 October 2010 with the objective of increasing the production of agricultural products and improving consumer access to these products. The project focussed specifically on four regions of Senegal, these being Fatick, Kaolack, Kaffrine and Kolda. No direct legislative action is expected to occur as a result of this initiative.

### 3 Legislation relevant to warehouse receipt financing

#### 3.1 Legislative framework for warehouse receipt financing

- 3.1.1 Senegal does not have specific legislation governing warehouse receipt financing. However, warehouse financing is conducted in Senegal, relying instead on normal contractual rules to govern the relationships between the relevant parties to the financing (such as, the relationship between the borrower/depositor and the warehouse operator and the relationship between the borrower/depositor and the financier).
- 3.1.2 Although there is no specific warehouse receipt law, the provisions of the OHADA Uniform Act on Securities dated 15 December 2010 (the

Securities Act) contain some provisions similar to those that may be found in specific warehouse receipts legislation.

- 3.1.3 The Securities Act provides that a borrower may grant security over goods to its financier as collateral for its borrowings. The Securities Act does not contain any restrictions on the types of entity that may grant security over goods. This means that security over goods can be granted by a wide range of entities in Senegal including smallholder farmers, producer companies and cooperatives.
- 3.1.4 The secured goods may be held directly by the financier, or they may be held by a third-party warehouse operator or collateral manager as appointed by the borrower and the financier.
- 3.1.5 Reliance on the provisions of the Securities Act, which allows for financing against goods held with a third party, highlights that, even in the absence of specific warehouse receipts legislation, there is a legal framework for conducting warehouse financing in Senegal. This financing can be structured in line with either of Type B or Type C of the listed typologies, depending on where and with whom the secured goods are stored.
- 3.1.6 Further information on the Securities Act is provided in paragraph 5 (Security) below.

## **3.2 Compliance bodies**

Given the absence of specific legislation on warehouse financing, there are no regulatory or compliance bodies for monitoring existing warehouse financing practices.

## **3.3 Status of warehouse receipts**

- 3.3.1 The Senegalese Code of Civil and Commercial Obligations 1963 (as amended) (the Civil Code) states that any voluntary deposit of goods for storage with a warehouse operator or a collateral manager must be evidenced in writing. This requirement is satisfied by the issuance of a warehouse receipt by the warehouse operator or collateral manager confirming that it is storing, or in the case of the collateral manager, that it is holding and monitoring, the goods covered by the warehouse receipt.



- 3.3.2 This warehouse receipt is not a negotiable document of title and the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party. On this basis, the holder of a warehouse receipt may use the warehouse receipt as evidence to show that it has ownership over the stored goods, but the simple fact of holding possession of the warehouse receipt is not sufficient to prove ownership in itself.
- 3.3.3 Article 523 of the Civil Code states that certain information must be included in each warehouse receipt, including the name, occupation and address of the depositor as well as the type of the stored goods and, where applicable, any identifying mark (such as a specific lot number).
- 3.3.4 The Civil Code does not stipulate the form that a warehouse receipt must be in and these are currently issued in paper form. However, warehouse receipts could be issued electronically in line with the provisions of the OHADA Uniform Act on General Commercial Law dated 15 December 2010 (the Commercial Act) if required.
- 3.3.5 Where a third party has purchased goods that are subject to a warehouse receipt, that third party will in practice have to provide both the warehouse receipt and a copy of the sale and purchase agreement in order to secure the release of the goods from the warehouse. Where the secured goods have been pledged to a financier, the third-party purchaser will need to provide the warehouse receipt, the pledge form and confirmation that the financier has been repaid (either by the borrower or directly by the purchaser) in order to secure the release of the goods from the warehouse.

## **3.4 Field warehousing: legal recognition and requirements**

- 3.4.1 There is no specific legislation on field warehousing in Senegal. However, field warehousing could be used by reliance on more generic legislation relating to leases of land. The Commercial Act contains provisions dealing with lease agreements. These confirm that a person may take a lease of land or premises for commercial, industrial, professional, or artisanal purposes.
- 3.4.2 On the basis of the provisions in this Act, a lease of land by a field warehousing company or warehouse operator or collateral manager or

a financier from the borrower for the purposes of storing and monitoring the goods would be recognised as valid. This would allow financing to take place in line with Type B of the listed typologies.

- 3.4.3 In the absence of any express legal requirements for field warehousing, the more measures that the lessee takes to establish its rights over the leased land and its control over the stored goods, the stronger case it will have to show from a practical perspective that a field warehousing arrangement has been established. These measures could include creating physical boundaries around the leased area, controlling who has access to the leased area and labelling the stored goods with details of the pledge, the borrower and the financier.

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

- 4.1.1 The legal status of smallholder farmers or farmer organisations and cooperatives or other forms of producer organisations would not, as a matter of Senegalese law, prevent them from using warehouse financing.
- 4.1.2 A large proportion of the warehouse financing in Senegal is structured around loans by financiers to cooperatives who are then responsible for on-lending to smallholder farmers. A loan from a financier to a cooperative will usually be secured against goods stored in warehouses. These goods will be owned by the smallholder farmers who will receive the on-loans from the cooperative. These goods will be pledged to the financier at the time of, or just prior to, the financing being made available to the cooperative.

### **4.2 Legal status of farmers and farmers' organisations**

- (a) Individual farmers

Individual farmers are private individuals and they are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name. They have the power to sue and be sued in their own name. There are no restrictions on the type of contract that they can enter into (provided that these do not contravene Senegalese law) and there are no restrictions on the type of security interests that they can grant.

(b) Cooperative societies

Cooperative societies have legal personality under the provisions of the OHADA Uniform Act on Cooperatives dated 10 December 2010 (the Cooperatives Act). They are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name, and they have the power to sue and be sued in their own name. Under the Cooperatives Act, cooperatives have the power to undertake any activities that are in the best interests of its members. Further powers of a cooperative are set out in its constitutional document which is known as a *statuts*.

Notable cooperatives in Senegal are *La coopérative rurale de l'arrondissement de Pambal* (referred to as COORAP), département de Tivaouane, région de Thiès, *La coopérative agricole de Kéllé Guèye* (referred to as COOPAKEL), départements de Louga et Kébémér, régions de Louga, *La coopérative rurale de Malicounda* (referred to as COOPAM), département de Mbour, région de Thiès, *La coopérative agricole de Diendé* (referred to as COOPAD), département de Sédhiou, région de Sédhiou and *La coopérative rurale des agropasteurs pour le développement* (referred to as CORAD), département de Podor, région de Saint Louis. These are four of the cooperatives that undertake borrowing on behalf of smallholder farmers.

(c) Formal and informal representative bodies and trade organisations

There are a large number of formal trade organisations for farmers in Senegal. These can have one of three legal statuses: a cooperative, a federation, or a union. The most influential of the existing trade organisations in Senegal is the *Réseau des Organisations Paysannes et Pastorales du Sénégal* (referred to as RESOPP). The RESOPP is made up of a number of cooperatives.

## 4.3 Legal status of and requirements for warehouse operators and collateral managers

4.3.1 There are limited legal requirements for warehouse operators and collateral managers in Senegal. Articles 13 and 14 of the Commercial Act and Article 97 of the OHADA Uniform Act on Companies Law require the registration of all Senegalese companies with the company registry in Senegal. Similarly, Article 74 of the Cooperatives Act requires that all Senegalese cooperatives register with the cooperative

registry in Senegal. Both warehouse operators and collateral managers in Senegal are usually incorporated as cooperatives and they must therefore register with the cooperative registry.

- 4.3.2 Warehouse operators and collateral managers must also have insurance in place to cover any goods they are storing and/or monitoring. This insurance should as a minimum position cover risk of theft, fire and partial or complete damage of the goods.
- 4.3.3 Any pledge agreement between a financier and a borrower should stipulate that the borrower may only store goods with a warehouse operator or collateral manager (as applicable) that has a given level of insurance cover in place. The level of insurance required is set out in Article 121 of the Securities Act as discussed further in paragraph 5.4.10 below.

#### **4.4 Regulation of warehouse operators and collateral managers**

There are no regulatory bodies responsible for monitoring the activities of warehouse operators and collateral managers. However, the activities of warehouse operators and collateral managers are regulated to a certain extent by market practice and commercial peer pressure.

#### **4.5 Rights of a secured creditor in an insolvency**

- 4.5.1 In the event that the borrower becomes insolvent, the ranking of a secured creditor will be determined in accordance with Article 226 of the Securities Act. In descending order, the ranking of priority is as follows:
  - (a) the creditors having legal expenses incurred in the process, leading to the sale of the property and to the distribution of the assets
  - (b) the creditors of the incurred expenses for the custody of the debtor's property in the interest of creditors with older debts
  - (c) the creditors of highly preferred wages
  - (d) the creditors with a general lien subject to registration or a pledge, each according to the rank of his registration/enforceability to third parties
  - (e) the creditors with a special personal property lien

- (f) the creditors with a general lien not subject to a registration
- (g) the unsecured creditors.

4.5.2 A financier that has taken a pledge over goods will therefore have fourth ranking security in the event of the borrower's insolvency, provided that the pledge has been perfected (as discussed further in paragraph 5.4 (Perfection and registration of security) below). Where two or more persons have security over the same goods, the ranking of priority between those persons will depend on which security interest was perfected first (as discussed further in paragraph 5.5 (Priority/ranking of security) below).

4.5.3 Financiers must also use caution when lending to borrowers who are in financial difficulty. Article 67 of the OHADA Uniform Act on Insolvency dated 10 April 1998 (the Insolvency Act) provides that any transactions entered into by a borrower (including undertaking further borrowing or granting security) will be considered automatically void and of no legal effect if they are entered into during the period of suspicion.

4.5.4 The period of suspicion starts from the date on which the borrower ceases to pay its debts as they fall due and ends on the date that the court authorises the start of insolvency proceedings against the borrower.

4.5.5 The purpose of Article 67 of the Insolvency Act is to protect the rights of existing creditors and to ensure that the borrower is not able to dispose of its assets to the detriment of its creditors. However, it also means that any financier taking security during the period of suspicion runs the risk of that security being declared void by the courts under the terms of Article 67 of the Insolvency Act. The financier would then find itself holding the ranking of an unsecured creditor as set out in paragraph 4.5.1 above. A financier should conduct appropriate insolvency searches with the Senegalese courts before disbursing funds to a borrower. This should provide details of any current insolvency proceedings against the borrower, but it is subject to the court maintaining up-to-date records of insolvency proceedings.

4.5.6 In the event of the insolvency of a third party storing the secured goods (whether a warehouse operator or a collateral manager), creditors of that third party would not have any legal right to seize the stored goods.

## **5 Security**

### **5.1 Taking security over stored commodities and warehouse receipts**

- 5.1.1 Under Article 126 of the Securities Act, it is possible to take security interests over a number of different assets including security over goods, security over receivables, and security over bank accounts.
- 5.1.2 Warehouse financing in Senegal is structured on the basis that security is provided over the goods that are being financed (although this is not always the case, particularly with Type A financing). Security is taken over goods by way of pledge. Security cannot be granted over documents representing or relating to goods such as bills of lading or warehouse receipts.
- 5.1.3 The pledge must be granted under the terms of a written pledge agreement (the pledge agreement) between the grantor of the pledge (the pledgor) and the beneficiary of the pledge (the pledgee). The pledge agreement must specify the nature of the secured goods, their quantity and the debt that the pledge is securing.

### **5.2 Creation of security over future goods**

- 5.2.1 The pledgor can grant security to the pledgee over future goods that it does not yet own. The future goods may be described generically in the pledge agreement (i.e., by type or quality) and the pledge will become binding over these future goods as soon as they come into the pledgor's ownership. There is no need for the pledge agreement to be re-registered when the pledge takes effect over future goods.
- 5.2.2 The pledgor can also grant security to the pledgee over goods that are not yet in existence. For example, it may grant security over agricultural crops while they are growing in the fields. Again, these goods may be described generically (i.e., by location or by quality) and the pledge will become binding over these goods as soon as they come into existence.

## 5.3 Commingling and fungibility

- 5.3.1 A warehouse operator or collateral manager may release fungible goods that are subject to a pledge other than to the pledgor or pledgee (or a transferee of the pledgee) provided that the goods are replaced with substitute goods on a like-for-like basis. This allows the warehouse operator or collateral manager to release and replace fungible goods that would otherwise deteriorate in quality if left stored for a prolonged period of time.
- 5.3.2 Releasing goods covered by a pledge gives rise to the requirement to de-register the goods from the scope of the pledge agreement with the *Registre du Commerce et du Crédit Mobilier* (the RCCM) (known as *radiation*). Replacing goods covered by a pledge agreement gives rise to the requirement to re-register the pledge agreement with the RCCM. However, these requirements are often not complied with, either due to ignorance as to the existence of the requirement, or because compliance with them is administratively burdensome and costly in the case of re-registering. The consequences of non-compliance with this requirement are discussed in the following paragraphs.
- 5.3.3 Releasing or replacing fungible goods on this basis does not affect the validity of any pledge granted over them provided that the pledging clause in the pledge agreement was drafted in a generic manner. This would be the case, for example, if the pledging clause provides a pledge over a fixed number of bags of commodity of a certain quality or grade but without any further identification.
- 5.3.4 On the other hand, releasing or replacing fungible goods may be an issue if the pledge agreement grants the pledge over specifically identifiable goods. This would be the case, for example, if the pledging clause is drafted to cover specific goods stored with specific lot numbers or identification codes. In this situation, the financier may find itself having to enforce its pledge over the goods as against a third party which may be problematic. Issues of enforcement as against third parties are discussed further in paragraph 6.2 (Enforcement of security over commodity against third parties) below.

## 5.4 Perfection and registration of security

- 5.4.1 There are two ways in which the pledge may be effective under Senegalese law. The first method is to register the pledge agreement as provided for under the Securities Act. The pledge agreement must be registered at the RCCM, and it may be registered with the RCCM in paper or electronic form.
- 5.4.2 There is no mandatory timeframe for registering the pledge agreement with the RCCM, but a delay in registration may impact on the financier's ranking of security as discussed in paragraph 5.5 (Priority/ranking of security) below.
- 5.4.3 Either of the pledgor or the pledgee may register the pledge agreement with the RCCM. In practice, the pledgee may prefer to take responsibility for this given the consequences of any delay or failure to register the pledge agreement.
- 5.4.4 Although stamp duty is not payable on the pledge agreement, it must be registered with the relevant tax office. Registration of the pledge agreement with the tax office is subject to a fixed fee of FCFA 5000.
- 5.4.5 A registration fee must also be paid when registering the pledge agreement with the RCCM. The registration fee will be calculated at the rate of 1.5% of the amount secured by the pledge agreement.
- 5.4.6 Failure to register the pledge agreement with the RCCM means that the pledge will be void as against an insolvency practitioner of the pledgor or as against other creditors of the pledgor. However, the pledge will still be effective as between the pledgor and the pledgee.
- 5.4.7 The RCCM maintains a register of all security registered with it that is publicly available. Any person wishing to search the register to see if any security has been registered over specific goods must submit an information request to the RCCM. The RCCM then has two days from receipt of the request to deliver a certificate stating whether any security has been registered over the goods concerned.
- 5.4.8 Following registration of the pledge agreement, the RCCM will issue a document known as the *bordereau de gage de stocks* (the pledge form).



This document will specify details of the pledge, its registration date at the RCCM and the unique identification number assigned to it by the RCCM.

- 5.4.9 The pledge form serves as confirmation that the relevant pledge agreement has been successfully registered with the RCCM. It does not transfer ownership in the goods and it is not a document of title.
- 5.4.10 However, issuance of the pledge form is conditional on the RCCM being satisfied that there is insurance cover over the secured stocks against any risk of theft, fire, partial or complete damage. Details of the insurance cover in place should be included within the pledge agreement. Article 121 of the Securities Act states that any pledge agreement that does not indicate the name of the insurer that provides the required cover will be null and of no legal effect. However, this Article does not appear to be strictly applied in practice.
- 5.4.11 The pledge form will be issued to the pledgor who is then responsible for endorsing the pledge form to the pledgee. The endorsement confers on the pledgee the quality and rights of a secured creditor. The pledgee may in turn subsequently endorse the pledge form to a third party who will then obtain the rights of a secured creditor in relation to the pledged goods.
- 5.4.12 Endorsement should be made in writing (either on the back of the pledge form or on an attachment to the pledge form) and it should state the endorsee's name and be signed by the endorser. In this way, any person in possession of a pledge form should be able to show that they are the legitimate bearer through a chain of previous endorsements.
- 5.4.13 There is no requirement to enter into a new pledge agreement or to notify the RCCM each time the pledge form is transferred to a new third party.
- 5.4.14 The second method of ensuring that the pledge is effective is to transfer possession of the secured goods to the pledgee. The pledgee can show that it has possession of the goods in one of two ways.
- 5.4.15 Firstly, the pledgee can take actual possession of the secured goods by storing them in a warehouse or storage facility that the pledgee owns or has control over. This is referred to as having *actual possession* of the goods. This form of possession is not common as it places a burden

on the pledgee to store and monitor the goods which it may not be best placed to do.

- 5.4.16 The alternative is for the pledgee to appoint a collateral manager to store and monitor the secured goods on its behalf. This is known as *constructive possession* and it is the usual way of demonstrating that the pledgee has possession of the secured goods.
- 5.4.17 Provided that the pledgee can show that it has possession (either actual or constructive) of the secured goods, the pledge will be effective as against the pledgor, an insolvency practitioner of the pledgor, or as against other creditors of the pledgor. The priority of creditors who have competing pledges over the same goods is discussed in paragraph 5.5 (Priority/ranking of security) below.
- 5.4.18 In practice, many creditors adopt the second approach when taking security over goods in Senegal. The main reasons for this are a lack of knowledge about the registration regime and the time that it takes to successfully register security with the RCCM (which can routinely be up to 60 days).

## **5.5 Priority/ranking of security**

- 5.5.1 The ranking of creditors who have taken security over goods is set out in full in paragraphs 4.5.1 and 4.5.2 above.
- 5.5.2 Where more than one person has a pledge over the same goods, the order of priority will be determined by the order in which each pledge was perfected. Where the competing pledges have each been registered, priority will be determined by which pledge agreement was registered first with the RCCM.
- 5.5.3 In the event that none of the secured parties have registered their pledge agreements, priority will then be determined by which secured party has possession (either actual or constructive) of the relevant goods.
- 5.5.4 Where one pledge has been perfected by registration and another pledge has been perfected by taking possession, the order of priority will be determined by looking at whether possession of the goods in question was taken before the registration process was completed at the RCCM. If it were, then the possessory pledge will have priority. If

registration at the RCCM was completed before possession of the secured goods was taken by the competing creditor, then the registered non-possessory pledge will have priority.

- 5.5.5 The scenarios set out in paragraphs 5.5.2 to 5.5.4 (inclusive) are subject in each case to the issue of whether the creditor taking the second pledge knew, or could reasonably have known, of the existence of the first pledge. If the second creditor did know, or should reasonably have known, of the existence of the first pledge, then the second pledge will rank behind the first, irrespective of whether it was perfected first in time.

## **5.6 True sale versus secured lending**

- 5.6.1 Repurchase agreements are not used as a method of financing in Senegal. Although there is no legislation prohibiting these types of agreements, it is unlikely that they will be recognised as valid under Senegalese law and they may well be recharacterised as a loan. The financier may then find itself having the status of an unsecured creditor if it had not taken security over the goods or had not registered that security.
- 5.6.2 However, a further limitation on the use of such agreements is that financial institutions do not have the power under Senegalese law to buy and sell commodities. This means that financial institutions would not be able to enter into the types of ownership arrangement provided for under repurchase agreements.

# **6 Enforcement**

## **6.1 Enforcement of security over commodity against the borrower**

- 6.1.1 The times when the pledge will become enforceable by the pledgee will be set out in the pledge agreement (each an event of default) and it will include failure by the borrower to pay any sum on its due date.
- 6.1.2 If the pledgee wishes to enforce the pledge following an event of default, it must first serve a demand on the pledgor to resolve the event of default (e.g., by paying the unpaid amount). If the pledgor fails to resolve the event of default within eight days of receiving the demand, the pledgee may apply to the court to enforce its pledge over the goods.

6.1.3 The court will issue a writ of execution allowing the pledgee to enforce the sale of the pledged goods. The pledgee will then receive a share of the proceeds of the sale in accordance with its priority ranking as set out in paragraph 4.5.1. Obtaining a writ of execution can vary in terms of difficulty, time and cost. The main determining factors will be the complexity of the case and the efficiency of the court.

6.1.4 Alternatively, the pledgor and the pledgee may agree that, on an event of default, ownership of the goods is transferred from the pledgor to the pledgee. This means that the pledgee would not need to obtain a writ of execution from the court before selling the pledged goods. This is the most popular method of dealing with the goods following an event of default. However, the pledge of agreement must provide the pledgee with the power to sell the goods in order for this to be effective.

## **6.2 Enforcement of security over commodity against third parties**

6.2.1 If the pledgor were to sell the pledged goods to a third party, the pledgee would in theory be able to enforce its security over the goods as against the third party purchaser. However, any third-party purchaser will have a defence to the pledgee's claims if it can show that it purchased the goods in good faith.

6.2.2 In this case, the burden would be on the pledgee to show that the third-party purchaser had acted in bad faith. It should be noted that the simple fact that the third-party purchaser knew of the existence of the pledge does not mean that it acted in bad faith when purchasing the goods. Similarly, there is no requirement on a third-party purchaser to check with the RCCM as to whether there is any security over the goods it is intending to buy. This highlights the importance to the financier of having possession (actual or constructive) or appropriate control over the goods to avoid any issues with third-party purchasers.

## **6.3 Enforcement in the courts**

6.3.1 Any disputes may be submitted for resolution in the Senegalese courts. The case will initially be heard by a court of first instance which will issue its judgment on the dispute. The parties to the dispute have the right to appeal this decision to the appeal court, provided that any appeal is lodged within two months of the judgment being issued or, if

later, of the judgment being notified to the parties. Any appeal must be brought on different grounds to those that were rejected by the previous court.

- 6.3.2 The parties to a dispute may also appeal the decision of the appeal court to the supreme court of Senegal. This is the superior court and its decisions are final and non-appealable. The same two month timeframe and procedure applies to appeals from the appeal court to the supreme court.
- 6.3.3 The speed with which a dispute is resolved by the courts will vary depending on the complexity of the matter. However, in general, the judicial process in Senegal is slow and there can be delays in issuing judgments.
- 6.3.4 The Senegalese civil procedure code does provide for a fast track procedure before the courts (known as the *procédure des référés*). However, this can only be used in limited circumstances such as in an emergency or where a preliminary judgment is required in relation to the enforcement of a judgment or a writ of execution.
- 6.3.5 Judgments issued under this procedure are appealable in the manner set out in paragraphs 6.3.1 and 6.3.2, but any appeal must be started within 15 days of the judgment being issued or, if later, the date on which the parties are notified of the judgment.

## **6.4 Arbitration alternative dispute resolution mechanisms**

- 6.4.1 The OHADA Uniform Act on Arbitration dated 11 March 1999 (the Arbitration Act) expressly provides for the resolution of disputes by arbitration. The Arbitration Act applies to any arbitration proceedings in Senegal, whether these relate to Senegalese law or foreign law and it provides that arbitration is open to all persons with legal personality. Arbitral proceedings are also governed by the Senegalese civil procedure code.
- 6.4.2 Arbitration is often chosen as the preferred method of dispute resolution for domestic and international commercial disputes. There are no fixed timeframes or costs for arbitration proceedings, but these will often be favourable when compared to court proceedings.

6.4.3 The main arbitral body in Senegal is the *Centre arbitrage, de médiation et de conciliation*. Parties may choose to submit their disputes to this arbitral body or alternatively they can use the *Cour Commune de justice et d'arbitrage* which is the principal arbitral body for OHADA and it is based in Abidjan, Côte d'Ivoire.

## 6.5 Enforcement of foreign court judgments and arbitral awards

6.5.1 Foreign court judgments will only be applied in Senegal after a Senegalese court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Senegalese court will consider whether the foreign court judgment:

- (a) was issued by a competent foreign court in accordance with the rules on conflicts of jurisdiction applied in Senegal
- (b) was issued in connection with the applicable law to the dispute in accordance with the rules of conflicts of law applied in Senegal
- (c) in force and enforceable in the jurisdiction that it was issued
- (d) was issued after the defendant was provided with an opportunity to present his case
- (e) contravenes any matters of Senegalese public policy.

6.5.2 However, the Senegalese court will not reopen the dispute or reconsider the merits of the case when doing so.

6.5.3 Senegal is a treaty member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It will therefore recognise and enforce arbitral awards issued by other treaty members subject to a Senegalese court issuing an exequatur decision. Senegal will also recognise arbitral awards from non-treaty member countries subject to a Senegalese court issuing an exequatur decision.

6.5.4 The court will issue an exequatur decision provided that the foreign arbitral decision does not contravene Senegalese public policy. The speed with which an exequatur decision is issued will depend on the complexity of the foreign arbitral award.



# Block 2: Ghana

## Key legal points:

- The Ghanaian legal system is flexible, supporting implementation of financing and security arrangements through contractual agreements.
- No current legal regulation of warehouses and warehouse operators.
- Key legal barriers under the existing legal framework include: (1) payment of stamp duty on security; (2) the absence of a general legal framework for the negotiability of warehouse receipts; and (3) a cumbersome enforcement process over moveable property.
- Proposals exist for the introduction of specific warehouse receipt legislation. The Draft Warehouse Receipts Regulations would, when enacted, provide the legal framework required for the regulation of public warehouses and the licensing criteria for warehouses, warehouse operators and warehouse receipt systems. The legislation would be complemented by Draft Commodity Exchange Regulations which would facilitate the establishment of a commodities exchange.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing legal framework

- 1.1.1 The Ghanaian legal system is flexible, supporting implementation of financing and security arrangements through contractual agreements. There is recognition of the creation of possessory security over commodities through delivery of warehouse receipts (albeit subject to registration requirements) and it is possible to create security over a changing pool of assets (including future assets).
- 1.1.2 There is currently no legal framework for the regulation of warehouses and warehouse operators. Warehouse receipts issued by warehouse operators or collateral managers are not negotiable instruments although they can be used to transfer possession of goods and transfer some rights in those goods.



1.1.3 Key legal barriers to the successful encouragement of warehouse receipt financing include:

- (a) the requirement to pay *ad valorem* stamp duty on security documents, which includes a requirement to *up-stamp* documents where the value of the underlying financing arrangement is increased (if the security is to secure the increased facility amount). In practice, onerous stamp duty costs can be prohibitive for financings
- (b) the process for enforcement of a secured creditor's rights over moveable property is cumbersome.

## 1.2 Proposals to introduce warehouse receipt legislation

1.2.1 Proposals exist for the introduction of specific warehouse receipt legislation, which would support the implementation of warehouse receipt financing by creating a framework for legal regulation of warehouses and warehouse operators.

1.2.2 The proposed legislation will also provide the possibility of affording warehouse receipts issued in accordance with the legislation the status negotiable instruments.

## 2 Conclusions and interim recommendations

The existing legal framework would support the Type B method of financing (as defined in the typology), being the financing of commodities stored in a private warehouse under the control of a collateral manager, secured by a possessory pledge or a proprietary charge over the commodity. The warehouse operator or collateral manager would issue warehouse receipts confirming the quantity and quality of the commodity held and these could be delivered to the financier to create a pledge.

This arrangement would need to be implemented by contractual agreement between the relevant parties.

Ghana appears to be taking the route of enacting legislation to support the implementation of Type B and Type C financing (as defined in the typology), where the financing would be supported by delivery of a negotiable and tradable warehouse receipt to the relevant financier or the collateral manager

as its agent. It is contemplated that when enacted, the Draft Warehouse Receipts Regulations (described in further detail below) would provide the legal framework required for the regulation of warehouses, the licensing criteria for warehouses, warehouse operators and warehouse receipt systems. It is contemplated that, when enacted, the Draft Warehouse Receipts Regulations will lead to increased availability of credit to agricultural producers by creating secure collateral for the farmer, the processor and the trader, which can be used to obtain financing.

There are proposals to simultaneously enact Draft Commodity Exchange Regulations (described further below) to create a transparent marketing system for Ghana's key agricultural commodities.

The enactment of the draft legislation would be a positive step for access to warehouse finance in Ghana. The Draft Warehouse Receipts Regulations will reduce the burden of due diligence for financiers and to some extent ensure a more consistent approach in the market contractually. Stamp duty will continue to be a significant issue in the taking of security by financiers, increasing the cost of financing for borrowers. A reduction in the level of stamp duty from the rate of 0.5% for principal security documents would reduce a barrier for participants in warehouse financing.

Enforcement of security through the courts can be a lengthy and cumbersome process. Although a process exists to enforce registered security without recourse to the courts, doing so involves a process of valuation and public auction. The introduction of a fast-track court enforcement procedure would be of great benefit. However, the right to enforce security by a private sale following default without the need would be the best solution.

## Legal analysis

### 1 Overview of the legal system

Ghana has a common law legal system. Laws are made by the legislature and they are interpreted and applied by the courts. Sources of law include the Constitution, acts of parliament (and ancillary secondary legislation made under powers conferred by the constitution or acts of parliament), pre-Constitution written law and common law (which includes doctrines which originate in English law).

Ghana has a multi-tiered court hierarchy with the supreme court being the most superior court and the final forum of appeal. The supreme court also rules on the constitutionality of public acts. The court of appeal and the high court (along with the supreme court) form the superior court of judicature. There are also circuit courts and district courts which constitute the inferior courts.

## **2 Overview of existing warehouse financing initiatives**

### **2.1 Ghana Grains Council (GGC) Warehouse Receipt Rules and Regulations (WRRRs)**

- 2.1.1 The GGC is a body formed by leaders in the grain business with the support of USAID. Its membership includes banks, insurance companies, warehouse operators, farmer associations, software developers, commodity traders, food processors, collateral managers, agro input providers and agro input suppliers.
- 2.1.2 The GGC issued the WRRRs, a comprehensive set of regulations applying to warehouses, warehouse operators and staff, warehouse inspectors licensed by the GGC and all participants in the GGC warehouse receipt system.<sup>1</sup> The WRRRs lack the legal backing of enacted law in Ghana and they are only mandatory for members who voluntarily subscribe to the membership of the GGC.
- 2.1.3 The WRRRs provide a framework for the issuance of warehouse receipts that are transferrable between participants in the GGC Warehouse Receipts System.
- 2.1.4 In order to obtain a licence under the WRRRs, warehouse operators must meet certain criteria in relation to their premises and infrastructure. They must also provide a performance bond from a suitable surety and meet certain insurance requirements.
- 2.1.5 In the event of a failure to comply with the regulations by the warehouse operator, the GGC will administer claims against the warehouse operator and/or its surety under the WRRRs on behalf of the depositor.

1 A copy of the WRRRs can be found at - <http://www.ghanagrainscouncil.org/index.php/2013-06-23-14-55-47/warehouse-receipting/rules-of-warehouse-receipts>

2.1.6 Further analysis of the content of the WRRRs is set out at paragraph 2.2.3 below.

## **2.2 Proposals of the Ministry of Trade and Industry (MTI): regulations in relation to warehouse receipts and commodity exchange**

2.2.1 The MTI has initiated a proposal for legislation providing for a legal framework for the regulation of a warehouse receipt system in Ghana (the Draft Warehouse Receipts Regulations) and separate legislation in respect of the establishment of a commodities exchange (the Draft Commodity Exchange Regulations):

- (a) Draft Warehouse Receipts Regulations: These Draft Warehouse Receipts Regulations would provide: (1) the legal framework required for the regulation of warehouses; (2) the licensing criteria for warehouses and warehouse operators; and (3) a framework for warehouse receipt systems, addressing issues relating to liabilities of parties in a warehouse receipt system.
- (b) Draft Commodity Exchange Regulations: These Draft Commodity Exchange Regulations would provide the legal framework required for the establishment, operation; regulation of a commodity exchange commission, the licensing of exchange actors and other related matters.

2.2.2 The Draft Warehouse Receipts Regulations look to implement a system of warehousing which is open to all-comers, including smallholder farmers as part of efforts to create an orderly, transparent and efficient marketing system for Ghana's key agricultural commodities to promote agricultural investment and enhance productivity.

2.2.3 Comparing the Draft Warehouse Receipts Regulations and the WRRRs there are a number of points to note as set out in the table below.

	Draft Warehouse Receipts Regulations	WRRRs
Scope of application	Apply to the operations of all warehouses and warehouse receipts.	Apply to membership of GGC only.
Responsible regulatory body	Securities and Exchange Commission, although there is power to delegate to other corporate bodies. It is not clear the extent to which this is likely to happen.	Ghana Grains Council.
Licensing requirements for warehouse operators	The requirements are generally the same under both sets of regulations. Both sets of regulations provide for the licensing of warehouse specialised workers and warehouse inspectors.	
	The current draft does not contain requirements for the qualification of specialised staff, although there is provision for the Commission to specify requirements for the qualification of specialised staff through regulations or notices.	Specific requirements on the qualification of specialised warehouse staff. Licensed warehouse staff must also adhere to principles of good business practice in the conduct of their employers' affairs under the WRRRs.
Powers of warehouse inspectors	Warehouse inspectors are granted the same powers under both sets of regulations. These include the ability to enter and inspect warehouses (including spot checks) and report any breach of relations to the supervisory body.	
Commingling of fungible goods	Permitted with other goods of the same kind and grade if authorised by agreement between the depositor and warehouse operator.	Commingling permitted with approval of the depositor.
Delivery of goods	Warehouse operators under both sets of regulations have a duty to deliver goods specified in a warehouse receipt to the bearer of the receipt on demand; however, the warehouse operator must take all necessary precautions to ensure that delivery is made to a person who has lawfully obtained the warehouse receipt. Both sets of regulations require a warehouse operator who has information that a person other than the holder of a warehouse receipt claims to be the owner of, or entitled to, the goods to refuse to deliver the goods.	
	The warehouse operator has a maximum period of five working days to determine the validity of the adverse claim or to commence interpleader proceedings.	No equivalent provision. If multiple claims are made to goods, the warehouse operator must refer the dispute to arbitration.

	Draft Warehouse Receipts Regulations	WRRRs
Warehouse operators lien	Both regulations recognise that the warehouse operator has a lien over goods deposited with him for storage in respect of the charges for the storage of those goods.	
Alternative dispute resolution	Both regulations provide for the resolution of disputes by reference to arbitration under the Alternative Dispute Resolution Regulations 2010 (Act 798).	
Registration of warehouse receipts	Require that a warehouse operator registers all negotiable warehouse receipts issued by him with an automated depository approved by the Commission.	A register must be kept of warehouse receipts issued by the warehouse operator.
Rights conferred by a negotiable warehouse receipt	Specifically set out in the regulations.	Not applicable.
Rights conferred by a negotiable warehouse receipt after transfer	Provide that a subsequent negotiation of a negotiable receipt representing sold or pledged goods that are in a warehouse to another person in good faith, for valuable consideration and without actual notice of the previous sale, or pledge under a sale or other disposition, has the same effect as if a previous purchaser of the goods or receipt had expressly authorized the subsequent negotiation. This will be an exception to the general position that registration of security is notice to the world.	Not applicable.

2.2.4 These proposals are currently subject to a consultation process with the various stakeholders through workshops and seminars organised by MTI in conjunction with the Ghanaian Securities and Exchange Commission (the Commission) with feedback being reflected in changes to the Draft Warehouse Receipts Regulations.

2.2.5 At this stage, it is not possible to provide the time frame for the enactment of the Draft Warehouse Receipts Regulations.

## **2.3 Grains Development Authority: promotion of farmers' associations**

The Grains Development Authority Act 1970 (Act 324) established the Grains Development Authority with the primary function of organising grain and legume farmers into farmers' associations through which credit and production requisites could be channelled to the producers. The aim was also to assist the farmers' associations to market their produce and to mobilise funds from local and foreign sources to run small scale schemes for farmers' associations which produce grain and legumes. However, the Act was not effectively implemented; the Grains Development Authority was never constituted to perform the functions envisaged under the Act.

## **2.4 The legal status of farmers' associations**

2.4.1 Farmers' associations are not afforded any special legal status or protection under the Grains Development Act. Therefore, the legal status of farmers' associations is regulated as any other co-operative under Ghanaian law in accordance with the Co-Operatives Society Act 1968 (N.L.C.D. 1968). This is discussed further below.

2.4.2 Alternatively, a farmers' association may also be registered under the Companies Act as a company limited by guarantee.

# **3 Legislation and laws relevant to warehouse receipt financing**

## **3.1 Regulation of inventory credit systems and collateral managers**

Under Ghanaian law, there is currently no specific regulation of inventory credit systems or of collateral managers. The Contracts Act 1960 (Act 25) generally empowers parties to enter into any contracts of their choice provided such contracts are not contrary to public policy. This means that the arrangements between financiers, collateral managers, storage operators and depositors/borrowers would need to be fully documented in contracts entered into between those parties.

## 3.2 Laws applicable to warehouse receipt financing systems

- 3.2.1 Ghanaian law does not have existing comprehensive laws governing warehouse receipt systems. However, Ghanaian law supports and recognises the following arrangement:
- (a) the borrower grants security in favour of the financier, such as a pledge of goods, over both the secured commodities and all warehouse receipts and other documents of title relating to the secured commodities
  - (b) the financier enters into a collateral management agreement with an independent collateral manager who undertakes to hold the relevant assets to the order of the financier and to regularly inspect and report to the financier on those assets.
- 3.2.2 In this scenario, the collateral manager will issue warehouse receipts that certify the quantity and quality of the stored commodities and which serve as confirmation that the collateral manager is holding goods under the terms of the collateral management agreement. It is a requirement that the underlying documents are duly stamped and the security is registered with the collateral registry in Ghana. The requirements for taking security in this scenario are discussed in more detail below.
- 3.2.3 Although it is not technically necessary that a collateral manager is appointed in order to evidence possession of goods for the purposes of establishing a pledge, from a practical perspective, collateral managers play a key role in protecting the goods and ensuring the value and enforceability of the security created by the pledge.

## 3.3 Compliance bodies

- 3.3.1 The Bank of Ghana has some supervisory and enforcement powers in respect of compliance by financiers with applicable laws (as well as having advisory and policy-creating roles). Failure to cooperate with the Bank of Ghana when it is exercising its enforcement duties is an offence punishable by a fine or imprisonment. The Bank of Ghana can also issue administrative fines in some circumstances.



- 3.3.2 Ghana has a collateral registry (established under The Borrowers and Lenders Act 2008 (Act 773)) for the registration of security created by borrowers to secure credit facilities.
- 3.3.3 When the Draft Warehouse Receipts Regulations come into force the Commission shall be the regulatory authority under those Regulations. The Commission will be responsible for:
- (a) licensing warehouses, warehouse operators and warehouse inspectors
  - (b) issuing negotiable warehouse receipts books and approving electronic warehouse receipts systems.
- 3.3.4 To support this role, the Commission will have investigative and enforcement powers. The Commission will also have a role in drafting rules and guidelines for compliance with the relevant regulations. The Commission will have the power to delegate its powers and the performance of its role.

## **3.4 Status of warehouse receipts**

- 3.4.1 Under Ghanaian law, warehouse receipts are recognised and treated as documents of title which can be used to transfer the possession and title in goods (Section 81(1) of the Sale of Goods Act 1962 (Act 137)).
- 3.4.2 The courts of Ghana will recognise warehouse receipts issued pursuant to a valid contract as transferable documents of title, which: (1) provide the holder of the warehouse receipt with constructive possession of the goods covered in the receipt; and (2) provide good faith buyers without notice of any third-party claim with effective and immediate protection against third-party claims over the commodities they represent (other than the claims of a secured party that has registered their security).
- 3.4.3 The basis of the transferability of warehouse receipts is contractual and, therefore, in order for a warehouse receipt to be capable of transfer by delivery or by endorsement and delivery, it must be agreed between the issuer and the depositor that this will be the case and the warehouse receipt must be marked as transferable on its face.

- 3.4.4 It should be noted, however, that if security is created over goods represented by a warehouse receipt (whether before or after deposit) and that security is duly registered with the collateral registry, the secured party will currently be able to enforce that security against a subsequent purchaser or pledgee of those goods. This is regardless of whether the purchaser or pledgee had given good value or had knowledge of any existing security. As a matter of Ghanaian law, registration is deemed to be notice to the whole world and subsequent owners and secured parties must take the goods subject to such security.
- 3.4.5 The Draft Warehouse Receipts Regulations set out comprehensive provisions in relation to warehouse receipts, including providing for negotiability of such instruments. In particular, the acquisition of a warehouse receipt by a good faith buyer would create a direct obligation of the warehouse operator to hold possession of the relevant goods for such person according to the terms of the receipt as if the warehouse operator had contracted directly with him. This is a departure from the current position in respect of the rights of a secured financier (with registered security) against third-party good faith purchasers and it will provide an exception to the rule that registration is notice to the world in respect of negotiable warehouse receipts issued under the Draft Warehouse Receipts Regulations.
- 3.4.6 The Draft Warehouse Receipts Regulations currently require that all warehouse operators issuing warehouse receipts that are non-negotiable to mark them as such.
- 3.4.7 Ghanaian law allows for the possibility of warehouse receipts being validly issued electronically under The Electronic Transactions Act 2008 (Act 772), which provides for the validity of an agreement made by electronic means.
- 3.4.8 The Draft Warehouse Receipts Regulations contain specific requirements for negotiable electronic warehouse receipts.

### **3.5 Field warehousing: legal recognition and requirements**

- 3.5.1 Field warehousing exists under Ghanaian law as a purely contractual arrangement. To ensure that valid security in favour of the financier

had been created, the security would need to be duly stamped and registered with the collateral registry in Ghana.

3.5.2 In terms of warehouse regulation, field warehousing is not treated any differently to other warehouse operations. Therefore, parties engaged in field warehousing would have to comply with the requirements applying to warehouse operators generally (as discussed in more detail in paragraph 4.3 (Legal status of and requirements for warehouse operators and collateral managers)).

3.5.3 In order to create an effective possessory pledge it is necessary that the secured party be able to demonstrate effective control of the relevant goods. Although the courts of Ghana have not given any specific guidance in this respect, in order to achieve this demonstration, it is accepted that the pledgor must not have unrestricted access to the goods, in particular:

- (a) the secured party or its agent would need to take a lease over the property where the goods are stored
- (b) the relevant area would need to be segregated by sealing entrances and restricting access to the goods
- (c) the area and/or the goods would need to be identified as being in the possession of the secured party by appropriate signage.

3.5.4 It may be possible to provide for these formalities in the instrument creating the security interest. However, in respect of the granting of a lease (whether or not the lease is included in the pledge or a separate document), the document creating the lease must be registered at the Lands Commission and a nominal registration fee be paid.

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

The legal status of smallholder farmers or farmer organisations/cooperatives or other forms of producer organisations would not, as a matter of Ghanaian law, prevent them from making use of warehouse financing.

## 4.2 Legal status of farmers and farmers' organisations

4.2.1 Under Ghanaian law, the following entities have the following legal status:

(a) Individual farmers

Individual farmers can enter into contractual agreements, sue and be sued as individuals. Individuals can create or register charges (proprietary security) under Ghanaian law. An individual can also grant a pledge (possessory security).

(b) Co-operative societies

Co-operative societies registered under the Co-Operatives Society Act 1968 (N.L.C.D. 1968) have the legal status of a body corporate with perpetual succession who may sue and be sued under the corporate name by which it is registered. A registered society also has an approved common seal and may hold movable and immovable property of every description and may enter into contracts and perform such acts that are necessary for the furtherance of its constitution.

The Co-Operative Society Act provides that if certain conditions are satisfied, a creditor of defaulting co-operative society may apply to the registrar of co-operative societies for the books of that co-operative society to be inspected.

Co-operative societies can create or register charges (proprietary security) or grant a pledge (possessory security).

(c) Formal and informal representative bodies and trade organisations

Such representative bodies do exist in Ghana. If a trade organisation is incorporated under the Companies Act 1963 (Act 179) it will possess a separate legal personality from its members and this will enable it to enter into contractual arrangements as provided for within its regulations.

Where they are not so registered, such organisations do not have a legal personality and any dealings would need to be with individual members.

4.2.2 The possibility for a farmers' organisation to have a separate legal personality (either as a registered co-operative society or as a body corporate) supports the possibility of such bodies representing farmers in channelling financing.

### **4.3 Legal status of and requirements for warehouse operators and collateral managers**

4.3.1 Warehouse operators, collateral managers and other entities involved in the storage of agricultural products do not have a special status under Ghanaian law. Further, there are currently no specific legal requirements with which an entity must comply in order to be a warehouse operator or a collateral manager.

4.3.2 However, from a practical perspective, there are a number of statutory requirements that apply to businesses generally that would need to be satisfied to legitimately store goods (and, in particular, agricultural goods), as set out below:

- (a) a valid permit would need to be obtained from the Foods & Drug Authority for the storage of food
- (b) the required weighing equipment at the warehouse would need to be calibrated and certified for use
- (c) the required fire equipment at the warehouse would need to be certified for use in accordance with the Fire Precaution (Premises) Regulations 2003 (LI 1724)
- (d) any permits required by local authorities would need to be obtained
- (e) the warehouse would need to be insured in accordance with the Insurance Act 2006 (Act 724)
- (f) where applicable, there would need to be a validly existing lease or sub-lease agreement between owners and tenants
- (g) the warehouse premises and infrastructure would need to be of adequate size and standard for handling the relevant commodities
- (h) a warehouse inspection report would need to be compiled and issued confirming findings and recommendations before acceptance if any.

- 4.3.3 Failure to comply with these requirements would not invalidate any security that is otherwise validly created over goods stored in a warehouse, but it may lead to civil penalties for the warehouse operator.
- 4.3.4 If the Draft Warehouse Receipts Regulations are enacted into law they will require warehouses and warehouse operators (terms which are broadly defined and will include any building, structure, or enclosure used to store goods and any person who for reward engages in the business of operating a warehouse) to be duly licensed. The criteria to obtain a licence will include satisfaction of requirements as to:
- (a) ownership or possession of the warehouse
  - (b) the suitability of the structure to store the relevant commodities and insurance coverage
  - (c) the financial capability and clean record of the warehouse operator
  - (d) the filing of a performance bond with the licensing Commission.
- 4.3.5 Failure to obtain a licence will be an offence.
- 4.3.6 From a legal perspective, the existing framework for the regulation of warehouse operators and collateral managers is weak. With no regulating body, any remedies against a warehouse operator or collateral manager would be as contractually agreed between the parties. Enforcement would be through the courts, arbitration, or other alternative dispute resolution mechanisms between the parties.
- 4.3.7 From a non-legal perspective, financiers would also need to carry extensive due diligence in respect of the ownership of the storage facility and its suitability, the existence and extent of insurance coverage, the capability of the relevant operator or manager and other matters. Financiers would need to consider building protection techniques into the contractual documentation, such as undertakings for the provision of insurance certificates and performance bonds in favour of the financier. As it stands, the lack of regulation would act as a barrier to warehouse financing arrangements, except where carried out on such a scale that the costs of taking mitigating steps could be borne by the parties.

4.3.8 The introduction of a regulatory framework, as provided for in the Draft Warehouse Receipts Regulations, would be positive. From a legal perspective, financiers could rely on the regulatory regime and therefore limit the need for extensive contractual undertakings from the warehouse operator or collateral manager. To be effective, the financier needs to have recourse to remedies from the regulating body. This would potentially allow for faster recourse than attempting to enforce contractual rights through the courts and access to fast, effective remedies would make financing more attractive to financiers.

## **4.4 Rights of a secured creditor in an insolvency**

4.4.1 In the event of an insolvency of the borrower, the claims of a financier with either possessory or proprietary security would rank ahead of the claims of unsecured creditors provided that the security had been duly registered. If the security had not been registered, the claims of the financier would rank equally with unsecured creditors, although (as previously mentioned) a consequence of failing to register is also that the sum secured becomes immediately due and payable.

4.4.2 In the event of multiple registered security interests, priority will be given to the first registered security interest over subsequent secured creditors and where secured creditors rank equally in time the proceeds of the security will be distributed equally.

4.4.3 The granting of security is subject to the common insolvency clawback triggers, for example, where the transaction has taken place at an undervalue (i.e., considerably below market rate) or where there has been a preference in favour of the financier in creating the security.

4.4.4 In the case of a warehouse operator or a collateral manager becoming insolvent, with the exception of a lien in respect of unpaid fees, creditors of the warehouse operator or collateral have no claim to the goods in the possession of that party that are secured in the financier's favour. A warehouse operator and collateral manager's lien can be excluded contractually in the appointing agreement.

## **4.5 Repurchase agreements: relative status of owners compared to secured creditors**

4.5.1 Under Ghanaian law, there is no restriction on a bank or other institution owning commodities.

- 4.5.2 Under Ghanaian law, from the perspective of a creditor, taking ownership of goods through a repurchase agreement would not necessarily offer better protection than lending against security. In particular, the registration of security acts as a notice to third parties of the existence of that security. This affords protection to a financier's interest and it prevents unwarranted encumbrances to exist alongside the financier. It would also serve as notice to a creditor of the warehouse operator or collateral manager attempting to enforce against the stored commodities.
- 4.5.3 See paragraph 5.7 (True sale versus secured lending) below for further consideration of issues associated with owning commodities in Ghana.

## **5 Security**

### **5.1 Taking security over stored commodities and warehouse receipts**

- 5.1.1 It is possible for a financier to take security over goods stored in a warehouse and/or over the warehouse receipts representing those goods. Such security will be a contractual arrangement and so it would require a security agreement to be entered into between the parties with that security agreement being stamped and registered.
- 5.1.2 The following types of security are relevant:
- (a) Pledge: This is a possessory security, with the pledger retaining title to the goods. The terms of the pledge will mainly be regulated by the terms of the pledge agreement between the parties, common law doctrines and practice, rather than by statutory provisions. The pledge agreement must be stamped and registered for it to be enforceable as security. The existence of possession required to give rise to a pledge can be accomplished by delivery of warehouse receipts to the creditor or his agent.
  - (b) Fixed or floating charge: A charge in Ghana is a non-possessory security where the goods stay in the possession of the borrower. Again, registration is required.
- 5.1.3 There is little difference between charges and pledges from a legal perspective in Ghana and the Borrowers and Lenders Act 2008 (Act 773) includes pledges within the definition of a charge. However, in



practice, the possession and control of the relevant goods clearly pose a practical advantage from an enforcement perspective.

- 5.1.4 Note that, under Ghanaian law, it is not possible to create a mortgage over movable property such as commodities.

## **5.2 Creation of security of future goods**

- 5.2.1 It is possible to take security over future goods without the need to create a new security each time new goods are stored in the warehouse in so far as the new goods are to discharge the secured obligations and provided this is specifically catered for by the underlying security document. Alternatively, it is possible for the underlying security document to provide for an amendment in the event of future goods, however, such an amendment would need to be stamped and registered at the collateral registry.

- 5.2.2 If the secured amount in relation to any security document increases, up-stamping will be necessary if the security is to be effective to secure the increased amount. Up-stamping/re-stamping the document incurs stamp duty at 0.25% of the difference between the original amount and the new secured amount. However, if the document is not up-stamped, this does not invalidate the security in respect of the amount originally secured.

## **5.3 Commingling and fungibility**

- 5.3.1 There is currently no specific provision of law in Ghana which recognises the right of a warehouse operator to replace fungible goods stored in a warehouse that are subject to a security interest with different goods on a like-for-like basis.

- 5.3.2 However, under the current form of the Draft Warehouse Receipt Regulations, a warehouse operator may commingle fungible goods with other goods of the same kind and grade if authorised by an agreement. It is therefore prudent to address the issue of commingling in security agreements.

- 5.3.3 Where goods have been commingled (whether or not pursuant to an agreement), the holders of the receipts for the commingled goods own the entire mass in common and each holder is entitled to a share of the

commingled product proportionate to the percentage that the amount deposited (shown by each holder's receipt) bears to the total deposited.

- 5.3.4 A warehouse operator is liable to each depositor for the care and delivery of his share of such commingled goods to the same extent and under the same condition as if the goods had been kept separate.

## 5.4 Perfection and registration of security

- 5.4.1 The following requirements for the perfection and registration of security in Ghana must be satisfied:

- (a) **Stamping:** Security documents must be stamped within two months of execution. Stamp duty is calculated at an *ad valorem* rate of 0.5% of the secured amount where the security document is considered the principal security instrument in relation to a financing and at 0.25% of the secured amount where it is an auxiliary security instrument (i.e., where it is determined that there is another, principal security instrument relating to financing). There are financial penalties for late stamping.
- (b) **Registration:** All security documents must be registered at the collateral registry in Ghana within 28 days of execution. Security documents cannot be registered if they have not been duly stamped. A security document which is not registered is of no effect as security for a borrower's obligations for repayment of the money secured and the money secured shall immediately become payable despite any provision to the contrary in any contract.

- 5.4.2 Any document creating an interest in land (such as a lease over part of a warehouse) must also be registered at the Lands Commission and a nominal fee paid or the instrument will not be effective to create the relevant interest in the land.

- 5.4.3 Anybody may conduct an electronic search of the collateral registry and request a search certificate without having to provide any reasons for conducting the search or requesting the search certificate. A fee of five Ghanaian Cedis must be paid for conducting a search. This system seems to be working relatively well in practice.

5.4.4 Although it is in the interest of lenders to conduct searches, it is not currently common practice to request that collateral managers do this, although there is no barrier to including a provision in a collateral management agreement requiring this.

## **5.5 Priority/ranking of security**

The general rule is the priority is determined by the order of registration.

## **5.6 Sale of encumbered goods**

Registration of security acts as notice to the world of the security interest in the goods and any subsequent purchaser of the goods currently takes the goods subject to that security interest (regardless of whether they were a purchaser for value or had actual notice of the security interest). This means that the secured party could enforce their security interests against subsequent holders of the goods.

## **5.7 True sale versus secured lending**

5.7.1 If a financier purchases goods subject to a borrower's obligation to repurchase those goods at a future date, such a transaction should not be treated as a secured loan under Ghanaian law. This kind of transaction would amount to a sale and purchase agreement for which there are no registration requirements.

5.7.2 In the case of a dispute as to whether a transaction was a genuine true sale, a court in Ghana would consider the terms of the transaction and the intentions of the parties to determine whether the sale and repurchase is a disguised loan.

5.7.3 VAT is a consideration in respect of sale and repurchase agreements. The tax is levied at 15% on the value of taxable supply of goods (including an arrangement where the owner of the goods parts with possession of the goods by way of sale, barter, lease, transfer, exchange, gift, or similar arrangement which would include a sale in a sale and repurchase transaction but not the realisation of security) and is the responsibility of the purchaser. In addition, a National Health Insurance levy of 2.5% is imposed on the value of a taxable supply.

- 5.7.4 It is worth noting, however, that many agricultural commodities including maize, sorghum, millet, rice, coffee, cocoa, vegetables and fruit<sup>2</sup> are exempt from VAT and the National Health Insurance levy.
- 5.7.5 Whilst sale and repurchase structures have been used in Ghana, this type of transaction is not currently a common form of financing.

## **6 Enforcement**

### **6.1 Enforcement of security over commodity**

- 6.1.1 Where a financier has duly stamped and registered the relevant security documents, the financier can enforce the security upon a default of the borrower. The financier must first give notice of the default to the borrower in writing and request the borrower to pay the amount due within 30 days. Such notice must be registered at the collateral registry stating the date of default and the date on which the borrower received the notice.
- 6.1.2 The financier may enforce his security by either; (1) court proceedings against the borrower; or (2) realising the security in the property charged on notice to the person in possession of the property. A financier who intends to realise security registered at the collateral registry without a court order must first serve notice of default and register that notice as described in paragraph 6.1.1. This notice of default should be registered at the collateral registry stating the date of the default and the date on which the borrower received this notice. If the default has not been cured within that 30-day period, the financier may register a notice of intention to realise the registered security at the collateral registry. The registrar of the collateral registry will certify the realisation process by issuing a certificate to that effect.
- 6.1.3 Alternatively, the financier may appoint a receiver or manager or apply to court for the appointment of a receiver or manager to take possession and manage the secured goods in the warehouse or to realise the security on his behalf. This method also requires filing certain information at the collateral registry.

2 The full list of exempt supplies is maize, sorghum, millet, tubers, guinea com, rice, fish, other than ornamental fish, crustaceans, molluscs, vegetables and fruits, nuts, coffee, cocoa and shea butter.

- 6.1.4 The financier must also comply with the contractual terms agreed between the parties, so it is prudent to cater for enforcement procedures in the security document.
- 6.1.5 All realisations of secured commodities by sale without court approval must be by public auction. There is also a requirement that the commodity must be valued by professional valuers. A realisation by private sale can be carried out only with the agreement of the parties involved (in practice this will usually need to be included in the security instrument) and the approval of the court.
- 6.1.6 Where a judgment for the payment of money is made and an attachment of moveable property is granted, the court may at any time during the attachment of property, direct that any part of the property attached which may be necessary for the satisfaction of the judgment is sold and the money realised by the sale, or a sufficient part of it, be paid to the judgment creditor. At least seven days' notice of the sale of movable property must be made in the town or place where the property to be sold is situated.

## **6.2 Enforcement through the courts**

- 6.2.1 The time it takes to obtain and enforce a judgment through the courts will vary widely depending on the circumstances. A time period of one year would not be considered unusual and the process could take much longer if, for example, there are appeals or a third-party claim over the same property.
- 6.2.2 There are several levels of appeal before a final non-appealable judgment can be obtained.

## **6.3 Arbitration and alternative dispute resolution**

- 6.3.1 Ghana has enacted statutory rules on alternative dispute resolution in the Alternative Dispute Resolution Act 2010 (Act 798). Amongst other things, this act provides that arbitral awards may, subject to the leave of the high courts, be enforced in the same manner as court judgments through the Ghanaian courts.
- 6.3.2 In practice, a variety of alternative dispute resolution mechanisms are used in the context of commodity financing including arbitration, mediation and negotiation.

## 6.4 Enforcement of overseas judgments or arbitral awards

- 6.4.1 Where a judgment has been obtained in a foreign country with a reciprocal arrangement with Ghana, that judgment will be enforceable in Ghana without further examination upon registration in the high court pursuant to the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement Instrument), 1993 (LI 1575). Certain criteria and procedural steps must be satisfied in order to do so.
- 6.4.2 If a judgment has been obtained in a country that has no reciprocity with Ghana, or where a judgment is given by a court that is not specified under the Reciprocal Enforcement Instrument as a superior court of the country or jurisdiction giving the judgment, the judgment will have to be re-litigated in the Ghanaian courts on its merits.
- 6.4.3 Ghana is also a party to the New York Convention (1958) and several other international conventions providing for a mechanism for the enforceability of arbitral awards obtained in other signatory States. Foreign arbitral awards are also enforceable in the courts of Ghana on the basis of reciprocity in the same manner as judgments of the courts. Certain criteria and procedural steps must be satisfied, including the existence of a reciprocal enforcement arrangement with the relevant country.



# Block 2: Côte d'Ivoire

## Key legal points:

- There is no specific warehouse receipt legislation in place, but there are laws governing the coffee, cocoa, cotton and cashew markets that impact on the financing of these products.
- Draft legislation for specific warehouse financing has been proposed.
- Collateral management activities are regulated in the agriculture industry and collateral managers must be authorised to conduct agricultural collateral management services.
- Key legal barriers include: (1) non-negotiability of warehouse receipts, (2) stamp duty and (3) lack of legislative framework for warehousing.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing legal framework

- 1.1.1 Warehouse financing has a key role to play in the development of the agriculture industry in Côte d'Ivoire. Although there is no specific legislation in place governing warehouse financing, this is conducted in reliance on normal contractual arrangements.
- 1.1.2 However, there is specific legislation governing the duties and obligations of collateral managers providing collateral management services over agricultural goods. This reflects the importance of the agriculture industry to Côte d'Ivoire, but it does also result in a two-tier regulatory system of collateral managers dependent on the types of goods they manage.
- 1.1.3 Smallholder farmers have the power to borrow and to provide security over their goods, which allows them to participate in warehouse financing projects in their own right. Some of the financing to smallholder farmers in Côte d'Ivoire is also structured around loans to farmers' cooperatives which then on-lend to smallholder farmers. The loan from the financier to the cooperative will be collateralised against goods owned by the smallholder farmers who will receive funding from



the cooperative. However, the volumes of this type of lending are far less than in some of the other OHADA jurisdictions, such as, Burkina Faso and Niger.

- 1.1.4 The legal framework for taking security over goods is governed by supranational legislation passed by OHADA (as defined below). Security over goods takes the form of pledges which need to be registered in order to establish priority of security. Ivorian law does recognise the right of a secured party to give effect to a pledge by taking possession of the goods (either actual or constructive) as opposed to registering it. However, failure to register the pledge will have an impact on the ranking of the secured party's security.
- 1.1.5 Key legal barriers to extending the use of warehouse receipt financing include:
- (a) the lack of a legal framework for such financing, both in terms of specific warehouse legislation and in terms of regulation of warehouse operators and collateral managers
  - (b) the non-negotiability of warehouse receipts which impacts on the ease of selling and transferring title to goods
  - (c) a requirement to pay *ad valorem* stamp duty and registration costs when registering security.

## **1.2 Proposals to introduce warehouse receipt legislation**

- 1.2.1 Proposals are currently at an advanced stage to implement new legislation dealing specifically with warehouse financing. The draft law will implement a number of changes including recognition of warehouse receipts as negotiable instruments. This would be a significant step in improving the speed of the sale and purchase of commodities. The draft law also provides express confirmation that warehouse receipts may be issued electronically.
- 1.2.2 Importantly, the proposed legislation will also establish a centralised body responsible for regulation of the warehouse receipt system. This body will be called the *Conseil du système des récépissés d'entrepôt*. Its powers are set out in the draft legislation, and they include

administrative powers to issue, suspend and revoke licences for collateral managers and a legislative power to create subsidiary regulations in connection with the operation of the warehouse financing system.

- 1.2.3 The new legislation is being promoted by the Ivorian Government in collaboration with the International Finance Corporation. A vote by the Ivorian Parliament on whether to adopt the draft legislation is expected during April 2014. If the draft legislation is adopted by the Ivorian Parliament, the Ivorian Government will have 15 days to enact it. The law will take effect from the date that it is published in the official journal.

### **1.3 Analysis of current status and feasibility of different financing methods**

- 1.3.1 The existing legal framework would support both Type B and Type C methods of financing (as defined in the typology) whereby goods are stored in a warehouse (either public or private), usually under the control of a collateral manager and secured in favour of the financier by way of pledge.
- 1.3.2 Although both these methods of financing can be implemented under the existing legal framework, the absence of any defined regulation of warehouse operators and collateral managers (other than in relation to coffee, cocoa, cotton and cashews) means that there can be concerns for financiers about accepting the risk of non-payment by the borrower and the risk of non-performance or fraud by a warehouse operator or collateral manager.
- 1.3.3 The concept of field warehousing is not expressly recognised under Ivorian law, but it can be implemented in reliance on existing contractual principles and land law concerning leases.
- 1.3.4 There is scope for financing by microfinance institutions in Côte d'Ivoire which could be conducted either directly or indirectly through cooperatives. By contrast, although Ivorian law allows for the creation of security over future goods, the implementation of Type D financing (as defined in the typology) is unlikely to be successful at present due to a lack of legal and institutional infrastructure needed to make this viable.

## 2 Conclusions and interim recommendations

The implementation and use of warehouse financing in Côte d'Ivoire provides an interesting example of how legislative changes can be adopted on an incremental basis. As discussed above, there is no wholesale regulation of warehousing and collateral management activities. Instead, the focus has been on adopting legislation and carrying out regulation only in the area that it is most needed, this being the agriculture industry.

The provisions of the 1994 Law have been built upon through the use of decrees to provide specific requirements and obligations for those working with specified agricultural goods. This incremental approach of adopting legislation has the benefit of allowing the legislators and regulators to review the strengths and weaknesses of the existing framework and address these in each new decree issued.

However, despite this, the powers of the CCC and the CCA (both as defined below) to issue sanctions against collateral managers that do not comply with their obligations are inadequate when considered against the value of the stocks that these collateral managers hold.

While implementing a legislative and regulatory framework on a smaller yet more focussed basis has a number of advantages, there are a number of further steps that could be taken to improve the legal framework for conducting warehouse financing in Côte d'Ivoire.

For example, legislation conferring on warehouse receipts the legal status of negotiable documents of title would assist with the process of selling and purchasing goods. It would also give greater protection for financiers who could take possession of warehouse receipts during the period that the loan is outstanding and, should they not be repaid, assume ownership of the goods and sell these themselves.

Warehouse legislation applying to all warehouse operators and collateral managers, irrespective of which industry or goods they are dealing with, would also be helpful. This could provide a minimum threshold that warehouse operators and collateral managers must meet in order to provide their relevant services. This minimum position could then be developed further for certain products or industries through the use of ancillary legislation as is currently the case in the decrees.

# Legal analysis

## 1 Overview of the legal system

Ivorian law is primarily based on a civil law system (a consequence of Côte d'Ivoire's time as a French colony from 1893 to 1960) with a strong influence from customary laws and practices. Côte d'Ivoire is also a Member State of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) and is therefore subject to the supranational laws established by the OHADA Treaty in relation to business law.

## 2 Legislation relevant to warehouse receipt financing

### 2.1 Laws applicable to warehouse financing systems

- 2.1.1 At present, Côte d'Ivoire does not have specific legislation governing warehouse financing, with this type of financing instead taking place in reliance on normal contractual rules to govern the relationships between the relevant parties to the financing. However, there are two sets of legislative provisions that impact on the implementation of warehouse financing in Côte d'Ivoire.
- 2.1.2 The first set of legislation is that governing the collateral management of agricultural goods in Côte d'Ivoire. Given the importance of the agriculture industry to Côte d'Ivoire, legislation was passed in 1994 creating a specific set of rules and obligations to be complied with by those warehouse operators and collateral managers handling agricultural goods. This is discussed in paragraph 2.2 below.
- 2.1.3 In keeping with the focus on agricultural goods, there are also a number of pieces of subsidiary legislation (known as decrees) that apply to specific agricultural goods, these being coffee, cocoa, cotton and cashews. These impose further obligations on warehouse operators and collateral managers handling these specific goods. Further information on these decrees is set out in paragraph 2.2 below.
- 2.1.4 The second piece of legislation relevant to warehouse financing in Côte d'Ivoire is the OHADA Uniform Act on Securities dated 15 December 2010 (the Securities Act). It contains similar provisions to those that may be found in specific warehouse receipts legislation.

- 2.1.5 The Securities Act provides that a borrower may grant security over goods to its financier as collateral for its borrowings. The Securities Act does not contain any restrictions on the types of entity that may grant security over goods. This means that security over goods can be granted by a wide range of entities in Côte d'Ivoire including smallholder farmers, producer companies and cooperatives.
- 2.1.6 The secured goods may be held directly by the financier or by a third-party warehouse operator or collateral manager as appointed by the borrower and the financier. However, any person acting as a collateral manager in Côte d'Ivoire in relation to agricultural goods must be authorised to do so as discussed in paragraph 3.3. For the purposes of this report, any entity authorised to provide collateral management services will be referred to as a collateral manager.
- 2.1.7 In either case, the third party will be appointed under the terms of a collateral management agreement entered into between the borrower, the financier, and the third party.
- 2.1.8 Reliance on the provisions of the Securities Act, which allows for financing against goods held with a third party, highlights that, even in the absence of specific warehouse receipts legislation, there is a legal framework for conducting warehouse financing in Côte d'Ivoire. This financing can be structured in line with either of Type B or Type C of the listed typologies depending on where and with whom the secured goods are stored.
- 2.1.9 Further information on the Securities Act is provided in paragraph 6 (Security) below.

## **2.2 Laws applicable to collateral management**

- 2.2.1 Law No. 94-620 dated 18 November 1994 (the 1994 Law) provides the legal framework for conducting agricultural collateral management in Côte d'Ivoire. The 1994 Law imposes legal requirements that collateral managers must satisfy before they can provide services in relation to agricultural goods. These are discussed further in paragraph 3.3.
- 2.2.2 The 1994 Law provides for a system of collateral management (*tierce détention*) whereby the collateral manager (*tiers détenteur*) is appointed

to monitor and conserve agricultural goods stored in a warehouse. Each time a new delivery of agricultural goods is deposited at the warehouse, the collateral manager will issue a deposit receipt stating the name and address of the warehouse where the goods are stored and their type, quantity and quality.

- 2.2.3 The depositor can also ask the collateral manager to issue a letter of collateral management similar to a warehouse receipt (known as a *lettre de tierce détention*). This will usually be requested where the depositor has pledged, or intends to pledge, the goods in storage as collateral for financing. The purpose of the letter of collateral management is to make clear that the collateral manager is holding the goods on behalf of a party other than the depositor (here, the financier).
- 2.2.4 As noted in paragraph 2.1.3, there is also specific legislation covering the collateral management of cocoa and coffee products, reflecting their importance to the agriculture industry in Côte d'Ivoire. The provisions specific to these products are set out in Decree No 2012-1013 dated 17 October 2012 (the 2012 Decree). The 2012 Decree sets out a number of duties and obligations of collateral managers handling these types of products including the legal status they must have, restrictions on trading activities and share capital requirements. Further information on the 2012 Decree is set out in paragraph 3.3 below.
- 2.2.5 There is also specific legislation covering the collateral management of cotton and cashew products. The provisions specific to these products are set out in Decree No 2013-814 dated 25 November 2013 (the 2013 Decree). The 2013 Decree sets out a number of duties and obligations of collateral managers handling these types of products including the legal status they must have, restrictions on trading activities and share capital requirements. Further information on the 2013 Decree is set out in paragraph 3.3 below.

## 2.3 Compliance bodies

- 2.3.1 There is no specific regulatory body in place with the sole purpose of supervising the collateral management industry in Côte d'Ivoire. However, under Article 10 of the 1994 Law, the Ministry of Economy and Finance, the Ministry of Commerce and the Ministry of Agriculture have the power to issue a joint order revoking the authorisation of a collateral

manager to provide collateral management services if it is shown that the collateral manager has breached any provision of the 1994 Law or any other legislative provision relating to it.

- 2.3.2 There is also a specific regulatory body in charge of supervising the cocoa and coffee industry in Côte d'Ivoire which includes monitoring the activities of collateral managers handling cocoa and coffee products. This body was originally the *Autorité de Régulation du Café et du Cacao*, but this was replaced by the *Conseil du Café-Cacao* (the CCC) in 2012.
- 2.3.3 The CCC is a public body under the authority of the Ministry of Agriculture and the Ministry of Economy and Finance. Ordinance No. 2011-481 dated 28 December 2011 governing the commercialisation of coffee and cocoa products and the regulation of the coffee-cocoa sector in Côte d'Ivoire sets out the powers of the CCC. These include the power to grant approvals to collateral managers to provide collateral management activities under the 2012 Decree and to withdraw these if a collateral manager breaches the terms of the 2012 Decree.
- 2.3.4 In addition to these powers, the CCC carries out a bi-annual review of the activities of each collateral manager and it can carry out both onsite and off-site investigations.
- 2.3.5 The cotton and cashew nut industry in Côte d'Ivoire also has a specific regulator responsible for monitoring the activities of collateral managers handling these products. This body is the *Conseil du Coton et de l'Anacarde* (the CCA). It is a public body under the authority of the Ministry of Agriculture and the Ministry of Economy and Finance.
- 2.3.6 The CCAs powers are set out in Law No. 2013-656 dated 13 September 2013 on the marketing of cotton and cashew and the regulation of activities of cotton and cashew and Decree No. 2013-681 dated 2 October 2013 on the body responsible for regulating, monitoring and development of cotton and cashew. As with the CCC for the 2012 Decree, these include the power to grant approvals to collateral managers to provide collateral management activities under the 2013 Decree and to withdraw these if a collateral manager breaches the terms of the 2013 Decree.

2.3.7 Any collateral manager that is found guilty of operating without the necessary approval or that has breached any provision of the 1994 Law is liable to a fine of up to FCFA 50,000,000 (approximately US\$ 104,377 at the time of writing) or up to six years in prison or both.

## **2.4 Status of warehouse receipts**

2.4.1 Article 1923 of the Ivorian Civil Code (the Civil Code) states that any voluntary deposit of goods for storage with a warehouse operator or collateral manager must be evidenced in writing. This requirement is satisfied by the issuance of a warehouse receipt by the warehouse operator or collateral manager confirming that it is storing, or in the case of the collateral manager, that it is holding and monitoring, the goods covered by the warehouse receipt.

2.4.2 This warehouse receipt is not a negotiable document of title and the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party. On this basis, the holder of a warehouse receipt may use the warehouse receipt as evidence to show that it has ownership over the stored goods, but the simple fact of holding possession of the warehouse receipt is not sufficient to prove ownership in itself.

2.4.3 Article 1923 of the Civil Code does not contain any specific requirements as to the information that these warehouse receipts should contain. However, it is likely that any collateral management agreement will stipulate the information that a collateral manager will have to include in any warehouse receipt it issues under that collateral management agreement.

2.4.4 As discussed above, the 1994 Law also requires that any deposit of agricultural goods with a collateral manager be evidenced in writing. This is also satisfied by the collateral manager issuing a warehouse receipt which must (as a minimum) state the name and address of the warehouse where the goods are stored and their type, quantity, and quality. As with warehouse receipts issued under the Civil Code, warehouse receipts issued under the 1994 Law are not negotiable documents of title and the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party.



- 2.4.5 Similarly, Article 5 of the 1994 Law states that a letter of collateral management is not a negotiable or transferable instrument. It is therefore not a document of title, and ownership of the goods represented by the letter of collateral management cannot be passed on simply by the transfer, or transfer and endorsement, of the letter of collateral management.
- 2.4.6 Neither the Civil Code nor the 1994 Law make any provision for warehouse receipts or letters of collateral management to be issued electronically, so the system is still paper based at present. However, warehouse receipts could be issued electronically in line with the provisions of the OHADA Uniform Act on General Commercial Law dated 15 December 2010 (the Commercial Act) if required.
- 2.4.7 Where a third party has purchased goods that are subject to a warehouse receipt, that third party will in practice have to provide both the warehouse receipt and a copy of the sale and purchase agreement in order to secure the release of the goods from the warehouse. Where the secured goods have been pledged to a financier, the third party purchaser will need to provide the warehouse receipt, the pledge form and confirmation that the financier has been repaid (either by the borrower or directly by the purchaser) in order to secure the release of the goods from the warehouse.

## **2.5 Field warehousing: legal recognition and requirements**

- 2.5.1 There is no specific legislation on field warehousing in Côte d'Ivoire. However, field warehousing is used by reliance on more generic legislation relating to leases of land. The OHADA Uniform Act on the General Commercial Law contains provisions dealing with lease agreements. These confirm that a person may take a lease of land or premises for commercial, industrial, professional, or artisanal purposes.
- 2.5.2 On the basis of the provisions in this Act, a lease of land by a field warehousing company or warehouse operator or collateral manager or a financier from the borrower for the purposes of storing and monitoring the goods is recognised as being valid. This allows financing to take place in line with Type B of the listed typologies.

- 2.5.3 In the absence of any express legal requirements for field warehousing, the more measures that the lessee takes to establish its rights over the leased land and its control over the stored goods, the stronger case it will have to show from a practical perspective that a field warehousing arrangement has been established. These measures could include creating physical boundaries around the leased area, controlling who has access to the leased area and labelling the stored goods with details of the pledge, the borrower and the financier.
- 2.5.4 At present, this form of financing is mainly to be found in the ports of Abidjan and San Pedro.

### **3 Status of the relevant participants**

#### **3.1 Access to warehouse finance by farmers and farmers' organisations**

- 3.1.1 The legal status of smallholder farmers or farmer organisations and cooperatives or other forms of producer organisations would not, as a matter of Ivorian law, prevent them from using warehouse financing.
- 3.1.2 A large proportion of the warehouse financing in Côte d'Ivoire is structured around loans by financiers to cooperatives who are then responsible for on-lending to smallholder farmers. A loan from a financier to a cooperative will usually be secured against goods stored in warehouses. These goods will be owned by the smallholder farmers who will receive the on-loans from the cooperative. These goods will be pledged to the financier at the time of, or just prior to, the financing being made available to the cooperative.

#### **3.2 Legal status of farmers and farmers' organisations**

- (a) Individual farmers

Individual farmers are private individuals and they are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name. They have the power to sue and be sued in their own name. There are no restrictions on the type of contract that they can enter into (provided that these do not contravene Ivorian law) and there are no restrictions on the type of security interests that they can grant.

(b) Cooperative societies

Cooperative societies have legal personality under the provisions of the OHADA Uniform Act on Cooperatives dated 10 December 2010 (the Cooperatives Act). They are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name and they have the power to sue and be sued in their own name. Under the Cooperatives Act, cooperatives have the power to undertake any activities that are in the best interests of its members. Further powers of a cooperative are set out in its constitutional document which is known as a *statuts*.

(c) Formal and informal representative bodies and trade organisations

There are more than one hundred trade organisations for farmers in Côte d'Ivoire as listed on a register maintained by the Ministry of Agriculture. These can have one of three legal statuses: an association, a federation, or a union. The main trade organisation is the *Union Nationale des planteurs de café cacao de Côte d'Ivoire* which represents farmers working in the cocoa and coffee industry.

### 3.3 Legal status of and requirements for warehouse operators and collateral managers

3.3.1 As a general proposition, there are limited legal requirements for warehouse operators and collateral managers in Côte d'Ivoire. This is particularly the case for warehouse operators and collateral managers that do not provide collateral management services for agricultural goods. In relation to collateral managers that are authorised to work in the agriculture industry, the applicable requirements are set out in the 1994 Law and the 2012 Decree.

3.3.2 In accordance with the provisions of the 1994 Law, the 2012 Decree and the 2013 Decree, a collateral manager must show that it has satisfied each of the following requirements before offering collateral management services for agricultural products:

(a) it must be authorised to operate by way of a joint order from the Ministry of Economy and Finance, the Ministry of Commerce and the Ministry of Agriculture

- (b) it must have insurance in place to cover theft, fire and damages provided by an insurance company incorporated in Côte d'Ivoire
- (c) in relation to collateral managers dealing with coffee or cocoa produced in Côte d'Ivoire, it must:
  - (i) be incorporated in Côte d'Ivoire in accordance with the OHADA Uniform Act on Companies dated 17 April 1997 and registered with the RCCM
  - (ii) have a share capital of at least FCFA 300,000,000 (approximately US\$ 625,421 at the time of writing)
  - (iii) provide a bank guarantee in an amount of at least FCFA 100,000,000 (approximately US\$ 208,463 at the time of writing)
  - (iv) have its head office and warehouse facilities in Côte d'Ivoire
  - (v) ensure that its warehouse facilities meet all applicable standards for the storage of cocoa and coffee as established by the CCC
  - (vi) not be an exporter of either or both of coffee and cocoa
- (d) in relation to collateral managers dealing with cotton or cashew nuts produced in Côte d'Ivoire, it must:
  - (i) be incorporated in Côte d'Ivoire in accordance with the OHADA Uniform Act on Companies dated 17 April 1997 and registered with the RCCM
  - (ii) have a share capital of at least FCFA 100,000,000 (approximately US\$ 208,643 at the time of writing)
  - (iii) provide a bank guarantee in an amount of at least FCFA 50,000,000 (approximately US\$ 104,231 at the time of writing)
  - (iv) have its head office and warehouse facilities in Côte d'Ivoire

- (v) ensure that its warehouse facilities meet all applicable standards for the storage of cotton and cashew nuts as established by the CCA
- (vi) not be an exporter of either or both of cotton and cashew nuts.

### **3.4 Rights of a secured creditor in an insolvency**

3.4.1 In the event that the borrower becomes insolvent, the ranking of a secured creditor will be determined in accordance with Article 226 of the Securities Act. In descending order, the ranking of priority is as follows:

- (a) the creditors having legal expenses incurred in the process, leading to the sale of the property and to the distribution of the assets
- (b) the creditors of the incurred expenses for the custody of the debtor's property in the interest of creditors with older debts
- (c) the creditors of highly preferred wages
- (d) the creditors with a general lien subject to registration or a pledge, each according to the rank of his registration/enforceability to third parties
- (e) the creditors with a special personal property lien
- (f) the creditors with a general lien not subject to a registration
- (g) the unsecured creditors.

3.4.2 A financier that has taken a pledge over goods will therefore have fourth ranking security in the event of the borrower's insolvency provided that the pledge has been perfected (as discussed further in paragraph 4.4 (Perfection and registration of security) below). Where two or more persons have security over the same goods, the ranking of priority between those persons will depend on which security interest was perfected first (as discussed further in paragraph 4.5 (Priority/ranking of security) below).

- 3.4.3 Financiers must also use caution when lending to borrowers who are in financial difficulty. Article 67 of the OHADA Uniform Act on Insolvency dated 10 April 1998 (the Insolvency Act) provides that any transactions entered into by a borrower (including undertaking further borrowing or granting security) will be considered automatically void and of no legal effect if they are entered into during the period of suspicion.
- 3.4.4 The period of suspicion starts from the date on which the borrower ceases to pay its debts as they fall due and ends on the date that the court authorises the start of insolvency proceedings against the borrower.
- 3.4.5 The purpose of Article 67 of the Insolvency Act is to protect the rights of existing creditors and to ensure that the borrower is not able to dispose of its assets to the detriment of its creditors. However, it also means that any financier taking security during the period of suspicion runs the risk of that security being declared void by the courts under the terms of Article 67 of the Insolvency Act. The financier would then find itself holding the ranking of an unsecured creditor as set out in paragraph 4.5.1 below.
- 3.4.6 In the event of the insolvency of a third party storing the secured goods (whether a warehouse operator or a collateral manager), creditors of that third party would not have any legal right to seize the stored goods.

## **4 Security**

### **4.1 Taking security over stored commodities and warehouse receipts**

- 4.1.1 Under Article 126 of the Securities Act, it is possible to take security interests over a number of different assets including security over goods, security over receivables and security over bank accounts.
- 4.1.2 Warehouse financing in Côte d'Ivoire is structured on the basis that security is provided over the goods that are being financed. Security is taken over goods by way of pledge. Security cannot be granted over documents representing or relating to goods such as bills of lading or warehouse receipts.

4.1.3 The pledge must be granted under the terms of a written pledge agreement (the pledge agreement) between the grantor of the pledge (the pledgor) and the beneficiary of the pledge (the pledgee). The pledge agreement must specify the nature of the secured goods, their quantity and the debt that the pledge is securing.

## 4.2 Creation of security over future goods

4.2.1 The pledgor can grant security to the pledgee over future goods that it does not yet own. The future goods may be described generically in the pledge agreement (i.e., by type or quality) and the pledge will become binding over these future goods as soon as they come into the pledgor's ownership. There is no need for the pledge agreement to be re-registered when the pledge takes effect over future goods.

4.2.2 The pledgor can also grant security to the pledgee over goods that are not yet in existence. For example, it may grant security over agricultural crops while they are in the process of growing in the fields. Again, these goods may be described generically (i.e., by location or by quality) and the pledge will become binding over these goods as soon as they come into existence.

## 4.3 Commingling and fungibility

4.3.1 A warehouse operator or collateral manager may release fungible goods that are subject to a pledge other than to the pledgor or pledgee (or a transferee of the pledgee) provided that the goods are replaced with substitute goods on a like-for-like basis. This allows the warehouse operator or collateral manager to release and replace fungible goods that would otherwise deteriorate in quality if left stored for a prolonged period of time.

4.3.2 Releasing or releasing and replacing goods covered by a pledge gives rise to the requirement to re-register the pledge agreement with the *Registre du Commerce et du Crédit Mobilier* (the RCCM). This process is known as *radiation*. However, this requirement is often not complied with, either due to ignorance as to the existence of the requirement or because compliance with it is administratively burdensome. The consequences of non-compliance with this requirement are discussed in the following paragraphs.

- 4.3.3 Releasing or replacing fungible goods on this basis does not affect the validity of any pledge granted over them provided that the pledging clause in the pledge agreement was drafted in a generic manner. This would be the case, for example, if the pledging clause provides a pledge over a fixed number of bags of commodity of a certain quality or grade but without any further identification.
- 4.3.4 On the other hand, releasing or replacing fungible goods may be an issue if the pledge agreement grants the pledge over specifically identifiable goods. This would be the case, for example, if the pledging clause is drafted to cover specific goods stored with specific lot numbers or identification codes. In this situation, the financier may find itself having to enforce its pledge over the goods as against a third party which may be problematic. Issues of enforcement as against third parties are discussed further in paragraph 5.2 below.

## **4.4 Perfection and registration of security**

- 4.4.1 There are two ways in which the pledge may be effective under Ivorian law. The first method is to register the pledge agreement as provided for under Article 52 of the Securities Act. The pledge agreement must be registered at the RCCM, and it may be registered with the RCCM in paper or electronic form.
- 4.4.2 There is no mandatory timeframe for registering the pledge agreement with the RCCM, but a delay in registration may impact on the financier's ranking of security as discussed in paragraph 4.5 (Priority/ranking of security) below.
- 4.4.3 Either of the pledgor or the pledgee may register the pledge agreement with the RCCM. In practice, the pledgee may prefer to take responsibility for this given the consequences of any delay or failure to register the pledge agreement.
- 4.4.4 Stamp duty is payable on pledges perfected by registration, and this must be paid to the relevant tax authority prior to registration of the pledge agreement with the RCCM. The tax authority will charge a registration fee of FCFA 18,000, and stamp duty is calculated at the rate of FCFA 2,000 for each page of the pledge agreement. The RCCM will refuse to register any pledge agreement where stamp duty has not been paid.



- 4.4.5 Significantly, a registration fee must also be paid to the RCCM when registering the pledge agreement. This registration fee has two parts. The first part constitutes a fixed fee of FCFA 5,000 while the second part is a proportional fee calculated at the rate of 0.05% of the secured amount.
- 4.4.6 Failure to register the pledge agreement with the RCCM means that the pledge will be void as against an insolvency practitioner of the pledgor or as against other creditors of the pledgor. However, the pledge will still be effective as between the pledgor and the pledgee.
- 4.4.7 The RCCM maintains a register of all security registered with it that is publicly available. Any person wishing to search the register to see if any security has been registered over specific goods must submit an information request to the RCCM. The RCCM then has two days from receipt of the request to deliver a certificate stating whether any security has been registered over the goods concerned.
- 4.4.8 Following registration of the pledge agreement, the RCCM will issue a document known as the *bordereau de gage de stocks* (the pledge form). This will specify details of the pledge, its registration date at the RCCM, and the unique identification number assigned to it by the RCCM.
- 4.4.9 The pledge form serves as confirmation that the relevant pledge agreement has been successfully registered with the RCCM. It does not transfer ownership in the goods, and it is not a document of title.
- 4.4.10 However, issuance of the pledge form is conditional on the RCCM being satisfied that there is insurance cover over the secured stocks against any risk of theft, fire, partial or complete damage. Details of the insurance cover in place should be included within the pledge agreement. Article 121 of the Securities Act states that any pledge agreement that does not indicate the name of the insurer that provides the required cover will be null and of no legal effect. However, this Article does not appear to be strictly applied in practice.
- 4.4.11 The pledge form will be issued to the pledgor who is then responsible for endorsing the pledge form to the pledgee. The endorsement confers on the pledgee the quality and rights of a secured creditor. The pledgee may in turn subsequently endorse the pledge form to a third party who will then obtain the rights of a secured creditor in relation to the pledged goods.

- 4.4.12 Endorsement should be made in writing (either on the back of the pledge form or on an attachment to the pledge form) and it should state the endorsee's name and be signed by the endorser. In this way, any person in possession of a pledge form should be able to show that they are the legitimate bearer through a chain of previous endorsements.
- 4.4.13 There is no requirement to enter into a new pledge agreement or to notify the RCCM each time the pledge form is transferred to a new third party.
- 4.4.14 The second method of ensuring that the pledge is effective is to transfer possession of the secured goods to the pledgee. The pledgee can show that it has possession of the goods in one of two ways.
- 4.4.15 Firstly, the pledgee can take actual possession of the secured goods by storing them in a warehouse or storage facility that the pledgee owns or has control over. This is referred to as having *actual possession* of the goods. This form of possession is not common as it places a burden on the pledgee to store and monitor the goods which it may not be best placed to do.
- 4.4.16 The alternative is for the pledgee to appoint a collateral manager to store and monitor the secured goods on its behalf. This is known as *constructive possession* and it is the usual way of demonstrating that the pledgee has possession of the secured goods. As noted in paragraph 2.1.7 above, the collateral manager must be appointed under the terms of a collateral management agreement. This will set out terms of the legal relationship between the pledgee and the collateral manager and their respective rights and obligations.
- 4.4.17 Provided that the pledgee can show that it has possession (either actual or constructive) of the secured goods, the pledge will be effective as against the pledgor, an insolvency practitioner of the pledgor, or as against other creditors of the pledgor. The priority of creditors who have competing pledges over the same goods is discussed in paragraph 4.5 (Priority/ranking of security) below.
- 4.4.18 Stamp duty is not payable in relation to pledges perfected by possession. However, a pledgee may wish to register the pledge agreement with the Ivorian tax authority in order to obtain a *date certaine*. The benefit of obtaining a *date certaine* is that it would be extremely difficult for a

Pledgor to challenge the existence of the pledge agreement and its creation on the relevant date in any proceedings before the Ivorian courts.

4.4.19 In practice, many creditors adopt the second approach when taking security over goods in Côte d'Ivoire. The main reasons for this are the fact that stamp duty is not payable on possessory pledges and the time that it takes to successfully register security with the RCCM.

## **4.5 Priority/ranking of security**

4.5.1 The ranking of creditors who have taken security over goods is set out in full in paragraphs 3.4.1 and 3.4.2 above.

4.5.2 Where more than one person has a pledge over the same goods, the order of priority will be determined by the order in which each pledge was perfected. Where the competing pledges have each been registered, priority will be determined by which pledge agreement was registered first with the RCCM.

4.5.3 In the event that none of the secured parties have registered their pledge agreements, priority will then be determined by which secured party has possession (either actual or constructive) of the relevant goods.

4.5.4 Where one pledge has been perfected by registration and another pledge has been perfected by taking possession, the order of priority will be determined by looking at whether possession of the goods in question was taken before the registration process was completed at the RCCM. If it were, then the possessory pledge will have priority. If registration at the RCCM were completed before possession of the secured goods were taken by the competing creditor, then the registered non-possessory pledge will have priority.

4.5.5 The scenarios set out in paragraphs 4.5.2 to 4.5.4 (inclusive) are subject in each case to the issue of whether the creditor taking the second pledge knew, or could reasonably have known, of the existence of the first pledge. If the second creditor did know, or should reasonably have known, of the existence of the first pledge, then the second pledge will rank behind the first irrespective of whether it was perfected first in time.

## 4.6 True sale versus secured lending

- 4.6.1 Repurchase agreements are not used as a method of financing in Côte d'Ivoire. Although there is no legislation prohibiting these types of agreements, it is unlikely that they will be recognised as valid under Ivorian law and they may well be recharacterised as a loan. The financier may then find itself having the status of an unsecured creditor if it had not taken security over the goods or had not registered that security.
- 4.6.2 However, a further limitation on the use of such agreements is that financial institutions do not have the power under Ivorian law to buy and sell commodities. This means that financial institutions would not be able to enter into the types of ownership arrangement provided for under repurchase agreements.

## 5 Enforcement

### 5.1 Enforcement of security over commodity against the borrower

- 5.1.1 The times when the pledge will become enforceable by the pledgee will be set out in the pledge agreement (each an event of default) and it will include failure by the borrower to pay any sum on its due date.
- 5.1.2 If the pledgee wishes to enforce the pledge following an event of default, it must first serve a demand on the pledgor to resolve the event of default (e.g., by paying the unpaid amount). If the pledgor fails to resolve the event of default within eight days of receiving the demand, the pledgee may apply to the court to enforce its pledge over the goods.
- 5.1.3 The court will issue a writ of execution allowing the pledgee to enforce the sale of the pledged goods. The pledgee will then receive a share of the proceeds of the sale in accordance with its priority ranking as set out in paragraph 4.5.1. Obtaining a writ of execution can vary in terms of difficulty, time and cost. The main determining factors will be the complexity of the case and the efficiency of the court.
- 5.1.4 Alternatively, the pledgor and the pledgee may agree that, on an event of default, ownership of the goods is transferred from the pledgor to the pledgee. This means that the pledgee would not need to obtain a writ of execution from the court before selling the pledged goods. This

is the most popular method of dealing with the goods following an event of default. However, the pledge of agreement must provide the pledgee with the power to sell the goods in order for this to be effective.

## **5.2 Enforcement of security over commodity against third parties**

- 5.2.1 If the pledgor were to sell the pledged goods to a third party, the pledgee would in theory be able to enforce its security over the goods as against the third-party purchaser. However, any third-party purchaser will have a defence to the pledgee's claims if it can show that it purchased the goods in good faith.
- 5.2.2 In this case, the burden would be on the pledgee to show that the third-party purchaser had acted in bad faith. It should be noted that the simple fact that the third-party purchaser knew of the existence of the pledge does not mean that it acted in bad faith when purchasing the goods. Similarly, there is no requirement on a third-party purchaser to check with the RCCM whether there is any security over the goods it is intending to buy.

## **5.3 Enforcement in the courts**

- 5.3.1 Any disputes may be submitted for resolution in the Ivorian courts. The case will initially be heard by a court of first instance which will issue its judgment on the dispute. The parties to the dispute have the right to appeal this decision to the appeal court provided that any appeal is lodged within two months of the judgment being issued or, if later, of the judgment being notified to the parties. Any appeal must be brought on different grounds to those that were rejected by the previous court.
- 5.3.2 The parties to a dispute may also appeal the decision of the appeal court to the supreme court of Côte d'Ivoire. This is the superior court, and its decisions are final and non-appealable. Any appeal to the supreme court must be made within one month of the later of the judgment being issued and the judgment being notified to the parties.
- 5.3.3 The speed with which a dispute is resolved by the courts will vary depending on the complexity of the matter. However, in practice, proceedings before the Ivorian courts are often slow, and there can be delays in issuing judgments.

- 5.3.4 Ivorian law does provide for a fast track procedure before the courts (known as the *procédure des référés*). This can be used in cases of urgency which will be decided on a case-by-case basis by the presiding court.
- 5.3.5 Judgments issued under this procedure are appealable in the manner set out in paragraphs 5.3.1 and 5.3.2, but any appeal must be started within eight days of the judgment being issued or, if later, the date on which the parties are notified of the judgment.

## 5.4 Arbitration alternative dispute resolution mechanisms

- 5.4.1 The OHADA Uniform Act on Arbitration dated 11 March 1999 (the Arbitration Act) expressly provides for the resolution of disputes by arbitration. The Arbitration Act applies to any arbitration proceedings in Côte d'Ivoire, whether these relate to Ivorian law or foreign law, and it provides that arbitration is open to all persons with legal personality.
- 5.4.2 Arbitration is often chosen as the preferred method of dispute resolution for domestic and international commercial disputes. There are no fixed timeframes or costs for arbitration proceedings, but these will often be favourable when compared to court proceedings.
- 5.4.3 The main arbitral body for arbitration proceedings is the *Cour Commune de justice et d'arbitrage*. This is the principal arbitral body for OHADA and it is based in Abidjan.

## 5.5 Enforcement of foreign court judgments and arbitral awards

- 5.5.1 Foreign court judgments will only be applied in Côte d'Ivoire after an Ivorian court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Ivorian court will consider whether the foreign court judgment was made by a competent foreign court and whether the judgment contravenes any matters of Ivorian public policy. However, the Ivorian court will not reopen the dispute or reconsider the merits of the case when doing so.
- 5.5.2 Côte d'Ivoire is a treaty member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It will therefore recognise and enforce arbitral awards issued by other treaty members

subject to an Ivorian court issuing an exequatur decision. Côte d'Ivoire will also recognise arbitral awards from non-treaty member countries subject to an Ivorian court issuing an exequatur decision.

- 5.5.3 The court will issue an exequatur decision provided that the foreign arbitral decision does not contravene Ivorian public policy. The speed with which an exequatur decision is issued will depend on the complexity of the foreign arbitral award.

# Block 2: Madagascar

## Key legal points:

- There is no specific warehouse receipt legislation in place, but warehouse financing does take place in reliance on ordinary principles of contract law.
- While much stock financing (advances against stock) is carried out under bank surveillance, Type C warehousing (GCV lending) is currently the only model directly relevant to the terms of reference of this legal report.
- Financiers play a more prominent role in monitoring financed goods with limited roles for warehouse operators and collateral managers.
- Control over goods is often favoured in place of legal security over goods.
- Key legal barriers include: (1) payment of stamp duty on security documents and (2) lack of legislative and regulatory structure for warehouses, warehouse operators and collateral managers.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing practices and legal framework

- 1.1.1 There are at present two main types of commodity-collateralised lending: (1) advances against stock to commercial players under direct surveillance by the financier; and (2) loans against stock in the *Grenier Communautaire Villageois* (the GCV), this being mainly financed by mutual microfinance networks and refinanced by the national banking system. Financiers appear to be content with the current system of advances against stock (and therefore have no recourse to collateral managers) and there are no serious legal concerns at present. For this reason, this report focuses mainly on the GCVs and the issues which would arise if Type B and/or Type C methods of financing (both as defined in the typology) were to be developed.
- 1.1.2 There is no specific legislation in place governing warehouse financing (with this being conducted in reliance on normal contractual arrangements), although there is a General Warehouses law stemming from the colonial era which provides for the issue of two-part warehouse



receipts (*récépissés-warrants*), which are in principle negotiable. However, no General Warehouses have operated since the 1980s and it is doubtful that the General Warehouse model is sufficiently up-to-date and appropriate for Madagascar at this point of time.

- 1.1.3 Key legal barriers to extending the use of warehouse receipt financing include:
- (a) the lack of a legal framework for such financing, both in terms of specific warehouse legislation and in terms of regulation of warehouse operators and collateral managers
  - (b) a requirement to pay *ad valorem* stamp duty when registering security.

## 1.2 Proposals to introduce warehouse receipt legislation

There are currently no proposals to introduce warehouse receipt legislation for Madagascar (as of 15 April 2014).

### 1.3 Analysis of current status and feasibility of different financing methods

- 1.3.1 GCV financing is an example of the Type A method of warehouse financing (as defined in the typology) with financiers playing a more proactive role in the day-to-day management of the goods than is usually the case with Types B, C and D. The development of Type A financing is reflected in the lack of regulation and lack of prominence for warehouse operators and collateral managers.
- 1.3.2 However, the existing legal framework in Madagascar would support both Type B and Type C methods of financing if the necessary infrastructure (such as independent private/public warehouses and collateral managers) were put in place.
- 1.3.3 The concept of field warehousing is not expressly recognised under Malagasy law, but it can be implemented in reliance on existing contractual principles.
- 1.3.4 By contrast, although Malagasy law allows for the creation of security over future goods, the implementation of Type D financing (as defined in the typology) is unlikely to be successful at present due to a lack of legal and institutional infrastructure needed to make this viable.

## 2 Conclusions and interim recommendations

Type A financing is widely used in Madagascar and it has proved a very effective means of financing stocks held back in villages for food security and speculative purposes. Despite this, the model is very dependent on the capabilities of the MFIs in handling the workload involved in ensuring security of goods stored at tens of thousands of decentralised locations. Moreover, the double-padlock arrangement cannot always be relied upon to provide the necessary level of security and the MFIs may need other forms of collateral (e.g., guarantors or mutual guarantees).

The gradual move to more centralised storage will involve larger quantities being stored in single locations; there will be an increasing need to move away from identity preservation and commingle commodities of different depositors by grade. The storage of more perishable crops than paddy rice also requires new skills. Apart from the need for additional warehousing capacity, these challenges will require building the capacity of those operating the warehouses as well as developing some sort of national regulatory capability to ensure good practice and to minimise the risks involved (notably physical losses and quality deterioration, fraud and speculative price risks). Although the CSBF is regulating the MFIs as institutions, it is not carrying out any oversight of their key lending product.

Any initiative to regulate warehouse financing should probably come from the MFIs and the refinancing banks, given their track record with the GCVs and their stake in the development of a vibrant and secure warehousing system. This could lead to enabling legislation at national level, covering issues such as warehouse licensing and regulation, the respective liabilities of participants, commodity handling and grading, and the negotiability of warehouse receipts.

Such a process would facilitate the development of Type B or Type C financing and it would also help improve existing Type A financing.

### Legal analysis

#### 1 Overview of the legal system

Malagasy law is primarily based on a civil law system (a consequence of Madagascar's time as a French colony from 1897 to 1958) with a strong influence from customary laws and practices.

## 2 Overview of existing warehouse financing initiatives (from the draft technical report by J. Coulter and S. Ramamonjisoa)

As noted in paragraph 1.1.1, there are two main types of commodity-collateralised lending involving agricultural commodities. These are: (1) advances on stock; and (2) loans against stock to the GCVs. The former are loans to domestic traders, agribusiness, importers and exporters by the primary commercial banks (notably BOA, BNI-CA and BFV-SG), while the latter are seasonal loans to farmers and rural traders (known as *collecteurs*) against stocks of agricultural commodities, mainly paddy rice, which beneficiaries are holding in expectation of price increases and/or to ensure their food security in the lean season.

Up to the 1980s, the Chambers of Commerce and Industry (the CCI), which at that time were public sector bodies, provided public warehousing services, entirely in customs-bonded areas of the ports. They apparently did this under a French pre-independence General Warehouses Law (*Loi de Magasins Généraux*) and a Malagasy regulation. However, with the liberalisation of the economy and successive changes in their structure and governance, the CCI ceased to offer this service.

Financiers provide advances against stocks under their own surveillance and without employing a collateral manager. However, financiers are sometimes willing to employ inspection companies to carry out stock monitoring, but with the inspection company simply reporting back to the financier on the status of the stock and without taking responsibility for the physical integrity of the stock. The non-employment of collateral managers cannot be attributed to legal reasons but rather to the financiers' willingness to do their own surveillance.

Despite the lack of private sector activity in this area, there was one Government aid-supported initiative to develop collateral management in the wake of a crisis in 2002, the Fund for the Marketing of Agricultural Production (FCPA), which continued up to 2009. It reportedly came to an end as a result of governance and management issues.

Apart from this initiative, the main warehouse financing initiative in Madagascar is the GCV. The initiative is focussed on the provision of direct lending from microfinance institutions (MFIs) to smallholder farmers and rural traders. These MFIs include *Caisse d'épargne et de crédit agricole mutuel*

(referred to as CECAMs), the *Ombon-Tahiry Ifampisamborana Vola* (referred to as the OTIV networks), the *Tahiry Ifamonjena Amin'ny Vola* (referred to as TIAVO) and the *Entreprenre à Madagascar* (referred to as EAM). The first three of these MFIs account for most of the lending. They consist of integrated mutual networks (i.e., regional savings and loans cooperatives with multiple branches) and GCVs account for upwards of 40% of the lending portfolio of two of them. To finance their GCV lending, the microfinance sub-sector obtains the majority of its resources through refinancing from the commercial banks.

The GCV initiative is primarily focussed on providing financing for a range of non-perishable agricultural goods, although in reality a substantial proportion of the financing relates solely to paddy rice. Most of the goods are stored in the houses and compounds of individual borrowers, with two to four borrowers typically storing in the same location under a double padlock arrangement with the MFI. However, an increasing percentage is being stored in warehouses at more central locations belonging to or rented by the MFIs themselves. In this way, the GCV system is taking on one of the key characteristics of public warehousing (Type C) in that the MFI is acting as warehouse operator on behalf of a range of depositors. However, the goods of individual depositors are not graded; they are still being handled on an identity-preserved basis, which is not normal practice for public warehousing of grains and it tends to lead to inefficient use of space. As such, there is likely to be a need for a gradual move towards commingling of depositors' stocks.

The GCV has been an influential project in developing the agricultural industry in Madagascar and in providing security for smallholder farmers, both in terms of livelihoods and food supplies during the off-season.

### **3 Legislation and laws relevant to warehouse receipt financing**

#### **3.1 Legislative framework for warehouse receipt financing**

3.1.1 Madagascar does not have specific legislation governing warehouse receipt financing. However, warehouse financing is widely conducted in Madagascar, relying instead on normal contractual rules to govern the relationships between the relevant parties to the financing (such as, the relationship between the borrower/depositor and the warehouse operator and the relationship between the borrower/depositor and the financier).

- 3.1.2 There is a General Warehouses law from the colonial era which provides for the issue of two part warehouse receipts (*récépissés-warrants*), which are negotiable in principle. However, no general warehouses have operated since the 1980s and it is doubtful that the general warehouse model is sufficiently up-to-date and appropriate for Madagascar at this point of time.
- 3.1.3 Indeed, the *chef de service des magasins généraux* informed the authors that there was no current regulation governing the *magasins généraux* which suggests that the General Warehouses law is no longer of relevance.
- 3.1.4 Although there is no specific warehouse receipt law, the provisions of Law No 2003-041 dated 3 September 2004 relating to securities (the Securities Act) contain similar provisions to those that may be found in specific warehouse receipts legislation.
- 3.1.5 The Securities Act provides that a borrower may grant security over goods to its financier as collateral for its borrowings. The Securities Act does not contain any restrictions on the types of entity that may grant security over goods. This means that security over goods can be granted by a wide range of entities in Madagascar including smallholder farmers, producer companies and cooperatives.
- 3.1.6 The secured goods may be held directly by the financier, or they may be held by a third-party warehouse operator or collateral manager as appointed by the borrower and the financier. For the purposes of this report, any entity providing collateral management services will be referred to as a collateral manager.
- 3.1.7 However, as noted above, financiers in Madagascar do not use collateral managers and they only occasionally use stock monitors. Instead, their normal practice is to: (1) allow the borrowers to store the goods under supervision by the financier which, in the case of the GCV, will involve a double-padlock arrangement; or (2) run the warehouses themselves in association with the depositors.
- 3.1.8 However, there is some interest in establishing larger, centralised warehouses for storing goods in agricultural production areas of Madagascar. It is possible that this will prompt an increasing use of collateral managers (Type B) and public warehousing (Type C). If a

collateral manager is used, it will be appointed under the terms of a collateral management agreement entered into between the borrower, the financier and the collateral manager.

- 3.1.9 If there is a move towards financing along the lines of Type B and Type C, then the taking of security in accordance with the Securities Act is likely to become more prominent. Further information on the Securities Act is provided in paragraph 5 (Security) below.

## 3.2 Compliance bodies

The *Commission de Supervision Bancaire et Financière* (the CBFS) is responsible for supervising the financial services industry in Madagascar. In accordance with Law No. 2005-016 of 29 September 2005, the CBFS has an administrative function, a regulatory function and a disciplinary function.

It has responsibility for issuing authorisations to MFIs and this authorisation will stipulate the activities that the MFI can conduct. It is illegal for an MFI to conduct business without such an authorisation or to carry out any activities not covered by the authorisation. The CBFS is responsible for ensuring compliance with the relevant banking regulations in Madagascar; it has the power to impose sanctions on financial institutions if they breach any of these regulations.

## 3.3 Status of warehouse receipts

- 3.3.1 Under the provisions of Law No 66-003 dated 2 July 1966, known as the *Loi sur la Théorie Générale des Obligations* (the LTGO), any voluntary deposit of goods for storage with a warehouse operator or collateral manager must be evidenced in writing. This document is a basic form of warehouse receipt confirming that the warehouse operator is storing, or the collateral manager is holding and monitoring, the goods deposited.
- 3.3.2 This warehouse receipt is not a negotiable document of title; the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party. On this basis, the holder of a warehouse receipt may use the warehouse receipt as evidence to show that it has ownership over the stored goods, but the simple fact of holding possession of the warehouse receipt is not sufficient to prove ownership in itself.

- 3.3.3 The LTGO does not stipulate the information that these warehouse receipts should contain. If a collateral manager were to be appointed, it is likely that the terms of the collateral management agreement would stipulate the information that the collateral manager would have to include in any warehouse receipt it issues under that collateral management agreement.
- 3.3.4 The colonial era General Warehouses Law provides for Type B warehouses and for two-part warehouse receipts (*récépissés-warrants*). These are certainly transferable and in principle negotiable documents, but these are not used in practice. Notwithstanding, Articles 1 to 3 of Law No. 1999-018 of 2 August 1999 (the Commercial Act) suggests that this document might still be used in Madagascar, when it says that a warrant can be used to transfer ownership in stored goods by endorsement and delivery of the warrant to a third party. However, these are not used in connection with warehouse financing; it is doubtful that the general warehouse model is sufficiently up-to-date and appropriate for Madagascar at this point of time, and, as noted in paragraph 3.1.3, it does not appear that General Warehouses Law is considered to be binding by the *magasins généraux*.
- 3.3.5 The warehouse receipt is issued in paper form. If a collateral manager were appointed, any warehouse receipts issued by it should state on their face that the collateral manager is holding the goods on behalf of the financier. Although there is no legal requirement to include such a statement on the warehouse receipt, it may be useful to include such a statement if the financier wishes to show that it has constructive possession over the stored goods (as discussed further in paragraph 5.4.18 below).
- 3.3.6 Where a third party has purchased goods that are subject to a warehouse receipt, that third party will in practice have to provide both the warehouse receipt and a copy of the sale and purchase agreement in order to secure the release of the goods from the warehouse. Where the secured goods have been pledged to a financier, the third-party purchaser will need to provide the warehouse receipt, the pledge form and confirmation that the financier has been repaid (either by the borrower or directly by the purchaser) in order to secure the release of the goods from the warehouse.

### **3.4 Field warehousing: legal recognition and requirements**

There is no specific legislation on field warehousing in Madagascar. However, field warehousing can be implemented by relying on normal contractual rules relating to leases of land. This would allow a financier, warehouse operator, or collateral manager to lease land from the borrower for the purposes of storing and monitoring the financed goods.

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

4.1.1 The legal status of smallholder farmers or farmer organisations and cooperatives or other forms of producer organisations would not, as a matter of Malagasy law, prevent them from using warehouse financing.

4.1.2 Unlike many of the OHADA countries, financing is usually made directly to smallholder farmers or to a collective of three to four farmers as opposed to lending being channelled through a large cooperative which then on-lends to its members. The loan from the financier to the smallholder farmer may be secured against the farmer's goods, but this is often not the case with financiers who instead rely on 'practical' security, peer pressure and other informal means to ensure that loans are repaid.

### **4.2 Legal status of farmers and farmers' organisations**

(a) Individual farmers

Individual farmers are private individuals and can enter into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name. They have the power to sue and be sued in their own name. There are no restrictions on the type of contract that they can enter into (provided that these do not contravene Malagasy law) and there are no restrictions on the type of security interests that they can grant.



(b) Cooperative societies

Cooperative societies have legal personality under the provisions of Law No 99-004 dated 21 April 1999 (the Cooperatives Act). They are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name, and they have the power to sue and be sued in their own name. Under the Cooperatives Act, cooperatives have the power to undertake any activities that are in the best interests of its members. Further powers of a cooperative are set out in its constitutional document which is known as a *statuts*.

(c) Formal and informal representative bodies and trade organisations

There are a number of trade organisations for farmers in Madagascar. These can have a number of different legal statuses: an association, a federation, a union, a cooperative, or any other entity recognised by Malagasy law. Among the largest and most influential of the existing farmers' organisations in Madagascar are *Fikambanana Fampivoarana ny Tantsaha* (FIFATA), the *Association pour le Développement de l'Agriculture et du Paysannat dans le Sambirano* and the *Syndicat des organisations agricoles* (SOA). Overall, however, producer organisations are less developed than in many areas in Africa.

### 4.3 Legal status of and requirements for warehouse operators and collateral managers

There are limited legal requirements for warehouse operators and collateral managers in Madagascar. They must be registered at the company registry; they must have insurance in place to cover any goods they are storing and/or monitoring. There is no clear consensus as to the level of insurance that must be in place; in the case of GCV lending, only relatively large stores need to be covered. For example, one group of MFI networks only requires insurance coverage for theft or loss or damage to goods resulting from fire and allied perils in warehouses holding upwards of 50 t of commodities. No MFI requires fidelity cover.

## 4.4 Regulation of warehouse operators and collateral managers

There are no regulatory bodies responsible for monitoring the activities of warehouse operators and collateral managers. The CSBF monitors the financial status of MFIs, but it does not monitor the risks associated with the individual lending products.

## 4.5 Rights of a secured creditor in an insolvency

4.5.1 In the event that the borrower becomes insolvent, the ranking of a secured creditor will be determined in accordance with the provisions of the Securities Act. In descending order, the ranking of priority is as follows:

- (a) the creditors owed legal costs incurred in the process leading to the sale of the property and in the actual distribution of the assets
- (b) the creditors who incurred the cost in conserving the debtor's property in the interest of the creditor with older debts
- (c) the creditors of highly preferred wages
- (d) the creditors guaranteed by a general lien subject to registration or a pledge
- (e) the creditors guaranteed by a pledge or lien, who must be disclosed, each according to the rank of registration in the commercial and companies register creditors
- (f) to creditors with a special privilege, each following the furniture from which the lien results
- (g) creditors with a general privilege not subject to advertising
- (h) the unsecured creditors.

4.5.2 A financier that has taken a pledge over goods will therefore have fourth ranking security in the event of the borrower's insolvency provided that the pledge has been registered (as discussed further in paragraph 5.4 below). Where two or more persons have security over the same goods, the ranking of priority between those persons will

depend on which security interest was registered by the *Registre du Commerce et des Sociétés* (the RCS) first.

- 4.5.3 Financiers must also use caution when lending to borrowers who are in financial difficulty. Article 62 of Law No. 2003-042 dated 3 September 2004 on the collective procedures for the wiping up of payable accounts (the Insolvency Act) provides that any transactions entered into by a borrower (including undertaking further borrowing or granting security) will be considered automatically void and of no legal effect if they are entered into during the period of suspicion.
- 4.5.4 The period of suspicion starts from the date on which the borrower ceases to pay its debts as they fall due and it ends on the date that the court authorises the start of insolvency proceedings against the borrower.
- 4.5.5 This is made in order to secure the creditors' rights and to avoid any fraudulent transactions of the debtor in the purpose of reducing the value of his property. The purpose of Article 62 of the Insolvency Act is to protect the rights of existing creditors and to ensure that the borrower is not able to dispose of its assets to the detriment of its creditors. However, it also means that any financier taking security during the period of suspicion runs the risk of that security being declared void by the courts under the terms of Article 62 of the Insolvency Act. The financier would then find itself holding the ranking of an unsecured creditor as set out in paragraph 4.5.1 above.
- 4.5.6 In the event of the insolvency of a third party storing the secured goods (whether a warehouse operator or a collateral manager), creditors of that third party would not have any legal right to seize the stored goods.

## **5 Security**

### **5.1 Taking security over stored commodities and warehouse receipts**

- 5.1.1 Under the provisions of the Securities Act, it is possible to take security interests over a number of different assets, including security over goods, security over receivables, and security over bank accounts.
- 5.1.2 In the context of warehouse financing, where security is granted, this is most likely to be security over the goods that are being financed.

Security is taken over goods by way of pledge. It is also possible to take security over documents representing or relating to goods such as bills of lading or warehouse receipts.

- 5.1.3 The pledge must be granted under the terms of a written pledge agreement (the pledge agreement) between the grantor of the pledge (the pledgor) and the beneficiary of the pledge (the pledgee). The pledge agreement must specify the nature of the secured goods, their quantity and the debt that the pledge is securing.

## **5.2 Creation of security over future goods**

- 5.2.1 The pledgor can grant security to the pledgee over future goods that it does not yet own. The future goods may be described generically in the pledge agreement (i.e., by type or quality) and the pledge will become binding over these future goods as soon as they come into the pledgor's ownership. There is no need for the pledge agreement to be re-registered when the pledge takes effect over future goods.

- 5.2.2 The pledgor can also grant security to the pledgee over goods that are not yet in existence. For example, it may grant security over agricultural crops while they are in the process of growing in the fields. Again, these goods may be described generically (i.e., by location or by quality) and the pledge will become binding over these goods as soon as they come into existence.

## **5.3 Commingling and fungibility**

A warehouse operator or collateral manager may release fungible goods that are subject to a pledge other than to the pledgor or pledgee (or a transferee of the pledgee) provided that the goods are replaced with substitute goods on a like-for-like basis. This allows the warehouse operator or collateral manager to release and replace fungible goods that would otherwise deteriorate in quality if left stored for a prolonged period of time. This does not affect the validity of any pledge granted over the released or replaced goods.

## **5.4 Perfection and registration of security**

- 5.4.1 There are two ways in which the pledge may be effective under Malagasy law. The first method is to register the pledge agreement as provided for under Article 128 of the Securities Act. The pledge agreement must be registered at the RCS and it may be registered with the RCS in paper or electronic form.

- 5.4.2 There is no mandatory timeframe for registering the pledge agreement with the RCS, but a delay in registration may impact on the financier's ranking of security as discussed in paragraphs 2.5.1 and 2.5.2 above.
- 5.4.3 Either of the pledgor or the pledgee may register the pledge agreement with the RCS. In practice, the pledgee may prefer to take responsibility for this given the consequences of any delay or failure to register the pledge agreement.
- 5.4.4 Stamp duty is payable on the pledge agreement and this must be paid to the relevant tax authority prior to registration of the pledge agreement with the RCS. Stamp duty is calculated against either the loan amount or the value of the pledged goods depending on which is the higher value. In practice, the value of the pledged goods should always be higher than the loan amount they secure and stamp duty will be calculated against this figure (the pledged amount).
- 5.4.5 The amount of stamp duty payable is calculated using the following rates:
- (a) Pledged amount from Malagasy Ariary (MGA) 0 to MGA 1,000,000: 1%
  - (b) Pledged amount from MGA 1,000,001 to MGA 10,000,000: 0.5%
  - (c) Pledged amount from MGA 10,000,001 to MGA 100,000,000: 0.2%
  - (d) Pledged amount from MGA 100,000,001 to MGA 500,000,000: 0.1%
  - (e) Pledged amount from MGA 500,000,001 to MGA 1,000,000,000: 0.05%
  - (f) Pledged amount exceeding MGA 1,000,000,000: 0.01%.
- 5.4.6 The RCS will refuse to register any pledge agreement where stamp duty has not been paid.
- 5.4.7 Failure to register the pledge agreement with the RCS means that the pledge will be void as against an insolvency practitioner of the pledgor or as against other creditors of the pledgor. However, the pledge will still be effective as between the pledgor and the pledgee provided that the pledgee has possession of the secured goods as discussed further below.

- 5.4.8 Where more than one person has a pledge over the same goods, the order of priority will be determined by the time of registration of each pledge agreement with the RCS. In the event that none of the secured parties have registered their pledge agreements, priority will then be determined by which secured party has possession (either actual or constructive) of the relevant goods.
- 5.4.9 The RCS maintains a register of all security registered with it that is publicly available. Any person wishing to search the register to see if any security has been registered over specific goods must submit an information request to the RCS. The RCS then has two days from receipt of the request to deliver a certificate stating whether any security has been registered over the goods concerned.
- 5.4.10 Following registration of the pledge agreement, the RCS will issue a document known as the *bordereau de nantissement de stocks* (the pledge form). This will specify details of the pledge, its registration date at the RCS and the unique identification number assigned to it by the RCS.
- 5.4.11 The pledge form serves as confirmation that the relevant pledge agreement has been successfully registered with the RCS. It does not transfer ownership in the goods, and it is not a document of title.
- 5.4.12 However, issuance of the pledge form is conditional on the RCS being satisfied that there is insurance cover over the secured stocks against any risk of theft, fire, partial or complete damage. Details of the insurance cover in place should be included within the pledge agreement.
- 5.4.13 The pledge form will be issued to the pledgor who is then responsible for endorsing the pledge form to the pledgee. The endorsement confers on the pledgee the quality and rights of a secured creditor. The pledgee may in turn subsequently endorse the pledge form to a third party who will then obtain the rights of a secured creditor in relation to the pledged goods.
- 5.4.14 Endorsement should be made in writing (either on the back of the pledge form or on an attachment to the pledge form), and it should state the endorsee's name and be signed by the endorser. In this way, any person in possession of a pledge form should be able to show that they are the legitimate bearer through a chain of previous endorsements.

- 5.4.15 There is no requirement to enter into a new pledge agreement or to notify the RCCM each time the pledge form is transferred to a new third party.
- 5.4.16 The second method of ensuring that the pledge is effective is to transfer possession of the secured goods to the pledgee. The pledgee can show that it has possession of the goods in one of two ways.
- 5.4.17 Firstly, the pledgee can take actual possession of the secured goods by storing them in a warehouse or storage facility that the pledgee owns or has control over. This is referred to as having *actual possession* of the goods. Some financiers in Madagascar (such as the CECAM networks) rent or own warehouses and do take actual possession of the secured goods or otherwise gain constructive possession (see below) by virtue of the double-padlock arrangement.
- 5.4.18 The alternative is for the pledgee to appoint a third party to store and monitor the secured goods on its behalf. This third party may be the operator of the warehouse where the goods are stored or a collateral manager appointed to hold the secured goods. This is known as *constructive possession*.
- 5.4.19 As noted above, the disadvantage of adopting this second method is that failing to register the pledge agreement means that the pledgee only has the status of an unsecured creditor. It will therefore be at a disadvantage to any claim over the pledged goods made by a creditor who has registered its security with the RCS. In the commercial sector, financiers make advances against stocks without gaining any form of possession, constructive or otherwise.
- 5.4.20 In practice, financiers in Madagascar often do not require pledges to be registered. Instead, financiers have focused on ensuring that there is 'practical' security (as opposed to 'legal' security) over the financed goods. This has taken the form of a double-padlock system whereby the goods are locked in the storeroom (whether on the borrower's premises or otherwise) using two padlocks. The key to one padlock is held by the borrower and the key to the other is held by the financier. This means that neither party is able (in theory) to access the goods without the other being present. MFIs also rely on local peer pressure within the community and the local MFI branch to protect against borrower fraud.

5.4.21 While this form of 'practical' security places the financier in the position of an unsecured creditor (as discussed above), it does provide a workable system of controlling the goods without the need to incur time and cost in putting security in place. One factor reported to favour 'practical' approaches is the cultural resistance among many borrower to register pledges given the bad memories of draconian debt-recovery measures taken during Madagascar's socialist period in the 1970s.

## **5.5 Priority/ranking of security**

The ranking of creditors who have taken security over goods is set out in full in paragraphs 4.5.1 and 4.5.2 above.

## **5.6 True sale versus secured lending**

5.6.1 Repurchase agreements are not used as a method of financing in Madagascar. Although there is no legislation prohibiting these types of agreements, it is unlikely that they will be recognised as valid under Malagasy law and they may well be recharacterised as a loan. The financier may then find itself having the status of an unsecured creditor if it had not taken security over the goods or had not registered that security.

5.6.2 However, a further limitation on the use of such agreements is that financial institutions do not have the power under Malagasy law to buy and sell commodities. This means that financial institutions would not be able to enter into the types of ownership arrangement provided for under repurchase agreements.

# **6 Enforcement**

## **6.1 Enforcement of security over commodity against the borrower**

6.1.1 The times when the pledge will become enforceable by the pledgee will be set out in the pledge agreement (each an event of default), and it will include failure by the borrower to pay any sum on its due date.

6.1.2 If the pledgee wishes to enforce the pledge following an event of default, Article 88 of the Securities Act states that it must first serve a demand on the pledgor to resolve the event of default (e.g., by paying



the unpaid amount). If the pledgor fails to resolve the event of default within eight days of receiving the demand, the pledgee may apply to the court to enforce its pledge over the goods.

- 6.1.3 The court will issue a writ of execution allowing the pledgee to enforce the sale of the pledged goods. The pledgee will then receive a share of the proceeds of the sale in accordance with its priority ranking as set out in paragraph 4.5.1. Obtaining a writ of execution can vary in terms of difficulty, time and cost. The main determining factors will be the complexity of the case and the efficiency of the court.
- 6.1.4 Alternatively, the pledgor and the pledgee may agree that, on an event of default, ownership of the goods is transferred from the pledgor to the pledgee. This means that the pledgee would not need to obtain a writ of execution from the court before selling the pledged goods. This is the most popular method of dealing with the goods following an event of default. While it is useful for the pledge agreement to provide the pledgee with the power to sell the goods, this is not essential as this power is provided by Articles 88 and 133 of the Securities Act.

## **6.2 Enforcement of security over commodity against third parties**

- 6.2.1 If the pledgor were to sell the pledged goods to a third party, the pledgee would in theory be able to enforce its security over the goods as against the third-party purchaser. However, any third-party purchaser will have a defence to the pledgee's claims if it can show that it purchased the goods in good faith.
- 6.2.2 In this case, the burden would be on the pledgee to show that the third-party purchaser had acted in bad faith. It should be noted that the simple fact that the third-party purchaser knew of the existence of the pledge does not mean that it acted in bad faith when purchasing the goods. Similarly, there is no requirement on a third-party purchaser to check with the RCS as to whether there is any security over the goods it is intending to buy. This highlights the importance to the financier of having possession (actual or constructive) or appropriate control over the goods to avoid any issues with third-party purchasers.

## 6.3 Enforcement in the courts

- 6.3.1 Any disputes may be submitted for resolution in the Malagasy courts. The case will initially be heard by a court of first instance which will issue its judgment on the dispute. The parties to the dispute have the right to appeal this decision, firstly to one of the six courts of appeal and subsequently to the supreme court. This is the superior court and its decisions are final and non-appealable.
- 6.3.2 Any appeal must be brought on different grounds to those that were rejected by the previous court.
- 6.3.3 The speed with which a dispute is resolved by the courts will vary depending on the complexity of the matter. However, in general the judicial process in Madagascar is slow and there can be delays in issuing judgments.
- 6.3.4 The Civil Procedure Code provides for a fast-track procedure before the courts (known as the *procédure des référés*). However, this can only be used in limited circumstances, such as in an emergency or where a preliminary judgment is required in relation to the enforcement of a judgment or a writ of execution.

## 6.4 Arbitration alternative dispute resolution mechanisms

- 6.4.1 Malagasy law supports the use of arbitration as a method of dispute resolution. Arbitral proceedings are governed by Law No 2001-022 dated 9 April 2003 (the Civil Procedure Code). The Civil Procedure Code applies to any arbitration proceedings in Madagascar, whether these relate to Malagasy law or foreign law and it provides that arbitration is open to all persons with legal personality. Decisions from an arbitral body may be appealed to the court of appeal in Antananarivo.
- 6.4.2 Arbitration is often chosen as the preferred method of dispute resolution for domestic and international commercial disputes. There are no fixed timeframes or costs for arbitration proceedings, but these will often be favourable when compared to court proceedings.
- 6.4.3 The main arbitral body for arbitration proceedings is the *Centre d'Arbitrage et de Médiation de Madagascar*.

## 6.5 Enforcement of foreign court judgments and arbitral awards

- 6.5.1 Foreign court judgments will only be applied in Madagascar after a Malagasy court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Malagasy court will consider whether the foreign court judgment contravenes any matters of Malagasy public policy. However, the Malagasy court will not reopen the dispute or reconsider the merits of the case when doing so.
- 6.5.2 Madagascar is a treaty member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It will therefore recognise and enforce arbitral awards issued by other treaty members subject to a Malagasy court issuing an exequatur decision. Madagascar will also recognise arbitral awards from non-treaty member countries subject to a Malagasy court issuing an exequatur decision.
- 6.5.3 The court will issue an exequatur decision provided that the foreign arbitral decision does not contravene Malagasy public policy. The speed with which an exequatur decision is issued will depend on the complexity of the foreign arbitral award.

# Block 3: Cameroon

## Key legal points:

- There is no specific warehouse receipt legislation in place, but warehouse financing does take place in reliance on ordinary principles of contract law.
- Limited legal regulation of warehouses, warehouse operators and collateral managers.
- Key legal barriers include: (1) non-negotiability of warehouse receipts, (2) uncertainty over stamp duty and registration fees and (3) lack of legislative and regulatory structure for warehouses, warehouse operators and collateral managers.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary

#### 1.1 Existing legal framework

- 1.1.1 Warehouse financing has a large role to play in the financing of smallholder farmers in Cameroon. Although there is no specific legislation in place governing warehouse financing, this is conducted in reliance on normal contractual arrangements.
- 1.1.2 Smallholder farmers have the power to borrow and to provide security over their goods which allows them to participate in warehouse financing projects in their own right. Although some financing to smallholder farmers in Cameroon is structured around loans to farmers' cooperatives, this is on a far smaller scale than in many of the other OHADA countries covered by this study.
- 1.1.3 The legal framework for taking security over goods is governed by supranational legislation passed by OHADA (as defined below). Security over goods takes the form of pledges which need to be registered in order to establish priority of security. Cameroonian law does recognise the right of a secured party to give effect to a pledge by taking possession of the goods (either actual or constructive) as opposed to registering it. However, failure to register the pledge will have an impact on the ranking of the secured party's security.

- 1.1.4 Key legal barriers to extending the use of warehouse receipt financing include:
- (a) the lack of a legal framework for such financing, both in terms of specific warehouse legislation and in terms of regulation of warehouse operators and collateral managers
  - (b) the non-negotiability of warehouse receipts which impacts on the ease of selling and transferring title to goods
  - (c) a requirement to pay *ad valorem* stamp duty and registration costs when registering security.

## 1.2 Proposals to introduce warehouse receipt legislation

There are currently no proposals to introduce warehouse receipt legislation for Cameroon (as of 15 April 2014).

## 1.3 Analysis of current status and feasibility of different financing methods

- 1.3.1 The existing legal framework would support both Type B and Type C methods of financing (both as defined in the typology) whereby goods are stored in a warehouse (either public or private), usually under the control of a collateral manager and secured in favour of the financier by way of pledge.
- 1.3.2 Although both these methods of financing can be implemented under the existing legal framework, the absence of any defined regulation of warehouse operators and collateral managers means that there can be concerns for financiers about accepting the risk of non-payment by the borrower and the risk of non-performance or fraud by a warehouse operator or collateral manager.
- 1.3.3 The concept of field warehousing is not expressly recognised under Cameroonian law, but it can be implemented in reliance on existing contractual principles and land law concerning leases.
- 1.3.4 There is scope for financing by microfinance institutions (MFIs) in Cameroon which could be conducted either directly or indirectly through cooperatives. By contrast, although Cameroonian law allows

for the creation of security over future goods, the implementation of Type D financing (as defined in the typology) is unlikely to be successful at present due to a lack of legal and institutional infrastructure needed to make this viable.

## 2 Conclusions and interim recommendations

- 2.1.1 Warehouse financing in Cameroon currently takes place in reliance on a limited legal framework and minimalist regulatory regime. Although warehouse financing is utilised, primarily under Type B or Type C, the scope for expanding its use is limited by the deficiencies in the legal and regulatory environment.
- 2.1.2 The situation could be improved by introducing specific warehouse legislation. This should focus on issues such as the negotiability of warehouse receipts, the licensing and regulation of warehouse operators and collateral managers and the respective liabilities of participants in the warehouse financing structure.
- 2.1.3 While specific warehouse finance legislation would create a clearer legal framework for this method of financing, drafting and negotiating this is likely to be time consuming. In light of this, consideration could be given to implementing legislative changes on an incremental basis, with the focus first on establishing a regulatory body responsible for monitoring and sanctioning the activities of warehouse operators and collateral managers in Cameroon.
- 2.1.4 Closer scrutiny of the activities of these entities would help to reduce the risks that financiers face when dealing with such entities (such as mismanagement, non-performance, fraud, and insolvency) and it would improve confidence in the creditworthiness of warehouse financing.
- 2.1.5 Although there is legislation in place governing court proceedings (at the national level) and arbitration proceedings (at the OHADA level), resolution of disputes and enforcement of judgments and arbitral awards can be slow and costly. This has the impact of undermining the faith of those using these systems and consideration should be given to improving how these processes work. Given that legislation is already in place, the focus in the first instance should be on how changes can be brought about to improve how the courts and arbitral bodies work in practice.

- 2.1.6 The cost of registration of security documentation is also a significant barrier to certain borrowers wanting to access warehouse financing and consideration should be given to reducing this barrier or dispensing with it completely.

## Legal analysis

### 1 Overview of the legal system

Cameroon has a somewhat unique binary legal system with the majority of the country adhering to a civil law system (a consequence of French colonisation of these areas in the early 20th century) while two anglophone regions of the country adhere to a common law system (reflecting British rule of these areas during the early 20th century). Cameroonian law also has a strong influence from customary laws and practices. Cameroon is a Member State of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) and is therefore subject to the supranational laws established by the OHADA Treaty in relation to business law.

### 2 Legislation and laws relevant to warehouse receipt financing

#### 2.1 Regulation of inventory credit systems

- 2.1.1 Cameroon does not have specific legislation governing inventory credit systems. However, warehouse financing is conducted in Cameroon, relying instead on normal contractual rules to govern the relationships between the relevant parties to the financing (such as, the relationship between the borrower/depositor and the warehouse operator and the relationship between the borrower/depositor and the financier).
- 2.1.2 Although there is no specific warehouse receipt law, the provisions of the OHADA Uniform Act on Securities dated 15 December 2010 (the Securities Act) contain some provisions similar to those that may be found in specific warehouse receipts legislation.
- 2.1.3 The Securities Act provides that a borrower may grant security over goods to its financier as collateral for its borrowings. The Securities Act does not contain any restrictions on the types of entity that may grant security over goods. This means that security over goods can be

granted by a wide range of entities in Cameroon, including smallholder farmers, producer companies and cooperatives.

- 2.1.4 The secured goods may be held directly by the financier, or they may be held by a third-party warehouse operator or collateral manager as appointed by the borrower and the financier.
- 2.1.5 Reliance on the provisions of the Securities Act, which allows for financing against goods held with a third party, highlights that, even in the absence of specific warehouse receipts legislation, there is a legal framework for conducting warehouse financing in Cameroon. This financing can be structured in line with either of Type B or Type C (as defined in the typology) depending on where and with whom the secured goods are stored.
- 2.1.6 Further information on the Securities Act is provided in paragraph 4 (Security) below.

## **2.2 Compliance bodies**

Given the absence of specific legislation on warehouse financing, there are no regulatory or compliance bodies for monitoring existing warehouse financing practices.

## **2.3 Status of warehouse receipts**

- 2.3.1 Warehouse receipts may be issued either by a warehouse operator or by a collateral manager. Under Cameroonian law, the warehouse receipt serves as confirmation that the warehouse operator is storing, or the collateral manager is holding and monitoring, the goods covered by the warehouse receipt.
- 2.3.2 The warehouse receipt is not a negotiable document of title and the depositor cannot transfer title to the goods simply by transferring or endorsing the warehouse receipt to a third party. On this basis, the holder of a warehouse receipt may use the warehouse receipt as evidence to show that it has ownership over the stored goods, but the simple fact of holding possession of the warehouse receipt is not sufficient to prove ownership in itself.



- 2.3.3 There are no specific requirements under Cameroonian law as to the information that these warehouse receipts should contain. However, it is likely that any collateral management agreement will stipulate the information that a collateral manager will have to include in any warehouse receipt it issues under that collateral management agreement.
- 2.3.4 Warehouse receipts are currently issued in paper form, but there is nothing under Cameroonian law to prevent them from being issued in electronic form if required.
- 2.3.5 Where a third party has purchased goods that are subject to a warehouse receipt, that third party will in practice have to provide both the warehouse receipt and a copy of the sale and purchase agreement in order to secure the release of the goods from the warehouse. Where the secured goods have been pledged to a financier, the third-party purchaser will need to provide the warehouse receipt, the pledge form and confirmation that the financier has been repaid (either by the borrower or directly by the purchaser) in order to secure the release of the goods from the warehouse.

## **2.4 Field warehousing: legal recognition and requirements**

- 2.4.1 There is no specific legislation on field warehousing in Cameroon. However, field warehousing could be used by reliance on more generic legislation relating to leases of land. The OHADA Uniform Act on the General Commercial Law (the Commercial Act) contains provisions dealing with lease agreements. These confirm that a person may take a lease of land or premises for commercial, industrial, professional, or artisanal purposes.
- 2.4.2 On the basis of the provisions in this Act, a lease of land by a field warehousing company or warehouse operator or collateral manager or a financier from the borrower for the purposes of storing and monitoring the goods would be recognised as valid. This would allow financing to take place in line with Type B (of the listed typologies).
- 2.4.3 In the absence of any express legal requirements for field warehousing, the more measures that the lessee takes to establish its rights over the

leased land and its control over the stored goods, the stronger case it will have to show from a practical perspective that a field warehousing arrangement has been established. These measures could include creating physical boundaries around the leased area, controlling who has access to the leased area and labelling the stored goods with details of the pledge, the borrower and the financier.

### **3 Status of the relevant participants**

#### **3.1 Access to warehouse finance by farmers and farmers' organisations**

The legal status of smallholder farmers, cooperatives, or other forms of POs would not, as a matter of Cameroonian law, prevent them from using warehouse financing.

#### **3.2 Legal status of farmers and farmers' organisations**

(a) Individual farmers

Individual farmers are private individuals and they are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name. They have the power to sue and be sued in their own name. There are no restrictions on the type of contract that they can enter into (provided that these do not contravene Cameroonian law) and there are no restrictions on the type of security interests that they can grant.

(b) Cooperative societies

Cooperative societies have legal personality under the provisions of the OHADA Uniform Act on Cooperatives dated 10 December 2010 (the Cooperatives Act). They are capable of entering into legal agreements (including loan agreements, sale and purchase agreements and security agreements) in their own name and they have the power to sue and be sued in their own name. Under the Cooperatives Act, cooperatives have the power to undertake any activities that are in the best interests of its members. Further powers of a cooperative are set out in its constitutional document which is known as a *statuts*.

- (c) Formal and informal representative bodies and trade organisations

There are a number of trade organisations for farmers in Cameroon. These can have one of three legal statuses: a cooperative, a federation, or a union. One of the main representative bodies in Cameroon is the *Organisation des Producteurs de Coton du Cameroun* (referred to as OPCC).

### **3.3 Legal status of and requirements for warehouse operators and collateral managers**

3.3.1 There are limited legal requirements for warehouse operators and collateral managers in Cameroon. Articles 13 and 14 of the Commercial Act and Article 97 of the OHADA Uniform Act on Companies Law require the registration of all Cameroonian companies with the company registry in Cameroon. Similarly, Article 74 of the Cooperatives Act requires that all Cameroonian cooperatives register with the cooperative registry in Cameroon.

3.3.2 Warehouse operators in Cameroon must be authorised by the Ministry of Trade in order to act as a warehouse operator.

3.3.3 Warehouse operators and collateral managers must also have insurance in place to cover any goods they are storing and/or monitoring. This insurance should as a minimum position cover risk of theft, fire and partial or complete damage of the goods.

3.3.4 Article 121 of the Securities Act states that any pledge agreement between a financier and a borrower must provide details of the insurer that is providing cover against the risks identified in paragraph 3.3.3. As such, the financier should ensure that either the Borrower has this insurance in place or that the goods are stored with a warehouse operator or collateral manager that has this level of insurance in place.

### **3.4 Regulation of warehouse operators and collateral managers**

There are no regulatory bodies responsible for monitoring the activities of warehouse operators and collateral managers.

## 3.5 Rights of a secured creditor in an insolvency

- 3.5.1 In the event that the borrower becomes insolvent, the ranking of a secured creditor will be determined in accordance with Article 226 of the Securities Act. In descending order, the ranking of priority is as follows:
- (a) the creditors having legal expenses incurred in the process, leading to the sale of the property and to the distribution of the assets
  - (b) the creditors of the incurred expenses for the custody of the debtor's property in the interest of creditors with older debts
  - (c) the creditors of highly preferred wages
  - (d) the creditors with a general lien subject to registration or a pledge, each according to the rank of his registration/enforceability to third parties
  - (e) the creditors with a special personal property lien
  - (f) the creditors with a general lien not subject to a registration
  - (g) the unsecured creditors.
- 3.5.2 A financier that has taken a pledge over goods will therefore have fourth ranking security in the event of the borrower's insolvency provided that the pledge has been perfected (as discussed further in paragraph 4.4 (Perfection and registration of security) below). Where two or more persons have security over the same goods, the ranking of priority between those persons will depend on which security interest was perfected first (as discussed further in paragraph 4.5 (Priority/ranking of security)).
- 3.5.3 Financiers must also use caution when lending to borrowers who are in financial difficulty. Article 67 of the OHADA Uniform Act on Insolvency dated 10 April 1998 (the Insolvency Act) provides that any transactions entered into by a borrower (including undertaking further borrowing or granting security) will be considered automatically void and of no legal effect if they are entered into during the period of suspicion.

- 3.5.4 The period of suspicion starts from the date on which the borrower ceases to pay its debts as they fall due; it ends on the date that the court authorises the start of insolvency proceedings against the borrower.
- 3.5.5 The purpose of Article 67 of the Insolvency Act is to protect the rights of existing creditors and to ensure that the borrower is not able to dispose of its assets to the detriment of its creditors. However, it also means that any financier taking security during the period of suspicion runs the risk of that security being declared void by the courts under the terms of Article 67 of the Insolvency Act. The financier would then find itself holding the ranking of an unsecured creditor as set out in paragraph 4.5.1 above.
- 3.5.6 In the event of the insolvency of a third party storing the secured goods (whether a warehouse operator or a collateral manager), creditors of that third party would not have any legal right to seize the stored goods.

## **4 Security**

### **4.1 Taking security over stored commodities and warehouse receipts**

- 4.1.1 Under Article 126 of the Securities Act, it is possible to take security interests over a number of different assets including security over goods, security over receivables and security over bank accounts.
- 4.1.2 Warehouse financing in Cameroon is structured on the basis that security is provided over the goods that are being financed (although this is not always the case, particularly with Type A financing). Security is taken over goods by way of pledge. Security cannot be granted over documents representing or relating to goods such as bills of lading or warehouse receipts.
- 4.1.3 The pledge must be granted under the terms of a written pledge agreement (the pledge agreement) between the grantor of the pledge (the pledgor) and the beneficiary of the pledge (the pledgee). The pledge agreement must specify the nature of the secured goods, their quantity and the debt that the pledge is securing.

## 4.2 Creation of security over future goods

- 4.2.1 The pledgor can grant security to the pledgee over future goods that it does not yet own. The future goods may be described generically in the pledge agreement (i.e., by type or quality) and the pledge will become binding over these future goods as soon as they come into the pledgor's ownership. There is no need for the pledge agreement to be re-registered when the pledge takes effect over future goods.
- 4.2.2 The pledgor can also grant security to the pledgee over goods that are not yet in existence. For example, it may grant security over agricultural crops while they are growing in the fields. Again, these goods may be described generically (i.e., by location or by quality) and the pledge will become binding over these goods as soon as they come into existence.

## 4.3 Commingling and fungibility

- 4.3.1 A warehouse operator or collateral manager may release fungible goods that are subject to a pledge other than to the pledgor or pledgee (or a transferee of the pledgee) provided that the goods are replaced with substitute goods on a like-for-like basis. This allows the warehouse operator or collateral manager to release and replace fungible goods that would otherwise deteriorate in quality if left stored for a prolonged period of time.
- 4.3.2 Releasing goods covered by a pledge gives rise to the requirement to de-register the goods from the scope of the pledge agreement with the *Registre du Commerce et du Crédit Mobilier* (the RCCM) (known as *radiation*). Replacing goods covered by a pledge agreement gives rise to the requirement to re-register the pledge agreement with the RCCM. However, these requirements are often not complied with, either due to ignorance as to their existence of the requirement or because compliance with them is administratively burdensome and costly in the case of re-registering. The consequences of non-compliance with these requirements are discussed in the following paragraphs.
- 4.3.3 Replacing or releasing fungible goods on this basis does not affect the validity of any pledge granted over them provided that the pledging clause in the pledge agreement was drafted in a generic manner. This

would be the case, for example, if the pledging clause provides a pledge over a fixed number of bags of commodity of a certain quality or grade but without any further identification.

- 4.3.4 On the other hand, replacing or releasing fungible goods may be an issue if the pledge agreement grants the pledge over specifically identifiable goods. This would be the case, for example, if the pledging clause is drafted to cover specific goods stored with specific lot numbers or identification codes. In this situation, the financier may find itself having to enforce its pledge over the goods as against a third party which may be problematic. Issues of enforcement as against third parties are discussed further in paragraph 5.2 (Enforcement of security over commodity against third parties) below.

## **4.4 Perfection and registration of security**

- 4.4.1 There are two ways in which the pledge may be effective under Cameroonian law. The first method is to register the pledge agreement as provided for under Article 52 of the Securities Act. The pledge agreement must be registered at the RCCM and it may be registered with the RCCM in paper or electronic form.
- 4.4.2 There is no mandatory timeframe for registering the pledge agreement with the RCCM, but a delay in registration may impact on the financier's ranking of security as discussed in paragraph 4.5 (Priority/ranking of security) below.
- 4.4.3 Either of the pledgor or the pledgee may register the pledge agreement with the RCCM. In practice, the pledgee may prefer to take responsibility for this given the consequences of any delay or failure to register the pledge agreement.
- 4.4.4 Stamp duty is payable on pledges perfected by registration, and this must be paid to the relevant tax authority prior to registration of the pledge agreement with the RCCM. Stamp duty is calculated against either the loan amount or the value of the pledged goods depending on which is the higher value. In practice, the value of the pledged goods should always be higher than the loan amount they secure, and stamp duty will be calculated against this figure. The rate of stamp duty payable is variable on a case-by-case basis, and it will be advised by the

tax authority to the party seeking to register the agreement. The RCCM will refuse to register any pledge agreement where stamp duty has not been paid.

- 4.4.5 A registration fee must also be paid to the RCCM when registering the pledge agreement. Again, the fee payable will vary on a case-by-case basis, and the clerks of the RCCM will advise the relevant registration fee for each pledge agreement.
- 4.4.6 Failure to register the pledge agreement with the RCCM means that the pledge will be void as against an insolvency practitioner of the pledgor or as against other creditors of the pledgor. However, the pledge will still be effective as between the pledgor and the pledgee.
- 4.4.7 The RCCM maintains a register of all security registered with it that is publicly available. Any person wishing to search the register to see whether any security has been registered over specific goods must submit an information request to the RCCM. The RCCM then has two days from receipt of the request to deliver a certificate stating whether any security has been registered over the goods concerned.
- 4.4.8 Following registration of the pledge agreement, the RCCM will issue a document known as the *bordereau de gage de stocks* (the pledge form). This will specify details of the pledge, its registration date at the RCCM and the unique identification number assigned to it by the RCCM.
- 4.4.9 The pledge form serves as confirmation that the relevant pledge agreement has been successfully registered with the RCCM. It does not transfer ownership in the goods; it is not a document of title.
- 4.4.10 However, issuance of the pledge form is conditional on the RCCM being satisfied that there is insurance cover over the secured stocks against any risk of theft, fire, partial or complete damage. Details of the insurance cover in place should be included within the pledge agreement. Article 121 of the Securities Act states that any pledge agreement that does not indicate the name of the insurer that provides the required cover will be null and of no legal effect. However, this Article does not appear to be strictly applied in practice.



- 4.4.11 The pledge form will be issued to the pledgor who is then responsible for endorsing the pledge form to the pledgee. The endorsement confers on the pledgee the quality and rights of a secured creditor. The pledgee may in turn subsequently endorse the pledge form to a third party who will then obtain the rights of a secured creditor in relation to the pledged goods.
- 4.4.12 Endorsement should be made in writing (either on the back of the pledge form or on an attachment to the pledge form) and it should state the endorsee's name and be signed by the endorser. In this way, any person in possession of a pledge form should be able to show that they are the legitimate bearer through a chain of previous endorsements.
- 4.4.13 There is no requirement to enter into a new pledge agreement or to notify the RCCM each time the pledge form is transferred to a new third party.
- 4.4.14 The second method of ensuring that the pledge is effective is to transfer possession of the secured goods to the pledgee. The pledgee can show that it has possession of the goods in one of two ways.
- 4.4.15 Firstly, the pledgee can take actual possession of the secured goods by storing them in a warehouse or storage facility that the pledgee owns or has control over. This is referred to as having *actual possession* of the goods. This form of possession is not common as it places a burden on the pledgee to store and monitor the goods which it may not be best placed to do.
- 4.4.16 The alternative is for the pledgee to appoint a collateral manager to store and monitor the secured goods on its behalf. This is known as *constructive possession*, and it is the usual way of demonstrating that the pledgee has possession of the secured goods.
- 4.4.17 Provided that the pledgee can show that it has possession (either actual or constructive) of the secured goods, the pledge will be effective as against the pledgor, an insolvency practitioner of the pledgor or as against other creditors of the pledgor. The priority of creditors who have competing pledges over the same goods is discussed in paragraph 4.5 (Priority/ranking of security) below.
- 4.4.18 It is unclear whether stamp duty is payable in respect of pledges that are perfected by taking possession (whether actual or constructive).

Whether stamp duty is payable in respect of any given pledge agreement would need to be discussed with the relevant tax authority in Cameroon.

4.4.19 In practice, many creditors adopt the second approach when taking security over goods in Cameroon. The main reasons for this are a lack of knowledge about the registration regime and the time that it takes to successfully register security with the RCCM (which can routinely be up to 60 days).

## **4.5 Priority/ranking of security**

4.5.1 The ranking of creditors who have taken security over goods is set out in full in paragraphs 3.5.1 and 3.5.2 above.

4.5.2 Where more than one person has a pledge over the same goods, the order of priority will be determined by the order in which each pledge was perfected. Where the competing pledges have each been registered, priority will be determined by which pledge agreement was registered first with the RCCM.

4.5.3 In the event that none of the secured parties have registered their pledge agreements, priority will then be determined by which secured party has possession (either actual or constructive) of the relevant goods.

4.5.4 Where one pledge has been perfected by registration and another pledge has been perfected by taking possession, the order of priority will be determined by looking at whether possession of the goods in question was taken before the registration process was completed at the RCCM. If it were, then the possessory pledge will have priority. If registration at the RCCM was completed before possession of the secured goods was taken by the competing creditor, then the registered non-possessory pledge will have priority.

4.5.5 The scenarios set out in paragraphs 4.5.2 to 4.5.4 (inclusive) are subject in each case to the issue of whether the creditor taking the second pledge knew, or could reasonably have known, of the existence of the first pledge. If the second creditor did know, or should reasonably have known, of the existence of the first pledge, then the second pledge will rank behind the first irrespective of whether it was perfected first in time.

## 4.6 True sale versus secured lending

- 4.6.1 Repurchase agreements are not used as a method of financing in Cameroon. Although there is no legislation prohibiting these types of agreements, it is unlikely that they will be recognised as valid under Cameroonian law and they may well be recharacterised as a loan. The financier may then find itself having the status of an unsecured creditor if it had not taken security over the goods or had not registered that security.
- 4.6.2 However, a further limitation on the use of such agreements is that financial institutions do not have the power under Cameroonian law to buy and sell commodities. This means that financial institutions would not be able to enter into the types of ownership arrangement provided for under repurchase agreements.

## 5 Enforcement

### 5.1 Enforcement of security over commodity against the borrower

- 5.1.1 The times when the pledge will become enforceable by the pledgee will be set out in the pledge agreement (each an event of default) and it will include failure by the borrower to pay any sum on its due date.
- 5.1.2 If the pledgee wishes to enforce the pledge following an event of default, it must first serve a demand on the pledgor to resolve the event of default (e.g., by paying the unpaid amount). If the pledgor fails to resolve the event of default within eight days of receiving the demand, the pledgee may apply to the court to enforce its pledge over the goods.
- 5.1.3 The court will issue a writ of execution allowing the pledgee to enforce the sale of the pledged goods. The pledgee will then receive a share of the proceeds of the sale in accordance with its priority ranking as set out in paragraph 4.5.1. Obtaining a writ of execution can vary in terms of difficulty, time and cost. The main determining factors will be the complexity of the case and the efficiency of the court.

5.1.4 Alternatively, the pledgor and the pledgee may agree that, on an event of default, ownership of the goods is transferred from the pledgor to the pledgee. This means that the pledgee would not need to obtain a writ of execution from the court before selling the pledged goods. This is the most popular method of dealing with the goods following an event of default. However, the pledge of agreement must provide the pledgee with the power to sell the goods in order for this to be effective.

## **5.2 Enforcement of security over commodity against third parties**

5.2.1 If the pledgor were to sell the pledged goods to a third party, the pledgee would in theory be able to enforce its security over the goods as against the third-party purchaser. However, any third party purchaser will have a defence to the pledgee's claims if it can show that it purchased the goods in good faith.

5.2.2 In this case, the burden would be on the pledgee to show that the third-party purchaser had acted in bad faith. It should be noted that the simple fact that the third-party purchaser knew of the existence of the pledge does not mean that it acted in bad faith when purchasing the goods. Similarly, there is no requirement on a third-party purchaser to check with the RCCM as to whether there is any security over the goods it is intending to buy. This highlights the importance to the financier of having possession (actual or constructive) or appropriate control over the goods to avoid any issues with third-party purchasers.

## **5.3 Enforcement in the courts**

5.3.1 Any disputes may be submitted for resolution in the Cameroonian courts. The case will initially be heard by a court of first instance which will issue its judgment on the dispute. The parties to the dispute have the right to appeal this decision to the appeal court provided that any appeal is lodged within three months of the judgment being issued or, if later, of the judgment being notified to the parties. The court may extend the timeframe for issuing an appeal where the parties to the proceedings are located in a different area to the court. Any appeal must be brought on different grounds to those that were rejected by the previous court.

- 5.3.2 The parties to a dispute may also appeal the decision of the appeal court to the Supreme Court of Cameroon. This is the superior court and its decisions are final and non-appealable. The same three-month time frame and procedure applies to appeals from the appeal court to the supreme court.
- 5.3.3 The speed with which a dispute is resolved by the courts will vary depending on the complexity of the matter. However, in general, the court process is slow in Cameroon.
- 5.3.4 Cameroonian law does provide for a fast track procedure before the courts (known as the *procédure des référés*). However, this can only be used in limited circumstances such as in an emergency or where a preliminary judgment is required in relation to the enforcement of a judgment or a writ of execution.
- 5.3.5 Judgments under this fast track procedure are subject to the same appeal structure as set out in paragraphs 5.3.1 and 5.3.2.

## **5.4 Arbitration alternative dispute resolution mechanisms**

- 5.4.1 The OHADA Uniform Act on Arbitration dated 11 March 1999 (the Arbitration Act) expressly provides for the resolution of disputes by arbitration. The Arbitration Act applies to any arbitration proceedings in Cameroon, whether these relate to Cameroonian law or foreign law and it provides that arbitration is open to all persons with legal personality.
- 5.4.2 Arbitration is often chosen as the preferred method of dispute resolution for domestic and international commercial disputes. There are no fixed timeframes or costs for arbitration proceedings, but these will often be favourable when compared to court proceedings.
- 5.4.3 The main arbitral body for arbitration proceedings in Cameroon is the *Centre d'Arbitrage, de Groupement interpatronal du Cameroun* based in Douala. Parties may choose to submit their disputes to this arbitral body, or alternatively they can use the *Cour Commune de justice et d'arbitrage* which is the principal arbitral body for OHADA and it is based in Abidjan, Côte d'Ivoire.

## 5.5 Enforcement of foreign court judgements and arbitral awards

- 5.5.1 Foreign court judgments will only be applied in Cameroon after a Cameroonian court has issued an exequatur decision. In considering whether to issue an exequatur decision, the Cameroonian court will consider whether the foreign court judgment contravenes any matters of Cameroonian public policy. However, the Cameroonian court will not reopen the dispute or reconsider the merits of the case when doing so.
- 5.5.2 Cameroon is a treaty member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It will therefore recognise and enforce arbitral awards issued by other treaty members subject to a Cameroonian court issuing an exequatur decision. Cameroon will also recognise arbitral awards from non-treaty member countries subject to a Cameroonian court issuing an exequatur decision.
- 5.5.3 The court will issue an exequatur decision provided that the foreign arbitral decision does not contravene Cameroonian public policy. The speed with which an exequatur decision is issued will depend on the complexity of the foreign arbitral award.



# Block 3: Mozambique

## Key legal points:

- Mozambique has a written civil code which enshrines the principle of contractual freedom, allowing parties to contractually agree to any arrangement not prohibited by written law.
- There is an existing legal regime for deposit contract arrangements. This could be adapted by parties to create a commodity-based financing structure.
- Mozambican law has some shortcomings in relation to taking security, in particular the difficulty taking security over commingled goods and the lack of a register of encumbrances. There are some onerous formalities, such as the need to notarise documents.
- The court process in Mozambique is very slow and there is little evidence of widespread use of alternative dispute resolution methods.
- Draft legislation has been proposed to implement a warehouse receipt system in Mozambique. The proposals are still in the early stages and there are a number of deficiencies in the proposals as currently drafted which, if not addressed, could act as a barrier to the success of the proposed regime.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary and conclusions

Proposals have been made to introduce legislation to implement a warehouse receipt system in Mozambique. The proposals are at an early stage, but if enacted, they would provide for the regulation of warehouse operators and the issue of negotiable warehouse receipts. The regime would be regulated by the Mozambique Commodities Stock Exchange (*Bolsa de Mercadorias de Moçambique*, or BMM), established by the Mozambique Government on 4 September 2012.

In the meantime, the general principles of Mozambican law apply to warehouse financing arrangements. The existing regime relating to deposit contracts is potentially helpful, particularly as it is possible to extend protective rights in relation to a deposit arrangement to a third party. Parties to a financing may adapt both the deposit contracts regime and the pledges regime in order to establish relationships between them. For example, the owner of the goods, the depositary and the financier could establish a contract between them that



would, on the one hand, establish the deposit and, on the other, provide for the constitution of the pledge in favour of the financier.

There are legal uncertainties in relation to taking effective security over stored goods. For example, the lack of a register of encumbrances and the difficulty taking security over commingled goods. Such difficulties can be overcome, but doing so necessitates increased levels of due diligence and the taking of protective practical steps by the financier (for example, to ensure goods are kept segregated in practice).

The procedure for enforcement through the courts is particularly slow in Mozambique, which might be a concern for financiers. However, when taking security it is possible for the parties to agree to enforcement by means of a private sale, allowing a financier to foreclose without judicial intervention. This is a helpful option for informed financiers; however, there is an element of risk that this will not be done or that it will be challenged. The legal position of a pledgee would clearly be much stronger if there were a legal right to dispose of pledged goods in the pledgee's possession by way of immediate private sale.

## **2 Interim legal recommendations**

The recommendations set out below suggest changes that could be made to the legal framework in Mozambique to improve the access of smallholder farmers to commodity-based financing by eliminating or clarifying certain legal risks which might otherwise act as a barrier to a financier offering financing.

### **2.1 Recommended amendments to the proposed warehouse receipt system legislation**

- 2.1.1 The following are recommendations in respect of the proposed WRS legislation to improve the likelihood of its successful implementation:
- (a) Provide for electronic warehouse receipts and an electronic register: An electronic system can offer financiers considerable comfort, where they can see their position at the touch of a button and where the electronic system provides an accessible registry. Such systems have successfully been implemented in other countries, notably South Africa.
  - (b) Create a duty to accept deposits on a first-come-first-served basis: Private warehousing systems favour parties with larger volumes to deposit.

- (c) Ensure warehouse operators can engage in trading activities: This allows warehouse operators to manage storage capacity more effectively and potentially offer lower storage rates.
- (d) Clarify the role of BMM and how it will be financed: Effective regulation is key to the success of the regime and this requires secure funding. Funding through warehouse levies alone might not be successful if volumes are low.
- (e) Address existing legal difficulties in taking security over commingled fungible goods: The current legal position means that taking effective security over fungible goods which are commingled is not possible. This should be addressed to give financiers better legal certainty.
- (f) Provide for alternative dispute resolution process: A speedy and reliable method of dispute resolution which would allow parties to avoid a lengthy court process could be attractive to financiers. For example, recourse to a reliable guarantee or bond system if a warehouse operator fails to perform.

## **2.2 Other recommendations**

2.2.1 Assuming the proposed legislation was not successfully passed into law, the following recommendations seek to address existing areas of legal risk in Mozambique:

- (a) Create a reliable, searchable collateral register, with a legal obligation to register security: An important protection for a secured creditor is having legal certainty as to the priority of security interests. In the context of warehouse receipt financing, this could be implemented by way of a searchable electronic register for all warehouse receipts, with an obligation to note security interests over those receipts and the underlying goods.
- (b) Address the difficulty in taking security over future deliveries of goods: There is an administrative and financial burden (stamp duty) involved in reconstituting a pledge each time deliveries of goods are made. This can often prove prohibitive to establishing a financing arrangement.
- (c) Address the difficulty in taking security over commingled fungible goods: From a practical perspective, lower value crops or small volumes

are more likely to be commingled, meaning that the inability to provide effective security is a barrier to some parties accessing financing.

- (d) Alternative fast and reliable commercial dispute resolution: See paragraph 2.1.1(f) above.

## Legal analysis

### 1 Overview of the legal system

Mozambique has a civil law legal system and legislation is the primary source of law. Decisions of the courts do not have binding authority and, therefore, case law is not a primary source of law in Mozambique.

### 2 Proposed warehouse receipt financing legislation

#### 2.1 Overview of proposals

2.1.1 In Mozambique, proposals have been made to introduce legislation to implement a warehouse receipt system. The objective of the proposals is to establish a system of licensed warehouse operators who can issue negotiable warehouse receipts to depositors of agricultural goods.

2.1.2 At the time of writing, the proposed legislation is in draft form and at an early stage. Therefore, it could be several months or longer before the legislation is passed (if at all) and it could potentially be substantially redrafted before becoming law. The analysis of the proposed legislation in this report is based on the published draft available to the local legal consultants at the time of writing.

#### 2.2 Licensing of warehouse operators

2.2.1 The proposed regime would be applicable to all companies or individuals engaged in the commercial activity of operating warehouses which store agricultural commodities. The law does not contain a duty to accept deposits from the general public and so the proposed legislation would be relevant to both public and private warehousing arrangements. The proposed legislation does not define the concept of warehouse.

2.2.2 Warehouse operators would be required to obtain a licence from BMM. Licensed operators would be subject to certain obligations, including:

- (a) the obligation to use a standardised measurement and classification system for stored goods
- (b) the obligation to keep fungible goods separate from other goods
- (c) the obligation to hold the required level of insurance coverage.

2.2.3 Licensed warehouse operators would also be subject to certain requirements in respect of the physical structure and installations of the relevant warehouse. Details of the proposed requirements have not yet been published and the proposed date of publication remains unknown.

2.2.4 The draft legislation does not contain any provisions regarding the licensing fees applicable to warehouse operators.

2.2.5 The draft legislation does not expressly permit or prohibit warehouse operators to issue warehouse receipts to themselves and/or to trade in commodities themselves.

## **2.3 Regulation of the system**

BMM would act as the regulatory authority under the proposed legislation. The proposed legislation does not specify how the regulatory function would be financed. BMM's Organic Statutes (Decree n.º 36/2012 dated 17 October 2012) state that BMM is able to accept financing from a number of sources, including charging fees, applying fines and through State budget contributions.

## **2.4 Warehouse receipts**

2.4.1 Warehouse receipts issued in accordance with the requirements of the proposed regime would be treated as negotiable documents of title. The key requirements would be that:

- (a) the receipt is issued by a warehouse operator licensed to do so
- (b) the receipt is issued in the form (to be) approved by BMM.

- 2.4.2 In the event that receipts did not comply with the above-mentioned requirements, they would be non-negotiable.
- 2.4.3 A holder in due course of a duly issued warehouse receipt would obtain rights against the relevant operator in respect of the underlying goods, including the right to faithful redelivery of such goods.
- 2.4.4 The legislation does not provide for the issue of electronic warehouse receipts or the establishment of an electronic register of warehouse receipts.

## **3 Existing legislation and laws relevant to warehouse receipt financing**

### **3.1 Laws applicable to warehouse receipt financing systems and collateral management**

- 3.1.1 There is no specific regulation in Mozambique in respect of warehouse receipt financing or collateral management arrangements. Therefore, it is necessary to consider the wider legal environment and how this does, or could, support different types of warehouse and other commodity-based financing.
- 3.1.2 Mozambican law has a concept of contractual freedom, established by article 405<sup>o</sup> of the Mozambican Civil Code (the MCC). This principle allows parties to establish relationships between them which are not specifically foreseen in the law, so long as those contractual relationships are not expressly prohibited.

### **3.2 Licensing of commercial activities**

- 3.2.1 Mozambique has licensing requirements in respect of parties engaging in commercial activities in Mozambique. According to the Mozambican banking legislation, a locally incorporated financier (for example, a bank) should have a banking licence issued by the Central Bank of Mozambique (CBM) to perform financial activities. The CBM normally takes between 12 and 18 months to issue a bank licence.

- 3.2.2 A financier without a legal presence in Mozambique, but that provides offshore financing to Mozambique-based borrowers, is subject to certain Mozambican law requirements. This includes a requirement to obtain the approval of the CBM for the financing. It is quite difficult to anticipate a timeframe for this approval, but an estimated timeframe for obtaining the CBM's approval is at least two months.
- 3.2.3 Additionally, the ability of a borrower to repay an offshore loan is subject to a number of legal requirements of foreign exchange nature. In accordance with Mozambican foreign exchange control rules, the following are subject to the prior approval of the CBM: (1) the opening and operation of foreign bank accounts by a foreign exchange resident (such as a domestic borrower); (2) the funding, any disbursement and any payment to a resident or by a resident under the loan advanced through foreign bank accounts; and (3) any transfer of funds from foreign bank accounts to Mozambican bank accounts and from Mozambican bank accounts to foreign bank accounts.

### **3.3 Laws relating to the deposit of goods**

- 3.3.1 The MCC (articles 1185<sup>o</sup> onwards) establishes a regime for the deposit of goods. Under the terms of the MCC, a deposit contract is a contract under which a party delivers (deposits) goods, movable or otherwise, to another party. The latter party (the depositary) keeps and guards the goods and returns them to the depositing party on request. The depositor of the goods remains the owner of the goods during the duration of the deposit contract arrangement. A contract between a warehouse operator and the owner of goods deposited in that warehouse would fall within that regime.
- 3.3.2 The deposit made under a deposit contract may be subject to payment of a fee (thus being onerous) or not (gratuitous). When the depositing party deposits goods, the depositary (i.e., the warehouse operator) issues a deposit receipt, containing the nature of the deposited goods, their state and quantities. This deposit receipt issued by the depositary will evidence that the goods exist and that they are being guarded by a depositary.
- 3.3.3 A deposit contract and deposit receipt must be established through a document signed by the depositary and the depositor. The signatures

of the depositor and the depositary must to be recognised before a public notary. In the event that these formalities are not complied with, the deposit contract and the deposit receipt would be invalid.

3.3.4 The depositary has certain legal obligations to the depositor, including:

- (a) the obligation not to sub-deposit the goods without the depositor's consent (meaning the depositary cannot give the goods to another depositary)
- (b) the obligation to notify the depositor of any danger to the deposited goods or if a third party claims ownership of the goods
- (c) on return of the goods to the depositor, the obligation to account for any outgrowth the goods may have generated.

3.3.5 A third party may directly benefit from the deposit contract in two situations:

- (a) first, if when the deposit contract is signed, the depositing party and the depositary agree that the deposit is being made in the interest of a third party
- (b) second, if after a deposit contract is signed, the depositing party and the depositary agree that the deposit already made shall be in the interest of a third party as from that moment.

3.3.6 In each case, in order for the deposit to be considered as being in the interest of a third party, the third party has to accept it and communicate its acceptance to the depositary. Once this arrangement had been established, the third party's consent would be required for return of the goods to the depositor.

3.3.7 There is no regime for *Armazéns Gerais* (i.e., general warehousing companies such as exist in Brazil) in Mozambique, meaning there is no specific legislative regime for general storage. Legislation exists with respect to storage of specific materials, such as petroleum or explosives, but not in respect of agricultural commodities.

## 3.4 Status of warehouse receipts and deposit receipts

- 3.4.1 There is no specific legislation in Mozambique providing for warehouse receipts and there have been no examples of case law where the courts have recognised the negotiability of warehouse receipts.
- 3.4.2 Under the deposit contract regime mentioned above, there is a concept of deposit receipts (in Portuguese, the *Guias de depósito* or *Recibos de depósito*), which act as a documentary proof of the deposit of goods in a depository. Deposit receipts can only be issued in paper form; they must contain certain minimum information about the underlying goods (including the quantity and quality of such goods).
- 3.4.3 Deposit receipts are not negotiable, meaning that transferability by delivery and endorsement is not possible. Under the Mozambican principle of contractual freedom, it is possible that parties to a deposit contract arrangement could contractually provide for the transferability of deposit receipts issued under it. The parties could provide that deposit receipts are transferable, meaning that a transfer of such deposit receipt would have the effect of transferring the goods represented by it. This would require contractual agreement between the depositor and depository and rights of the transferee would be subject to any contractual limitations. This would not be negotiable as it would not give the purchaser protection from claims by third parties.

## 3.5 Compliance body

- 3.5.1 In Mozambique, there is no governmental or other regulatory body currently entrusted to supervise participants in warehouse financing arrangements. In general terms, the courts have the role of enforcing existing legislation.
- 3.5.2 BMM is potentially the body in Mozambique most suited to carrying out a regulatory role in respect of a warehouse receipt financing system. BMM would need to be granted powers to carry out any such role (see paragraph 2.3 (Regulation of the system) above in respect of the proposed role of BMM in the proposed new regime). To provide a long-term regulatory base, BMM would need to become a viable concern in its own right, which may not be easy given various factors (for example, the geography of the country, dispersion and low productivity of agriculture and limited private-sector buy-in). Alternatively, BMM would



need to be permanently supported by the government budget, which could diminish its managerial autonomy and responsiveness to stakeholder needs. These matters are given further consideration as part of the institutional due diligence in the technical country report for Mozambique.

### **3.6 Field warehousing: legal recognition and requirements**

- 3.6.1 The concept of field warehousing does not exist under Mozambican law, although in principle, there is nothing in the Mozambican legal system that prevents a field warehousing arrangement. There is no court guidance on the legal requirements for this type of financing.
- 3.6.2 However, local counsel have particular concerns that the possibility of a financier or collateral manager taking a lease or licence over a portion of the borrower's land for this purpose would likely cause confusion and might not in practice prove effective.
- 3.6.3 In this scenario, the financier would take a pledge over the goods; this could be perfected by the constructive possession of a collateral manager as the financier's agent (see paragraph 5 (Security) below for more detail on pledges and constructive possession).

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

The legal status of farmers and farmers' organisations, such as cooperatives, would not in itself act as a barrier to those persons entering into warehouse financing arrangements.

### **4.2 Legal status of farmers' organisations**

- 4.2.1 Farmers' organisations could take one of several different forms, including an NGO, an ad-hoc entity, an association, or a cooperative.
- 4.2.2 NGOs are civil associations, the regime of which is established by the MCC (articles 177.<sup>o</sup> and following).

4.2.3 According to the Cooperatives General Law of Mozambique (Law n.º 23/2009 dated September 8th), cooperatives are expressly authorized to obtain loans and perform other financial operations, as well as to perform other operations with third parties (article 9.º, par. 1, e and article 5.º, respectively).

4.2.4 Many farmers' associations operate as ad hoc entities, which have no specific regulation, but are created through ad hoc governmental authorisations.

### **4.3 Legal status of and requirements for warehouse operators and collateral managers**

Warehouse operators, collateral managers and other entities involved in the storage of agricultural products are not subject to any specific regulation in Mozambique.

## **5 Security**

### **5.1 Taking security over stored commodities and deposit receipts**

5.1.1 Under Mozambican law, the type of security that would be granted over stored goods is a pledge, locally known as *penhor* (articles 666.º and following of the MCC).

5.1.2 A pledge, under Mozambican law, is an in-rem security over any moveable goods that cannot be mortgaged that is, moveable goods not subject to (public) registration. Pledges entitle the creditor to obtain repayment of debt through the sale of pledged goods, before and with preference over, other creditors of the debtor.

5.1.3 Under Mozambican law, there is a legal concept of the constitution of a pledge over several goods or over the inventory (the trading stock). However, the MCC requires that a pledge, in general terms, must be constituted over certain specific moveable goods. Therefore, it is debatable under Mozambican law and jurisprudence whether such a pledge, having as its object the inventory as a whole (that is, without impeding over specific identifiable goods), is valid. In addition there are issues regarding the taking of pledges over goods commingled with

the goods of third parties (e.g., fungible commodities stored in a warehouse). See paragraph 5.3 (Commingling and fungibility) below.

5.1.4 Pledges over goods can be constituted either by:

- (a) delivery of the goods to the pledgee
- (b) by the issuance of a document in which the pledgor grants the availability of the goods to the pledgee.

5.1.5 A pledge over goods would not be subject to special formalities or minimum requirements (other than as required for constitution of the pledge as set out in paragraph 5.1.4) nor subject to any type of public registry. The MCC does not establish a mandatory regime regarding the formalities to create a pledge.

5.1.6 Accordingly, a pledge over goods would usually be created by a written agreement between the pledger and pledgee, plus the delivery of the relevant goods or the documents which confer title to such goods to the pledgor. Although there are no specific formalities, local lawyers would advise to enter into a written agreement fully addressing the respective rights of the parties, as this would offer the best protection to a financier.

5.1.7 Mozambican law recognizes the concept of constructive possession through delivery to an agent of the financier. The formal requirements to establish legally effective construction possession are:

- (a) the contractual terms established between the lender and the agent
- (b) the actual delivery of the goods to the agent
- (c) the written acknowledgement of the receipt by the agent.

5.1.8 Pledges granted in favour of banks do not require dispossession of the pledged goods to be fully valid and effective (Decree law n.º 29 833, dated 17 August 1939).

5.1.9 It is not possible to take a pledge over deposit receipts.

## 5.2 Creation of security of future goods

- 5.2.1 A pledge cannot be taken over future goods and so a new pledge agreement is required each time a new deposit of goods is made (if such goods are intended to be pledged).
- 5.2.2 Each new pledge agreement is subject to the same perfection requirements as described above (i.e., payment of stamp duty).

## 5.3 Commingling and fungibility

- 5.3.1 Mozambique law does not recognise the right of a warehouse operator to replace pledged fungible goods stored in a warehouse. This means that for a pledge to be valid, the pledged goods would need to remain segregated and identity-preserved while in storage.
- 5.3.2 Under a deposit contract arrangement, the replacement of fungible goods is possible (as the deposit contract is separate from the pledge agreement).

## 5.4 Formalities for the perfection of security

- 5.4.1 There are a number of formalities to take into account:
- (a) Language: Mozambican law requires that all documents to be presented before a public entity (including the CBM, the Mozambican courts and all tax authorities and official registries) must be duly translated into Portuguese and such translation shall prevail over any other version.
  - (b) Notarisation: It is recommended that pledges should be constituted through a written document signed by both parties and such signatures should be recognized by a public notary. The cost of notarisation is linked with the value of the transaction and will depend on the loan amount/secured amount and the number of pages of the deed.
  - (c) Legalisation: Mozambique is not a party to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Therefore, any document executed outside Mozambique must be notarised, translated into Portuguese and legalised at the Mozambique Embassy in the country of execution to be enforceable before the Mozambique courts.

- (d) Stamp duty: A pledge is subject to stamp duty at a rate of 0.3% of the amount secured by that pledge. Stamp duty must be paid for each pledge agreement entered into between parties. This is a significant cost for financiers.
  - (e) Registration of underlying finance document: In the event that a pledge secures a loan provided by foreign capital/currency and despite the fact that the goods the pledge relates to are located in Mozambican territory, the mere fact that the loan is granted through foreign capital implies a previous registry before the CBM. Such registry has the aim of assuring that the amounts resulting from the eventual enforcement of the pledge can be repatriated. The calculation of registration fees is based on a percentage which varies, depending on the loan amount/secured amount.
- 5.4.2 In light of the requirements above, it would be advisable that any pledge entered into should be constituted through a written document in Portuguese and signed by both parties, with such signatures recognised by a public notary.

## **5.5 Absence of a collateral registry**

- 5.5.1 There are no collateral registries in Mozambique and there is no legal way in which a financier can practically prevent double-pledging, or put other parties on notice of its security interest in goods.
- 5.5.2 As such, a financier would likely need to rely on practical methods, such as ensuring it has practical control over the goods and can prevent another party attempting to remove it.

## **5.6 Priority/ranking of security**

If goods are pledged and then become subject to a subsequent security interest, the first pledge will have priority.

## **5.7 Sale of encumbered goods by the pledgor**

- 5.7.1 If a bona fide third party purchases pledged goods from the pledgor, the pledgee would not be able to enforce his security against the buyer as new owner of those goods. This would leave the pledgee with a contractual claim against the pledgor.

5.7.2 A party can only be a bona fide purchaser if it is unaware of the existence of the security. The same rule applies to any subsequent sale of the encumbered goods.

## **5.8 Repurchase agreements and true sale**

5.8.1 There is no specific legislation regarding repurchase arrangements in Mozambique, and such arrangements are not common. There is a high possibility of such an arrangement being recharacterised as a financing arrangements. Further, such an arrangement could be seen as an attempt to avoid application of the relevant legal rules regarding the taking of security.

5.8.2 According to the MCC, the key elements that would indicate a true sale are:

- (a) transmission of the property and title over specific goods
- (b) payment of a determined amount as price for the goods in question.

Any other matters would be considered on a case-by-case basis.

5.8.3 The characterisation of a repurchase agreement as either a true sale or as a secured financing would depend on the exact wording of the repurchase agreement, but there is no way to guarantee that a repurchase agreement may not be considered as a secured financing if challenged before the courts. In other words, the court would look to the substance of the agreement and not just the form of it.

5.8.4 Sales of goods are subject to VAT (value added tax) in Mozambique. Tax issues would need to be addressed when contemplating such an arrangement.

## **6 Enforcement**

### **6.1 Enforcement of security over goods**

6.1.1 In case of an event of default (being the occurrence of an event that allows the lender to demand repayment of the loan in advance of its normal due date), the creditor will have the right to be paid for the sale of the secured goods with preference over other creditors. The creditor

must be able to prove that an event of default has occurred. What constitutes an event of default would be subject to commercial agreement between the parties at the time of negotiating the financing.

- 6.1.2 In the case of the pledges over goods, the abovementioned sale may be performed either judicially (by suit of the defaulting debtor) or, when previously agreed by the parties in the written agreement, by means of a private sale. The steps a creditor would need to take in these circumstances would depend on what is set out in the written security agreement. Normally, the first step would consist of a formal letter from the financier informing the borrower that the debt is in collection and that it must be paid to avoid the private sale of the goods. The debtor could attempt to block the private sale in court by proving that an event of default did not occur.
- 6.1.3 Usually, an irrevocable power of attorney is granted to the creditor under which the creditor is entitled, at its discretion, to sell the secured goods of behalf of the debtor to either itself or third parties and to keep the proceeds of the sale. This power of attorney must also be granted by means of a separate notary instrument. This would cost in the region of US\$ 50.
- 6.1.4 However, the security interest can also be enforced before the deadline for payment of the debt in the event there is a serious risk that the goods might deteriorate or be destroyed. In this case, it is necessary to obtain a court order prior to enforcing security (articles 675.<sup>o</sup> and 674.<sup>o</sup> of the MCC, respectively). In practice, the Mozambican courts are very slow; although there is provision for the granting of urgent preventative orders, this might still take 30 days or longer to occur.

## **6.2 Enforcement through the courts**

- 6.2.1 The enforcement of a decision through the Mozambican courts typically takes between one and two years. Mozambican judges are not penalised if they fail to meet deadlines and there is no fast-track procedure.
- 6.2.2 Before a final non-appealable decision is granted, there are two levels of appeal for the superior courts: (1) the appeal to regional courts; and (2) the supreme court.
- 6.2.3 The enforcement procedure is potentially prohibitively lengthy.

## 6.3 Realising security: privileged creditors and creditors' retention rights

- 6.3.1 There are certain creditors which are defined as privileged and consequently, those creditors are entitled to be paid before other creditors. This is relevant to both solvent and insolvent debtors.
- 6.3.2 Privileges over movables may be: (1) general (i.e., privileged credits over all the movables goods of the debtor); or (2) special (i.e., privileged credits over certain movable goods of the debtor).
- 6.3.3 Only special privileged rights are given priority in relation to the debts secured by pledges, being:
- (a) debts to the State arising from tax, including customs debts, and related with outstanding court fees
  - (b) in accordance with the Mozambican Bankruptcy Law (Law n.º 1/2013 dated July 4th), debts deriving from Labour Legislation or deriving from labour accidents.
- 6.3.4 Moreover, certain creditors are entitled to retain certain goods in their possession until debts owed to them by the owner are paid. This is called *direito de retenção* (retention right) or a lien. This is applicable to certain debts arising from deposit agreements, among other things. The retention right prevails over debts secured by pledges, even if such pledge was already in existence at the time that the retention right arises. The right of retention is not subject to registration.
- 6.3.5 In practical terms, this means that a warehouse operator could refuse to release deposited goods until outstanding warehouse fees had been paid.
- 6.3.6 This right is a retention right only and not a right to sell the goods to realise the proceeds. The warehouse operator would need a court order to sell any goods subject to a retention right.

## 6.4 Arbitration and alternative dispute resolution

- 6.4.1 Local laws support arbitration and other alternative dispute resolution methods (together, ADR). The primary domestic source of law relating



to arbitration in Mozambique is the Law on Arbitration, Conciliation and Mediation, Law n.º 11/99 dated 8 July (the Arbitral Law). This law is for the most part based on the UNCITRAL Model Law. The parties are free to determine the rules of the procedure, provided said determination is in written form. Notwithstanding, Mozambique is not an official UNCITRAL Model Law jurisdiction.

- 6.4.2 The Arbitral Law consists of a number of legal rules related to domestic and international arbitration. The concept of International Commercial Arbitration is introduced (article 52). This definition mirrors the definition in the UNCITRAL Model Law. An arbitration is of an international nature when it involves international trade interests and in particular: (1) when the parties have, at the time they conclude their agreement, businesses domiciled in different countries; or (2) either the place of arbitration or any place where a substantial part of the obligations resulting from the commercial relationship is to be performed or the place with which the subject-matter of the dispute is deemed to be most closely connected is outside the place in which the parties have their place of business; or (3) the parties have expressly stipulated that the subject-matter of the arbitration agreement has connections with more than one country.
- 6.4.3 The general provisions of the Arbitral Law apply to international commercial arbitration, save where there is a special provision in the Arbitral Law. In particular, in relation to international commercial arbitration, the Arbitral Law provides that the tribunal will rule on the dispute in accordance with the substantive law chosen by the parties (excluding the conflict of laws rules) (article 54).
- 6.4.4 The concepts of mediation and conciliation exist in Mozambique, but they are not widespread.
- 6.4.5 Parties to litigation and arbitration are not required to consider or submit to ADR before or during proceedings. Articles 60-66 of the Arbitral Law provide for an express framework for the resolution of disputes through mediation and/or conciliation, but this relies on the mutual agreement of the parties to attempt these procedures before or during litigation or arbitration. Therefore, it would be advisable for a financier to ensure that an arbitration provisions is included in all contractual documentation.

- 6.4.6 Confidentiality is preserved under the Arbitral Law such that evidence adduced in mediation or conciliation cannot later be admitted in evidence before a court or arbitral tribunal. Any written settlement reached pursuant to mediation or conciliation has the force of an arbitral award pursuant to the Arbitral Law.
- 6.4.7 It is difficult to comment on the uptake of ADR, since Arbitration and ADR decisions have not been published regularly in Mozambique. However, Mozambique has one arbitration institute, the Mozambique Arbitration Centre (CACM), and there are no private arbitration bodies. Nonetheless, the law leaves open the possibility of creating conflict and mediation centres or private enterprises, although other than CACM, none have been established to date.

## **6.5 Enforcement of overseas judgments or arbitral awards**

- 6.5.1 As a rule, the foreign courts judgments do not have legal weight in Mozambique until they are confirmed by the local judicial system. This is through a judicial procedure submitted to the Supreme Court to confirm and revise the foreign judgment.
- 6.5.2 The foreign arbitral awards are not enforced automatically, and they may require a judicial procedure to review them and confirm them by the Mozambican courts, unless a treaty has been signed between Mozambique and the other State. Although Mozambique is a party to the New York Convention (1958), at the time of signature Mozambique reserved the right to apply the New York Convention on the basis of reciprocity.



# Block 3: Uganda

## Key legal points:

- Uganda introduced warehouse receipt system legislation in 2006, establishing a system of licensing and regulation for warehouse operators and providing for negotiable warehouse receipts.
- Ugandan law recognises constructive possession and the ability of financiers to take security over stored goods under the control of a collateral manager.
- Field warehousing is recognised in Uganda and purported to be within the ambit of the WRS legislative regime, however it may occur on an unregulated basis in practice.
- Key legal barriers to the success of warehouse financing include: (1) legal uncertainties between the operation of WRS legislation and law relating to taking security; (2) the lack of widespread application of the eWRS system; and (3) stamp duty costs applicable to security documents.

## Executive summary, conclusions and interim recommendations

### 1 Executive summary and conclusions

Uganda introduced warehouse receipt system legislation in 2006. The legislation provides for the licensing and regulation of warehouse operators (termed warehouse keepers under the legislation). The legislation also sets out the rules applying to warehouse receipts (with a distinction between negotiable and non-negotiable receipts), including the requirements for negotiation, the rights of holders in due course and the exceptions to those rights.

The existence of WRS-specific legislation is helpful; it provides parties engaged in the financing of stored commodity with better legal certainty when dealing with warehouse receipts. Additionally, warehouse keepers are subject to certain requirements which offer protection to those depositing goods or financing stored goods. For example, warehouse keepers are required to file a financial undertaking with the regulating authority and hold insurance in respect of their operations. The regulating authority has some step-in rights to take control of the operations of failing warehouses. These types of measures should give financiers a degree of confidence, although this largely depends on how well they work in practice.

However, there are still some areas of potential concern for financiers. For example, the legislation seeks to address all types of warehousing in relation to agricultural commodities, including field warehousing. However, in practice, the legislation is only applied to a limited number of public warehouses. Other forms of warehousing, such as private warehousing, would appear to be taking place on the basis of existing legal principles outside the legislative framework. On the legal side, for example, the legislation could address in the licensing criteria the elements required to create a field warehouse where valid security could be taken over the goods stored. This would give financiers comfort that a licensed warehouse was suitable for this type of financing arrangement.

The legislation does not expressly address matters of taking security over warehouse receipts and the goods they represent. This leads to some inconsistencies. For example, the negotiation of a warehouse receipt must be notified to the relevant regulatory body. However, there is a separate regime for registering security, which means that a financier would need to do additional due diligence to establish whether a warehouse receipt was subject to security. Moreover, not all collateral registries are performing properly and there do not exist effective mechanisms to prevent fraud or double-pledging.

Additionally, to enforce security by way of sale without requiring a court order requires the parties to have included the right to private sale in the underlying security document. Although it is true that an informed financier can seek to ensure that it does this, there is an element of risk that this will not be done or that it will be challenged. In the case of warehouse receipts, the legal position of the financier could be improved by including an express right to dispose of a warehouse receipt (and the goods it represents) by way of immediate private sale.

## **2 Interim recommendations**

The recommendations set out below suggest changes that could be made to the legal framework in Uganda to improve the access of smallholder farmers to commodity-based financing by eliminating or clarifying certain legal risks which might otherwise act as a barrier to a financier offering financing.

- (a) Reconcile the WRS regime with existing laws relating to taking security: In particular, it would be useful to implement a simple process for the electronic registration and recording of security interests and other third-party interests over warehouse receipts, allowing financiers to confirm the existence of and interests over such receipts in one place.

Ensuring that only registered security interests were enforceable would also give effective protection against fraud and double-pledging.

- (b) Provide a legal right for a financier to sell pledged goods by way of immediate private sale: This would give financiers comfort that their security interests could be quickly realised, particularly in respect of commodities that can be sold on the commodity exchange.

## Legal analysis

### 1 Overview of the legal system

Uganda's legal system is based on English common law and customary law. Uganda has a written Constitution, which is the supreme law in Uganda and which supersedes any common law or custom that is in conflict with it. Uganda also has a body of written statutory law that supersedes any common law or custom.

### 2 Overview of existing warehouse financing initiatives

#### 2.1 Public warehousing

2.1.1 In Uganda, public warehousing is governed by the Warehouse Receipt System Act 2006 (the Act) and the Warehouse Receipt System Regulations 2007 (the Regulations). The Act and the Regulations provide for the licensing, regulation and bonding of warehouse keepers and the issue of warehouse receipts. The Act also provided for the establishment of the Uganda Warehouse Receipt System Authority (the Authority) to perform the functions of licensing and regulating warehouse keepers.

2.1.2 The Act requires that any person who operates a warehouse (as defined in the Act) must hold a valid licence issued by the Authority. The Act defines warehouse to include field warehouses, meaning a building leased or licensed by a person for the purpose of operating a warehouse and issuing warehouse receipts in respect of goods owned by the owner of the premises or third persons. The Regulations further provide for the licensing of public and private warehouses (the latter including field warehouses).

2.1.3 In practice, institutional due diligence suggests that the Ugandan Government and the Authority is currently only applying the Act to public warehousing. Therefore, the relevant type of financing in this scenario is that of Type C of the typology, financing of commodities deposited in commercial warehouses by lending against warehouse receipts. However, it must be noted that the Act prohibits any person from operating a warehouse without a valid licence and this includes field warehouses (as indicated above). In practice, as stipulated by the Uganda Commodities Warehouse Licensing Criteria, where a warehouse keeper offers warehousing and related services directly to the public or specific parties, the Authority considers the same to be acting as warehouse keeper.

## **2.2 Private warehousing through collateral management arrangements including field warehousing**

2.2.1 Despite the establishment of the regulated system under the authority of Uganda Commodity Exchange or UCE (acting as the Authority on an interim basis), institutional due diligence suggest that the main form of warehouse receipting carried out in Uganda occurs under private collateral management agreements on an unregulated basis. In these circumstances, collateral managers are relying on the pre-existing largely common law legal framework.

2.2.2 In this case, typology Type B is relevant, being financing of commodity stored in a warehouse under the custody of a collateral manager. The warehouse may be owned by the borrower but leased (in whole or in part) to the collateral manager. Such financing would be secured by a security interest over the commodity (with the collateral manager acting as custodial agent of the financier).

## **2.3 Focus of the legal analysis**

The legal analysis focuses on the legal framework in relation to financing Types B and C as described above and, in particular, the legal issues surrounding the Act and the Regulations.

## **3 Legislation and laws relevant to warehouse receipt financing**

### **3.1 Laws applicable to warehouse receipt financing systems**

As set out above, Uganda has introduced legislation to implement a warehouse receipt system.

### **3.2 Licensing of warehouse keepers and collateral managers**

3.2.1 The Act requires a warehouse keeper to be licensed by the Authority in order to carry out the activity of warehousing. In practice a collateral manager might be treated as warehouse keeper for licensing purposes if that collateral manager operates the warehouse.

3.2.2 The criteria for licensing is set out in published licensing conditions (the Conditions).<sup>3</sup> The licensing conditions also set out the requirements for a licensed warehouse keeper to follow when operating the licensed warehouse, including the acceptance, discharge and management of stored goods.

3.2.3 The following are some of the key requirements that must be complied with in order to be a licensed warehouse keeper in Uganda:

- (a) The warehouse must be inspected to determine whether it is suitable for the storage of the particular goods for which the licence will apply. The warehouse keeper also has certain maintenance duties.
- (b) The warehouse keeper must guarantee full out-turn of stored commodity as evidence by a warehouse receipt.
- (c) The warehouse keeper must file with the Authority a bond of not less than UGX 20,000,000 (approximately € 5,800) in a form approved by the Authority, in respect of the warehouse keeper's performance of its obligations as warehouse keeper.

3 The conditions were until recently shown at [http://www.uce.co.ug/page.php?tb=wh\\_become\\_wh\\_keeper](http://www.uce.co.ug/page.php?tb=wh_become_wh_keeper). However, the last time the authors checked this information was no longer accessible.



- (d) The warehouse keeper must comply with the insurance requirements in the licensing conditions, including the requirement to insure stock against fire, theft and loss due to other perils described in the Act and to hold professional indemnity insurance. Each insurance policy must note the interest of the Authority in that policy.
- (e) The warehouse keeper must pay the licence fee prescribed by the Authority.

### **3.3 Warehouse keeper's obligations and rights**

3.3.1 A warehouse keeper has certain legal obligations, as prescribed by the Act, including:

- (a) the obligation to deliver the goods to a person entitled under the warehouse receipt who complies with the Act
- (b) a duty to take care of the goods (meaning that the warehouse keeper is liable for damages for loss caused by its failure to exercise its duty of care)
- (c) unless otherwise provided in the relevant warehouse receipt, a duty to keep separate the goods covered by each receipt so as to permit, at all times, identification and delivery of those goods or, where packing, processing, substitution, or other transformation is authorised by the bailor, the transformed products of those goods.

3.3.2 The Act permits commingling of different lots of fungible goods (Section 48 of the Act). Commingled fungible goods are owned in common by the persons entitled to them and the warehouse keeper is severally liable to each owner for that owner's share. If a warehouse keeper over-issues receipts in respect of a mass of fungible goods, the holders of such receipts will have a claim against the warehouse keeper.

3.3.3 The holder of a warehouse receipt can claim compensation against a warehouse keeper where:

- (a) the warehouse receipt holder is a party to or a purchaser for value in good faith of a warehouse receipt who is relying on the description of the good in such receipt, and suffers damages due to mis-description of the goods or non- receipt

- (b) the warehouse keeper causes the receipt holder to suffer damages due to the warehouse keeper's over issue or failure to identify a duplicate document
- (c) the warehouse keeper issues a receipt for goods not received, a receipt containing false statement or a duplicate receipt not duly marked
- (d) the warehouse keeper issues a receipt not stating fact of warehouse keeper's ownership of goods
- (e) a warehouse receipt is issued without a valid licence.

3.3.4 If a warehouse receipt was lost, the holder would need to either obtain a court order or seek issue of a substitute receipt.

3.3.5 The Act provides for certain exceptions to the obligation to deliver the goods to the warehouse receipt holder. This means that, in some circumstances, the warehouse receipt holder cannot be certain that it will receive the full amount of the goods described in the receipt. For example, where as a result of a quality or condition of the goods (of which the warehouse keeper had no notice at the time of deposit), the goods are a hazard to other property or to the warehouse or to person.

3.3.6 Under the Act, a warehouse keeper has a lien against the bailor (depositor) on the goods covered by a warehouse receipt or on the proceeds of those goods in his or her possession for charges for storage, packing, processing or transportation, insurance, labour, or other charges present or future in relation to the goods and for expenses necessary for preservation of the goods or reasonably incurred in their sale according to law. Where a warehouse receipt is duly negotiated, the warehouse keeper's lien is limited to the charges specified on the receipt, giving a holder in due course some certainty. However, if no charges are specified, the warehouse keeper may still claim a reasonable charge for storage of the goods covered by the receipt.

3.3.7 In specified circumstances, the warehouse keeper may seek to satisfy his or her lien from the proceeds of a sale of the goods in accordance with the Act, but he/she must hold the balance for delivery on the demand of the receipt holder or other person to whom he/she would have been bound to deliver the goods. The warehouse keeper would

need to notify all persons with a known claim on the goods before enforcing the right to sell the goods.

### **3.4 Insolvency of a licensed warehouse keeper**

- 3.4.1 If the Authority becomes aware that a warehouse has failed or will in all probability fail, the Authority may give notice to the licensed warehouse keeper to cease operations and it may revoke the warehouse keeper's licence.
- 3.4.2 The Authority may petition the court for an ex parte order, authorising the Authority to seize and take title possession, as trustee, of any goods and goods-related assets in the warehouse or under the warehouse keeper's control where it has evidence that a warehouse keeper is insolvent or is unable to satisfy the claims of all holders as they become due, or if the warehouse keeper does not have in his or her inventory sufficient goods to cover the outstanding warehouse receipts.

### **3.5 Collateral management arrangements**

- 3.5.1 A warehouse keeper is a person licensed under the Act to engage in the business of storing goods for hire and includes a person who operates a warehouse. In practice, where the owner of a warehouse engages a collateral manager to operate the warehouse, and that collateral manager guarantees the integrity and quality of the stock, then the Authority considers the collateral manager to be the warehouse keeper. Upon issuing a warehouse keeper's licence, the Authority will deal with this company and hold it solely responsible for the correct operation of the warehouse according to the licensing conditions.
- 3.5.2 Ugandan law does not expressly provide for or recognise a system where warehouse receipts are issued under collateral management agreements, which serve as confirmation that the collateral manager is holding goods under the terms of the collateral management agreement (and against which a financier might finance). However, there is nothing under local law that would prevent such a system.
- 3.5.3 In practice, upon execution of a collateral management agreement between parties, warehouse receipts are indeed issued against such

agreements and the collateral manager under the agreement holds and manages the goods on behalf of the financier under the terms of the collateral management agreement.

### **3.6 Field warehousing: legal recognition and requirements**

- 3.6.1 The concept of field warehousing is recognised under Ugandan law and it is common in practice. Warehouse receipts issued by field warehouses are recognised and regulated by the Act. As previously stated, the institutional due diligence suggests that much of this type of financing actually happens on an unregulated basis. This is explored further in the technical country report for Uganda.
- 3.6.2 There are no specific legal requirements for a field warehousing arrangement as between the borrower and the financier; however, the law recognises that a financier can create a valid and enforceable security interest in the goods that are subject of a warehouse receipt.
- 3.6.3 In practice, goods remain on the borrower's premises, but they are managed and controlled by a collateral manager acting on the instructions of the financier as pledge holder. The collateral manager would be responsible for controlling entry to and from the premises and he would sign a sublease agreement with the owner of the premises. The courts have not given guidance on what further steps should be taken by a financier or collateral manager to ensure that control is properly established.
- 3.6.4 The law provides that a depositor of goods must disclose any security interest in those goods. If a depositor does not disclose the security interest and obtains a negotiable receipt in respect of the goods, which is later negotiated, such depositor commits an offence and is upon conviction liable to a fine not exceeding UGX 2,400,000 (approximately € 700) and/or to imprisonment for a period not exceeding five years (Section 63 of the Act).

### **3.7 Compliance body**

- 3.7.1 The Act provides for the establishment of the Authority as the body responsible for ensuring compliance with the Act. However, the

functions of the Authority are currently carried out by the UCE, as the Authority is being set up.

3.7.2 The Regulations stipulate that the UCE will operate in this role for a period of 60 months from the date of commencement of the Act. However, since the Act commenced in 2007, this period expired in 2012, but UCE is still acting as the Authority. It is not clear for how long this will continue.

3.7.3 The Act sets out the powers of the Authority. These are set out in Section 5 of the Act and broadly include the powers to:

- (a) license warehouse keepers in accordance with the Act, including the issuance, suspension, and revocation of licences
- (b) inspect warehouses, including assessing suitability for storage and examining books and records
- (c) close premises operated by unlicensed warehouse keepers
- (d) prescribe the duties of licensed warehouse keepers and provide guidelines and standard for storage of goods
- (e) collect fees.

3.7.4 It can be noted from the above, that the functions of the Authority are multi-faceted. The Authority has a role in both enforcing the provisions of the Act and in setting its own standards for warehouses and warehouse keepers.

3.7.5 The national body that could ensure uniform compliance with the relevant legislation is the UCE. However, it does not yet have the requisite market reach that brings influence on a national level. The UCE works hand in hand with the Uganda Grain Council and the Uganda National Bureau of Standards (UNBS). It is normal international practice for standards authorities to delegate enforcement to other parties that are in closer contact with the industry concerned.

3.7.6 On a regional level, the same issues that are relevant to Uganda on a local level are of concern across the region. Accordingly, a regional

body to monitor this nascent sector is still a way off. The East African Grain Council and the East African Commodities Exchange play a minimal role and the latter is still a very young entity.

### **3.8 Status of warehouse receipts**

- 3.8.1 The Act provides for negotiable and non-negotiable warehouse receipts. Under Ugandan law, warehouse receipts are issued in both paper and electronic form, and local law supports the issue of electronic documents of title.
- 3.8.2 Negotiable warehouse receipts are documents of title and they provide the holder with constructive possession of the goods covered in the receipt. Although described as negotiable (usually meaning transferable by delivery and endorsement alone), the Act specifies that a warehouse receipt will only be considered as duly negotiated (Section 52):
- (a) once it is endorsed and delivered to the relevant person and the negotiation of the warehouse receipt is registered with the Authority
  - (b) if the person who purchases the receipt does so in good faith without notice of any defect in it or claim to it on the part of any person and for value.
- 3.8.3 A warehouse receipt also constitutes prima facie evidence of the holder's claim to the goods represented on it. Therefore, warehouse receipts provide good faith buyers with effective and immediate protection against third-party claims over the commodities they represent. However, this has not been tested in practice.
- 3.8.4 The Act (Section 40) provides that a negotiable warehouse receipt must be issued by a person designated by the Authority and in the form prescribed in the Third Schedule to the Act as supplied by the Authority. A non-negotiable receipt need not be in any particular form, but it must contain the terms set out in Section 40 of the Act, including details of the warehouse keeper and the goods.
- 3.8.5 In practice, it is common for non-negotiable warehouse receipts to be issued under conventional collateral management agreements.

## 3.9 Electronic warehouse receipt system

- 3.9.1 When the Authority established the electronic warehouse receipts system in 2007/08, the creation, transfer and cancellation of eWRS was notified to the electronic warehouse receipt system server automatically. The Authority's administrator has access to this information.
- 3.9.2 The licensing conditions refer to the electronic warehouse receipt system. However, local counsel have suggested that this system does not have wide coverage.

## 3.10 Transfer and negotiation of warehouse receipts

- 3.10.1 The Act provides for the rights obtained by due negotiation of a warehouse receipt (Section 53 of the Act). The key rights are: (1) title to the warehouse receipt and the underlying goods (including transformed goods); and (2) the right to delivery of goods from the warehouse keeper free from defence or claim (except arising under the terms of the warehouse receipt, storage agreement, or under the Act). A holder of a duly negotiated warehouse receipt (i.e., a good faith purchaser) will obtain these rights even if a previous holder of the warehouse receipt was deprived of possession of the warehouse receipt by misrepresentation, fraud, mistake duress, loss, theft, or conversion, or even though a previous sale or other transfer of the goods or where warehouse receipt has been made to a third person (Section 53(2)(b) of the Act).
- 3.10.2 Endorsement of a non-negotiable warehouse receipt does not make it negotiable and it does not add to the transferee's rights beyond what would otherwise be obtained as a transferee of a non-negotiable instrument. The title and rights acquired from the transfer of a non-negotiable receipt would be limited to the title and rights the transferor had the right to convey.
- 3.10.3 The Act provides that the endorsement of a warehouse receipt does not make the endorser liable for any default by the warehouse keeper or by previous endorser (Section 56(1)). The Act provides that the transferor of a warehouse receipt gives certain warranties to the immediate transferee, including a warranty that the receipt is genuine and the transferor has no knowledge on any fact which would impair its validity or worth (Section 56(3)).

3.10.4 In the case of conflicting claims over goods covered by a warehouse receipt, the warehouse keeper may delay delivery of the goods while it ascertains the validity of the claims or brings an action to determine whose claim is valid (Section 57 of the Act).

## **4 Status of the relevant participants**

### **4.1 Access to warehouse finance by farmers and farmers' organisations**

The legal status of smallholder farmers or farmer organisations does not in itself prevent access to financing. However, most financiers are wary of dealing with individual farmers since they usually have little or no collateral. Financiers are more willing to deal with cooperative societies.

### **4.2 Legal status of farmers' organisations**

4.2.1 According to the records of the Ministry of Trade and Cooperatives, there are 9967 permanent registered cooperative societies in Uganda and 3212 Savings and Credit Cooperatives (SACCOs). These entities empower and assist the small scale farmers in acquiring access to credit and other financing options such as warehouse financing.

4.2.2 Cooperative societies are registered under the Cooperative Societies Act (Cap 112) as body corporates with perpetual succession able to hold property, enter into contracts, institute and defend suits and other legal proceedings in their own name. Cooperative societies may be registered with or without limited liability.

### **4.3 Repurchase agreements: relative status of owners compared to secured creditors**

In theory, a repurchase agreement would give the financier title to the goods and thereby grant him greater protection under Ugandan law. However, it is not an option for financial institutions in Uganda as they are prohibited from engaging directly or indirectly in trade, commerce, industry, or agriculture, except in the course of realisation of security in which case such interests must be disposed of at the earliest reasonable opportunity.



## 5 Security

### 5.1 Taking security over stored commodities and warehouse receipts

5.1.1 A financier can take security over goods stored in a warehouse in Uganda and/or over warehouse receipts representing those goods. The security may be in form of a letter of pledge or a fixed or floating charge.

5.1.2 The following types of security are relevant:

(a) Letter of pledge: A pledge over goods and/or over warehouse receipts representing those goods would be created by way of a written document.

The minimum requirements (terms) for a legally effective pledge agreement are: (1) particulars of the security; (2) fees required and who bears them; (3) interest and repayment terms; (4) instances when goods are to be released; and (5) where applicable, responsibilities of the collateral manager (stipulated in a tripartite agreement between the pledger, pledgee and collateral manager). It is not necessary to take a new pledge for each new delivery of goods to a warehouse.

The pledge is perfected by transfer of possession to the pledgee. A possessory pledge can be achieved through constructive possession by an agent of the pledgee, with contractual terms agreed between the parties. The pledgee's agent (i.e., the collateral manager) would need to have effective custody and control over the premises where the pledged goods were stored and also have professional indemnity insurance.

(b) Fixed or floating charge: This would be documented in the form of a debenture. It would be usual practice, however, to take a pledge in the context of commodity financing. This is because the pledge pays a nominal stamp duty only, while a debenture pays stamp duty of 0.5% of the facility being extended.

### 5.2 Creation of security of future goods

Security can be granted over future goods, and it will become effective as soon as the goods are stored in the warehouse.

## 5.3 Commingling and fungibility

- 5.3.1 Section 48 of the Act provides that, unless the warehouse receipt otherwise provides, a warehouse keeper must keep separate the goods covered by each receipt so as to permit, at all times, identification and delivery of those goods or, where packing, processing, substitution, or other transformation is authorised by the bailor, the transformed products of those goods; except that different lots of fungible goods may be commingled.
- 5.3.2 It is possible to take an effective pledge and/or charge over goods that have been commingled in this way. This is because the goods are weighed and graded before they are commingled, which ascertains their quality and quantity.

## 5.4 Perfection and registration of security

- 5.4.1 Stamp duty must be paid on security documents in Uganda to render them admissible as evidence in the courts of law of Uganda. A debenture attracts duty at the rate of 0.5% of the amount secured, whereas a pledge attracts duty at the nominal rate of UGX 5000 (approximately € 1.5).
- 5.4.2 Registration of a pledge over goods is not required, but it is recommended. A debenture/charge must be registered within 42 days of creation. The fee for registration of a charge in the form of a debenture is the Uganda Shilling equivalent of € 16.
- 5.4.3 The Act provides that any security taken over a warehouse receipt must be notified to the secretary of the Authority within 14 days and entered as such against the receipt. Notice is given by a letter to the registry forwarding a copy of the security document.

## 5.5 Priority/ranking of security

- 5.5.1 Under Ugandan law, unless otherwise provided under an intercreditor agreement, security is ranked in the order of creation and perfection. Secured creditors are ranked before all other creditors (except for those creditors entitled to priority by law - see paragraph 6.3 (Realising security: creditors with priority over secured creditors) below).

5.5.2 There are collateral registries in Uganda. These are the companies registry, the registry of documents and the registration by the Authority.

5.5.3 Aside from the registry of the Authority, which is yet to be fully functional, the registries do not provide effective mechanisms to prevent fraud or double-pledging. The companies registry, which registers the debentures and assignments, is fairly reliable, and it may provide accurate and up-to-date information in a timely fashion, but this is not always the case. The registry of documents is not effective; it will not provide accurate information unless one has information as to when the agreement searched for was registered.

## **5.6 Sale of encumbered goods by the borrower**

5.6.1 Where a secured creditor has a registered security interest over goods, the secured creditor has the right to enforce the security against a good faith purchaser for value and against a subsequent pledgee. However, this protection is not afforded to a creditor whose security was not registered.

5.6.2 Where a pledge is not registered, but the purchaser has knowledge of the pledge, the security will continue to be effective against the goods.

## **5.7 Sale of goods by the warehouse keeper**

Section 54(3) of the Act specifies that a buyer in the ordinary course of business of fungible goods sold and delivered by a warehouse keeper who is also in the business of buying and selling such goods, takes free of any claim under a warehouse receipt even though it has been duly negotiated. This means that in this scenario, the rights of a financier holding a warehouse receipt against the underlying may be defeated and the financier would have to seek contractual damages from the warehouse keeper.

# **6 Enforcement**

## **6.1 Enforcement of security over commodity**

6.1.1 The law is silent on the procedure for enforcement of security and therefore such a procedure is usually agreed upon by the parties under the agreement creating the security.

6.1.2 According to Act (Section 51), where the instrument creating the security gives the financier a power of sale, enforcement by sale must be by:

- (a) public auction following a 14-day advert of the auctioneers notice to the holder
- (b) sale on the Uganda Commodities Exchange
- (c) private treaty if expressly authorised in the instrument.

6.1.3 Under Ugandan law, unless an agreement between the parties provides otherwise, the financier must obtain a court order prior to enforcing security.

## **6.2 Enforcement through the courts**

On average, it takes between four and 10 weeks to enforce a decision through the local courts. There is no fast track procedure, but a lender may appoint highly skilled court bailiffs to execute the decree on his/her behalf in a timely manner.

## **6.3 Realising security: creditors with priority over secured creditors**

The following debts must be settled before the debts of secured creditors:

- (a) employees wages and any amounts due under the Ugandan Worker's Compensation Act
- (b) taxes due to the Uganda Revenue Authority one year prior to commencement of insolvency
- (c) any social security benefits due to the Ugandan National Social Security Fund.

## 6.4 Arbitration and alternative dispute resolution

Ugandan law supports arbitration and other alternative dispute resolution mechanisms under the Arbitration and Conciliation Act, Cap 4 which applies to both domestic and international arbitrations. In addition, there is a drive in the courts currently to first refer all matters to mediation before trial. Ugandan law provides that the court shall refer every civil action for mediation before proceeding for trial. Both arbitration and mediation are used in practice.

## 6.5 Enforcement of overseas judgments or arbitral awards

6.5.1 Foreign superior court judgments and foreign arbitral awards can be enforced in the local courts. The Reciprocal Enforcement of Judgments Act, Cap 21 of Uganda provides for the enforcement of judgments by superior courts of the United Kingdom and other Commonwealth countries and the Republic of Ireland. According to this law, where a judgment has been obtained in a superior court in the United Kingdom or the Republic of Ireland, the judgment creditor may apply to the High Court of Uganda, within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court and on any such application, the court may order the judgment to be registered accordingly. Upon registration such judgment shall be enforceable as if it was a judgment entered by the registering court.

6.5.2 For countries not in the Commonwealth, the Foreign Judgments (Reciprocal Enforcement) Act, Cap 9 was enacted to make provision for the enforcement of judgments entered by superior courts of any foreign country. According to this law, the minister responsible for justice in Uganda may make an order for enforcement of judgments of superior courts of a foreign country if he/she is satisfied that substantial reciprocity of treatment will be assured in respect of enforcement in that foreign country of judgments given in the superior courts of Uganda.

6.5.3 It is further provided under the Foreign Judgments (Reciprocal Enforcement) Act, Cap 9 that where a judgment has been obtained in a superior court of a foreign country to which this law applies, the judgment creditor may apply to the High Court of Uganda, within six years after the date of the judgment; and on any such application, the

court may order the judgment to be registered accordingly. Upon registration such judgment shall be enforceable as if it were a judgment entered by the registering court.

6.5.4 Uganda is a contracting State to the New York Convention (1958), and it will enforce arbitral awards granted in other contracting States.





# SECTION C:

## Annexes







# Annex 1: Section 3.2 of the terms of reference

## **3.2 Review of Government policy and applicable laws and regulations in relation to warehouse receipt financing**

In each country, the consultant will examine the policy measures which might affect the development of warehouse receipt financing and assess whether the environment is an enabling one or not.

In addition, the consultant will review, among others:

- Relevant regulations in force (cooperatives, warrantage, third-detention, security, standards of agricultural products, etc.)
- The status of smallholder farmers and farmer organisations (« cooperatives or other forms of producer organisations »)
- The status of warehouse operators and other entities involved in storage of agricultural products (potential collateral managers)
- Financial solidarity mechanisms in place between producers within cooperatives (or other forms of producer organisations) or between warehouse operators, such as mutual guarantee systems
- Contracts (including collateral management agreements) between stakeholders involved in warehouse receipt financing or repurchase agreements
- Warehouse receipts or warrants, promissory notes, collaterals, bill of exchanges, or any other form of documents related to stored agricultural products which can be traded, endorsed, or discounted
- The possibility of financiers' taking a security interest in an existing or future agricultural production and conditions underlying the creation of such a security interest

- Record and registration of a security interest and registries
- Conditions for the enforcement of a security interest created in favour of a financial institution by means of a warrant receipt related to agricultural products stored in a warehouse. More specifically, the consultant will examine the possibility for a financial institution to enforce such security interest without a court ruling
- Insurances of stored commodities and/or of loans in the event of the borrower's death
- Support programmes and approaches introduced to secure warehouse receipt financing and financing based on repurchase agreements (guarantee funds, refinancing, financing infrastructure, strengthening the capacity of operators, etc.).

Consultants are invited to add to this list any other matter they might consider relevant for the purpose of the review. In countries which are members of the Organisation for the Harmonisation of Business Law in Africa (OHADA) relevant provisions of the OHADA Uniform Act(s) will also need to be taken into account for this review.

# Annex 2: Typology of financing methods - legal framework

With reference to the Terms of Reference, the authors have set out below the types of financing which form the focus of the legal and institutional analysis (the typology).

Typology of financing types
<b>Type A</b> Community-based inventory credit systems for small farmers.
<b>Type B</b> Private warehouses. Financing against commodities stored in a private warehouse under the control and responsibility of a collateral manager, or subject to monitoring by a stock monitor.
<b>Type C</b> Public warehouses. Financing against commodities stored in a public warehouse.
<b>Type D</b> Lending against the security of current or future production.

The financing methods described in the typology utilise different legal frameworks. This is explored below.

## 1 Type A: Community-based inventory credit systems for small farmers

- 1.1 In this case, a producer group or organisation representing the producers carries out the collateral management function itself in conjunction with the financier (usually a micro-finance institution, or MFI). This type of financing allows the financing of small amounts of commodity, which is typically held in the farmer's own name (known as *identity preserved*).
- 1.2 In this model, a local producer organisation or group of smallholder farmers stores the members' commodity in small warehouses or other suitable buildings under the control of the organisation or group. While the product is serving as loan collateral, it is secured

by way of a double padlock arrangement, with the producer organisation or group holding the key to one lock and the MFI the other. In practice, however, the MFI may hand its key to a party (for example a producer organisation) that acts as its agent in ensuring the integrity of the collateral. This model is unlikely to create a legal security interest in the goods.

- 1.3 An analysis of this type of arrangement suggests that the practical elements are of far greater significance than the legal framework. The financier may not have any security interest over the commodity in this scenario, instead relying on the fact that access to the warehouse can only (lawfully) be gained when both the financier (or its agent) and the borrower are present to unlock the padlock. The financier may have contractual rights which it could enforce over the commodity, but in reality the cost of enforcement is likely to be prohibitive.
- 1.4 The non-legal elements that contribute to the success of this type of financing are discussed in detail at Part A (*Summary*) and Section 3.4 (*Community inventory credit (warrantage c.) in francophone West Africa*) of Volume I.
- 1.5 There might be a role for legal reform in regulating the micro-financiers participating in this type of financing, or in supporting alternative dispute resolution mechanisms.

## **2 Type B: Financing against commodities stored in a *private* warehouse under the control and responsibility of a collateral manager**

- 2.1 In this case, *private* warehouse refers to a warehouse that is not open to deposits by the public, but only on a contractually-agreed basis. There are a number of possible variations to this scenario:
  - (a) Ownership of the warehouse: The warehouse may belong to the collateral manager or to a third party. Alternatively, the warehouse may belong to the borrower but be leased (in whole or in part) to a collateral manager (known as *field warehousing*).
  - (b) Security: A financing may be secured in a number of ways including by a possessory interest (with the collateral manager acting as custodial agent of the lender) or a proprietary security interest backed by: (1)

the commodity; (2) a warehouse receipt representing the commodity; or (3) a fixed interest security backed by a warehouse receipt.

- (c) Repurchase arrangements (Repos): In this scenario, rather than taking a security interest over the collateral, the *lender* buys the commodity and the *borrower* enters into an obligation (or option) to repurchase the commodity at a later date, subject to certain conditions. Repos can also be used with Type C financing.

## Ownership, control and regulation of private storage facilities

- 2.2 This type of financing incorporates different ownership scenarios. The storage facility might be owned by a third party (to the depositor), who also manages the facility or who contracts a collateral manager to manage the facility. The storage facility may belong to the borrower, but be leased (in whole or in part) to a collateral manager (i.e., field warehousing). It might be the case that the warehouse operator stores its own commodity in the storage facility, as well as storing commodity for other parties on a privately agreed basis.
- 2.3 A key legal element is the framework for regulation of warehouse operators. This is important both for depositors, who need reassurance that their commodity is being stored securely and third parties who may finance or purchase the commodity while in storage and who need certainty that the relevant commodity actually exists.
- 2.4 Regulation of warehouses could be prescribed by legislation (or by regulations produced by a regulatory body empowered by legislation), or it could be achieved by self-regulation, giving participants contractual obligations and contractual remedies in the case of a failure. This is explored in further detail at Annex 3 (*Legal annex*) of Volume I. A regulatory regime, whether statutory or contractual, needs to cover registration and licensing requirements, inspection and enforcement procedures, and remedies in case of failure.

## Taking security over stored commodity

- 2.5 It is necessary to consider whether the legal regime in the relevant subject country supports taking security over commodities, including commingled commodities and what type of security is available. Key to this type of financing is whether the lender can

take an effective possessory security by virtue of having constructive possession over the commodity (by way of a collateral management arrangement and/or by holding warehouse receipts).

- 2.6 In the case of field warehousing (where the secured commodity remains on the borrower's property), there are particularly complex legal issues to consider in the context of how constructive possession by the lender can be established.
- 2.7 There are wider legal issues to consider too, such as formal documentary requirements for taking security, perfection requirements (such as payment of stamp duty, registration) and the existence and effectiveness of collateral registries.

## Warehouse receipts

- 2.8 The legal treatment of warehouse receipts in each subject country must be considered, including whether warehouse receipts are negotiable documents of title, or something else. It is necessary to consider the complex issues of the rights of the holders of warehouse receipts, including the rights of the depositor, a financier and any subsequent holder/buyer.
- 2.9 It is also necessary to consider whether warehouse receipts can be issued electronically. Electronic registers can allow instant transfer and registration of warehouse receipts. There are also broader legal issues relevant to the establishment of software to allow the electronic creation and issue of warehouse receipts, such as the ownership of intellectual property. Those issues are outside the scope of this report, which considers only the legal treatment of electronic warehouse receipts. There are also non-legal issues, such as the requirement to have internet access, the sophistication of users and access to training.
- 2.10 Warehouse receipts that have the legal status of a negotiable instrument will typically need to be issued in a certain format, containing certain minimum information (such as the nature of the commodity, the quantity, the quality and the owner).

## Collateral management arrangements: specific legal considerations

- 2.11 Where a collateral manager is used in a financing arrangement, that party will usually be appointed under the terms of a tripartite collateral management agreement entered into between the borrower, the financier and the collateral manager. The collateral management agreement will set out the rights and obligations of each party in relation to the secured goods. In particular, the collateral management agreement will set out the duties of the collateral manager in relation to monitoring and controlling the secured goods on the financier's behalf and the collateral manager's responsibility to return the goods to the financier.
- 2.12 The collateral manager may lease the warehouse from a third party, taking responsibility for operating the facility. Alternatively, a collateral manager may operate independently, in which case the contractual documentation for the financing arrangement will need to include an agreement from the warehouse operator to give the collateral manager access to the warehouse and not to interfere with the rights of the financier.
- 2.13 Given the importance of the role played by the collateral manager, the financier will usually in practice have the final decision-making power as to whom to appoint in the event of any disagreement between the borrower and the financier as to who should be the collateral manager for the secured goods.
- 2.14 Where a warehouse receipt is issued by a collateral manager, it may state on its face that the collateral manager is holding the goods on behalf of the financier. However, generally speaking, such warehouse receipt will not be a negotiable instrument. Therefore, if the goods are transferred to a third party while in storage, the warehouse receipt alone will not be sufficient to obtain release of the goods from the collateral manager. In addition, the holder of a warehouse receipt may not obtain any direct contractual rights against the collateral manager unless it enters into an independent contract with that collateral manager.
- 2.15 In this scenario, the delivery of a warehouse receipt will not in itself create a legal security over the stored goods. As such, the financier and the borrower will need to enter into a legal security agreement



(such as a pledge) over the goods. This security agreement may be subject to local formalities, such as, liability to pay stamp duty and/or registration.

- 2.16 Although there is no legal requirement to include such a statement on the warehouse receipt, it may be useful to include such a statement if the financier wishes to show that it has constructive possession over the stored goods.
- 2.17 Only one warehouse receipt will be issued in relation to any particular consignment of goods. Where the collateral manager and warehouse operator are two separate entities, the warehouse receipt will usually be issued by the collateral manager in accordance with the collateral management agreement.
- 2.18 The collateral manager will be responsible for redelivery of the stored commodity to the depositor. This is termed an out-turn guarantee. In an unregulated system, this will be a contractual obligation of the collateral manager as set out in the collateral management agreement.

### **Collateral management versus stock monitoring**

- 2.19 A stock monitor is a party that monitors the existence, location, quantity, and/or quality of an asset, without having control of, or responsibility for, that asset. Financiers may engage a stock monitor rather than a collateral manager where, for example, it has a higher level of trust in the borrower or where it does not require constructive possession of the goods for the purposes of taking security.
- 2.20 In a financing, stock monitoring arrangements differ from collateral management in the following key ways:
  - (a) A collateral manager has full responsibility for the commodity 24 hours a day, seven days a week. By contrast, a stock monitor will inspect the goods at agreed upon intervals and report to the financier.
  - (b) A collateral manager has full responsibility for the delivery of the goods back to the financier (the out-turn guarantee) and for any loss of the commodity in its control. It will be contractually liable to

the financier for loss due to a breach of its contractual duties up the full value of the goods. It must be fully insured to this effect. A stock monitor's liability for any loss of the monitored commodity will be limited to losses directly related to its own negligent and/or fraudulent acts. The amount of its liability may be contractually limited to a fixed multiple of the amount of fees due from the financier under the stock monitoring agreement.

- (c) A collateral manager will have possession of the commodity, meaning possessory security over that commodity can be perfected by the collateral manager taking possession of the commodity on behalf of the financier (this is constructive possession). A stock monitor does not have possession of the goods, meaning that possessory security will not be an option for the financier if the goods are stored in the warehouse of the borrower or a third party.
- 2.21 Stock monitoring arrangements are documented in a similar way to collateral management arrangements, with an agreement covering the stock monitor's duties and responsibilities to the financier and the borrower.

### **Field warehousing: specific legal considerations**

- 2.22 Field warehousing is the concept of granting a possessory security over goods stored on the borrower's own premises. Key to this concept is the idea of the financier or collateral manager taking effective control of the storage area. The commercial reason for engaging in field warehousing is to give the borrower the benefits of inventory financing and to give the lender effective security, without the borrower needing to move the goods to the warehouse of a third party. This is particularly useful where the goods need to remain on the borrower's premises to be processed in the borrower's facilities during the financing period.
- 2.23 As an alternative, a lender could take a charge-type security over the borrower's assets. However, the perceived benefit of field warehousing is that the lender (or the collateral manager who is acting for the lender) should get practical control over the commodity and the benefit of the right to take possession of the commodity and realise its proceeds. There will obviously be practical considerations for the lender, not least being comfortable that it trusts the borrower not to

fraudulently remove the goods. The lender will also need to ensure that it has appropriate agents on the ground to perform the control and monitoring functions, in particular, having full control over what goes in and out of the storage space. This could be difficult if the borrower is located remotely. This might be solved by temporarily employing members of the borrower's own staff.

- 2.24 The legal analysis turns on whether the financier can effectively take a possessory pledge. Key questions include: (1) does local law recognise the concept of constructive possession; and (2) what formalities must be observed to achieve constructive possession? Examples of relevant formalities include:
- (a) the financier taking a lease or licence of the storage area (thus having exclusive access to and legal control of that part of the borrower's land, with the right to exclude others)
  - (b) locking and sealing of entrances to prevent access without the financier's consent, creating physical boundaries around the leased area, and control of movements in and out of the storage area
  - (c) posting of signs giving public notice of possession by financier
  - (d) segregation and identification of pledged and unpledged goods within the controlled area.
- 2.25 Unless a collateral manager operating a field warehouse is legally able to issue negotiable warehouse receipts, the normal requirements for creating a possessory pledge (for example, minimum written terms, perfection requirements, and formalities) would also need to be followed. Legal documentation would be needed to document the pledge and any subsequent transfer of the stored goods.
- 2.26 Many of the legal considerations will overlap with the practical considerations. For example: locking of the storage area will protect the goods from fraudulent removal, but it may or may not be necessary to satisfy the legal requirements of a pledge.

## Field warehousing: legal documentation

- 2.27 A field warehousing arrangement would typically be documented as follows:
- (a) A tripartite collateral management agreement (or *convention de tierce détention*). This sets out the terms of the collateral management arrangements and it gives the financier contractual recourse against the collateral manager.
  - (b) A lease of the warehouse to the collateral manager. This gives the collateral manager the legal right to occupy the land where the goods are stored to the exclusion of the borrower.
  - (c) A warehouse receipt, which the collateral manager issues to the financier to show him the commodity is being held to his order. This receipt will generally form part of the terms of the collateral management agreement and it will not give the financier any additional rights in respect of the goods.
  - (d) A release warrant, which the financier issues to the collateral manager and which authorises the latter to release the commodity to the borrower or a buyer.
  - (e) In some cases, a trust receipt issued by the financier authorising the borrower to withdraw the commodity without repayment for the purpose of sale, but during such time the borrower holds such commodity and its proceeds on trust for the financier.

## 3 Type C: Financing against commodities stored in a public warehouse

- 3.1 In this case, *public* warehouse refers to a commercial warehouse open to deposits by commodity producers and other customers. Financing in this case would involve lending against warehouse receipts or delivery of warehouse receipts as negotiable title documents.

### Ownership and control of public storage facilities

- 3.2 In the case of public warehousing, the legal issues that apply to private warehousing will be relevant.

- 3.3 For public warehousing to be truly *public*, any person who wants to store commodities meeting the criteria for storage must be permitted to do so. This could be provided by legislation or a licensing regime. If this is provided by way of self-regulation, it requires a degree of transparency from the warehouse operators. It is also important that the warehouse operators can properly identify the parties using their facilities.
- 3.4 Another issue is whether regulated public warehouse operators are legally permitted to store their own commodities in the same facilities, issue warehouse receipts in respect of those commodities and trade those commodities.

### Regulation - Warehouse Receipt Systems

- 3.5 The case for establishing a regulatory regime for public warehousing will generally be much stronger than for private warehousing because of the potential for involving a larger number of parties. Additionally, there are some further legal issues to consider. The key legal elements for a regulated system of public warehouses are discussed in detail in Annex 3 (*Legal annex*) of Volume I.

## 4 Type D: Lending against the security of current or future production

- 4.1 In this case, the commodities would be subject to a registered charge or other proprietary interest in favour of a lender that would not be dependent upon the control of the commodity by a third party.
- 4.2 The key focus of the legal analysis of this type of financing is whether it is possible to effectively take security over future production and/or crops in a field and the existence and effectiveness of collateral registries. The registration of security is of high importance in this type of financing as there is no element of possession of the commodity by the financier.

# Annex 3: Overview of key legal concepts

This Annex provides an overview of the legal concepts and terminology used in this report.

**Part A** (*Overview of commodity financing*) gives a brief overview of commodity financing for the benefit of those readers who might not already be familiar with the subject and for context.

**Part B** (*The key legal considerations relevant to warehouse financing*) sets out an overview of the key legal concepts relevant to the types of financing described in the typology.

**Part C** (*General legal considerations*) considers some more general legal considerations relevant to warehouse financing in the subject countries and the legal systems in those countries.

## PART A: Overview of commodity financing

### 1 Financing at different stages of the agricultural production process: why is financing needed and what are the risks?

- 1.1 A financier could become involved at several different stages of the agricultural production process and there are different risks involved for the financier at each stage. These risks are both legal and practical.
- 1.2 Pre-harvest, a borrower might seek financing for expenses related to the production of the crop. For example, seeds, fertiliser, pesticides, tools, labour, processing, and storage costs. A financier getting involved at this stage will be taking risk on the crop (for example, risk of failure due to drought or pests) and risk on the borrower's performance in delivering the harvested crop, among other practical risks. Crop risk and producer risk may be difficult for a financier to quantify, particularly where the potential borrower does not have an established track record. The financier will also take elements of legal risk, for example,

establishing legal rights over the commodity before such time as it is delivered into the financier's control.

- 1.3 Once the commodity is delivered into storage (whether on the borrower's premises or a third party's), a borrower might seek inventory financing, collateralised on the stored commodity. The financier takes practical risks on the performance of the warehouse operator and any collateral manager (including fraud risk) and legal risks in terms of its rights over that stored commodity. At some stage, the commodity may be transported, at which point, if the commodity is still subject to financing, the financier will be taking legal and practical risks associated with the logistics of transport. For some types of transportation, this risk is easier to mitigate. For example, where the commodity is transported by ship the financier may take control of the bills of lading, giving it certain legal rights.
- 1.4 If the commodity is exported from the country of production, there is an element of political risk, for example, if the relevant government puts an embargo on exports. Where the commodity is exported to another country for consumption, there may be a period of storage in that country which could be subject to financing. Finally, at the point the commodity is sold to the end-consumer, the financier might take credit risk on payment.
- 1.5 At each stage, the financier may attempt to mitigate the risks, taking both legal and practical measures. The more risk the financier assumes, the more due diligence it needs to perform and the more costly (both in terms of time and money) the financing will be. Typically, financing will be more readily available towards the end of the production process (i.e., nearer to the time where the commodity is sold to the end consumer), as the risks are lower and more easily quantifiable by the financier.
- 1.6 The focus of the typology is on inventory financing. The reasoning for this is more fully considered below in the context of the size of the relevant borrowers. Financing Types A, B and C (as described in the typology) are different types of inventory financing in the country of origin of the commodity. Financiers providing financing at this stage do not take crop risk or producer risk as the commodity exists and is delivered into the financier's control at time of financing.

- 1.7 Financing Type D (as described in the typology), lending against current or future production, occurs earlier in the production chain. Due to the increased risk assumed by the financier, this type of financing is inevitably more complex, both legally and practically. This means that such financing is likely to be more successful for borrowers operating on a larger scale, where the potential returns are great enough to offset the greater cost the financier of taking a higher level of risk.

## 2 The relevance of the size of the borrower to the focus of the study

- 2.1 The size and credit history of the borrower will determine what types of financing are available to that borrower.
- 2.2 Small and medium-sized enterprises (SMEs) often find it more difficult to access financing than large entities.<sup>4</sup> Larger entities may find it easier to demonstrate a track record to financiers and a larger scale of production will mean greater returns for a potential financier when compared with the level of work involved in implementing the financing arrangement (for example, due diligence costs, legal costs). This will mean that more complex, or perhaps more risky (i.e., unsecured) financing models are available to those borrowers. For example, pre-export finance facilities or general working capital facilities.
- 2.3 The focus of the study is mainly on *upstream* players in the commodity production process, particularly smallholder farmers and rural aggregators who can use financing schemes. Financiers will generally find it unattractive to provide unsecured financing to these players on an individual basis at an early stage in the production process where there is a high level of risk that is difficult for a financier to quantify. They may also be reluctant to finance producer cooperatives without some sort of third-party guarantee. As such, financing at the storage stage is highly relevant to these types of borrowers. The financier can more easily mitigate its risk by relying on the performance of the warehouse operator, who may be able to demonstrate a positive track record or who may be subject to a financially sound regulatory system.

4 The factors determining whether an entity is an SME vary, but they will usually take into account the number of employees the entity has and its annual turnover. For example, see the EU definition, which considers entities with fewer than 10 employees to be micro-SMEs. [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)



Alternatively, in the case of community-based inventory credit financing, the financier might rely on having practical control over the stored commodity and effective monitoring processes.

- 2.4 In addition, developing well-regulated warehouse financing systems will benefit these upstream players indirectly, through increased market efficiency.

## **PART B: The key legal considerations relevant to warehouse financing**

### **1 Key legal considerations for a financier entering into a warehouse financing**

- 1.1 Warehouse financing is, in brief, a loan extended by a lender which is secured by a security interest over commodity stored in a warehouse. Warehouse receipt financing is a type of warehouse financing where the secured commodity is represented by a warehouse receipt, which is issued to the lender as collateral for the loan. Holding a warehouse receipt should give the lender, in the case of the borrower's default, recourse to the underlying commodity to obtain repayment of the loan.
- 1.2 The extent of the lender's rights and the rights of any subsequent holder of a warehouse receipt, will depend on the legal status of the warehouse receipt and whether it is considered a negotiable or transferable document of title under local law. An instrument is negotiable if: (1) it can be transferred from one party to another by mere delivery, or by endorsement and delivery; and (2) the transferee takes the instrument free of defect in title (although this may be subject to the transferee being a good faith purchaser for value). An instrument is transferable if one party can transfer that instrument to another party, and that transferee can then exercise the rights under that instrument. The transferee may take that instrument subject to existing defects in title. An instrument might be transferable, without also being negotiable. A negotiable instrument is, by definition, also a transferable instrument.
- 1.3 There are other possible ways of financing stored commodities, such as taking alternatives types of security or entering into repurchase agreements. These methods are also explored below.

1.4 The key legal considerations for a financier entering into a warehouse financing arrangement fall into three broad categories:

Category 1 - Security: Is it possible for the financier to take a first ranking security interest over the stored commodity? What are the legal requirements for this?

Category 2 - Monitoring and control: How can the financier (or its agent) monitor and control the stored commodity? What legal protection does the financier have?

Category 3 - Enforcement: In the event of a default by the borrower, what is the legal process for taking possession of and selling the commodity? How quickly can the financier do this?

1.5 The answers to the above questions will depend largely on the legal framework of the relevant subject country. However, in practice, the ability of a financier to satisfy any legal requirements, or enforce any legal rights it obtains, will depend on the commercial realities of, and the infrastructure in, the relevant jurisdiction. Such matters are addressed in this legal review to the extent they impact on the legal analysis, but are dealt with more fully in Volumes I and II of the final report.

## **2 Creation of security interests over commodities**

2.1 From a legal standpoint, security is the creation of rights over assets of the borrower in favour of a lender. The real value of those rights to a lender will be influenced by legal and non-legal considerations. It is sometimes the case that parties talk about a loan being *secured* by an asset, without the lender having any security interest at all. For example, in a double padlock arrangement, where commodity are stored in a warehouse locked with two padlocks; one is held by the borrower and one is held by the lender, which the lender keeps until it is repaid. From a practical perspective, the lender might be comfortable that the borrower cannot dispose of the commodity without the lender's permission. However, from a legal perspective, the lender might not have any security interest over the commodity. Depending on the circumstances, a lender might be comfortable proceeding without legal security, where the risks can be minimised in other ways.

- 2.2 The reason for taking security is to provide the lender with collateral that it can turn to for satisfaction of the debt if the borrower fails to perform. A security interest over a commodity will give the lender some or all of the following rights: (1) the right to prevent the borrower dealing with the secured commodity; (2) the right to take possession of and sell the secured commodity in satisfaction of the debt; and (3) the right to prevent others from having recourse to that commodity in priority to the lender.
- 2.3 The nature of the security interest created and the rights a holder of a security interest obtains, can vary and are jurisdiction specific. Two types of security which would be most likely to be relevant when taking security over commodities (as compared with immovable property such as land) are as follows:
- (a) Proprietary rights: This is an encumbrance which attaches to the relevant asset. On sale of the relevant asset, the security interest, if duly perfected, may stay attached to it, meaning that the new owner takes title to the asset subject to the security interest. This type of security interest may be referred to as a charge, hypothecation or, in some jurisdictions, a pledge.

This type of security must usually be created using a contractual instrument granted by the borrower in favour of the lender. As the secured assets may remain within the possession of the borrower, this type of security interest is often registrable, meaning that it may be deemed invalid if not registered at the appropriate registry within a certain time limit. It is possible for more than one party to have this type of security interest over the same asset. Such rights will be ranked in priority. The order of priority may be determined by a number of factors including (but not limited to) the order in which the security interests were created, the order in which they were registered, or the type of rights held.

In some jurisdictions, usually common law jurisdictions, it is possible to take a proprietary security interest over a changing pool of assets, without need to re-register the security interest each time new assets enter or leave the pool. In other jurisdictions, it may be necessary to enter into a new security agreement on each occasion.

In this report (unless otherwise indicated), a reference to a charge in the context of security interests is generally a reference to this type of proprietary security interest.

- (b) Possessory rights: This type of security interest is created by a lender taking possession of an asset. The lender's security interest will continue for as long as it maintains possession of the relevant asset. To demonstrate possession over the relevant asset, the lender must usually be able to show that it has a sufficient degree of control over how the commodity is stored and released.

In practical terms, the lender might not be able to take actual possession of the commodity itself. It is often the case that this element can be satisfied by using an agent acting for the lender, such as a collateral manager, to take possession of the commodities. Alternatively, a lender might take constructive possession by holding documents of title in respect of the commodity.

Possessory interests are not always subject to registration, as it should not be possible (in theory) for two lenders to hold competing security interests, as only one party can possess the commodity at any one time.

In some jurisdictions, the process of taking security over future deposits of commodity at the time they are delivered to the warehouse is straightforward. In others, it requires the parties to enter into further documentation. The latter situation might be so cumbersome as to be prohibitive in practice.

In this report (unless otherwise indicated), a reference to a pledge in the context of security interests is generally a reference to this type of possessory security interest.

- 2.4 In each of the cases above, there may be a requirement to sufficiently identify the secured commodities before security can be validly created. This can be a practical issue where commodities from multiple depositors are stored together in a single warehouse. In addition, local law might stipulate certain perfection requirements such as stamping, notarisation, or registration. The issues of commingling and perfection are considered further below. It is also worth noting that it might not be possible in all

jurisdictions to take security over perishable commodities, or it might only be possible to take security once the commodity has been harvested and put into storage (rather than, for example, when it is still growing in the field or before it has been processed).

- 2.5 When it comes to taking security over commodities stored on the borrower's own property (for example, in field warehousing where the borrower leases or licenses its storage facility to a collateral manager), or over commodities not yet in existence (such as future harvests), the legal analysis can be complex. Whether it is possible, or practical, to take security in such circumstances will depend on the local legal framework.

### **3 Warehouse receipts**

- 3.1 A warehouse receipt is a document issued by a warehouse operator, collateral manager, or other storage operator that provides proof or evidence of ownership of commodities stored in a warehouse or other storage depository. It may also be used to evidence that a collateral manager is holding commodities under the terms of a collateral management agreement. Depending on applicable laws, a warehouse receipt may be: (1) a document of title, or not; and (2) negotiable or non-negotiable. In some cases, a warehouse receipt might not act as a document of title but as evidence of a pledge over the commodity it covers.
- 3.2 Where applicable law permits, warehouse receipts can provide a straightforward way of creating a possessory security in favour of a lender over commodities held in a third-party warehouse. For example, the warehouse operator accepts the commodity into storage and then issues a warehouse receipt representing the commodity. The warehouse operator (or collateral manager) holds this on behalf of the lender and it controls the underlying commodity, effectively preventing the borrower from dealing with the commodity until it has repaid the loan.
- 3.3 In an established warehouse receipts programme where warehouse receipts are treated as documents of title, the act of delivery of the warehouse receipt to the lender or its agent may create a pledge, without further need for evidence of possession or control.
- 3.4 Warehouse receipts may be issued as a single instrument or, in certain cases, as a double receipt consisting of two parts: (1) the receipt for the

commodities stored; and (2) a pledge certificate which can be separated from the other part and given to a financier. The warehouse operator will release the commodities to the holder of both parts.

## **4 Creating security over stored commodities: issues regarding commingling and fungibility**

- 4.1 This is one area where the practical reality of storing commodities can adversely impact the ability of a lender to take valid security. Deposits of fungible commodity from multiple depositors are often stored together in bulk. In such circumstances, each depositor has a contractual right to delivery of the same amount of commodity that it deposited, rather than to the specific commodity it deposited. Not all commodities are fungible and achieving fungibility may require the relevant storage facility to have effective cleaning, processing and grading capabilities. Standardised grading is key to achieving fungibility.
- 4.2 In some legal systems, it is not possible to take a valid security interest over commingled commodities. In order to take security, it might be necessary for the relevant commodity to be stored separately from other lots and to be readily identified (e.g., by signage on the storage containers). This is known as identity preservation.
- 4.3 Even if the local law does recognise security over commodity stored in an undifferentiated bulk, there are other considerations for the lender. The lender will need to be satisfied as to the effectiveness of the grading system and that the commodities stored together are truly fungible. If there is no standard framework for grading and/or commodity of different grades is stored together, a lender who enforces its security might find that the commodity it receives is of a lower grade and therefore lower value, than the commodity over which it believed it held security. Even where commodities are commingled within grades, segregation between different grades is crucial to ensuring the value of the product returned to the depositor is the same as the product delivered into storage.
- 4.4 It is not always practically possible for commodities to be stored in segregated and identifiable lots, particularly commodities with a lower value. Storing commodities this way requires more space and more manpower. Even where a warehouse operator claims that commodities are stored this way, the lender should be careful as segregation might not

happen in practice, meaning any security interest in those commodities could be adversely affected.

## **5 Creating security over stored commodity: perfection requirements**

- 5.1 Many countries require certain procedural steps to be carried out in respect of finance and security documents. For example, notarisation, stamping and/or registration of documents. Failure to carry out such steps can have a variety of consequences, including: (1) rendering the document invalid, unenforceable and/or inadmissible in court; (2) making the contracting parties subject to financial penalties; and/or (3) in the case of registrable security, affecting the priority of that security against other security interests.
- 5.2 Some perfection requirements attract a fee. This might be nominal. However, in many countries, notarisation fees or stamp duties are calculated on the value of the underlying transaction. This is known as *ad valorem* duty and such costs can act as a financial barrier for parties entering into such transactions.

## **6 Alternative to taking security: repurchase arrangements**

- 6.1 Under a repurchase arrangement, a financier buys commodity from a borrower and owns it for a period of time. The borrower has an obligation to repurchase that commodity at a later date, at a higher price to reflect the financing cost.
- 6.2 This kind of arrangement might offer the financier additional protection in a legal system that respects ownership rights more than the rights of a secured creditor. As the owner of the commodity, the financier has the flexibility to sell the commodity elsewhere if the producer is in financial difficulties, without first needing to take steps to enforce its security.
- 6.3 However, there is a risk that such repurchase transactions could be recharacterised as financings rather than a true sale and purchase. In this situation, the financier might be left with security over the commodity or no security at all if the requirements to take valid security

were not met. The financier might then be unable to enforce its security or recover its money if the producer becomes insolvent.

- 6.4 Whether a true sale of the commodity has occurred will depend on the legal analysis of the arrangement. In countries where the legal system looks past the form of an arrangement to consider its substance, the following issues might be relevant:
- (a) To what extent did ownership risks to pass from the borrower to the financier? This might include risk of loss, risk of price fluctuation, etc.
  - (b) To what extent does the financier have possession/control of the commodity?
  - (c) To what extent does the (re)purchase price reflect the market price of the commodity?
  - (d) Does the borrower have an obligation, or just an option, to repurchase the commodity?
- 6.5 It might be the case that financiers cannot own certain commodities in some jurisdictions, or that they require a licence to do so, making this type of arrangement impractical or even impossible.

## **7 Monitoring and control of secured (or purchased) commodities**

- 7.1 Issues surrounding monitoring and control of the secured commodity have both legal and non-legal elements.
- 7.2 On the non-legal side, the lender will be looking to protect the commodity from risk of loss, for example, due to damage or theft. This has practical implications, such as the need to have access to secure storage facilities and to use reliable collateral managers. Other credit support features might also be relevant, such as the ability to obtain insurance and the existence of indemnity funds to protect against the failure of warehouse operators or collateral managers. This also has cost implications for the parties. These matters are outside the scope of this legal review but are considered in Volumes I and II of the final report.



- 7.3 On the legal side, the lender may need to demonstrate a sufficient level of control over the commodity to create a valid security interest. The level of control needed will depend on local law. As a general rule, it will be easier for a lender to demonstrate control where the commodity is stored in a third-party warehouse, under 24/7 management by a collateral manager acting as the lender's agent, with limited access to the commodity for the borrower.
- 7.4 The situation is likely to be more problematic if the commodity remains stored on the borrower's own property, as the borrower is likely to retain a level of access and control which might invalidate the lender's security interest.
- 7.5 In some legal systems, it is possible for a lender to retain legal possession of secured commodities while still allowing the borrower to hold those commodities or the documents of title that represent them for the purposes of selling them. This might be of practical importance if, for example, the borrower needs to sell the pledged commodities for the purpose of repaying its financing. During this period the lender can have continuing security over the pledged commodities.
- 7.6 The borrower will sign a trust receipt in favour of the lender acknowledging that it holds the pledged commodities and the proceeds of sale, to the order of and on trust for the lender (in accordance with the terms of the pledge). This legal mechanism does not work in all legal systems.

## 8 Enforcement

- 8.1 The legal process for enforcing a lender's rights over secured commodities is a key consideration. In some jurisdictions, holders of certain types of security (usually possessory security, such as a pledge) can avail themselves of *self help* remedies. This means the lender can take action to sell the secured commodity and realise the proceeds without first obtaining a court judgment or following a set procedure (such as a public auction). For proprietary security, such as charges, it is often necessary to follow a specified foreclosure procedure, which might involve notifying a collateral registry, giving notice to the borrower and/or obtaining a court order.

- 8.2 If the lender is required to follow a costly or lengthy procedure to enforce its security rights, this can be economically prohibitive, particularly in the case of perishable commodities. The liquidity of the relevant market for the commodity and the ease of obtaining a reliable market price are important practical factors to consider.
- 8.3 The enforcement process may be much easier in countries where there is an established warehouse receipts programme and commodities exchange. In theory, a financier holding warehouse receipts would be able to sell these on the relevant exchange and delivery of the warehouse receipts would transfer title to the underlying commodity. The lender would be able to realise its security quickly without incurring significant out-of-pocket expenses.
- 8.4 In the case of a borrower's insolvency, there are a number of further considerations, including: (1) whether the lender is able to deal with the secured commodity without the consent of any appointed insolvency practitioner; (2) whether the proceeds of sale of the secured commodity will be subject to payment of mandatorily preferred creditors; and (3) the existence of and claims from, competing creditors.

## **PART C : General legal considerations**

### **1 Civil law and common law legal systems**

- 1.1 The two major types of legal system found in the subject countries are the common law system and the civil law system. The main features of a common law system, often found in anglophone countries, are that sources of law include both legislation and doctrines developed through the courts. Court decisions form precedents binding on lower courts. There is usually a general freedom to contract, subject to any specific laws to the contrary, meaning that the common law system is generally seen as flexible.
- 1.2 The main feature of a civil law system, often found in the francophone and lusophone countries of Africa, is that laws are only created by legislature and form a written civil code. The courts apply and enforce the civil code, without developing doctrines. In comparison to common law systems, if something is not specifically permitted by the civil

code, this means that it cannot be done. Civil law systems are therefore often seen as less flexible than common law systems. However, the benefit of a civil law system is that it offers a higher degree of certainty and predictability.

- 1.3 Five of the subject countries: Burkina Faso, Niger, Senegal, Côte d'Ivoire, and Cameroon, are members of *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA), which is a system of harmonised business laws applicable in the member countries.
- 1.4 The legal systems of Niger and Senegal are additionally influenced by Islamic law and customary laws and practices.

## **2 Financing of different commodities: political considerations**

Unless otherwise specified, the country reports for each Subject Country consider the legal regime relevant to agricultural commodities in the generic sense. However, it is often the case that different commodities will have different levels of importance to a particular country. Some countries have implemented specific regimes in relation to crops that have a significant value, such as cocoa and coffee. Where relevant, we have addressed this in the individual country reports.

## **3 Legal requirements versus practical reality**

- 3.1 One of the difficulties of trying to implement a particular finance regime is reconciling the strict legal requirements with the practical reality. For example, where a legal system does not allow security to be taken over future deposits of commodity, this will conflict with the practical reality of crops being harvested at different times. If the only way to create valid security is to execute new documentation each time a consignment is deposited into storage, this might make a particular method of financing impossibly cumbersome in practice.
- 3.2 This issue also arises in the context of commingling. There is little value in a financier taking security which requires segregation of the secured commodity, if in reality the parties know that the commodity will be stored as part of a bulk.

- 3.3 It is often the case that local laws provide that possessory security can be created by use of a collateral manager acting on behalf of the financier. In practice, this will only be feasible if reliable collateral managers are available.
- 3.4 Another issue is considering the relative sophistication of the parties involved. Where a particular method of financing can only be implemented through entry into complex contractual documentation, this might not be appropriate where the borrower is unable to properly understand the documentation being signed, or does not have the required legal capacity (for example, an unregistered representative body without separate legal personality).



# Annex 4: Glossary of terms

## PART 1: Defined terms

In this report, unless otherwise indicated, the following capitalised terms have the following meanings.

<b>ADR</b>	Alternative dispute resolution methods. For example, arbitration or mediation.
<b>AFD</b>	Agence Française de Développement, being one of the funding agencies that has commissioned the study.
<b>Authors</b>	Sullivan & Worcester UK LLP and J Coulter Consulting Ltd, being the authors of this report.
<b>CTA</b>	Technical Centre for Agricultural and Rural Cooperation ACP-EU, being one of the funding agencies that has commissioned the study.
<b>eWRS</b>	Electronic warehouse receipts or electronic warehouse receipt system, as the context requires.
<b>Funding agencies</b>	Each of AFD, CTA and IFAD, being the funding agencies that have commissioned the study.
<b>IFAD</b>	International Fund for Agricultural Development, being one of the funding agencies that has commissioned the study.
<b>J Coulter</b>	J Coulter Consulting Ltd
<b>MFI</b>	microfinance institution
<b>OHADA</b>	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
<b>S&amp;W</b>	Sullivan & Worcester UK LLP
<b>SME</b>	Small and medium-sized enterprises
<b>Study</b>	The study on appropriate warehousing and collateral management systems to promote access to finance through warehouse receipt finance (and other forms of asset-based finance) in favour of smallholder farmers in sub-Saharan Africa, commissioned by the funding agencies.
<b>Subject countries</b>	Each of Burkina Faso, Cameroon, Ghana, Côte d'Ivoire, Madagascar, Mozambique, Niger, Senegal and Uganda.
<b>Terms of reference</b>	The terms of reference for the study, provided by the funding agencies. A copy of Section 3.2 of the terms of reference (which sets out the scope of the legal review) is found at Annex 1 (Section 3.2 of the Terms of Reference).
<b>Typology</b>	The typology of different methods of warehouse receipt financing (and other forms of asset-based financing) set out in Annex 2 (Typology of different financing methods) of this report.
<b>WRS</b>	Warehouse receipt system

## PART 2: Legal terms

In this report, unless otherwise indicated, the following legal terms have the following meanings:

<b>ad valorem</b>	In the context of stamp duty, a duty or tax calculated using the value of the underlying transaction or property.
<b>charge</b>	A proprietary security interest of the type described in Part A of Annex 3 ( <i>Overview of key legal concepts</i> ), paragraph 2.3.
<b>collateral manager</b>	A person who manages stored commodity. A collateral manager would typically have 24/7 control over the commodity it manages and would be able to prevent access to that commodity without its consent. This is in contrast to a stock monitor, who might only monitor the storage of commodity without taking control over it. A collateral manager might act as agent of a financier.
<b>document of title</b>	An instrument which is treated under applicable laws as representing ownership of the commodity covered by it. Depending on applicable laws, a warehouse receipt may be, but is not always, a document of title.
<b>field warehouse</b>	A warehouse located on the borrower's own premises, but leased or licensed to and controlled by, the lender or a collateral manager as the lender's agent.
<b>negotiable instrument</b>	An instrument is negotiable if: (1) it can be transferred from one party to another by mere delivery, or by endorsement and delivery; and (2) the transferee takes the instrument free of defect in title (although this may be subject to the transferee being a good faith purchaser for value). A negotiable instrument is, by definition, a transferable instrument.
<b>out-turn guarantee</b>	A contractual or mandatory undertaking from a warehouse operator or collateral manager to redeliver the quantity, type and grade of the commodity deposited with it. In a WRS, the mandatory out-turn guarantee would give any holder of a warehouse receipt a legal right against the warehouse operator to delivery on presentation of receipt of the quantity, type and grade of the commodity as stated in that receipt.
<b>pledge</b>	A possessory security interest of the type described in Part A of Annex 3 ( <i>Overview of key legal concepts</i> ), paragraph 2.3.
<b>private warehouse</b>	A warehouse that is not open to deposits by the public, but only on a contractually-agreed basis.
<b>public warehouse</b>	A commercial warehouse open to deposits by commodity producers and other customers.
<b>stamp duty</b>	A form of tax or duty charged on documents.
<b>stock monitor</b>	A person who monitors stored commodity. A stock monitor would typically have sufficient access to stored commodity to monitor what is happening to that commodity. However, a stock monitor would not have full control of the commodity and might not have the right to prevent access to it. This is in contrast to a collateral manager, who would typically have 24/7 access to and control of stock. A stock monitor might report to a financier.

<b>transferable instrument</b>	An instrument is transferable if one party can transfer that instrument to another party and that transferee can then exercise the rights under that instrument. The transferee may take that instrument subject to existing defects in title. An instrument might be transferable, without also being negotiable.
<b>trust receipt</b>	Mechanism by which pledged goods are released to the borrower while the lender maintains legal possession for the purpose of maintaining its security. The trust receipt provides that the borrower holds the pledged goods and the proceeds of sale on trust for the lender. This allows the borrower to sell the goods and to repay the lender from the proceeds of the sale.
<b>repurchase agreement</b>	An agreement between a financier and a borrower, under which the financier agrees to purchase commodity from the borrower. The agreement will contain an obligation (or possibly an option) on the borrower to repurchase the commodity from the financier at a later date. The repurchase price will typically be higher than the initial purchase price, such difference representing the finance cost.
<b>warehouse receipt</b>	A document issued by a warehouse operator, collateral manager, or other storage operator that provides proof or evidence of ownership of commodities stored in a warehouse or other storage depository. Depending on applicable laws, a warehouse receipt may be: (1) a document of title, or not; and (2) negotiable or non-negotiable.





# Annex 5: Summary of findings of legal review

Please turn to the following pages for a summary of findings in relation to the key legal issues as outlined in the terms of reference. Please note that the summary is a simplified overview; it should be read in conjunction with the country reports, which set out the relevant matters in more detail.

## Block 1: Burkina Faso, Niger and Senegal

Burkina Faso - Summary of findings	Burkina Faso		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		x <sup>1</sup>	
Proposed legislation for warehouse receipt financing?		x <sup>2</sup>	
Are warehouse operators/collateral managers regulated?		x	
Existing regulation of any specific commodities?		x	
Is there a regulator with statutory powers?		x	
Are warehouse receipts negotiable instruments?		x	
Are warehouse receipts transferable?		x	
Is field warehousing legally possible?	x <sup>3</sup>		
Is there judicial or other guidance on effective field warehousing procedures?		x	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	x		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	x		
Must public warehouse operators/collateral managers be licensed to operate?		x	
Must private warehouse operators/collateral managers be licensed to operate?		x	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	x		
Pledge: written document required?	x		
Pledge: perfection by delivery to lender alone?	x		
Pledge: registration required?			x <sup>4</sup>
Pledge: other formalities or perfection requirements?	x <sup>5</sup>		

Burkina Faso - Summary of findings	Burkina Faso		
	Yes	No	Partial
Pledge: recognition of constructive possession?	x		
Pledge: possible to pledge future commodity?	x		
Pledge: possible to pledge commingled commodity?	x <sup>6</sup>		
Pledge: priority over subsequent (registered) security?			x <sup>7</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		x	
Pledge: possible to enforce security against future purchaser with knowledge of security?		x <sup>8</sup>	
Possible to take proprietary (charge-type) security over stored commodity?		x <sup>9</sup>	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?	x		
Are banks permitted to enter into commodity repurchase agreements?		x	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	x		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	x <sup>10</sup>		
Court order required for sale of secured commodity?			x <sup>11</sup>
Other sale requirements (e.g., notice, public auction)?		x	
Can a warehouse operator claim a lien over stored goods?	x		
Availability of fast-track enforcement through the courts?	x <sup>12</sup>		
Availability of ADR?	x		
Possible to enforce overseas court judgments?	x <sup>13</sup>		
Possible to enforce overseas arbitral awards?	x <sup>14</sup>		

Niger - Summary of findings	Niger		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		x <sup>15</sup>	
Proposed legislation for warehouse receipt financing?		x	
Are warehouse operators/collateral managers regulated?		x	
Existing regulation of any specific commodities?		x	
Is there a regulator with statutory powers?		x	
Are warehouse receipts negotiable instruments?		x	
Are warehouse receipts transferable?		x	
Is field warehousing legally possible?	x <sup>16</sup>		
Is there judicial or other guidance on effective field warehousing procedures?		x	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	x		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	x		
Must public warehouse operators/collateral managers be licensed to operate?		x	
Must private warehouse operators/collateral managers be licensed to operate?		x	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	x		
Pledge: written document required?	x		
Pledge: perfection by delivery to lender alone?	x		
Pledge: registration required?			x <sup>17</sup>
Pledge: other formalities or perfection requirements?	x <sup>18</sup>		
Pledge: recognition of constructive possession?	x		
Pledge: possible to pledge future commodity?	x		
Pledge: possible to pledge commingled commodity?	x <sup>19</sup>		
Pledge: priority over subsequent (registered) security?			x <sup>20</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		x	
Pledge: possible to enforce security against future purchaser with knowledge of security?		x <sup>21</sup>	
Possible to take proprietary (charge-type) security over stored commodity?		x <sup>22</sup>	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	

Niger - Summary of findings	Niger		
	Yes	No	Partial
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?	x		
Are banks permitted to enter into commodity repurchase agreements?		x	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	x		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	x <sup>23</sup>		
Court order required for sale of secured commodity?			x <sup>24</sup>
Other sale requirements (e.g. notice, public auction)?		x	
Can a warehouse operator claim a lien over stored goods?	x		
Availability of fast-track enforcement through the courts?	x <sup>25</sup>		
Availability of ADR?			x <sup>26</sup>
Possible to enforce overseas court judgments?	x <sup>27</sup>		
Possible to enforce overseas arbitral awards?	x <sup>28</sup>		

Senegal - Summary of findings	Senegal		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		x <sup>29</sup>	
Proposed legislation for warehouse receipt financing?		X	
Are warehouse operators/collateral managers regulated?		X	
Existing regulation of any specific commodities?		X	
Is there a regulator with statutory powers?		X	
Are warehouse receipts negotiable instruments?		X	
Are warehouse receipts transferable?		X	
Is field warehousing legally possible?	x <sup>30</sup>		
Is there judicial or other guidance on effective field warehousing procedures?		X	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	X		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	X		
Must public warehouse operators/collateral managers be licensed to operate?		X	
Must private warehouse operators/collateral managers be licensed to operate?		X	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	X		
Pledge: written document required?	X		
Pledge: perfection by delivery to lender alone?	X		
Pledge: registration required?			X <sup>31</sup>
Pledge: other formalities or perfection requirements?	X <sup>32</sup>		
Pledge: recognition of constructive possession?	X		
Pledge: possible to pledge future commodity?	X		
Pledge: possible to pledge commingled commodity?	X <sup>33</sup>		
Pledge: priority over subsequent (registered) security?			X <sup>34</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		X	
Pledge: possible to enforce security against future purchaser with knowledge of security?		X <sup>35</sup>	
Possible to take proprietary (charge-type) security over stored commodity?		X <sup>36</sup>	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	

Senegal - Summary of findings	Senegal		
	Yes	No	Partial
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?	X		
Are banks permitted to enter into commodity repurchase agreements?		X	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	X		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	X <sup>37</sup>		
Court order required for sale of secured commodity?			X <sup>38</sup>
Other sale requirements (e.g., notice, public auction)?		X	
Can a warehouse operator claim a lien over stored goods?	X		
Availability of fast-track enforcement through the courts?	X <sup>39</sup>		
Availability of ADR?	X		
Possible to enforce overseas court judgments?	X <sup>40</sup>		
Possible to enforce overseas arbitral awards?	X <sup>41</sup>		

## Block 2: Ghana, Côte d'Ivoire and Madagascar

Ghana - Summary of findings	Ghana		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		X	
Proposed legislation for warehouse receipt financing?	X <sup>42</sup>		
Are warehouse operators/collateral managers regulated?		X	
Existing regulation of any specific commodities?	X <sup>43</sup>		
Is there a regulator with statutory powers?		X	
Are warehouse receipts negotiable instruments?		X	
Are warehouse receipts transferable?			X <sup>44</sup>
Is field warehousing legally possible?	X		
Is there judicial or other guidance on effective field warehousing procedures?		X	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	X		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	X		
Must public warehouse operators/collateral managers be licensed to operate?		X	
Must private warehouse operators/collateral managers be licensed to operate?		X	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	X		
Pledge: written document required?	X		
Pledge: perfection by delivery to lender alone?		X	
Pledge: registration required?	X		
Pledge: other formalities or perfection requirements?	X <sup>45</sup>		
Pledge: recognition of constructive possession?	X		
Pledge: possible to pledge future commodity?	X		
Pledge: possible to pledge commingled commodity?	X		
Pledge: priority over subsequent (registered) security?	X <sup>46</sup>		
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?	X <sup>47</sup>		
Pledge: possible to enforce security against future purchaser with knowledge of security?	X		
Possible to take proprietary (charge-type) security over stored commodity?	X		
Charge: registration required?	X		
Charge: other perfection requirements (e.g., stamp duty)?	X		
Charge: possible to charge future commodity?	X		



Ghana - Summary of findings	Ghana		
	Yes	No	Partial
Charge: possible to charge commingled commodity?	X		
Charge: priority over subsequent registered security?	X		
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?	X <sup>48</sup>		
Charge: possible to enforce security against future purchaser with knowledge of security?	X		
Existence of publically searchable collateral register?	X		
Are banks permitted to enter into commodity repurchase agreements?	X		
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	X		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	X <sup>49</sup>		
Court order required for sale of secured commodity?			X <sup>50</sup>
Other sale requirements (e.g., notice, public auction)?			X <sup>51</sup>
Can a warehouse operator claim a lien over stored goods?	X		
Availability of fast-track enforcement through the courts?		X	
Availability of ADR?	X		
Possible to enforce overseas court judgments?			X <sup>52</sup>
Possible to enforce overseas arbitral awards?			X <sup>53</sup>

Côte d'Ivoire - Summary of findings	Côte d'Ivoire		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		X <sup>54</sup>	
Proposed legislation for warehouse receipt financing?	X <sup>55</sup>		
Are warehouse operators/collateral managers regulated?			X <sup>56</sup>
Existing regulation of any specific commodities?	X <sup>57</sup>		
Is there a regulator with statutory powers?			X <sup>58</sup>
Are warehouse receipts negotiable instruments?		X	
Are warehouse receipts transferable?		X	
Is field warehousing legally possible?	X <sup>59</sup>		
Is there judicial or other guidance on effective field warehousing procedures?		X	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	X		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	X		
Must public warehouse operators/collateral managers be licensed to operate?			X <sup>60</sup>
Must private warehouse operators/collateral managers be licensed to operate?	X <sup>61</sup>		
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	X		
Pledge: written document required?	X		
Pledge: perfection by delivery to lender alone?	X		
Pledge: registration required?			X <sup>62</sup>
Pledge: other formalities or perfection requirements?	X <sup>63</sup>		
Pledge: recognition of constructive possession?	X		
Pledge: possible to pledge future commodity?	X		
Pledge: possible to pledge commingled commodity?	X <sup>64</sup>		
Pledge: priority over subsequent (registered) security?			X <sup>65</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		X	
Pledge: possible to enforce security against future purchaser with knowledge of security?		X <sup>66</sup>	
Possible to take proprietary (charge-type) security over stored commodity?		X <sup>67</sup>	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	

Côte d'Ivoire - Summary of findings	Côte d'Ivoire		
	Yes	No	Partial
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?	x		
Are banks permitted to enter into commodity repurchase agreements?		x	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	x		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	x <sup>68</sup>		
Court order required for sale of secured commodity?			x <sup>69</sup>
Other sale requirements (e.g., notice, public auction)?		x	
Can a warehouse operator claim a lien over stored goods?	x		
Availability of fast-track enforcement through the courts?	x <sup>70</sup>		
Availability of ADR?	x		
Possible to enforce overseas court judgments?	x <sup>71</sup>		
Possible to enforce overseas arbitral awards?	x <sup>72</sup>		

Madagascar - Summary of findings	Madagascar		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		X	
Proposed legislation for warehouse receipt financing?		X	
Are warehouse operators/collateral managers regulated?		X	
Existing regulation of any specific commodities?		X	
Is there a regulator with statutory powers?		X	
Are warehouse receipts negotiable instruments?		X <sup>73</sup>	
Are warehouse receipts transferable?		X	
Is field warehousing legally possible?	X <sup>74</sup>		
Is there judicial or other guidance on effective field warehousing procedures?		X	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	X		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	X		
Must public warehouse operators/collateral managers be licensed to operate?		X	
Must private warehouse operators/collateral managers be licensed to operate?		X	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	X		
Pledge: written document required?	X		
Pledge: perfection by delivery to lender alone?		X	
Pledge: registration required?	X		
Pledge: other formalities or perfection requirements?	X <sup>75</sup>		
Pledge: recognition of constructive possession?	X		
Pledge: possible to pledge future commodity?	X		
Pledge: possible to pledge commingled commodity?	X		
Pledge: priority over subsequent (registered) security?			X <sup>76</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		X	
Pledge: possible to enforce security against future purchaser with knowledge of security?		X <sup>77</sup>	
Possible to take proprietary (charge-type) security over stored commodity?		X <sup>78</sup>	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	

Madagascar - Summary of findings	Madagascar		
	Yes	No	Partial
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?	x		
Are banks permitted to enter into commodity repurchase agreements?		x	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	x		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	x <sup>79</sup>		
Court order required for sale of secured commodity?		x	
Other sale requirements (e.g., notice, public auction)?		x	
Can a warehouse operator claim a lien over stored goods?	x		
Availability of fast-track enforcement through the courts?	x <sup>80</sup>		
Availability of ADR?	x		
Possible to enforce overseas court judgments?	x <sup>81</sup>		
Possible to enforce overseas arbitral awards?	x <sup>82</sup>		

### Block 3: Cameroon, Mozambique and Uganda

Cameroon - Summary of findings	Cameroon		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		x <sup>83</sup>	
Proposed legislation for warehouse receipt financing?		x	
Are warehouse operators/collateral managers regulated?		x	
Existing regulation of any specific commodities?		x	
Is there a regulator with statutory powers?		x	
Are warehouse receipts negotiable instruments?		x	
Are warehouse receipts transferable?		x	
Is field warehousing legally possible?	x <sup>84</sup>		
Is there judicial or other guidance on effective field warehousing procedures?		x	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	x		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	x		
Must public warehouse operators/collateral managers be licensed to operate?		x	
Must private warehouse operators/collateral managers be licensed to operate?		x	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	x		
Pledge: written document required?	x		
Pledge: perfection by delivery to lender alone?	x		
Pledge: registration required?			x <sup>85</sup>
Pledge: other formalities or perfection requirements?	x <sup>86</sup>		
Pledge: recognition of constructive possession?	x		
Pledge: possible to pledge future commodity?	x		
Pledge: possible to pledge commingled commodity?	x <sup>87</sup>		
Pledge: priority over subsequent (registered) security?			x <sup>88</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		x	
Pledge: possible to enforce security against future purchaser with knowledge of security?		x <sup>89</sup>	
Possible to take proprietary (charge-type) security over stored commodity?		x <sup>90</sup>	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	

Cameroon - Summary of findings	Cameroon		
	Yes	No	Partial
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?	x		
Are banks permitted to enter into commodity repurchase agreements?		x	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	x		
Enforcement procedures			
Possible to enforce security over commodity by private sale?	x <sup>91</sup>		
Court order required for sale of secured commodity?			x <sup>92</sup>
Other sale requirements (e.g., notice, public auction)?		x	
Can a warehouse operator claim a lien over stored goods?	x		
Availability of fast-track enforcement through the courts?	x <sup>93</sup>		
Availability of ADR?	x		
Possible to enforce overseas court judgments?	x <sup>94</sup>		
Possible to enforce overseas arbitral awards?	x <sup>95</sup>		

Mozambique - Summary of findings	Mozambique		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?		X	
Proposed legislation for warehouse receipt financing?	X <sup>96</sup>		
Are warehouse operators/collateral managers regulated?		X	
Existing regulation of any specific commodities?		X	
Is there a regulator with statutory powers?		X	
Are warehouse receipts negotiable instruments?		X	
Are warehouse receipts transferable?			X <sup>97</sup>
Is field warehousing legally possible?			X <sup>98</sup>
Is there judicial or other guidance on effective field warehousing procedures?		X	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	X		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	X		
Must public warehouse operators/collateral managers be licensed to operate?		X	
Must private warehouse operators/collateral managers be licensed to operate?		X	
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	X		
Pledge: written document required?			X <sup>99</sup>
Pledge: perfection by delivery to lender alone?			X <sup>100</sup>
Pledge: registration required?		X	
Pledge: other formalities or perfection requirements?	X <sup>101</sup>		
Pledge: recognition of constructive possession?	X		
Pledge: possible to pledge future commodity?		X	
Pledge: possible to pledge commingled commodity?		X	
Pledge: priority over subsequent (registered) security?			X <sup>102</sup>
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		X	
Pledge: possible to enforce security against future purchaser with knowledge of security?	X		
Possible to take proprietary (charge-type) security over stored commodity?		X	
Charge: registration required?		-	
Charge: other perfection requirements (e.g., stamp duty)?		-	
Charge: possible to charge future commodity?		-	
Charge: possible to charge commingled commodity?		-	
Charge: priority over subsequent registered security?		-	



Mozambique - Summary of findings	Mozambique		
	Yes	No	Partial
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		-	
Charge: possible to enforce security against future purchaser with knowledge of security?		-	
Existence of publically searchable collateral register?		x	
Are banks permitted to enter into commodity repurchase agreements?	x		
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	x		
Enforcement procedures			
Possible to enforce security over commodity by private sale?			x <sup>103</sup>
Court order required for sale of secured commodity?			x <sup>104</sup>
Other sale requirements (e.g., notice, public auction)?		x	
Can a warehouse operator claim a lien over stored goods?	x		
Availability of fast-track enforcement through the courts?		x	
Availability of ADR?	x		
Possible to enforce overseas court judgments?		x <sup>105</sup>	
Possible to enforce overseas arbitral awards?			x <sup>106</sup>

Uganda - Summary of findings	Uganda		
	Yes	No	Partial
Legislation and regulations			
Existing legislation for warehouse receipt financing?	X		
Proposed legislation for warehouse receipt financing?	-		
Are warehouse operators/collateral managers regulated?			X <sup>107</sup>
Existing regulation of any specific commodities?	-		
Is there a regulator with statutory powers?	X <sup>108</sup>		
Are warehouse receipts negotiable instruments?	X <sup>109</sup>		
Are warehouse receipts transferable?	X		
Is field warehousing legally possible?	X		
Is there judicial or other guidance on effective field warehousing procedures?		X	
Status of relevant participants			
Do individuals have legal personality permitting them to enter into secured financing arrangements?	X		
Do cooperatives/other forms of farmer organisations have legal personality permitting them to enter into secured financing arrangements?	X		
Must public warehouse operators/collateral managers be licensed to operate?	X		
Must private warehouse operators/collateral managers be licensed to operate?			X <sup>110</sup>
Taking security			
Possible to take possessory (pledge-type) security over stored commodity?	X		
Pledge: written document required?	X		
Pledge: perfection by delivery to lender alone?		X	
Pledge: registration required?			X <sup>111</sup>
Pledge: other formalities or perfection requirements?	X <sup>112</sup>		
Pledge: recognition of constructive possession?	X		
Pledge: possible to pledge future commodity?	X		
Pledge: possible to pledge commingled commodity?			X <sup>113</sup>
Pledge: priority over subsequent (registered) security?	X		
Pledge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?		X	
Pledge: possible to enforce security against future purchaser with knowledge of security?	X		
Possible to take proprietary (charge-type) security over stored commodity?	X		
Charge: registration required?	X		
Charge: other perfection requirements (e.g., stamp duty)?	X <sup>114</sup>		
Charge: possible to charge future commodity?	X		
Charge: possible to charge commingled commodity?			X <sup>115</sup>
Charge: priority over subsequent registered security?	X		

Uganda - Summary of findings	Uganda		
	Yes	No	Partial
Charge: possible to enforce security against future purchaser without knowledge of security (i.e., bona fide purchaser)?			X <sup>116</sup>
Charge: possible to enforce security against future purchaser with knowledge of security?			X <sup>117</sup>
Existence of publically searchable collateral register?	X <sup>118</sup>		
Are banks permitted to enter into commodity repurchase agreements?		X	
Risk of recharacterisation based on court reviewing substance of underlying arrangement?	-		
Enforcement procedures			
Possible to enforce security over commodity by private sale?			X <sup>119</sup>
Court order required for sale of secured commodity?			X <sup>120</sup>
Other sale requirements (e.g., notice, public auction)?	X		
Can a warehouse operator claim a lien over stored goods?	X		
Availability of fast-track enforcement through the courts?		X	
Availability of ADR?	X		
Possible to enforce overseas court judgments?			X <sup>121</sup>
Possible to enforce overseas arbitral awards?	X <sup>122</sup>		

## Endnotes

- 1 There is no specific WRS legislation.
- 2 Although there are no legislative proposals in place, the Ministry of Economy and Finance has commissioned a study to investigate possible legal and regulatory reforms for the promotion of warehouse financing in Burkina Faso.
- 3 There is no specific legislation on field warehousing, but it can be conducted in reliance on normal contractual arrangements and land law principles.
- 4 Registration is only necessary for non-possessory pledges.
- 5 Stamp duty is payable for all pledges and registration fees are payable when registering a non-possessory pledge.
- 6 The pledge will need to be drafted appropriately to reflect this. Please see paragraph 5.3 of the Burkina Faso country report for more details.
- 7 Priority over other security holders will depend on whether you have registered your security and which security was registered first.
- 8 A third party can still be a bona fide purchaser even if they were aware of an existing security interest over the goods purchased. They will therefore still have a defence to a claim by the security holder unless the security holder can show the third party acted in bad faith.
- 9 Charge-type security not relevant to taking security over stored goods.
- 10 The parties must contractually agree to enforcement by private sale.

- 11 This is not necessary where the parties have agreed to enforcement by private sale. However, a court order is necessary where there is no contractual right to private sale.
- 12 There is little practical guidance on when the fast track procedure can be used and this appears to be decided on a case-by-case basis.
- 13 Enforcement is subject to the Burkinabe courts issuing an exequatur decision. It will do this provided the foreign judgment is not contrary to Burkinabe public policy.
- 14 Burkina Faso is a party to the New York Convention (1958) and will recognise foreign arbitration awards provided they are not contrary to Burkinabe public policy.
- 15 The Nigerien Civil Code contains requirements to be followed by those receiving goods (whether agricultural or not) on deposit.
- 16 There is no specific legislation on field warehousing, but it can be conducted in reliance on normal contractual arrangements and land law principles.
- 17 Registration is only necessary for non-possessory pledges.
- 18 Stamp duty is payable for all pledges and registration fees are payable when registering a non-possessory pledge.
- 19 The pledge will need to be drafted appropriately to reflect this. Please see paragraph 5.3 of the Niger country report for more details.
- 20 Priority over other security holders will depend on whether you have registered your security and which security was registered first.
- 21 A third party can still be a bona fide purchaser even if they were aware of an existing security interest over the goods purchased. They will therefore still have a defence to a claim by the security holder unless the security holder can show the third party acted in bad faith.
- 22 Charge-type security not relevant to taking security over stored goods.
- 23 The parties must contractually agree to enforcement by private sale.
- 24 This is not necessary where the parties have agreed to enforcement by private sale. However, a court order is necessary where there is no contractual right to private sale.
- 25 There is little practical guidance on when the fast track procedure can be used, and this appears to be decided on a case-by-case basis.
- 26 Niger is subject to OHADA laws on arbitration; however, there is no established arbitral body in Niger.
- 27 Enforcement is subject to the Nigerien courts issuing an exequatur decision. It will do this provided the foreign judgment is not contrary to Nigerien public policy.
- 28 Niger is a party to the New York Convention (1958) and will recognise foreign arbitration awards provided they are not contrary to Nigerien public policy.
- 29 There is no specific WRS legislation.
- 30 There is no specific legislation on field warehousing, but it can be conducted in reliance on normal contractual arrangements and land law principles.
- 31 Registration is only necessary for non-possessory pledges.
- 32 Registration fees are payable with both the regional tax authority and the collateral registry when registering non-possessory pledges.
- 33 The pledge will need to be drafted appropriately to reflect this. Please see paragraph 5.3 of the Senegal country report for more details.

- 34 Priority over other security holders will depend on whether you have registered your security and which security was registered first.
- 35 A third party can still be a bona fide purchaser even if they were aware of an existing security interest over the goods purchased. They will therefore still have a defence to a claim by the security holder unless the security holder can show the third party acted in bad faith.
- 36 Charge-type security not relevant to taking security over stored goods.
- 37 The parties must contractually agree to enforcement by private sale.
- 38 This is not necessary where the parties have agreed to enforcement by private sale. However, a court order is necessary where there is no contractual right to private sale.
- 39 There is little practical guidance on when the fast track procedure can be used, and this appears to be decided on a case-by-case basis.
- 40 Enforcement is subject to the Senegalese courts issuing an exequatur decision. The factors that the Senegalese courts will take into account when deciding whether to issue an exequatur decision are set out in paragraph 6.5.1 of the Senegal country report.
- 41 Senegal is a party to the New York Convention (1958) and it will recognise foreign arbitration awards provided they are not contrary to Senegalese public policy.
- 42 There are currently draft regulations in respect of warehouse receipts and a commodities exchange.
- 43 There is a system of voluntary regulation in respect of grain administered by the Ghana Grains Council.
- 44 It can be contractually agreed that warehouse receipts will be transferrable.
- 45 Stamping is required.
- 46 Provided registered.
- 47 This will change in respect of negotiable warehouse receipts issued under the draft warehouse receipts regulations.
- 48 This will change in respect of negotiable warehouse receipts issued under the draft warehouse receipts regulations.
- 49 Although only with agreement of the borrower and the consent of the court.
- 50 There are procedures for sale of commodity without court order, but this must be done by public auction.
- 51 If a non-court enforcement procedure is chosen, registration of notice to enforce and public auction are required.
- 52 Subject to reciprocity.
- 53 Ghana is a party to the New York Convention (1958), but it reserved the right to apply the convention on the basis of reciprocity.
- 54 There is no specific WRS legislation.
- 55 Draft legislation to create a warehouse receipts system and a central regulator is at an advanced stage.
- 56 Collateral managers operating in the agriculture industry are regulated; there are specific requirements for dealing with coffee, cocoa, cashew nuts, and cotton.
- 57 Coffee, cocoa, cashew nuts and cotton are all subject to specific legislation.
- 58 There are specific regulators for coffee, cocoa, cashew nuts and cotton products.

- 59 There is no specific legislation on field warehousing, but it can be conducted in reliance on normal contractual arrangements and land law principles.
- 60 Collateral managers handling coffee, cocoa, cashew nuts and cotton products must be licensed.
- 61 Collateral managers handling coffee, cocoa, cashew nuts and cotton products must be licensed.
- 62 Registration is only necessary for non-possessory pledges.
- 63 Stamp duty is payable for all pledges and registration fees are payable when registering a non-possessory pledge.
- 64 The pledge will need to be drafted appropriately to reflect this. Please see paragraph 4.3 of the Côte d'Ivoire country report for more details.
- 65 Priority over other security holders will depend on whether you have registered your security and which security was registered first.
- 66 A third party can still be a bona fide purchaser even if they were aware of an existing security interest over the goods purchased. They will therefore still have a defence to a claim by the security holder unless the security holder can show the third party acted in bad faith.
- 67 Charge-type security not relevant to taking security over stored goods.
- 68 The parties must contractually agree to enforcement by private sale.
- 69 This is not necessary where the parties have agreed to enforcement by private sale. However, a court order is necessary where there is no contractual right to private sale.
- 70 There is little practical guidance on when the fast track procedure can be used and this appears to be decided on a case-by-case basis.
- 71 Enforcement is subject to the Ivorian courts issuing an exequatur decision. It will do this provided the foreign judgment was issued by a competent foreign court and is not contrary to Ivorian public policy.
- 72 Côte d'Ivoire is a party to the New York Convention (1958) and it will recognise foreign arbitration awards provided they are not contrary to Ivorian public policy.
- 73 The Madagascar Commercial Act provides that warrants may be issued which are negotiable instruments. However, these are not used in connection with warehouse financing in Madagascar.
- 74 There is no specific legislation on field warehousing, but it can be conducted in reliance on normal contractual arrangements and land law principles.
- 75 Stamp duty and registration fees are payable.
- 76 Priority over other security holders will depend on whether you have registered your security and which security was registered first.
- 77 A third party can still be a bona fide purchaser even if they were aware of an existing security interest over the goods purchased. They will therefore still have a defence to a claim by the security holder unless the security holder can show the third party acted in bad faith.
- 78 Charge-type security not relevant to taking security over stored goods.
- 79 The Malagasy Securities Act provides for an express power of sale for security holders.

- 80 There is little practical guidance on when the fast track procedure can be used, and this appears to be decided on a case-by-case basis.
- 81 Enforcement is subject to the Malagasy courts issuing an exequatur decision. It will do this provided the foreign judgment is not contrary to Malagasy public policy.
- 82 Madagascar is a party to the New York Convention (1958) and it will recognise foreign arbitration awards provided they are not contrary to Malagasy public policy.
- 83 There is no specific WRS legislation.
- 84 There is no specific legislation on field warehousing, but it can be conducted in reliance on normal contractual arrangements and land law principles.
- 85 Registration is only necessary for non-possessory pledges.
- 86 Stamp duty is payable for all pledges and registration fees are payable when registering a non-possessory pledge.
- 87 The pledge will need to be drafted appropriately to reflect this. Please see paragraph 4.3 of the Cameroon country report for more details.
- 88 Priority over other security holders will depend on whether you have registered your security and which security was registered first.
- 89 A third party can still be a bona fide purchaser even if they were aware of an existing security interest over the goods purchased. They will therefore still have a defence to a claim by the security holder unless the security holder can show the third party acted in bad faith.
- 90 Charge-type security not relevant to taking security over stored goods.
- 91 The parties must contractually agree to enforcement by private sale.
- 92 This is not necessary where the parties have agreed to enforcement by private sale. However, a court order is necessary where there is no contractual right to private sale.
- 93 There is little practical guidance on when the fast track procedure can be used, and this appears to be decided on a case-by-case basis.
- 94 Enforcement is subject to the Cameroon courts issuing an exequatur decision. It will do this provided the foreign judgment is not contrary to Cameroonian public policy.
- 95 Cameroon is a party to the New York Convention (1958) and it will recognise foreign arbitration awards provided they are not contrary to Cameroonian public policy.
- 96 The proposals are at an early stage. See paragraph 2 (Proposed warehouse receipt financing legislation) of the Mozambique country report. The proposed legislation will introduce regulation of warehouse operators and the concept of negotiable warehouse receipts. The following answers in this *table address that law as it currently stands*.
- 97 This can be provided for contractually.
- 98 There is nothing under Mozambique law to prevent field warehousing, but local counsel have some concerns over how effective this arrangement would be in practice from a legal standpoint.
- 99 Written document recommended.
- 100 Written document recommended.
- 101 Pledge documents should be written in Portuguese, notarised and (if applicable) legalised. Ad valorem stamp duty payable (0.3% of the amount secured). Registration of the underlying finance document may be required.

- 102 Registration of security not possible. However, a pledge will have priority over a subsequent security interest.
- 103 This must be provided for in advance in the security document. Debtor may grant the creditor an irrevocable power of attorney to effect the sale.
- 104 A court order is required if the parties did not provide for enforcement by way of private sale.
- 105 As a rule, confirmation of the local judicial system will be required.
- 106 Mozambique is a party to the New York Convention (1958), but it reserved the right to apply the convention on the basis of reciprocity.
- 107 The Uganda WRS legislation provides for a regulating authority. This role is being carried out on an interim basis by the Uganda Commodity Exchange, but it is only being applied with UCE-licensed grain warehouses.
- 108 The Uganda WRS legislation provides for a regulating authority. This role is being carried out on an interim basis by the Uganda Commodity Exchange.
- 109 It is possible to issue both negotiable and non-negotiable warehouse receipts under the Ugandan system.
- 110 The Ugandan WRS legislation purports to require all warehouse operators to be licensed. In practice, UCE does not appear to be applying this requirement to private warehousing arrangements carried out under traditional collateral management arrangements.
- 111 Registration of a pledge is not required but is recommended.
- 112 Stamp duty on pledges is payable at a nominal rate (UGX 5000). Security over a warehouse receipt must be notified to the regulating authority.
- 113 It is possible to take security over fungible goods commingled in accordance with the WRS legislation, which provides for quantity and grading to be established prior to commingling.
- 114 Ad valorem stamp duty payable (0.5% of the amount secured).
- 115 It is possible to take security over fungible goods commingled in accordance with the WRS legislation, which provides for quantity and grading to be established prior to commingling.
- 116 Ugandan law requires registration of charges. Once a charge is registered, the secured creditor could enforce against a subsequent purchaser.
- 117 Ugandan law requires registration of charges. Once a charge is registered, the secured creditor could enforce against a subsequent purchaser.
- 118 The existing registries may not be reliable.
- 119 This must be provided for in advance in the security document.
- 120 A court order is required if the parties did not provide for enforcement by way of private sale.
- 121 Depends on the country. Judgements obtained in Commonwealth countries are enforceable. For other countries, it depends on reciprocity arrangements.
- 122 Uganda is a party to the New York Convention (1958) and it will apply awards obtained in other contracting states.





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