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Default rules for data provision contracts (second revision)

Note by the Secretariat

Contents

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I. About this note

1. This note contains a second revision of the draft default rules for data provision contracts for consideration by the Working Group at its sixty-seventh session. It has been prepared by the secretariat to incorporate the deliberations and decisions of the Working Group at its sixty-sixth session (Vienna, 16–20 October 2023) (A/CN.9/1162, paras. 59–89).

II. Revised draft rules

A. Introduction

2. As with the first revision that was considered by the Working Group at its sixty-sixth session (A/CN.9/WG.IV/WP.183), the draft default rules set out in this note are accompanied by remarks which explain their origin and intent. Consistent with views expressed at the sixty-fifth session, the rules are drafted as provisions which could eventually take the form of model legislation or model contract clauses (A/CN.9/1132, para. 13).[1]

3. In considering the revised set of rules, the Working Group may wish to focus on rules that were not considered – or not deliberated in detail – at the sixty-sixth session, as well as rules that have been substantively revised, namely those contained in articles 5 to 11. In that regard, several issues are highlighted in the remarks for consideration, including:

(a) how the fitness for purpose standards should be adapted to data (article 7);

(b) whether special rules on the use of the data (article 8) should be established based on the mode of provision (i.e. where the data is provided by making it available to the data recipient in an information system controlled by the data provider);

(c) the scope of a new rule on the use of data upon expiration of the term or earlier termination of the contract (article 8);

(d) the scope of rules on derived data (article 9); and

(e) whether the rules on remedies should be expanded (article 10).

4. In doing so, the Working Group may wish to bear in mind the broader policy objectives that data provision contracts engage, including those pursued by a range of other international initiatives on data governance and cross-border data flows, as previously reported to the Working Group (A/CN.9/WG.IV/WP.180, chapter IV). A recent example is the Global Digital Compact, contained in annex I to the Pact for the Future that was adopted by the General Assembly on 22 September 2024, which charts a roadmap for global digital cooperation, including through commitments in the areas of cross-border data flows and data governance.

[1] If the rules take the form of model contract clauses, the matters addressed in articles 1 to 4 would presumably be transposed into an accompanying legal guide on the use of the model clauses. Moreover, it would not be necessary to specify that certain rules apply only “as between the parties” (e.g. articles 8 and 9).

B. Rules on general matters

Article 1. Definitions[2]

For the purpose of these rules:

(a) "Data" means a representation of information in electronic or other machine-readable form;[3]

(b) "Using" data includes performing one or more operations on data, such as sharing, porting, transferring or providing data.[4]

Remarks on article 1

1. The concept of "data"

5. The definition of "data" is broad (A/CN.9/1132, para. 18). Confining the scope of data and data provision contracts to which the rules apply is currently left to article 2.

6. The concept of data as a representation of information underlies the concept of "data message" in UNCITRAL texts on electronic commerce, which is defined as "information generated, sent, received or stored by electronic, magnetic, optical or similar means" (i.e. other than by paper-based means).[5] Earlier UNCITRAL texts on electronic commerce – such as the Model Law on Electronic Commerce (MLEC) and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC) were primarily concerned with data as a means of communication between the parties (hence "data message"). Conversely, these rules are concerned with data as a commodity, regardless of what the information represented by the data communicates.[6] Accordingly, the term "data" is used.

7. The reference to "electronic or other machine-readable form" encompasses data in digital form (i.e. information represented by a string of "zeros" and "ones"), which is currently the focus of trade in data (A/CN.9/1132, para. 20). However, consistent with the principle of technology neutrality, the definition encompasses data suitable for processing using other information technologies (e.g. high-speed analogue computing and quantum computing) (ibid., para. 21).

2. The concept of "using" data

8. Paragraph (b) clarifies what it means to "use" data, reflecting the deliberations within the Working Group regarding the relationship between "processing" and "using" data (A/CN.9/1132, para. 25). In effect, paragraph (b) reflects the broad technical definition of "processing" data but uses the terminology of "using" data to reflect common usage. "Porting" data refers to the operation by which the data recipient initiates a transfer of data from the data provider under a data provision contract

[2] Article 1 reproduces article 1 of the first revision, which drew on a glossary of terms that was considered by the Working Group at its sixty-fifth session (A/CN.9/1132, paras. 18–23 and 25). It has been revised to reflect the suggestions made within the Working Group at its sixty-sixth session (A/CN.9/1162, paras. 88–89).

[3] The definition of "data" in paragraph (a) has been amended to reflect several observations made at the seventy-fifth and seventy-sixth sessions of the Working Group (A/CN.9/1162, para. 88; A/CN.9/1132, para. 22). It is assumed that a requirement of machine readability implies suitability for automated processing.

[4] To reflect the distinction between "use" and "access" within the meaning of article 5 (see paras. 28–29 below), the definition of "using" has been revised to remove reference the term "accessing".

[5] See, e.g. UNCITRAL Model Law on Electronic Commerce, art. 2(a); United Nations Convention on the Use of Electronic Communications in International Contracts, art. 4(c).

[6] For completeness, it is worth recalling that the term "data message" in UNCITRAL texts is not limited to communication but is also intended to encompass computer-generated records that are not meant for communication, and therefore comprises "electronic records": see A/CN.9/WG.IV/WP.176, para. 13.

(A/CN.9/1093, para. 83) and is therefore particularly relevant where data is provided under article 5(2)(b).

Article 2. Scope of application[7]

(1) These rules apply to contracts for the provision of data under which one party (the "data provider") provides data to another party (the "data recipient") [, whether or not with the involvement of a third party].[8]

[(2) These rules do not apply to software or other supplies that are transacted for purposes other than accessing the information represented by the data.][9]

[(3) These rules do not apply to contracts concluded for personal, family or household purposes, unless the data provider, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the data recipient was acting for any such purposes.][10]

(4) Nothing in these rules affects the application to contracts for the provision of data of any law related to data privacy and protection, trade secrets or intellectual property.[11]

Remarks on article 2

1. "Contracts for the provision of data"

9. Paragraph 1 of article 2 states that the rules apply to "contracts". By implication, the rules apply to the voluntary provision of data, and do not apply to the provision of data that is mandated by law outside a contractual setting. The rules do not address matters relating to contract formation or validity.

10. Data commonly transacted by contract is data that is generated and used in commercial activity (e.g. research and development, production, distribution and consumption of goods and services). This data is sometimes referred to as "industrial data", although that term has not yet acquired an established legal meaning. An example identified in earlier deliberations by the Working Group is data sets used to train AI models (A/CN.9/1093, para. 79). Such transactions are sometimes described as data "supply" or data "sharing" arrangements, although those terms can sometimes be associated with a particular regime for the use of the data by the parties. The rules refer to data "provision" as a more neutral term (A/CN.9/1162, para. 61).

11. Contracts for the provision of data are typified by transactions in "big data" (A/CN.9/1132, para. 19), a term which generally refers to large volumes of data that are collected from a variety of sources and generated and processed at high velocity (the so-called "3 Vs" of volume, velocity and variety). A similar assumption underpins the Principles for a Data Economy, jointly developed by the American Law Institute and European Law Institute (hereafter the "ALI/ELI Principles").[12] Difficulties in identifying the limits of "big data" make it an unsuitable reference point for defining the scope of application of the rules.

[7] Article 2 was inserted following discussions at the sixty-fifth session of the Working Group (A/CN.9/1132, paras. 19 and 24). It has been revised to reflect the deliberations at the sixty-sixth session (A/CN.9/1162, paras. 62–70).

[8] See remarks in para. 14.

[9] See remarks in paras. 19–14.

[10] Paragraph 3 is new. It implements the prevailing view at the sixty-sixth session of the Working Group to exclude consumer contracts from the scope of the rules (A/CN.9/1162, para. 70).

[11] Paragraph 4 reproduces paragraph 4 of the first revision. The express preservation of "any laws governing transactions in specific electronic records", wording whose meaning was queried within the Working Group at its sixty-sixth session (A/CN.9/1162, para. 70), has been removed in view of the remarks in paras. 19–21.

[12] The ALI/ELI Principles were presented to the Working Group at its sixty-third session: see A/CN.9/1093, paras. 82–85.

12. At the sixty-sixth session of the Working Group, several suggestions were made to clarify the range of contracts within the scope of the rules. One suggestion was to insert a non-exhaustive list of specific types of data provision contracts to which the rules applied, while another suggestion was to include only specified types of contracts within the scope of the rules (A/CN.9/1162, para. 63). Reference was made to the approach taken in the ALI/ELI Principles, which distinguish five types of data provision contracts (referred to as "contracts for the supply or sharing of data") and establish a separate set of default terms for each. The five types are:

(a) "Contracts for the transfer of data", under which the data recipient is put in control of the data by transferring the data to a medium within the recipient's control, or by delivering to the recipient a medium on which the data is stored, and for which the default terms apply a "sales approach" to the mode of provision, conformity, and use of the data;

(b) "Contracts for simple access to data", under which the recipient is given access to the data on a medium within the supplier's control, and for which the default terms apply a "licence approach", the main difference with contracts for the transfer of data being in the mode of provision;

(c) "Contracts for exploitation of a data source", under which the data recipient is given access to a data source, and for which the default terms focus more on the mode of provision (real-time access) than on conformity of the data (on account of the data not yet existing);

(d) "Contracts for authorization to access", under which the data recipient is authorized to access data, and for which the default terms impose no obligation on the data provider (on account of the passive role that it plays in the transaction); and

(e) "Contracts for data pooling", under which two or more parties share data in a "data pool" (with or without the involvement of a third-party intermediary), and for which the default terms focus on the use of the data and derived data.

13. Paragraph 1 of article 2 is intended to encompass each of those types of contract, including contracts for data pooling. Specifically, paragraph 1 covers contracts under which the parties provide data to each other (e.g. a two-way data sharing arrangement), and therefore extends to "decentralized" data pools. Each party (described in the ALI/ELI Principles as a "data partner") would act as a "data provider" and "data recipient", depending on its contribution to the data pool (A/CN.9/1162, para. 86), and the rules would apply accordingly.

14. Moreover, paragraph 1 is intended to cover contracts under which data is provided through a third-party intermediary (e.g. via an online platform) (A/CN.9/1132, para. 19 and 27), and therefore to extend to "centralized" data pools and other data exchanges. Under such arrangements, the intermediary would not ordinarily be party to the data provision contract, but would rather have separate contracts in place with the data provider or the data recipient (or both), which may be characterized as data processing contracts (see para. 18 below).[13] The first revision sought to accommodate the involvement of third-party intermediaries in the rules on mode of provision (article 5). To reinforce this approach, the Working Group may wish to consider inserting the bracketed text in paragraph 1.

15. Unlike the ALI/ELI Principles, the Working Group has worked on the basis of a single set of rules that apply to all data provision contracts, with any differential treatment between particular types of contracts being accommodated in the individual rules themselves. At the sixty-sixth session of the Working Group, it was noted that special rules for particular types of contracts might be warranted (A/CN.9/1162, para. 64). This approach is reflected in the present revision, which establishes special rules on the use of the data where it is provided in an information system controlled

[13] This is based on the contractual structure of online platforms previously described by the secretariat: see A/CN.9/1117, para. 25.

by the data provider (similar to transactions covered by "contracts for simple access to data" in the ALI/ELI Principles).

2. "Data providers" and "data recipients"

16. As the secretariat has previously observed,[14] data is transacted along a "data value chain" which involves multiple actors performing a range of (often overlapping) roles with respect to data to generate value. For a particular data provision contract, the "data provider" may have generated "raw" data from a data source under its control, or it may have acquired the data as a "data broker" to provide it to another person or "derived" the data by processing other data. The "data recipient" may be acquiring the data to perform similar activities.

3. Contracts excluded from the scope of the rules

17. Paragraph 1 of article 2 refers to contracts "for" the provision of data, which implies that the rules are concerned with contracts whose object is the provision of data. This recalls a suggestion made at the sixty-sixth session for work to focus on contracts characterized by the provision of data (A/CN.9/1162, para. 68). Relying on this implicit limitation, a contract would not fall within the scope of the rules merely because it obliges a party to provide information that is capable of being provided by electronic means (see A/CN.9/1132, para. 18).

(a) Data processing contracts

18. The limitation implicit in paragraph 1 could also be relied on to exclude from the scope of the rules contracts under which one party provides data to another party for the purpose of receiving data processing services (e.g. data scraping, cloud-based services, data analytics and electronic transmission services). The first revision contained a rule that explicitly excluded contracts "in which the preponderant part of the obligations of the data provider consists in the supply of services with respect to the data". At the sixty-sixth session of the Working Group, it was acknowledged that the distinction between data provision contracts and data processing contracts was not always clear-cut, and that the provision of data could itself be characterized as the provision of services. Accordingly, support was expressed to remove the rule (A/CN.9/1162, para. 68).

(b) Contracts for the supply of software etc.

19. Broad support has been expressed within the Working Group to exclude from the scope of the rules transactions in "functional data" (e.g. software) and "representative data" (e.g. digital assets) (A/CN.9/1132, para. 19; A/CN.9/1162, para. 65). Such transactions are not concerned with data itself (i.e. the "information" that the data represents), but with the functions that it delivers (e.g. a computer program) or the rights and obligations that holding the data represents (e.g. cryptocurrency). The same could be said for transactions in digital content (e.g. consumable content delivered by integrating data into the user's digital environment).

20. Different approaches have been put forward to implement this position. The first revision inserted a non-exhaustive list of data to which the rules did not apply. An alternative approach, suggested at the sixty-sixth session of the Working Group (A/CN.9/1162, para. 65), is to exclude "functional data" and "representative data" from the definition of "data", assuming that a definition of both concepts can be agreed.

21. Another approach that the Working Group may wish to consider is to rely on the limitation implicit in paragraph 1 that the rules apply only to contracts "for" the provision of data as "information". The "give way" clause in paragraph 4 may also apply, given that transactions in certain types of "functional data" and "representative data" are becoming the subject of specific regulation in several jurisdictions (e.g. the

[14] A/CN.9/WG.IV/WP.180, para. 21.

regulation of digital content in the European Union[15]). For this approach, it would not be necessary to retain a rule expressly excluding particular contracts from the scope of the rules.

(c) Contracts with consumers

22. Paragraph 3 is based on article 2(a) of the CISG with revised wording from article 2(1)(a) of the ECC. While data provision contracts with consumers may not be very common (as opposed to other contracts excluded from the scope of application), it has been observed that transactions in the digital economy make it difficult for data providers to identify the purposes for which the data recipient is acting (A/CN.9/1162, para. 70). Accordingly, in the interests of legal certainty, paragraph 3 applies the approach of article 2(a) of the CISG to preserve the application of the rules if the purposes of the data recipient in concluding the contract are not apparent to the data provider.

4. Preserving other laws

23. Paragraph 4 operates as a "give way" clause in the event of conflict between the rules and other laws (A/CN.9/1162, para. 69). Unlike paragraphs 2 and 3, it is not intended to exclude contracts governed by other laws entirely from the scope of the rules. To the extent that other laws do not regulate matters governed by the rules, the default rules apply on their terms. See also remarks in the first revision (A/CN.9/WG.IV/WP.183, para. 25).

Article 3. Party autonomy[16]

(1) The parties may derogate from or vary by agreement any of these rules.

(2) Such an agreement does not affect the rights of any person that is not a party to that agreement.

Remarks on article 3

24. See remarks in the first revision (A/CN.9/WG.IV/WP.183, para. 28).

Article 4. Interpretation[17]

(1) In the interpretation of these rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith in international trade.

(2) Questions concerning matters governed by these rules which are not expressly settled therein are to be settled in conformity with the general principles on which they are based.

Remarks on article 4

25. See remarks in the first revision (A/CN.9/WG.IV/WP.183, paras. 30–31).

[15] See Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *Official Journal of the European Union*, L 136 (22 May 2019), p. 1.

[16] Article 3 was not discussed at the sixty-sixth session and remains unchanged from the first revision.

[17] Article 4 was not discussed at the sixty-sixth session and remains unchanged from the first revision.

C. Rules on mode of provision

Article 5. Mode of provision[18]

(1) The data provider shall provide the data by giving the data recipient access to the data.

(2) The data provider shall give the data recipient access[19] to the data by:

(a) Delivering the data to an information system designated by the data recipient; or

(b) Making the data available to the data recipient in an information system designated by the data provider.[20]

Remarks on article 5

1. General obligation to provide the data

26. Paragraph 1 establishes a general obligation on the data provider to provide the data. It reflects the essential component of that obligation, which is to make the data accessible to the data recipient (A/CN.9/1162, paras. 72 and 73).

27. Paragraph 1 refers to giving "access" to the data, rather than making the data "accessible", to avoid any implication that article 5 is concerned with the characteristics of the data, which is a matter of conformity of data that is addressed in article 7. The distinction between mode of provision and conformity of data has been recognized within the Working Group (A/CN.9/1162, para. 78). Article 5 is concerned with putting the data recipient in a position to use the data, but not with whether or how the data recipient can use the data.

2. The concept of "access" to data

28. The concept of "access" to data is used in several international instruments but not often defined. The Organisation for Economic Co-operation and Development (OECD) Recommendation on Enhancing Access to and Sharing of Data defines "access" to mean the "act of querying or retrieving data for its potential use, subject to applicable technical, financial, legal, or organisational access requirements", while the ALI/ELI Principles define it as "being in a position to read the data and utilize it, with or without having control of that data". The commentary to the ALI/ELI Principles clarifies that access "often includes some kind of processing, but not necessarily so; merely reading data on a screen would amount to access but normally not to processing".

29. Based on these definitions, having "access" to data is akin to being in the position – or having the capability – to process data, which in turn ordinarily presupposes an ability to "read" the data. It does not encompass the further processing or use of the data, and thus does not presuppose any entitlement to use or to "control" the data. Rather, in the context of data provision contracts, "access" is a necessary first step to using the data. In this sense, the concept of "access" aligns with the

[18] Article 5 is based on the rules set out in paragraph 28 of A/CN.9/WG.IV/WP.180 ("initial draft"). It has been revised to reflect the suggestions made within the Working Group at its sixty-fifth session (A/CN.9/1132, paras. 27–28) and sixty-sixth session (A/CN.9/1162, paras. 71–79). Paragraph 1 is new (see para. 26).

[19] At the sixty-sixth session of the Working Group, it was suggested to include a definition of "access" (A/CN.9/1162, para. 89). As the term is only used in article 5, it may be sufficient for the term to be defined in accompanying explanatory material.

[20] The first revision referred to an information system "under the control of the data provider". For the reasons given in para. 33, it is suggested to refer to the system "designated by the data provider", thereby aligning the wording of subparagraph (b) with that of subparagraph (a).

technical understanding of the term, as reflected in ISO/IEC Standard No. 2382, which defines "access" in terms of "obtain[ing] the use of a resource".

3. Different modes of providing data

30. Paragraph 2 contemplates the provision of data by delivery and by making it available, which constitute the two main modes of provision in practice (A/CN.9/1132, para. 28; A/CN.9/1162, para. 73). Other modes of provision can be provided for by agreement of the parties under article 3.

31. The concept of "delivering" data in subparagraph (a) is intended to coincide with the receipt of data (i.e. entry into the information system designated by the data recipient).[21] For the term "information system", see remarks in the first revision (A/CN.9/WG.IV/WP.183, para. 35).

32. 'The concept of "making [data] available" in subparagraph (b) is a less technical concept and should be understood consistent with its usage in other UNCITRAL texts on electronic commerce. Those texts distinguish between data that is "available" and data that is "accessible". For instance, article 9(2) of the ECC refers to information in an electronic communication being "accessible so as to be usable for subsequent reference", which is meant to imply characteristics of readability and interpretability,[22] while article 9(4) refers to information in an electronic communication being "available", which implies no quality of usability.[23] In keeping with the distinction between mode of provision and conformity of data (see para. 27 above), whether data is "available" for the purposes of subparagraph (b) is a factual matter concerned with whether the data recipient is in a position to use the data.

33. Paragraph 2 is intended to accommodate modes of provision involving a third party, even if the rules themselves are not concerned with the contractual relationship between that person and the parties to the data provision contract. Specifically, the information system designated by the data recipient for delivery, or the information system in which the data is made available, may be operated by a third-party intermediary (e.g. via an online platform) on behalf of either party.

Article 6. Timing of provision[24]

The data provider shall provide the data according to the time frame fixed by or determinable from the contract, or otherwise without undue delay.

Remarks on article 6

34. See remarks in the first revision (A/CN.9/WG.IV/WP.183, paras. 39–41).

[21] *UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services* (United Nations publication, Sales No. E.23.V.10), para. 216.

[22] *United Nations Convention on the Use of Electronic Communications in International Contracts* (United Nations publication, Sales No. E.07.V.2), para. 145.

[23] See *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996* (United Nations publication, Sales No. E.99.V.8), para. 103 (discussing availability of data in the context of article 15).

[24] Article 6 was not discussed at the sixty-sixth session and remains substantively unchanged from the first revision. It has been revised to reflect the wording of article 5(1) and to clarify that the requirement to provide data "without undue delay" applies only if no time frame is fixed by or determinable from the contract.

D. Rules on conformity of the data

Article 7. Conformity of the data[25]

(1) The data shall be of the quantity, quality and description required by the contract.

(2) The data conforms with the contract if:

(a) It is fit for the purposes for which data of the same description would ordinarily be used;[26]

(b) It is fit for any particular purpose expressly or impliedly made known to the data provider at the time of the conclusion of the contract, except where the circumstances show that the data recipient did not rely, or that it was unreasonable for the data recipient to rely, on the data provider's skill and judgment;[27]

(c) It possesses the characteristics which the data provider has held out to the data recipient as a sample or model; and

(d) It possesses the characteristics in accordance with any representations that the data provider makes with respect to the data.

(3) In assessing whether the data conforms with the contract, regard is to be had to:

(a) All relevant characteristics of the data, including its authenticity, integrity, completeness, accuracy and currency, as well as the format and structure of the data [and the lawfulness of its provision][28]; and

(b) Any agreement between the parties or applicable industry standards.

Remarks on article 7

35. Article 7 is inspired by the rules on conformity of goods in article 35 of the CISG. The primary test of conformity in paragraph 1 defers to the terms of the contracts as to the "quantity, quality and description" of data. See remarks on those concepts in the first revision (A/CN.9/WG.IV/WP.183, para. 45).

36. Paragraph 2 establishes default standards relating to the data that are deemed to be part of the contract, unless otherwise agreed by the parties under article 3. The standards apply cumulatively (but see A/CN.9/1162, para. 82). The Working Group may wish to confirm that paragraph 1 applies to the data at the time of its provision in accordance with articles 5 and 6, which would accord with the discussion on allocation of risk at the sixty-fifth session (A/CN.9/1132, para. 31).

37. Subparagraphs (a) and (b) of paragraph 2 establish standards regarding fitness for purpose. Subparagraph (a) requires the data to be fit for ordinary purposes, while

[25] Article 7 is based on the rules set out in the initial draft. It has been revised to reflect the suggestions made within the Working Group at its sixty-fifth session (A/CN.9/1132, paras. 33–37) and sixty-sixth session (A/CN.9/1162, paras. 81–83).

[26] This standard was not included in the first revision following deliberations at the sixty-fifth session (A/CN.9/1132, para. 36). It has been reinserted following the deliberations at the sixty-sixth session (A/CN.9/1162, para. 82).

[27] This standard reproduces article 7(2)(a) of the first revision.

[28] The first revision made a distinction between the lawful provision of the data by the data provider as a matter of conformity of data under article 7 and the lawful use by the data recipient as a matter of rights in data under article 8 (see A/CN.9/1132, para. 34 and A/CN.9/1093, para. 90). Accordingly, paragraph 2 of article 7 of the first revision established a requirement for the data to be provided lawfully as a default standard. At the sixty-sixth session of the Working Group, support was expressed for recasting the requirement as a stand-alone provision (A/CN.9/1162, para. 82). The Working Group may wish to consider whether it would be sufficient to incorporate the requirement into paragraph 3 by inserting the bracketed text.

subparagraph (b) requires the data to be fit for particular purposes notified by the data recipient. The Working Group may wish to focus on how those standards should apply to the data. At the sixty-fifth session of the Working Group, it was noted that the standards were excessively prescriptive, and it was suggested that a more flexible notion covering a broad range of data uses should be substituted (A/CN.9/1132, para. 36).

38. The standards in subparagraphs (c) and (d) of paragraph 2 remain unchanged from the first revision. The words "sample or model" in subparagraph (c) are intended to encompass data previews (A/CN.9/1132, para. 35). Subparagraph (d) reflects the suggestion for data quality to be assessed by reference to public statements by the data provider (A/CN.9/1132, para. 35). The wording draws on articles 6(b) and 14(1)(b) of the MLIT.

39. Paragraph 3 provides guidance on assessing data conformity. It lists some of the elements of data conformity that were put forward during the sixty-fifth session (A/CN.9/1132, paras. 33 and 35). It also confirms the relevance of industry standards in assessing data conformity, where they exist and are applicable, as well as any agreement of the parties of the kind mentioned in article 11(2)(b) (see A/CN.9/1132, para. 37). The importance of standards for increasing data access and sharing, thereby helping to close data divides, and for ensuring the interoperability of different information systems processing data ("data interoperability"), thereby enabling cross-border data flows, is highlighted in the Global Digital Compact (see para. 3 above). The Working Group may wish to consider how else industry standards (including codes of conduct) may be relevant in the performance of data provision contracts.

E. Rules on the use of the data

Article 8. Use of provided data[29]

(1) As between the parties to the contract:

(a) The data recipient is entitled to use the data for any lawful purpose and by any lawful means;

(b) The data provider is entitled to continue using the data, including by providing it to third parties.[30]

(2) In the case of data provided under subparagraph 2(b) of article 5:

(a) The data provider shall provide the data recipient with appropriate means to use the data and the data recipient shall apply those means;

(b) The data recipient is entitled to use the data, with the exception of data that the data recipient has ported under the contract, for the period of time specified in the contract.[31]

Remarks on article 8

1. Establishing a contractual framework for the use of data

40. As noted in the remarks on the first revision, article 8 establishes a basic framework for the rights and obligations of the parties with respect to the use of the data provided under the contract. It is premised on the peculiar qualities of data that

[29] Article 8 is based on the rules set out in paragraph 44 of the initial draft, which have been revised to reflect the suggestions made within the Working Group at its sixty-fifth session (A/CN.9/1132, paras. 38–46) and sixty-sixth session (A/CN.9/1162, paras. 84–85).

[30] Paragraph 1 remains unchanged from the first revision, with the exception of the removal of bracketed text in subparagraph (a) that was found to be redundant at the sixty-sixth session (A/CN.9/1162, para. 84).

[31] Paragraph 2 is new. See paras. 42–46.

distinguish data provision contracts from contracts for the sale of goods. Owing to the nature of "goods" as an object of property rights, as well as the characteristics of a "sale" as a transaction involving the transfer of ownership, the CISG does not contain provisions on how the buyer is to use the goods. Beyond requiring the seller to "transfer the property in the goods", the CISG leaves it to the law of property and other legal regimes to govern the use of the goods. Conversely, data is generally not recognized as an object of property rights (see A/CN.9/1117, para. 47) and is therefore not amenable to ownership nor to the rights that the law attributes to ownership. Given the absence of a comprehensive property-like regime for data rights (ibid., para. 46), data provision contracts remain the primary source of law regulating the use of data.

41. In keeping with the deliberations of the Working Group at its sixty-fifth and sixty-sixth sessions, article 8 avoids the concepts of "sale" or "licence" (A/CN.9/1132, para. 39; A/CN.9/1162, para. 60). Accordingly, it makes no reference to the ownership of the provided data (or of any derived data, which is addressed in article 9) or to the data provider "licensing" the data to the data recipient.

2. Special rules for data provided in an information system controlled by the data provider

42. Paragraph 2 has been inserted for the consideration of the Working Group as a starting point for possible new rules on two issues highlighted in the first revision, namely (i) the use of data that is made available to the data recipient in a system controlled by the data provider under article 5(2)(b), and (ii) the use of data upon expiration of the term or earlier termination of the contract. Subparagraph (a) addresses the first issue, while also implementing a suggestion made at the sixty-sixth session of the Working Group to require the provision of data to be "appropriate". Subparagraph (b) addresses the second issue. Paragraph 2 is concerned only with use of the provided data and is not intended to affect the use of derived data under article 9.

43. Where data is provided under article 5(2)(b), the data provider's control over the information system will extend to control over the data recipient's use of the data for as long as the data remains in that system. The right of the data recipient to use the data therefore needs to be balanced with the exercise by the data provider of its control over the information system. That balance is reflected in subparagraph (a).

44. The requirement in subparagraph (a) for the data provider to provide the data recipient with appropriate means to use the data stems from a suggestion at the sixty-sixth session that the provision of data be "appropriate" (A/CN.9/1162, para. 78). The suggestion was made in the context of rules on the mode of provision (article 5); however, if, as discussed above (para. 32), the concept of "making [data] available" to the data recipient under article 5(2)(b) already implies that the data recipient is put in a position to use the data, the requirement would seem to be more relevant in the context of rules on the use of the data (article 8). Whether the means provided by the data provider are "appropriate" will depend on the circumstances of the case, having regard to the nature and purpose of the contract and the purposes for which the data is used, as well as the trade usages and practices established between the parties.

45. The requirement in subparagraph (a) for the data recipient to apply the means provided by the data provider recognizes that those means determine the operations that the data recipient may perform on the data, and therefore limits how the data recipient can use the data. This reflects the main distinction in the ALI/ELI Principles between "contracts for the transfer of data" and "contracts for simple access to data". Under the ALI/ELI Principles, any use of the data by the data recipient under a "contract for simple access to data" is carried out on the medium (e.g. in the information system) controlled by the data provider, although the data recipient is entitled to port data (e.g. to an information system under its control) when it "can reasonably be expected in a transaction of the relevant kind".

46. Subparagraph (b) reflects a suggestion made at the sixty-sixth session to include a rule on the use of data upon expiration of the term or earlier termination of the

contract (A/CN.9/1162, para. 84). The suggestion was made without reference to any particular mode of provision, although the issue was raised in the first revision by reference to contracts in which data is provided under article 5(2)(b)). Presumably, a rule limiting the right of the data recipient to use data would be more readily enforced by the data provider in the case of data made available to the data recipient in a system controlled by the data provider. However, practice suggests that such a limitation is also common in the case of data delivered to a system controlled by the data recipient. The Working Group may therefore wish to consider whether the rule in subparagraph (b) should be developed to apply in both cases, in which case it should be recast as a stand-alone provision. In either case, it may wish to consider whether such a rule should be complemented by a rule obliging the data recipient to erase any of the data that it holds (e.g. data provided under article 5(2)(a) or data provided under article 5(2)(b) that is ported by the data recipient), or at least the data specified in the contract.

F. Rules on derived data

Article 9. Derived data[32]

As between the parties to the contract:

(a) The data recipient is entitled to use any data that it generates ("derived data") by using the data under paragraph 1 of article 8;

(b) The data provider is not entitled to use the derived data.

Remarks on article 9

47. Article 9 acknowledges the economic importance of derived data, as well as the legal uncertainty regarding the rights of the parties in derived data when the issue is not addressed contractually (A/CN.9/1132, para. 47). Article 9 is not intended to govern intellectual property rights in derived data (see para. 23 above).

48. Article 9 establishes a straightforward definition of "derived data" that is consistent with the term used in other legislative and non-legislative projects on data transactions. The definition is broad and does not depend on the value created by its generation or level of industrial activity involved.

49. At its sixty-sixth session, the Working Group heard a suggestion to revise the definition of "derived data" to require it to be sufficiently distinct from provided data so as not to undermine limits on use under article 8 (A/CN.9/1162, para. 86). While the suggestion was not taken up, it underscores the need for default rules on the use of derived data to be developed in step with default rules on the use of the provided data. The Working Group may therefore wish to consider whether special rules should be developed on the use of derived data that is generated by using data provided under article 5(2)(b). Another issue, raised in the first revision (A/CN.9/WG.IV/WP.183, para. 70), is whether special rules should be developed to address the issue of access to metadata that is generated by the data recipient by its use of the data. The issue presumably does not arise where the data is provided under article 5(2)(a) and processed by the data recipient on systems under its control.

[32] Article 9 is based on the text of a proposal put forward at the sixty-fifth session of the Working (A/CN.9/1132, paras. 48–49). Paragraph (a) has been revised to reflect the wording of article 8(1), while paragraph (b) has been revised to reflect a suggestion agreed by the Working Group at its sixty-sixth session (A/CN.9/1162, para. 86).

G. Rules on remedies

Article 10. Remedies[33]

(1) If the data provider fails to perform its obligations under articles 5 or 6, the data recipient may require performance by the data provider in accordance with applicable law.

(2) The data recipient shall notify the data provider of any lack of conformity of the data within a reasonable time after discovering it.

(3) If the data provider is entitled by law to claim restitution from the data recipient of data provided under the contract, that requirement may be met by the data recipient erasing the data from any information system under its control, provided that the data provider remains in a position to use the data.

(4) Nothing in these rules affects the application of any rule of law that may govern the legal consequences of a failure of a party to perform its obligations under the contract other than as provided for in this article.

Remarks on article 10

50. Article 10 was inserted following a preliminary exchange of views on rules on remedies for breach at the sixty-fifth session of the Working Group, in which it was observed that the peculiar qualities of data might require remedies under existing law to be adapted (A/CN.9/1132, para. 51).

51. Paragraph 1 of article 10 addresses the remedy of requiring performance in the event of a failure by the data provider to provide the data. It assumes that, given the peculiar qualities of data, the data can be provided again. The words "in accordance with applicable law" have been inserted to address concerns about applying the remedy in some jurisdictions (A/CN.9/1162, para. 87), as recognized in article 28 of the CISG. The words are also intended to accommodate exceptions recognized under applicable law if performance is impossible or disproportionate (ibid.).

52. Paragraph 1 applies to the obligations of the data provider to provide the data under articles 5 (mode of provision) and 6 (timing of provision). In the event of a lack of conformity of the data (article 7), paragraph 2 requires the data recipient to notify the data provider. Article 10 otherwise defers to the arrangements between the parties under article 11, which provides for the parties to cooperate in remedying any lack of conformity. The Working Group may wish to consider supplementing that provision with specific obligations on the part of the data provider to remedy the lack of conformity.

53. For paragraphs 3 and 4, see remarks in the first revision on the corresponding provisions (A/CN.9/WG.IV/WP.183, paras. 74 and 75).

[33] Article 10 reproduces article 10 of the first revision. Paragraph 1 has been revised to reflect the suggestions made within the Working Group at its sixty-sixth session (A/CN.9/1162, para. 87). Paragraph 2, which stems from deliberations within the Working Group at its sixty-fifth session (A/CN.9/1132, para. 37), reproduces article 7(4) of the first revision (A/CN.9/1162, para. 83). The other paragraphs remain substantively unchanged from the first revision.

H. Rules on cooperation between the parties

Article 11. Cooperation between the parties[34]

(1) The data provider and data recipient shall cooperate with each other on matters governed by these rules where such cooperation could reasonably be expected.

(2) Without limiting paragraph 1:

(a) The data provider and data recipient shall notify each other of any data breach affecting the provision of the data within a reasonable time after becoming aware of the data breach;[35]

(b) Where appropriate, the data provider and data recipient shall agree on procedures for assessing the conformity of the data and remedying any lack of conformity;[36]

(c) The data provider shall ensure that the data recipient is entitled to use the data under article 8;[37]

(d) The data provider shall notify the data recipient of any limitation on the use of the data arising from a right or claim of the data provider or a third party without delay after becoming aware of the right or claim.[38]

Remarks on article 11

1. General duty of cooperation

54. Like articles 5(2) and 8(2) of the first revision, which it replaces, paragraph 1 is inspired by article 5.1.3 of the 2016 UNIDROIT Principles of International Commercial Contracts. It builds on article 4(1), which already points to the observance of good faith in the performance of data provision contracts.

2. Specific obligations

55. Each obligation listed in paragraph 2 is formulated as an application of the obligation to cooperate in paragraph 1 (see A/CN.9/1132, para. 45). As suggested in remarks in the first revision (A/CN.9/WG.IV/WP.183, para. 60), each obligation would therefore be subjected to an assessment of what "could reasonably be expected" of the party on which the obligation is imposed. The Working Group may wish to consider whether this approach is appropriate.

(a) Duty to notify data breaches

56. Subparagraph (a) of paragraph 2 is inspired by articles 7 and 14(2) of the MLIT. Consistent with the MLIT, the concept of "data breach" refers to a security breach

[34] Article 11 is new. It consolidates and revises various rules on cooperation contained in the first revision to reflect the suggestions made within the Working Group at its sixty-sixth session (A/CN.9/1162, paras. 80). Paragraph 1 responds to a suggestion at the sixty-sixth session to include a general provision on the conduct of the parties (A/CN.9/1162, paras. 80). A similar suggestion was made at the sixty-fifth session (A/CN.9/1132, para. 43). Paragraph 2 consolidates various provisions of the first revision that applied the duty of cooperation in specific areas.

[35] This subparagraph reproduces article 5(3) of the first revision.

[36] This subparagraph is based on article 7(5) of the first revision. The wording has been refined.

[37] This subparagraph reproduces article 8(3)(a) of the first revision and has been revised to address queries raised within the Working Group at its sixty-sixth session (A/CN.9/1162, para. 85).

[38] This subparagraph is based on article 8(3)(b) of the first revision and has been revised to reflect the agreement of the Working Group at its sixty-sixth session regarding a supplementary obligation on the data provider (A/CN.9/1162, para. 85). A similar obligation was suggested at the sixty-fifth session (A/CN.9/1132, para. 45).

leading to the accidental or unlawful destruction, loss, alteration or unauthorized disclosure of, or unauthorized access to, data transmitted, stored, or otherwise processed. By virtue of article 2(3), subparagraph (a) does not displace any similar obligation imposed under data privacy and protection legislation or other law.

(b) Cooperation on matters relating to data conformity

57. Subparagraph (b) of paragraph 2 reflects observations made within the Working Group at its sixty-fifth session about assessing data conformity in practice, particularly where data is provided over a relatively long period of time (A/CN.9/1132, para. 37). Whether it is "appropriate" for the parties to agree on the matters mentioned in subparagraph (b) will depend on the circumstances of the case, including the period of time over which the data is provided and the availability of relevant industry standards. Subparagraph (b) is not exhaustive of cooperation between the parties on matters relating to data conformity.

(c) Cooperation on matters relating to data use

58. Subparagraph (c) of paragraph 2 is designed to promote the view, expressed within the Working Group at its sixty-third session, that the data recipient should have an assurance that the data can lawfully be used under the contract (A/CN.9/1093, para. 90). It does not use the wording of articles 41 and 42 of the CISG (which refer to the delivery of goods "free from any right or claim of a third party") to emphasize that the obligation is not a matter of conformity of the data provided, but rather of ensuring that the data recipient can exercise its rights to use the data under the contract.

59. The concept of "right or claim" in subparagraph (d) is intended to cover the concept of "data rights" (see A/CN.9/1117, paras. 27–28), which covers a broader range of rights and claims than those envisaged in articles 41 and 42 of the CISG.

60. Several specific obligations set out in the first revision have not been retained. Those obligations were imposed on the data recipient with a view to promoting a mutuality of obligations between the data provider and data recipient (A/CN.9/1132, paras. 41–45) and included:

(a) an obligation to ensure that the data is not used in a manner that infringes the rights of the data provider or of a third party;

(b) an obligation to notify the data provider of any right or claim of a third party with respect to the use of the data under the contract without delay after becoming aware of the requirement, unless it is reasonable to expect the data provider to have been aware of the requirement.

61. At the sixty-sixth session of the Working Group, it was noted that the obligations were of limited use in practice (A/CN.9/1162, para. 85).