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Revised draft legal taxonomy – revised section on data transactions

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I. Introduction

1. As noted in A/CN.9/1064 (paras. 4–9), the Commission had before it at its fifty-third session a preliminary draft of the legal taxonomy, which included a section on data transactions contained in A/CN.9/1012/Add.2. The secretariat is revising the preliminary draft to reflect further research and intervening developments, as well as consultations with experts.
2. This document outlines some of the main areas of the section on data transactions that are being revised. The secretariat expects the draft to be further revised and refined, with a view to producing a “map to guide future work”, as suggested at the fifty-third session,¹ that will remain relevant in a dynamic and rapidly changing environment.
3. The Commission is invited to take note of the work done on the legal taxonomy and to authorize its eventual publication as a secretariat product that can continue to be updated as a “living document” in cooperation and coordination with relevant international organizations.

II. Main revisions to A/CN.9/1012/Add.2

A. What are data and what are data transactions?

4. The chapter is being revised to refer to additional materials on the concept of “data transaction” and use cases for each type of data transaction.
5. In the context of digital trade, all transactions involve some exchange of data, including the conclusion of electronic contracts, and electronic identification. To focus on data as the subject of the transaction, a working definition of “data transaction” may therefore be formulated in terms of a commercial transaction that is concerned with the provision of data.
6. A rough distinction may be drawn between two types of data transactions:
 - (a) *Data provision* – a data transaction in which a person (the “data provider”) provides data to another person (the “data recipient”). The data provider may provide the data by giving the data recipient access to the data, or by giving the data recipient access to a data source that the data provider controls. In very broad terms, data provision may be likened to the “sale” or “licensing” of data. Data provision transactions include “data sharing” arrangements by which the parties provide data to one another, usually via an online space, such that each party is both data provider and data recipient;
 - (b) *Data processing* – a data transaction in which a person (the “data processor”) processes data for another person (the “data controller”) and provides the processed data to the other person. While data processing comprises all types of operations performed on data (including collection, recording, organizing, structuring, altering, and transmitting), common types of data processing transactions includes data scraping, cloud-based services, data analytics, data platform services, and electronic transmission services. While data processing may result in the provision of data, the transaction is more concerned with the provision of services.

B. Legal regimes

7. The discussion of contract law (A/CN.9/1012/Add.2, paras. 12–15) is being revised to refer to additional materials on the rights and obligations that are usually contained in data provision contracts and data processing contracts. As the different

¹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/75/17)*, part two, para. 75.

types of underlying data transactions engage different business needs, the different types of contracts will address different rights and obligations.

8. Several national and international initiatives have sought to identify the various of rights and obligations that are suited to data transactions:

(a) As part of an ongoing joint project, the American Law Institute (ALI) and the European Law Institute (ELI) are examining the legal rules and doctrines governing data transactions and data rights with a view to developing principles for a data economy (“ALI/ELI Principles”). In their current form, the principles distinguish two types of contract, namely (i) contracts for the supply or sharing of data, which include contracts for the transfer of data, and (ii) contracts for services with regard to data, which include contracts for the processing of data. For each type of contract, the principles identify a range of rights and obligations that should be included by law, subject to the agreement of the parties;

(b) In 2018, the Ministry of Economy, Trade and Industry of Japan published contract guidelines on the utilization of data (“METI Data Guidelines”)² with a view to “promoting reasonable negotiations and execution of contracts, reducing transaction costs and diffusing data contracts”. The METI Data Guidelines distinguish three types of contract, namely (i) data provision contracts, (ii) data generation contracts, and (iii) data sharing contracts using platforms, which includes contracts between the platform operator and data users for the provision of processed.

9. While the typology of contracts adopted by each initiative differs, both initiatives address data provision contracts and data processing contracts:

(a) Data provision contracts usually contain terms addressing the following data-specific issues:

(i) *What the data are* – a precise description of the types of data to be provided under the contract;

(ii) *How the data are provided* – if data are transferred to a medium (e.g., a disk, a server or an online platform), which party has control of the medium; if access is given to data or to a data source, whether the data provider merely authorizes authorized access or does more to facilitate that access;

(iii) *Conformity of the data* – description and warranties as to the quantity and quality of the data, including in terms of its completeness, accuracy, and format, as well as conformity with any relevant industry or international standards or representations made by the data provider;

(iv) *Use of data by data recipient* – description and warranties as to how the data recipient may use (or more generally process) the data, including any limitations on use by reference to purpose, rights of others, or use by the data provider;

(v) *Use of data by data provider* – description of how the data provider may use the data (if at all), as well as any use in any new data generated by the data recipient in its use of the data;

(vi) *Dealing with data upon breach or avoidance* – description of how the defaulting party is to deal with the data in the event of breach or avoidance of the contract.

(b) Data processing contracts usually contain terms addressing the following data-specific issues:

(i) *Scope and purpose of services* – description of the data processing services provided by the data processor, including performance parameters;

² A/CN.9/1012/Add.2, footnote 11.

(ii) *Data security and data integrity* – description of the policies and procedures for maintaining data security and integrity, and for managing security incidents;

(iii) *Data portability* – description of processes available to the data recipient to access data in a format that is usable in systems other than the system provided by the data processor;

(iv) *Data localization* – any limitations on the locations in which the data are processed under the contract;

(v) *Use of data by data processor* – description of how the data processor may use data collected under the contract, particularly data collected from the data recipient, and data provided under the contract, including any limitations on use by reference to purpose (e.g. the purpose of providing the data processing services) and obligations to deliver up data at the end of the contract term.

10. The discussion of other legal regimes applicable to data as a commodity (A/CN.9/1012/Add.2, paras. 33–39) will be revised to cover materials on recent developments and initiatives:

(a) In India, a committee of experts commissioned to deliberate on a non-personal data governance framework has released a draft report exploring mechanisms to establish rights over non-personal data collected and generated in India. In particular, the report examines the possibility of the law conferring certain rights on the community that generated the data, comprising “any group of people that are bound by common interests and purposes, and involved in social and/or economic interactions”.³ Those rights include the right to derive economic and other value from the data, and the right to eliminate or minimize harms to the community;

(b) In Germany, the SME strategy developed by the Federal Ministry for Economic Affairs and Energy contemplates a “data economy that is appropriate for SMEs” and refers to improvements in the form of data access in the event of joint value creation with larger companies;⁴

(c) References to the ALI/ELI Principles will also be updated.

C. Appraisal of relevant UNCITRAL texts

11. The appraisal (A/CN.9/1012/Add.2, paras. 42–57) is being revised to update the discussion of the CISG and to include a discussion of the Notes on the Main Issues of Cloud Computing Contracts, which is particularly relevant to transactions for “data processing”.

(a) With regards to the CISG, leaving aside the debate on the meaning of “contracts of sale of goods”, a more practical question arises as to whether the provisions of the CISG are appropriate to address the needs of the parties to data transactions, specifically data provision contracts. As the Secretariat observed in 2001, it is one thing for the “sale” of “virtual goods” to come within the scope for the CISG, it is another thing for the substantive rules laid down by the Convention to accommodate the practical needs of those kinds of transactions.⁵ An analysis of substantive provisions of the CISG reveals that some of its provisions would ordinarily find application in the relationship between the parties to data provision contracts, such as provisions regarding contract formation (arts. 14–24), general

³ *Draft Report by the Committee of Experts on Non-Personal Data Governance Framework* (16 December 2020), available at https://static.mygov.in/rest/s3fs-public/mygov_160975438978977151.pdf, chapter 7.

⁴ Germany, Federal Ministry for Economic Affairs and Energy, *Valuing SMEs, Strengthening Opportunities, Easing the Burden: The German SME Strategy*, (2019), available at https://www.bmwi.de/Redaktion/EN/Publikationen/Mittelstand/german-sme-strategy.pdf?__blob=publicationFile&v=3, p. 21.

⁵ A/CN.9/WG.IV/WP.91, para. 29.

provisions relating to the sale of goods (arts. 25–29), and provisions relating to anticipatory breach and fundamental breach of contract (arts. 25 and 71). However, the provisions concerning rights and obligations of the parties may not be adapted to data transactions, even applying a generous functional equivalence approach;

(b) As for the Notes on the Main Issues of Cloud Computing Contracts, cloud-based services are essentially a form of data transaction of the data processing type. The Notes, prepared by the secretariat and approved for publication by the Commission in 2019, contain a non-exhaustive analysis of issues for consideration by parties before and during the drafting of contracts for cloud-based services, including the application of mandatory laws and the issues to be addressed in the contract. While not prepared with data transactions in mind, the issues analysed in the text are relevant to the conclusion of data processing contracts, including the data-specific issues usually contained in those contracts.

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