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Draft model legislative provisions on contracts for the provision of data: Text

Note by the Secretariat

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I. Introduction

1. At its sixty-ninth session (Vienna, 20–24 October 2025), the Working Group requested the secretariat to prepare a revised version of the default rules[1] for data provision contracts in the form of model legislative provisions accompanied by an explanatory note (A/CN.9/1241, para. 77).

2. This note contains the text of the draft provisions reflecting the deliberations of the Working Group at its sixty-ninth session (A/CN.9/1241, paras. 10–73). Annotations to each provision explain the revisions and identify issues for the Working Group to consider. A draft explanatory note on the draft model provisions is contained in A/CN.9/WG.IV/WP.193.

3. The Working Group may wish to continue its discussions on the final form of its work, whether it be a model law with a guide to enactment (like the Model Law on Automated Contracting (MLAC)[2]) or a legislative guide accompanied by model legislative provisions (similar to the Legislative Guide and Model Legislative Provisions on Public-Private Partnerships[3]) (A/CN.9/1241, paras. 74–79). The Working Group may also wish to consider whether to present the text to the Commission for adoption at its fifty-ninth session, tentatively scheduled from 22 June to 10 July 2026.

II. Draft model legislative provisions

Article 1. Definitions

For the purpose of these provisions, "data" means a representation of information in electronic form or other form suitable for processing in an information system.

Annotations

4. The description of "using" data is found in article 9 (see para. 37 below).

Article 2. Scope of application

1. These provisions 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.

2. Without prejudice to paragraph 1, these provisions do not apply where the primary purpose of the data is:

(a) To deliver particular functionalities when processed, including data in the form of computer code;

(b) To represent a particular asset or particular rights and obligations assigned to a person associated with the data.

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[1] An "initial draft" of the default rules (A/CN.9/WG.IV/WP.180) was considered by the Working Group at its sixty-fifth session (A/CN.9/1132, paras. 9–51). Since then, a "first revision" (A/CN.9/WG.IV/WP.183) was considered at its sixty-sixth session (A/CN.9/1162, paras. 59–89), a "second revision" (A/CN.9/WG.IV/WP.186) was considered at its sixty-seventh session (A/CN.9/1197, paras. 29–72), a "third revision" (A/CN.9/WG.IV/WP.188) was considered at its sixty-eighth session (A/CN.9/1202, paras. 10–79) and a "fourth revision" (A/CN.9/WG.IV/WP.190) was considered at its sixty-ninth session (A/CN.9/1241, paras. 10–79).

[2] *UNCITRAL Model Law on Automated Contracting with Guide to Enactment* (United Nations publication, Sales No. E.25.V.4).

[3] *UNCITRAL Legislative Guide on Public-Private Partnerships* (United Nations publication, Sales No. E.20.V.2) and *UNCITRAL Model Legislative Provisions on Public-Private Partnerships* (United Nations publication, Sales No. E.20.V.4).

[3. These provisions do not apply to contracts concluded for personal, family or household purposes.]

4. [These provisions govern only the rights and obligations of the data provider and the data recipient arising from a contract for the provision of data.] Nothing in these provisions affects the application of any rule of law that may govern transactions in data or the provision of data, including on matters related to data privacy and protection, the protection of consumers, trade secrets or intellectual property.

Annotations

1. Paragraph 1

5. Paragraph 1 no longer requires the data provider to "hold" the data (A/CN.9/1241, para. 26). That requirement assumed that "providing" data involved the communication (i.e. transmission) of data from a system under the control of the data provider to a system under the control of the data recipient (see A/CN.9/WG.IV/WP.188, note 15). It has, however, been observed that providing data does not necessarily involve the communication of data from the data provider to the data recipient (A/CN.9/1241, para. 51).

2. Paragraph 2

6. Paragraph 2 reflects suggestions put forward concerning the exclusion of "functional data" and "representative data". (A/CN.9/1241, paras. 27–32). It is stated to be "without prejudice to paragraph 1" on the assumption that (i) some data products (such as software-as-a-service, digital assets and digital content) might not correspond to the concepts of "functional data" or "representative data" as described in subparagraphs (a) and (b), respectively, and (ii) paragraph 1 has a limiting effect on scope (A/CN.9/1241, para. 30).

7. The Working Group may wish to confirm the understanding that paragraph 1 effectively excludes from scope other contracts involving data, such as contracts for the supply of services regarding data and "data processing services", as well as contracts under which a party provides information in electronic form merely as an incident to the supply of goods or services (A/CN.9/1241, para. 32; A/CN.9/WG.IV/WP.186, paras. 17 and 18).

3. Paragraph 3

8. Paragraph 3 remains in square brackets pending a decision on whether to delete it once the content of the default rules and their application to the passive provision of data is more settled (A/CN.9/1241, para. 36). In that regard, attention is drawn to the new provision on the passive provision of data in article 13 and the strengthened primacy (or "give way") clause in article 2(4).

9. The two variants presented in square brackets in the previous revision – namely (i) applying the rule only where the data provider is the "consumer", and (ii) not applying the rule where either the data provider or data recipient is a "consumer" but the other party neither knew nor ought to have known that fact – have not been reflected in paragraph 3 in view of doubts raised regarding their feasibility and desirability (A/CN.9/1241, paras. 33 and 35).

10. Paragraph 3 is inspired by article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (CISG). It is worth noting that the CISG does not contain a "give way" clause preserving mandatory laws. Such a provision was proposed, but it was felt that consumer contracts should be excluded altogether because "in the usual case, a sale to a consumer was not regarded as an important aspect of international trade" (A/CN.9/52, para. 57).

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4. Paragraph 4

11. Paragraph 4 has been revised to respond to concerns that it should (i) capture all mandatory laws governing matters addressed in the provisions with which the provisions may come into conflict, and (ii) signal the importance and parallel application of laws affecting transactions in data that engage matters of public policy, whether or not those laws have a bearing on data provision contracts (A/CN.9/1241, paras. 37–38).

12. Paragraph 4 includes a new first sentence in square brackets, which is based on the first sentence of article 4 of the CISG. It emphasizes the limited focus of the provisions and thus the matters where they may come into conflict with mandatory law. By implication, other matters related to the contract, including the validity of the contract or any of its terms, or the effect of the contract on any rights in the data outside the contract (e.g. rights of a proprietary nature), are left to other law, regardless of the mandatory nature of that law.

13. The remainder of paragraph 4 has been expanded to include laws governing "transactions in data" with a view to signalling the importance of mandatory laws dealing with the handling of data in general, regardless of whether they might be characterized as laws governing the "provision" of data. It also refers to "matters" rather than "laws" to emphasize that paragraph 4 is not intended to prescribe the laws whose application is preserved.

14. The connection with public policy, as well as the nature of the list in paragraph 4 as illustrative and not exhaustive, is addressed in the remarks on paragraph 4 in A/CN.9/WG.IV/WP.193. Outside the context of private international law (conflict of laws), it is unusual for UNCITRAL legislative texts to expressly refer to "mandatory" laws or "public policy" (*ordre public*).

Article 3. Party autonomy

1. Subject to article 2, paragraph 4, the parties may derogate from or vary by agreement any of these provisions.

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

Annotations

15. Paragraph 1 is now stated to apply "subject to" article 2(4) (A/CN.9/1241, para. 39).

Article 4. Interpretation

1. In the interpretation of these provisions, 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.

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

Annotations

16. Like the MLAC, the provisions apply regardless of whether the places of business of the parties are in different States. Paragraph 1 has been revised accordingly to align with the corresponding provision in the MLAC (article 3).

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Chapter II. Rights and obligations of the parties

Article 5. Obligation to provide the data

1. The data provider shall provide the data to the data recipient as required by the contract and according to these provisions.

2. The obligation of the data provider in paragraph 1 consists of making the data available to the data recipient and providing any information necessary to access the data.

Annotations

17. The requirement for the data provider to provide "any information necessary to access the data" has been reinserted and should be read in conjunction with article 6(3).

18. The requirement was originally intended to ensure that, where encrypted data was provided, the general obligation in article 5 extended to the delivery of the encryption key (A/CN.9/1197, para. 45). Assuming that this is now covered by article 6(3), the requirement in paragraph 2 is understood to cover other types of information, such as metadata and domain tables. The need to provide accompanying information is recognized in the Organisation for Economic Co-operation and Development Recommendation of the Council on Enhancing Access to and Sharing of Data (2021), document C/MIN(2021)20/FINAL, which refers to the provision of data "together with any required metadata, documentation, data models and algorithms" in a transparent and timely manner, as well as in the ALI/ELI Principles, which refer to the "inclusion of metadata, domain tables, and other specifications required for data utilization" (although this is treated as a matter of data conformity not data provision) (A/CN.9/WG.IV/WP.188, note 24). It would also presumably cover documentation of third-party consents connected with the performance of article 8(3)(b).

19. The Working Group may wish to confirm this understanding of the scope of article 5(2) and its interaction with article 6(3), and to consider whether, on that basis, it is more appropriate to refer to information necessary to "use" the data.

Article 6. Mode of provision of the data

1. The data provider shall make the data available to the data recipient by the mode agreed upon by the parties.

2. In the absence of an agreed mode of provision, the data provider shall make the data available to the data recipient by:

(a) Delivering the data to the data recipient, including by enabling the data recipient to export the data from a particular information system; or

(b) Giving the data recipient access to the data in a particular information system.

3. The data provider shall provide the means to access the data so as to put the data recipient in a position to use the data.

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Annotations

20. A new default rule for the passive provision of data, which was developed by the Working Group in the context of article 6 (A/CN.9/1241, para. 48), is found in article 13(2).

21. The additional rule that the Working Group agreed to insert at the end of paragraph 2 (A/CN.9/1241, para. 49) is recast as a stand-alone provision in paragraph 3 to clarify that it applies to both modes of provision in paragraph 2. As

such, it would cover the delivery of an encryption key for encrypted data provided under paragraph 2(a) and the delivery of access credentials for data provided under paragraph 2(b). Additional revisions have been made to the rule to avoid repetition.

Article 7. Timing of provision of the data

1. The data provider shall provide the data according to the time frame fixed by or determinable from the contract.

2. In the absence of a time frame fixed by or determinable from the contract, the data provider shall provide the data without undue delay.

Article 8. Conformity of the data

1. The data shall be of the quantity, quality and description as agreed by the parties.

2. In addition, and unless otherwise agreed by the parties, the data shall:

(a) Possess the characteristics that may reasonably be expected of data provided by the data provider in the circumstances;

(b) Be 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; and

(c) Possess the characteristics which the data provider has held out to the data recipient as a sample or model [or in accordance with representations made by the data provider with respect to the data before the conclusion of the contract].

3. The data shall be provided:

(a) In compliance with applicable law; and

(b) Free from any right or claim of a third party which impedes the use of the data under the contract or these provisions and of which, at the time of the conclusion of the contract, the data provider knew or could not have been unaware.

4. In assessing whether the requirements under this article are met, regard is to be had to:

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

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

[5. As between the parties, the data provider shall not bear the legal consequences of any lack of conformity of the data under paragraphs 2 or 3 if, at the time of the conclusion of the contract, the data recipient knew or could not have been unaware of such lack of conformity.]

Annotations

1. Application of paragraph 2

22. The words "and unless otherwise agreed by the parties" have been inserted in the chapeau of paragraph 2 to clarify that the conformity standards set out in subparagraphs (a) to (c) apply only in the absence of agreement (A/CN.9/1241, para. 61(a)).

23. The Working Group may wish to consider the possible reformulation of paragraphs 1 to 3 as obligations of the data provider (e.g. "the data provider shall provide data that is…") rather than as requirements of the "data".

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2 Fitness for particular purposes (article 8(2)(b))

24. The current wording of article 8(2)(b) corresponds with article 32(2)(b) of the CISG. Citing differences in business practices between the supply of goods and provision of data, proposals have been put forward to delete article 8(2)(b) entirely or to remove reference to purposes that are "impliedly made known" to the data provider (A/CN.9/1241, para. 61(b) and (c)). The Working Group has agreed to retain the standard but to place the words "or impliedly" in square brackets for further consideration.

3. Conformity with public statements (article 8(2)(c))

25. Earlier drafts of the default rules included a requirement for the data to conform to "representations that the data provider makes with respect to the data". The requirement had been inserted as a stand-alone standard to reflect a suggestion for data quality to be assessed by reference to public statements by the data provider (A/CN.9/1132, para. 35), drawing on the term "representations" as used in articles 6(b) and 14(1)(b) of the Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services (MLIT). However, that requirement was subsequently deleted (A/CN.9/1202, para. 37) due to concerns that it could cover statements made during the life of the contract (i.e. not just precontractual statements) and override the terms of the contract.

26. The Working Group may wish to consider a proposal made at its sixty-ninth session to reinstate the requirement at the end of article 8(2)(c) on the basis of the text in square brackets (A/CN.9/1241, para. 61(d)). If so, the following points may be relevant:

(a) The aforementioned concerns with the requirement may be sufficiently addressed by referring only to representations made "before the conclusion of the contract" and by relying on the revised chapeau of article 8(2) (see para. 20 above), according to which the terms of the contract – including any contrary indication regarding the quality of the data – would prevail;

(b) There is no corresponding requirement in the CISG. Moreover, conformity with public statements may already be covered in part by other rules in article 8. For example, precontractual statements might be incorporated into the contract under other law, in which case they would be captured by the basic standard of conformity in paragraph 1 (A/CN.9/1202, para. 37). Such statements may also be included in the circumstances to be considered when ascertaining what may reasonably be expected of the data for the purposes of the supplementary standard in paragraph (2)(a).

4. Third-party rights and claims (article 8(3)(b))

27. Article 8(3)(b) has developed from a rule on the use of data in the form of a warranty by the data provider to a rule on data conformity modelled on article 42 of the CISG (A/CN.9/1197, para. 71; A/CN.9/1202, para. 40).

28. The Working Group may wish to consider a proposal made at earlier sessions to amend article 8(3)(b) to require the data to be provided "respecting" any third-party rights or claims that might "limit or specify" how the data is to be used (A/CN.9/1202, para. 39; A/CN.9/1241, para. 62). If so, the following points may be worth recalling:

(a) The data recipient should have an assurance that the data can lawfully be used under the contract (A/CN.9/1093, para. 90). In that regard, the data recipient depends on rights acquired under the data provision contract as set out in article 9 (A/CN.9/WG.IV/WP.188, para. 8). Article 8(3)(b) should therefore be considered together with article 9, particularly paragraphs 1(a) and 2 thereof;

(b) The lawful use of data should be distinguished from the lawful provision of that data (A/CN.9/1197, para. 58). A requirement for the data provider to provide data free from third-party rights and claims provides assurance to the data recipient that it may lawfully use that data under the contract, while a requirement for the data

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provider to provide data "respecting" third-party rights and claims would appear not to provide such assurance;

(c) The burden of procuring required third-party consents to put the data recipient in the position to use the data lawfully should be placed on the data provider (A/CN.9/1202, para. 39; A/CN.9/1241, para. 62). However, the requirement to ensure that the data recipient is entitled to use the data under the default rules – as provided for in the precursor to article 8(3)(b) – might impose too high a burden on the data provider (A/CN.9/1197, para. 71).

29. If the Working Group were to take up the proposal to amend article 8(3)(b), it may wish to consider complementing the amended provision with a requirement for the data provider to obtain third-party consents to put the data recipient in the position to use the data lawfully under the default rules and the contract.

5. Assessment criteria (article 8(4))

30. The chapeau of paragraph 4 has been revised to refer to requirements "under this article" to reflect the view that the criteria in the paragraph are relevant not just to the requirements in paragraphs 1 and 2, but also to those in paragraph 3 (A/CN.9/1241, para. 64).

31. The characteristics listed paragraph 4(a) are drawn from "core attributes" identified within the Working Group (A/CN.9/1132, para. 33). Following the discussion at the sixty-ninth session, "availability" has been inserted, while "origin" and "coherence" have been inserted in square brackets (A/CN.9/1241, para. 64). The Working Group may wish to consider whether to retain these additional characteristics, for which the following points may be relevant:

(a) In the context of data, "coherence" is understood to refer to the logical connections and completeness within a data set or across data sets. As such, it would appear to represent a core attribute of data that is not covered by the other characteristics listed in paragraph 4(a);

(b) Conversely, using "availability" to assess data conformity may pose logical difficulties given that the term is already used in article 5 to determine whether the data has been provided in the first place. It may also be apt to confuse an assessment of data conformity under article 8 with system conformity (e.g. the availability of the system in which the data is accessed) (A/CN.9/1247, para. 65);

(c) The reference to "origin" may be redundant if "authenticity" continues to be understood to cover data origin (A/CN.9/1132, para. 33).

6. Legal consequences of lack of conformity (article 8(5))

32. Paragraph 5 addresses questions raised regarding the legal consequences of non-performance (A/CN.9/1197, paras. 68 and 71; A/CN.9/1241, para. 68). It is based on articles 35(3) and 42(2)(a) of the CISG and, as such, is relevant to the requirements in paragraphs 2 and 3 of article 8. Paragraph 5 has been placed in square brackets as the Working Group did not have sufficient time to consider the provision at its sixty-ninth session (see A/CN.9/WG.IV/WP.190, para. 4).

33. The Working Group may wish to consider whether to include article 8(5) and to address the other issues regarding non-performance that were put forward for consideration at the sixty-ninth session (see A/CN.9/WG.IV/WP.190, paras. 4–5), possibly in the context of article 12.

Article 9. Use of the data

1. Unless otherwise agreed by the parties:

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

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(b) The data recipient is entitled to use the data for an unlimited period of time;

(c) The data recipient is not entitled to provide the data to a third party;

(d) The data provider is entitled to continue to use the data;

(e) The data provider is entitled to provide the data to a third party.

[2. The data recipient shall ensure that the data is not used in a manner that infringes the rights of the data provider or of a third party with respect to the use of the data [provided that the data provider has given the data recipient notice of those rights].]

[3. If the data provider provides the means to use the data under the contract, the data recipient shall use the data by those means.]

4. For the purposes of this article, "using" data includes performing any one or more operations on the data.

Annotations

1. Obligations of the data recipient

34. Paragraph 2 imposes obligations on the data recipient with respect to the use of the data under the contract, including an obligation to prevent downstream abuse of data and to comply with rights and claims notified by the data provider (A/CN.9/1132, paras. 41–42). The rule was removed in an earlier draft (A/CN.9/1162, para. 85) but the Working Group has requested that it be reinstated in square brackets for further consideration (A/CN.9/1241, para. 72).

35. As already noted (para. 28 above), paragraph 2 should be considered together with article 8(3)(b). It should also be considered in view of any default rule that imposes notice requirements for third-party rights and claims (for the reasons given in A/CN.9/WG.IV/WP.190, para. 16). The proviso in the additional square brackets has thus been inserted for consideration by the Working Group.

36. Paragraph 3 reflects a suggestion to include a rule regarding the means to use the data (A/CN.9/1241, para. 73). It imposes an obligation on the data recipient only where the means are provided (e.g. where data is provided on a "data-as-a-service" basis). A distinction has been drawn between the means to access the data (see articles 6(3) and 13(1)(a)) and the means to use it (see article 9(1)(a)) (A/CN.9/1202, para. 62; A/CN.9/1241, para. 44(b)). The former "means" allow the data to be read; the latter "means" allow the data to be used (i.e. to be processed) and can therefore affect the scope of rights under article 9(1)(a) and (b) (see A/CN.9/WG.IV/WP.186, para. 45).

2. Concept of "using" data

37. Paragraph 4 reproduces article 1(b) of the fourth revision. It is suggested to move the provision to article 9, which addresses the use of data. While article 8(3)(b) also refers to the "use" of the data, it effectively refers back to article 9. While suggestions have been made to include examples of operations that "using" data involves (A/CN.9/1241, para. 24), such examples might better be left for the explanatory note (see remarks on article 9 in A/CN.9/WG.IV/WP.193). The words "involved in the processing of data" have been removed based on a suggestion made at the sixty-ninth session (A/CN.9/1241, para. 23).

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Article 10. Derived data

1. As between the parties to the contract, the data recipient is entitled to provide derived data to a third party.

2. For the purposes of paragraph 1, "derived data" means data that:

(a) The data recipient generated by processing the data provided under the contract, including by combining that data with other data; and

(b) Is sufficiently distinct from the data provided under the contract in terms of its content, format and structure.

3. For the purposes of paragraph 2(b), whether the derived data is sufficiently distinct is to be determined taking into account all relevant circumstances, which may include:

(a) Whether the derived data can be processed to generate data that is essentially identical to the data provided under the contract, including by way of reverse engineering;

(b) Whether the derived data can be used as a substitute for the data provided under the contract; and

(c) The level of investment involved in the generation of the derived data.

Annotations

38. Article 10 was not considered by the Working Group at its sixty-ninth session. The text reflects suggestions put forward at its sixty-eighth session (A/CN.9/1202, paras. 67–71) with further revisions to the chapeau of paragraph 3 and paragraph 3(a) for additional clarity.

Article 11. Common obligations of the data provider and data recipient

1. Each party shall cooperate with the other party when such cooperation may reasonably be expected for the performance of that party's obligations under the contract and these provisions.

[2. Each party shall give notice to the other party of any serious data breach affecting the provision of the data under the contract within a reasonable time after becoming aware of it.]

Annotations

39. Article 11 was not considered by the Working Group at its sixty-ninth session and remains unchanged.

40. Paragraph 2 was placed in square brackets for further consideration, including possible deletion, following the sixty-eighth session (A/CN.9/1202, para. 77). It has been observed that data breaches are a matter of data security and system conformity (A/CN.9/1241, para. 77), rather than a matter of data provision. It has been suggested that, as an alternative, the data recipient could be obliged to notify all circumstances hindering data provision (A/CN.9/1202, para. 75).

Article 12. Non-performance

1. Nothing in these provisions 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 or these provisions.

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> 2. If the data provider fails to perform its obligations under [articles 6 or 7], the data recipient may require performance by the data provider in accordance with applicable law.
>
> 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.

Annotations

41. Article 12 was not considered by the Working Group at its sixty-eighth or sixty-ninth sessions and has not been further revised.

42. The following summary of earlier deliberations of the Working Group on default rules for non-performance in general was previously provided (A/CN.9/WG.IV/WP.188, paras. 18–19):

> "At the sixty-sixth session, the Working Group heard some general observations about the rights and remedies available to a party in the event of non-performance by the other party. It was observed that monetary damages could be applied without difficulty to data transactions (A/CN.9/1132, para. 51), which suggests that it might be more readily available as a remedy for breach of data provision contracts as compared to sales contracts under the CISG. It was also observed that remedies (and the circumstances in which they are available) might need to be adapted on account of the peculiar qualities of data, in particular its non-rivalrousness (ibid.). This would appear to be particularly relevant to remedies for lack of conformity and termination (avoidance). For instance, non-conform data might be readily cured by updating or resupplying the data, and data might be readily erased by the data recipient upon termination.
>
> At the sixty-seventh session, different views were expressed about remedies (A/CN.9/1197, paras. 68–70). On one view, it was sufficient to preserve remedies under applicable law (e.g. for breach of contract). On another view, the default rules should contain a comprehensive yet non-exhaustive list of remedies, including termination (avoidance), price reduction and compensation, which would be available not only for non-provision of the data under articles 6 and 7 (mode and timing of provision of the data), but also lack of conformity under article 8 and non-performance of other obligations. It was generally recognized that the default rules (now in article 12) do not deal with judicial remedies but rather with the rights and obligations of the parties in the event of non-performance."

43. Paragraph 1 reflects the view that existing laws on remedies for breach of contract apply to data provision contracts.

44. Paragraph 2 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 attributes of data, the data can be provided again. The words "in accordance with applicable law" 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.).

45. Paragraph 2 refers to obligations of the data provider under article 6 (mode of provision) and article 7 (timing of provision) but not under article 8 (conformity of the data). This is because, when it was inserted, it was assumed that the default rules would establish special procedures for conformity assessment. The merits of establishing such special procedures for data conformity, including on the basis of the CISG, were deliberated by the Working Group at the sixty-fifth and sixty-eighth sessions (A/CN.9/1132, para. 37; A/CN.9/1202, paras. 44–47). A summary of relevant

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default rules and issues for further consideration was provided in A/CN.9/WG.IV/WP.190, paras. 4–5.

46. In considering article 12, the Working Group may wish to review that summary. It may also wish to consider issues previously identified but not considered by the Working Group (A/CN.9/WG.IV/WP.190, para. 20), namely:

(a) Whether – and in what circumstances – the non-defaulting party should have the right to monetary damages, to withhold performance or to terminate (avoid) the contract; and

(b) Whether other rights should be recognized to address non-performance of obligations under article 9 (use of the data), such as a right to require the defaulting party to refrain from using the data.

Chapter III. Passive provision of data

Article 13. Passive provision of data

1. For the purposes of this article, the provision of data is "passive" if, as agreed by the parties:

(a) The data recipient provides the means to access the data;

[(b) The object of the transaction is the data recipient obtaining access to data generated by a product, service, or activity performed by the data provider in exchange for the data provider obtaining access to a product, service, or other value supplied by the data recipient;]

(c) The data provider does not have control over the quantity or quality of the data; and

[(d) The data provider does not have meaningful influence on the terms of the transaction.]

2. Unless otherwise agreed by the parties, in the case of a contract for the passive provision of data, the data provider shall:

(a) allow the data recipient to access data by the means that the data recipient has provided according to the contract; and

(b) not impede access to the data.

3. Articles 6 to 8 [and 11 and 12] shall not apply to contracts for the passive provision of data.

Annotations

47. Article 13 consolidates the two provisions on the passive provision of data that were deliberated at the sixty-ninth session (A/CN.9/1241, paras. 14–15 and para. 48, respectively). The provisions are presented as a new stand-alone article, rather than in article 6, to avoid the issue of whether the new default rule in paragraph 2 may be characterized as a rule on the "mode" of provision (ibid., para. 50).

1. Definition of "passive" provision of data (article 13(1))

48. Paragraph 1 reproduces the "working draft" of the new provision set out in paragraph 14 of the report of the sixty-ninth session (A/CN.9/1241) without the *chaussette* (which is reproduced in paragraph 3). The chapeau has been revised to clarify that paragraph 1 serves as a closed definition.

49. Subparagraph (a) merges paragraphs 1 and 4 of the working draft (A/CN.9/1241, para. 20). It has further been streamlined to avoid logical difficulties which may arise from defining the passive provision of data by reference to the default rules that would flow from a data transaction meeting that definition. Accordingly, the data provider

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"authorizing" (or "allowing") access to the data forms part of the sole default rule under paragraph 2 rather than the definition (ibid., para. 21). Subparagraph (a) also avoids references to "responsibility", which may pose interpretation difficulties.

50. Subparagraph (a) mirrors the wording of article 6(2)(b) but replaces "data provider" with "data recipient", thereby emphasizing the distinction between the "active" and "passive" provision of data. It does not refer to "data source" on the understanding that providing access to a data source (i.e. a "connected device") is already covered by the concept of "providing" data (A/CN.9/1093, para. 89) and that the "active" provision of data could potentially involve the data provider giving access to a data source.

51. The Working Group may wish to consider deleting subparagraphs (b) and (d) (A/CN.9/1241, para. 18).

52. Subparagraph (c) reproduces paragraph 3 of the working draft but shifts the enquiry from what the data provider "undertakes" as to the quantity and quality of the data to whether the data provider "has control over" those matters. Besides avoiding the logical difficulties identified above (para. 49), it establishes a more familiar standard that is amenable to a factual enquiry.

2. Special default rule (article 13(2))

53. Paragraph 2 reproduces the "working draft" of the new provision set out in paragraph 48 of the report of the sixty-ninth session (A/CN.9/1241). It establishes a special default rule for contracts for the passive provision of data obliging the data provider to allow access to the data and not to impede that access. It does not refer to "sole obligation" as there may be other obligations of the data recipient under the contract or under applicable law.

54. The term "allow" is used in lieu of "authorize" as the latter term suggests that the data provider has a pre-existing right to control how the data is accessed and used, whether under contract or under other law (A/CN.9/1117, paras. 26–27). However, the data provider need not "hold" the data that it provides (A/CN.9/1241, para. 26) nor have control over the data (A/CN.9/1202, para. 23).

55. It has been observed that the obligation on the data provider is not entirely one of refrain and could, in certain circumstances, require action to be taken to assure the operation of the information system to which the data source is connected (e.g. entering a password, pressing a button or installing software updates) (A/CN.9/1241, para. 53). Such action is not part of providing the means to access the data, which is the responsibility of the data recipient under paragraph 1(a) and goes beyond the requirement on the data provider in article 5(2) to provide "information necessary to access the data".

56. The Working Group may wish to consider whether the obligation in subparagraph (b) to "not impede access to the data" should be expanded to cover additional actions that may reasonably be required to maintain the means of access. Alternatively, the scope of the obligation could be elaborated in the explanatory note.

3. Disapplying other default rules (article 13(3))

57. Paragraph 3 reproduces the *chaussette* of the "working draft" of the new provision set out in paragraph 14 of the report of the sixty-ninth session (A/CN.9/1241). It has been revised to reflect the further deliberations of the Working Group regarding the application of articles 5, 6 and 8 (A/CN.9/1241, paras. 42–43, 50 and 69). The reference to articles 11 and 12 remain in square brackets as their application to the passive provision of data has not been deliberated. The Working Group may wish to consider whether articles 11 and 12 should apply to the passive provision of data and to further reconsider whether articles 6(1) and 7(1) can be applied.

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