



EN

Model Law on Factoring Working Group

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Issues Paper

(prepared by the UNIDROIT Secretariat)

1. The draft Model Law on Factoring was subject to an online consultation process (July – October 2022) between the Working Group’s fifth and sixth sessions. As the Working Group’s primary focus at its sixth session is reviewing the submissions received during the public consultation, there was no need for the Secretariat to prepare a comprehensive update to the Issues Paper. However, this document provides additional analysis on one issue that remained unresolved at the Working Group’s fifth session: the treatment of data-related receivables.

The treatment of data-related receivables

2. At its fifth session, the Model Law on Factoring Working Group discussed whether data-related receivables should be included within the scope of the MLF. While no firm decision was adopted, it was suggested that the matter should be dealt with separately to the treatment of intellectual property. Ultimately, the Working Group agreed that the treatment of ‘data’ required further consideration.¹

3. Article 2(1)(f) of the draft MLF provides the following definition of receivable:

“Receivable” means a contractual right to payment of a sum of money arising from:

- (i) *the supply or lease of goods or services;*
- (ii) *the assignment or licence of intellectual property; or*
- (iii) *the payment obligation for a credit card transaction.*

¹ See [UNIDROIT 2022 – Study LVIII A – W.G.5 – Doc. 6](#), paragraph 87.

4. Receivables arising from the contracts related to the supply and use of data might be already be captured as “receivables” under the MLF as receivables arising from the supply or lease of goods and services. However, there is some uncertainty on this matter.² Given the growing importance of data-related transactions to the global economy, there may be merit MLF including an explicit provision that provides that data-related receivables are within the scope of the MLF.

5. In April 2023, UNCITRAL considered a proposal for future work by Working Group IV on data transactions.³ The discussion paper provided conceptual descriptions of “data”, “data transactions” and “data contracts”. The paper defines “data contracts” as contracts for the control or processing of data for commercial purposes. The paper makes a further distinction between “data provision contracts” and “data processing contracts”.

6. As consistent with the terminology current under consideration at UNCITRAL, it is suggested that the Working Group could consider including an additional sub-paragraph to Article 2(1)(f) of the MLF:

“Receivable” means a contractual right to payment of a sum of money arising from:

- (i) *the supply or lease of goods or services;*
- (ii) *the assignment or licence of intellectual property;*
- (iii) *the provision or processing of data; or***
- (iv) *the payment obligation for a credit card transaction.*

7. It is suggested that there would be no need to define “data” in the MLF (as consistent with the fact that the MLF does not define “goods”, “services”, “intellectual property”, or “credit card transactions”).

8. The below section of this paper provides further research on this matter, which informed the Secretariat’s drafting proposal.

Background research⁴

Treatment of data

9. Definition of data is important to determine what will be the subject of data contracts where data receivables will arise from. According to the ISO definition, data is “*a reinterpretable representation of information in a formalized manner, suitable for communication, interpretation or processing*”⁵. According to this definition, data does not need to be in electronic form or in a machine-readable format. Inspired by the ISO definition, the UNCITRAL defines data as “*a representation of*

² The UNCITRAL Secretariat examined the provisions of the CISG as a possible source of inspiration for future work defining the contents of data provision contracts, adopting a cautious view that such contracts do not constitute a “contract for sale” and that data can be characterized as a “good”. The Secretariat observed that, while the provisions of the CISG are not tailored to the particular needs of the parties to data provision contracts, the legal issues dealt with in those provisions – particularly the rights and obligations of the parties and remedies for breach of contract may offer a blueprint or methodology for future work on data provision contracts. See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V22/024/80/PDF/V2202480.pdf?OpenElement>, paragraph 31.

³ See <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V22/024/80/PDF/V2202480.pdf?OpenElement>.

⁴ The Secretariat is grateful for the assistance provided by UNIDROIT Scholar Ms Zeynep Ülkü Kahveci for her assistance in the preparation of this document.

⁵ ISO, *Information Technology – Vocabulary*, ISO/IEC Standard No. 2382, 2015.

*information in electronic form*⁶. In parallel, OECD defines data as “*recorded information in structured or unstructured formats.*”⁷

10. Pursuant to Professor Herbert Zech’s classification of different levels of data, there are three levels of data⁸: (1) semantic level – “*information with a certain meaning*”; (2) the syntactic level – “*information represented by a certain amount of signs*”; or (3) by its physical carrier – “*information contained in a certain physical carrier or in a wider sense information represented by the structure of a physical object*”. The abovementioned definitions of ISO, UNCITRAL and OECD target data at the syntactic level of information (the bits and bytes).

11. A definition deviating from this approach is the definition of recent EU Data Governance Act which defines data as “*any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording*”⁹. Legal scholars have suggested that the word “compilation” may be confused to mean the content or services in digital form which will extend the definition to the semantic level of information¹⁰. Apart from this approach, data is usually understood at the syntactic level, in parallel with the ISO definition.

Data with economic value/subject to proprietary rights

12. Some legal documents identify data’s economic value in relation to the regulation of data transactions. For example, the definition of data under the American Law Institute – European Law Institute Principles for a Data Economy (“ALI-ELI Principles”) is “*information recorded in any machine-readable format suitable for automated processing, stored in any medium or as it is being transmitted*”. This definition identifies the syntactic level of data while also narrowing it down even more as it aims to only focus on data that may be the subject of various transactions¹¹. For this reason, “machine-readability” is part of the definition of data under the ALI-ELI principles. This is a significant criterion for data to be the subject of transactions as it will allow its suitability for automated processing. Also, this definition expressly excludes “functional data” (i.e. “*data the main purpose of which is to deliver particular functionalities*”) and “representative data” (i.e. “*data the main purpose of which is to represent other assets or value*”).

13. Certain other legal documents only focus on data that may be subject of proprietary rights. This is the case for the definition of “data objects” by the Law Commission of the United Kingdom as “*a thing that (1) is composed of data represented in an electronic medium, including in the form of computer code, electronic, digital or analogue signals; (2) exists independently of persons and exists independently of the legal system; and (3) is rivalrous.*”¹². The main characteristic distinguishing data objects from other data is its rivalrous character. Therefore, data objects is a subcategory of data and are deemed to be eligible for being a subject of proprietary rights by the Law Commission of the United Kingdom.

⁶ Legal issues related to digital economy – proposal for future work on data transactions, 2022.

⁷ OECD, Recommendation of the Council on Enhancing Access to and Sharing of Data (2021), document C/MIN(2021)20/FINAL.

⁸ Herbert Zech, “Information as Property”, JIPITEC 6 (3) 2015, pp. 192-197, p. 194.

⁹ Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) (Text with EEA relevance), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0868>.

¹⁰ Baloup, Julie and Bayamlioglu, Emre and Benmayor, Alike and Ducuing, Charlotte and Dutkiewicz, Lidia and Lalova, Teodora and Miadzevetskaya, Yuliya and Peeters, Bert, White Paper on the Data Governance Act (June 23, 2021). CiTiP Working Paper 2021, Available at SSRN: <https://ssrn.com/abstract=3872703> or <http://dx.doi.org/10.2139/ssrn.3872703>.

¹¹ ALI-ELI Principles for a Data Economy - Data Transactions and Data Rights – ELI Final Council Draft – Principle 3(1)(a).

¹² Law Commission, Digital Assets: Consultation paper, 2022, para. 5.10, available at: <https://www.lawcom.gov.uk/project/digital-assets/>.

14. Some other institutes focus on the term “digital assets” instead of data objects when talking about data being subject to proprietary rights. A digital asset is defined as “*an electronic record which is capable of being subject to control*” by UNIDROIT’S Working Group on Digital Assets and Private Law¹³ and as “*any record or representation of value that fulfils the following criteria: (i) it is exclusively stored, displayed and administered electronically, on or through a virtual platform or database, including where it is a record or representation of a real-world, tradeable asset, and whether or not the digital asset itself is held directly or through an account with an intermediary; (ii) it is capable of being subject to a right of control, enjoyment or use, regardless of whether such rights are legally characterized as being of a proprietary, obligational or other nature; and (iii) it is capable of being transferred from one party to another, including by way of voluntary disposition*” by the European Law Institute¹⁴. The notion of control is emphasised in the definitions of digital assets as they are aiming to distinguish from other data which will not be eligible for proprietary rights.

Data contracts

15. Contracts where data is the subject of transaction have been evaluated and explored by legal institutes and certain states’ working groups as they are frequently being executed in data-based/information economy. UNCITRAL defines data contracts as “*contracts for the control or processing of data for commercial purposes*”¹⁵. It then categorises data contracts into two groups: data provision contracts and data processing contracts. Japan’s Ministry of Economy, Trade and Industry (“**METI**”) defines data contracts as “*contracts relating to the utilisation, processing, transfer and other handling of data*”¹⁶. In contrast to UNCITRAL, the METI guidelines split data contracts into three categories: (1) data provision type; (2) data generation type; and (3) data sharing type (platform type).

16. Under the ALI-ELI Principles, data contracts are defined as “*a contract the subject of which is data*”. ALI-ELI Principles uses two main categories of data contracts. Under the first general category of contracts for supply or sharing of data is included (1) Contracts for the transfer of data; (2) Contracts for simple access to data; (3) Contracts for exploitation of a data source; (4) Contracts for authorization to access; and (5) Contracts for data pooling. Under the second general category of contracts for services with regard to data is included (1) Contracts for the processing of data; (2) Data trust contracts; (3) Data escrow contracts; and (4) Data marketplace contracts.

Treatment of data-related receivables in the MLF

17. To ensure the inclusion of relevant types of data contracts under the MLF, existing definitions of different categories of data contracts should be explored. The categorisation of the three main resources on this issue may be found in the Table 1 below.

18. The definition of data receivables should cover receivables arising from all types of data contracts that are not covered by other subparagraphs of Article 2(1)(f) of the MLF. In the intersection of data contract categories employed by UNCITRAL, METI and ALI-ELI Principles are (i)

¹³ Study LXXXII – W.G.6 – Doc. 2: Master Copy of the Draft Principles and Comments, Principle 2(2), available at: <https://www.unidroit.org/wp-content/uploads/2022/08/W.G.6-Doc.-2-Master-Copy-of-the-Draft-Principles-and-Comments-clean.pdf>. UNIDROIT Working Group also defines electronic record as “*information which is (i) stored in an electronic medium and (ii) capable of being retrieved.*” under Principle 2(1).

¹⁴ ELI Principles on the Use of Digital Assets as Security, p. 17, available at: <https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/use-of-digital-assets-as-security/>.

¹⁵ UNCITRAL, A/CN.9/1117, para. 22, available at: <http://undocs.org/en/A/CN.9/1117>.

¹⁶ Ministry of Economy, Trade and Industry, Contract Guidelines on Utilization of AI and Data (June 2018), available at: https://www.meti.go.jp/english/press/2019/0404_001.html.

the data provision category; and (ii) the data processing category. These two categories should be covered under the MLF. Regarding the first category, UNCITRAL and METI use the term “provision” and include both contracts where data is assigned/transferred from one party to the other and contracts where data remains under the control of one party and other party also gains access to it (i.e. license or utilization contracts). ALI-ELI Principles do not use the term “provision”, however they name this category as “contracts for supply or sharing of data” with the goal of covering both scenarios. For this reason, the term “provision” may be preferred under the MLF as it is broader.

19. Regarding the second category of data processing type contracts, “data processing” term is used both by UNCITRAL and ALI-ELI Principles. On the other hand, METI uses “data generation”. As data processing is also a term that legal world is familiar with thanks to the personal data protection rules, it can be preferred over “data generation”.

Table 1 – The treatment of data-related contracts

UNCITRAL	METI	ALI-ELI Principles
<p>Data Provision Contracts</p> <p><i>“involves a person (the “data provider”) providing data to another person (the “data recipient”) for the other person to use or otherwise process”</i></p>	<p>Data Provision Type Contracts</p> <p><i>“a contract which is based on the premise that there is no dispute between the parties with respect to the factual state that only one party (data provider) retains the data subject to the transaction and that the data provider provides such data to the other party and which provides for the other party’s utilization rights and other conditions of the data provision”</i></p> <p>Categories:</p> <ul style="list-style-type: none"> (1) Assignment of data (2) License of data (3) Joint utilisation of data 	<p>Contracts for supply or sharing of data</p> <ul style="list-style-type: none"> (1) Contracts for the transfer of data (2) Contracts for simple access to data (3) Contracts for exploitation of a data source (4) Contracts for authorization to access (5) Contracts for data pooling
<p>Data Processing Contracts</p> <p><i>“involves a person (the “service provider”) processing data for another person (the “service recipient”) and providing the processed data to the other person. Common types of data processing transactions include data scraping, cloud-based services, data analytics, and electronic transmission services.”</i></p>	<p>Data Generation Type Contracts</p> <p><i>“when new data that never existed before is generated with participation of multiple parties and the parties who participate in the data generation make an agreement as to the utilization rights to such data”</i></p>	<p>Contracts for services with regard to data</p> <ul style="list-style-type: none"> (1) Contracts for the processing of data (2) Data trust contracts (3) Data escrow contracts (4) Data marketplace contracts
	<p>Data Sharing Type / Platform Type Contracts</p> <p><i>“is assumed to have a platform, which aggregates, stores, processes or analyzes data, at the center, surrounded by a group of data providers, who provide data to the platform (X1, X2, X3...), and a group of data users, who share and apply data through the platform (Y1, Y2, Y3...)”</i></p>	

20. METI's category of data sharing type/platform type contracts and ALI-ELI Principles' sub-category of data marketplace contracts both concern contracts with platforms which serve as an intermediary between two parties willing to exchange data. In essence, this is a contract concerning the supply of a service similar to matchmaking between two parties looking for transfer/licensing of data. Although it includes data as part of its subject, it does not need to be separately addressed under the MLF's definition of data receivables as it can be accepted to already be covered under Article 2(1)(f)(i)'s "supply of services". The same conclusion can be reached for the data trust and data escrow contracts which are covered under the ALI-ELI principles.