

Model contract to ensure equivalent protection in the context of transborder data flows with explanatory report (1992)

Study made jointly by the Council of Europe, the Commission of the European Communities and International Chamber of Commerce (2 November 1992)

Preliminary note

- i. The Consultative Committee, set up under Article 18 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, has studied, together with the Commission of the European Communities and the International Chamber of Commerce (ICC), the possibilities of drawing up a model contract for transborder data flows which would ensure equivalent protection of personal data transferred from one country to another with different legal rules.
- ii. This study has resulted in a number of model clauses which could be included in a contract between licensor and licensee whenever they envisage a transborder data flow. These model clauses appear in the Appendix to this study.
- iii. The Consultative Committee agreed that these clauses, together with the explanatory memorandum hereafter, should be tested on their practical value by those who are involved in the transfer of personal data across the frontiers.

The Consultative Committee would be grateful for any report or observations on the use of the model clauses.

Explanatory Memorandum

CONSULTATIVE COMMITTEE

GENERAL COMMENTS

DETAILED COMMENTS

ARBITRATION

EXPERTISE

APPENDIX I - MODEL CLAUSES FOR INCLUSION IN A MODEL CONTRACT

APPENDIX II - List of Arbitrators proposed by the member States of the Council of Europe

INTRODUCTION

1. In a study (see [Footnote 1](#)) prepared by the Council of Europe's Committee of experts on data protection (CJ-PD), attention is drawn to the increase of transborder data flows:

"If, as stated at the beginning of this chapter, the volume of personal data in circulation has dramatically increased, then it is certain that the amount of transborder traffic in such data has also increased and will continue to do so. The technological trends outlined in Chapter 2 make these conclusions inevitable. Accordingly, it may be expected

that information flow patterns used in the report to distinguish between different technologies will increasingly be of a transnational character. Videotex, for example, now allows users to access data bases located in different countries. International carriers using satellites and fibre optics have vastly increased facilities for promoting electronic mail use and other technologies conforming to the conversational model. However, as the volume of transborder flow increases, the control possibilities diminish. It becomes much more difficult, for example, to identify the countries through which data will transit before reaching the authorised recipient. Problems of data security and confidentiality are heightened when data are piped through communication lines which traverse countries where little or no attention is accorded to issues of data protection. The transborder flow of sensitive data in particular becomes more acute.

In brief, when advanced communications networks enable businessmen on foreign travels to access their enterprises' databases via hand-held computers plugged into sockets available in airports and to down-load data instantaneously into their computers across vast distances, the issue of national regulation of transborder data flows becomes problematic indeed."

2. The Convention for the protection of individuals with regard to automatic processing of personal data (Strasbourg 1981, ETS 108) addresses transborder flows of personal data and domestic law in Article 12, which reads:

"1. The following provisions shall apply to the transfer across national borders, by whatever medium, of personal data undergoing automatic processing or collected with a view to their being automatically processed.

2. A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party.

3. Nevertheless, each Party shall be entitled to derogate from the provisions of paragraph 2

a. in so far as its legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection;

b. when the transfer is made from its territory to the territory of a non-Contracting State through the intermediary of the territory of another Party, in order to avoid such transfers resulting in circumvention of the legislation of the Party referred to at the beginning of this paragraph."

3. The principles of transborder data flow contained in Article 12 of Convention 108 are so far the only clear answer to the expectation of a minimum guaranteed protection of an

individual's privacy within the free flow of information, which is an indispensable element of free trade in information Services. (see [Footnote 2](#))

However, Article 12 in itself may, at this stage, not be sufficient to ensure adequate protection of personal data which are transferred from one country to another.

4. Firstly, in 1992, only twelve States (see [Footnote 3](#)) had ratified the Convention and in 1998 twenty States have ratified it; personal data may have to be communicated to States which are not Party to Convention 108.

5. Secondly, exchange of information, including personal data, may be based on multilateral legal instruments, Community rules and bilateral agreements which may have been drawn up prior to Convention 108 and their drafters may not have given sufficient consideration to the privacy issues created by transborder exchanges of personal data.

6. And thirdly, Article 12, paragraph 3(a) accepts that Parties may accord certain categories of data, or data files, particular protection, going beyond that accorded to other categories of data or data files. Such specific regulations in the exporting State may not correspond to the regulations in the importing State, and therefore prevent an "equivalent protection".

7. In the course of discussion on the notion of "equivalent protection", the Consultative Committee of Parties to Convention 108 noted that certain countries had experience of the use of contractual techniques for ensuring data protection in the context of transborder data flows, in both the private and public sectors. The experience of these countries led the Committee to reflect on the possibility of elaborating a model international contract laying down guarantees of data protection.

8. This contractual technique had in fact already been referred to in several sectorial recommendations on data protection adopted by the Committee of Ministers.

9. Principle 8.2 of Recommendation No R (86) 1 on the protection of personal data used for social security purposes requires that in the case of transborder flows of personal data additional safeguards should be provided whenever necessary. The Explanatory Memorandum explains that in cases where data are to be transferred to a State which has no data protection legislation, agreements which provide necessary additional guarantees should be concluded. Such agreements need not be formal treaties but could take the form of an exchange of letters. (*cf. Explanatory Memorandum, paragraph 44*)

10. Principle 5.4 of Recommendation No R (87) 15 regulating the use of personal data in the police sector permits international communication of data to foreign authorities if there is a legal provision or if the communication is necessary for the prevention of danger or the suppression of a criminal offence, and provided that domestic regulations for the protection of the individual are not prejudiced. The Explanatory Memorandum adds that if the sending authority imposes conditions on the use of data in the receiving

State (for example as to the length of conservation), it is to be understood that these conditions are to be respected. (cf. *Explanatory Memorandum, paragraph 69*)

11. The text of Recommendation No R (89) 2 on protection of personal data used for employment purposes is silent on the question of transborder data flows between a firm situated on the territory of a Party and a firm established in a country which has no legislation in the field of data protection. The Explanatory Memorandum suggests that in these cases consideration should be given to the possibility of contractually obliging the person who is to receive the data to respect the principles laid down in the Recommendation. (cf. *Explanatory Memorandum, paragraph 63*)

12. The Conference organised jointly by the Council of Europe and the Commission of the European Communities, in Luxembourg, 27-28 March 1990, noted in its Conclusions

"(...) the possible utility of contractual techniques to promote equivalent protection in the context of transborder data flow. While emphasising that the law of contract could never replace the need to legislate for data protection, contractual techniques could nevertheless be used as a sort of palliative or complement to the legal framework for data protection and transborder data flow."

13. In his summary of conclusions of the XIIIth Conference of Data Protection Commissioners, Strasbourg, 2-4 October 1991, Mr. Erik Harremoes, Director of Legal Affairs at the Council of Europe and Rapporteur General of the Conference stated:

"Contracts on transborder data flows

The debate has shown that as long as legal lacunae subsist, such contracts may contribute to improving the protection of personal data which are communicated from one country to the other with different regulations.

It has, however, also been underlined that such contracts do not provide a waterproof guarantee; questions remain as to the possibilities of controlling their implementation, or enforcing their clauses.

Contracts should therefore never substitute legal provisions; the European Community, the Consultative Committee, the Council of Europe Committee of experts, and, of course the Conference of Commissioners should continue their endeavours to develop such legislation."

CONSULTATIVE COMMITTEE

14. The Consultative Committee of Convention 108 believed that it would be useful to examine the extent to which the law of contract could be used so as to bind the importer of personal data to respect a number of data protection principles, in particular the basic principles laid down in Convention 108.

15. For this purpose the Consultative Committee agreed in May 1989 to commission three legal consultants to structure a set of possible clauses for inclusion in a model contract (see [Footnote 4](#)). This work was financed by the Commission of the European Communities.

16. The contractual clauses proposed by the consultants were brought to the attention of the Institute of International Business Law and Practice of the International Chamber of Commerce, the Legal Advisory Board of the Commission of the European Communities, as well as the various national authorities in charge of data protection, for observations and comment.

17. In March 1991, a Drafting Group with Mme Ch.-M. Pitrat (France) in the Chair, met in Paris to revise the draft model clauses in the light of observations made.

18. The revised draft model clauses were examined by the Consultative Committee in May 1991 and in February 1992. The Committee agreed that the model clauses should be tested on their practical value, and for this purpose be distributed to interested parties, together with an explanatory memorandum.

19. The explanatory memorandum was prepared by a Drafting group which met in Luxembourg in June 1992 under the chairmanship of Mrs Pitrat (France). Representatives of the Commission of the European Communities, the Secretariat of the Council of Europe and the International Chamber of Commerce attended.

20. In October 1992, the Consultative Committee accepted the arbitration clauses proposed by the experts from the International Chamber of Commerce, examined the draft explanatory memorandum and instructed the Secretariat to amend it in the light of observations made.

21. On that occasion, the Consultative Committee agreed that the draft model clauses with the revised explanatory memorandum should be circulated by the Secretariat to the International Bar Association and by the Commission of the European Communities and the International Chamber of Commerce to industry and commerce, as a study made jointly by the Council of Europe, the Commission of the European Communities and the International Chamber of Commerce. All interested parties, including the International Bar Association, industry and commerce and the national data protection authorities would be invited to report on their experiences with the model clauses and the explanatory memorandum.

GENERAL COMMENTS

Introduction

22. The obligations of the licensor and licensee under the model contract are based on the guarantees established by the Council of Europe's Convention for the protection of

individuals with regard to automatic processing of personal data, which appear also in the OECD Guidelines on the protection of privacy and transborder flows of personal data.

Objectives

23. The objectives of the model contract to ensure equivalent data protection in the context of transborder data flows are as follows:

- a. to provide an example of one way of resolving the complex problems which arise following the transfer of personal data subjected to different protection regimes;
- b. to facilitate the free circulation of personal data in the respect of privacy;
- c. to allow the transfer of data in the interest of international commerce;
- d. to promote a climate of security and certainty of international transactions involving the transfer of personal data.

Scope

24. The clauses of the model contract have been designed to allow the transfer of personal data between independent economic entities. It is left to the parties whether to use the clauses or not; the clauses are optional. Parties shall adapt the clauses to specific conditions. The clauses can serve as a basis for the establishment and development of appropriate rules e.g. for transfers within the same group of enterprises or between a file controller and a data processing service.

Applicable law

25. Parties are free to choose the law applicable to the contract between licensor and licensee. They should always stipulate explicitly the law which they have chosen. When the applicable domestic law ensures a better protection of the personal data, the licensor is recommended to check whether he must complete the clauses accordingly.

DETAILED COMMENTS

Obligations of the licensor

26. The first obligation of the licensor is to ensure that the transfer of the data is in accordance with the conditions laid down in the domestic law of his State. This may imply that the Data Protection Authority of his State has been informed, or, as the case may be, has authorised the transfer.

27. The second obligation of the licensor is to ensure that the conditions in Article 5 of Convention 108 are met, before the data are transferred. The licensor should also indicate the period during which the data may be stored by the licensee.

Obligations of the licensee

28. First of all, the licensee undertakes to abide by the same principles as the licensor which follow from Article 5 of Convention 108 and which are listed in the contract.

29. Secondly, the licensee commits himself to prevent any use of the data beyond the terms of the contract. For this purpose, he explicitly accepts a number of obligations, but these obligations are not exhaustive and their respect does not automatically exculpate the licensee if nevertheless the data are not used in accordance with the contract. This implies also that he must destroy the data once the purpose of the transfer has been achieved.

30. The first of these explicit obligations of the licensee is to respect the purpose or purposes for which the data will be transferred, and which must be defined in the contract.

31. In respect of sensitive data, the licensee undertakes to respect the provisions under Article 6 of Convention 108, ie. to refrain from processing such data, unless the appropriate safeguards provided for by the domestic law of the licensor are being applied.

32. The licensee may not communicate the data to third parties, unless this is foreseen in the contract (clause 2.a) or his domestic law would oblige him to do so. In the latter case, this obligation must be mentioned in the contract.

33. The licensee undertakes also to rectify, delete or update the data on instruction of the licensor, or if required by the law of the State of the licensor, or as a consequence of developments in the State of the licensor. To this end, the licensor must inform the licensee of any such law or new development. The obligations of the licensee under clause 2.d must be seen in the context of the first clause in the model contract, which lays down that the objective is not to transfer the right of property of personal data, but merely a right to use these data.

34. In accordance with Article 8 of Convention 108, the licensee must ensure that the data subject enjoys the same rights of access, rectification and erasure as under the domestic law of the licensor.

35. When such rights of access and rectification are denied by the licensee, it is the duty of the licensor to counteract, either by terminating the contract under clause 5, or by starting the arbitration procedure under clause 4.

Liability and indemnity

36. The licensee is liable for any use made of the data which have been transferred; in case of damage because of breach of the contract he must indemnify the licensor. Damage caused to the data subject should be repaired by the licensor under domestic law or international private law.

Settlement of disputes

37. Parties to the model contract or to a contract including the model clauses must establish an appropriate system of settlement of disputes arising out of the execution of the model contract or of the model clauses.

They have the possibility to submit such disputes to arbitration or expertise.

ARBITRATION

38. When the parties to the contract agree to settle any disputes by arbitration, they can refer to existing arbitration rules of UNCITRAL or ICC and use the model UNCITRAL or ICC rules (see [Footnote 5](#)).

It is recommended to add to these model arbitration clauses the following elements:

- language of arbitration
- place of arbitration
- number of arbitrators.

However, when the contract deals only with transborder data flows, the parties can provide for the following procedure of appointment of arbitrators:

"Each party shall appoint one arbitrator, the arbitrators so appointed shall agree on a third arbitrator selected on a list of persons chosen by the Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data, which shall be the chairman of the arbitral tribunal. In cases where the arbitrators appointed by the parties are not able to agree on the appointment of the third arbitrator, within 30 days the ICC (or the Appointing Authority chosen by the parties in charge of the arbitration) shall appoint the third arbitrator in accordance with its arbitration rules." (see the list of persons chosen by the Consultative Committee)

If appropriate, this clause can also be used in mixed contracts.

EXPERTISE

39. When the contract include provisions on transborder data flows, but is not limited to such item, the parties can have recourse to an expertise on this special item during the main arbitral procedure.

In such a case, the parties can provide that the expert to be appointed will be selected on a list drawn up by the Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data - the expert thus selected will provide an opinion to the established arbitral tribunal. (see the list of persons chosen by the Consultative Committee)

Termination

40. In case of manifest bad faith of the licensee or his failure to respect the result of arbitration, the licensor can terminate the contract, and claim damages or interest.

41. In such cases, the licensee must destroy the data and inform the licensor of this destruction. The contract should provide for a dissuasive fine to be paid if the former licensee does not implement this principle. Any damage incurred by the data subject should be settled between him and the licensor, under domestic law or international private law.

APPENDIX I - MODEL CLAUSES FOR INCLUSION IN A MODEL CONTRACT

The licensor and the licensee agree on a licence giving the right to use personal data against payment of a sum of ...

The agreement between the parties shall be governed by the following conditions.

1. Obligations of the licensor

The licensor represents and warrants to the licensee that the data are lawfully transferred to the licensee and that in accordance with domestic law, they

- a) have been obtained and processed fairly and lawfully;
- b) have been stored for specific and legitimate purposes and are not used in a way incompatible with these purposes;
- c) are adequate, relevant and not excessive in regard to the purposes for which they will be licensed;
- d) are accurate and up to date;
- e) are authorised to be stored for a period of ...

2. Obligations of the licensee

The licensee represents and warrants for his part that in using the data he will respect in all regards the principles set out in the representations and warranties of the licensor and that he will prohibit any processing or use of the data which would not be in accordance with the contract. For this purpose, the licensee undertakes in particular to respect the following non-exhaustive list of obligations:

- a) the licensee will use the data for the following purposes, to the exclusion of any other purposes, namely [the purposes in question would be listed];

b) the licensee shall refrain from processing personal data revealing racial origin, political opinions, or religious or other beliefs, as well as personal data concerning health or sexual life or criminal convictions unless the processing is governed by such guarantees as would have been applied under the domestic law of the licensor.

c) The licensee shall use the data exclusively for his own use and shall not communicate, either free of charge or in return for payment, the data to any other legal or natural person, except when there is an obligation under his domestic law, which shall be mentioned.

d) the licensee shall immediately rectify, delete and update the data on receiving instructions to this effect from the licensor. The licensee undertakes in particular to rectify, complete or delete all or part of the data if it appears that such measures are required by the law of the State of the licensor or are based on new circumstances occurring in the State of the licensor. The licensor shall notify and justify the circumstances to the licensee as soon as legal notice is published in the State of the licensor.

The licensee undertakes to ensure that data subjects have rights of access to and rectification and erasure of their data in the same way as they would have had under the domestic law of the licensor.

Should the licensee refuse to allow data subjects to exercise the right of access, or refuse rectification or erasure requested by the data subject, the licensor shall :

- either terminate purely and simply the contract, on the conditions and with the consequences which result from this as foreseen in clause 5,
- or set in motion the procedure for designation of an arbitrator foreseen in clause 4.

3. Liability and indemnity

The licensee shall be liable for the use made of the data which have been transferred by the licensor.

The licensee undertakes to indemnify the licensor for any breach resulting from his obligations under the contract or for any fault or manifest negligence linked to the execution of the contract.

4. Settlement of disputes

See paragraphs 37-39 "Settlement of disputes" in the explanatory memorandum.

5. Termination of the contract

Should the licensee show bad faith in the implementation of the contract or refuse to respect, in particular, the decision of the arbitrators, the licensor reserves the right to terminate the contract by registered letter with recorded delivery, or by any other equivalent means, and without prejudice to any claim for damages and interest.

On termination of the contract, the licensee shall destroy the data and inform the licensor accordingly.

In case of failure to respect the preceding clause, the licensee undertakes to pay to the licensor the sum of ...

APPENDIX II - List of Arbitrators proposed by the member States of the Council of Europe

ALBANIA/ALBANIE	
ANDORRA/ANDORRE	
AUSTRIA/AUTRICHE	- Dr. Waltraut KOTSCHY , Director, Federal Chancellery, Ballhausplatz 1, A - 1014 WIEN - Dr. Eva SOUHRADA-KIRCHMAYER , Deputy Head of Division, Federal Chancellery, Ballhausplatz 1, A - 1014 WIEN
BELGIUM/BELGIQUE	
BULGARIA/BULGARIE	
CROATIA/CROATIE	
CYPRUS/CHYPRE	
CZECH REP./ REP. TCHEQUE	
DENMARK/DANEMARK	- Prof. dr.jur. Mads Bryde ANDERSEN , University of Copenhagen - Prof. dr.jur. Peter BLUME , University of Copenhagen
ESTONIA/ESTONIE	
FINLAND/FINLANDE	- Mr. Timo KONSTARI , Special Adviser, Ministry of Justice - Mr. Ahti SAARENPÄÄ , Director, University of Lapland, Institute of Legal Informatics
FRANCE	- M. Jérôme HUET , Professeur à la Faculté de Droit de l'Université de Paris V - M. Hubert MAISL , Recteur de l'Université de Rennes

GERMANY/ALLEMAGNE	
GREECE/GRECE	<p>- M. Kimon CHALAZONITIS, Vice-Président du Conseil d'Etat</p> <p>- M. Constantinos MAVRIAS, Professeur à l'Université de Thrace (Corr. à: Ministère de la Justice, Direction de la préparation des lois, c/o Mme Patelis, 96, av. Messogion, GR - 11527 ATHENES)</p>
HUNGARY/HONGRIE	- Mme Paulina OROS , Deputy Head of Department of Public Law, Ministry of Justice
ICELAND/ISLANDE	<p>- Mr Thorgeir ORLYGSSON, Chairman of the Data Protection Commission</p> <p>- Ms Sigrun JOHANNESDOTTIR, Director of the secretariat for the Data Protection Commission</p>
IRELAND/IRLANDE	
ITALY/ITALIE	<p>- Dott. prof. Giuseppe MIRABELLI, Libera Università degli Studi Sociali di Roma</p> <p>- Avv. Francesco REBUFFAT, Università La Sapienza di Roma</p>
LATVIA/LETONIE	
LIECHTENSTEIN	
LITHUANIA/LITUANIE	
LUXEMBOURG	<p>- Maître Claude KREMER, avocat-avoué, 8-10, rue Mathias-Hardt, BP 39, L - 2010 LUXEMBOURG</p> <p>- Maître Dean SPIELMANN, avocat-avoué, 17, bld Royal, BP 871, L - 2018 LUXEMBOURG</p>
MALTA/MALTE	
MOLDOVA	
NETHERLANDS/ PAYS-BAS	<p>- Prof. H. FRANKEN, P.O. Box 9520, NL - 2300 RA LEIDEN</p> <p>- Prof. D.W.F. VERKADE, Rapenburg 49, NL - 2311 GH LEIDEN</p>
NORWAY/NORVEGE	
POLAND/POLOGNE	
PORTUGAL	<p>- M. Joachim de SEABRA LOPES, Directeur Général, Ministère de la Justice, av. Oscar Monteiro Torres, 39, 1016 LISBOA Codex</p> <p>- M. Amavel RAPOSO, Magistrat, Attaché au Ministère de la Justice, Praca do Terreiro do Paco, LISBOA</p>

ROUMANIA/ROUMANIE	
RUSSIAN FED / FED. DE RUSSIE	
SAN MARINO/ SAINT MARIN	
SLOVAK REP./ REP. SLOVAQUE	
SLOVENIA/SLOVENIE	
SPAIN/ESPAGNE	
SWEDEN/SUEDE	- Mr. Ulf ARRFELT , President of the City Court of Malmö - Mr. Sten WAHLQVIST , Head of Division, Administrative Court of Appeal, JÖNKÖPING
SWITZERLAND/SUISSE	- M. Rainer J. SCHWEIZER , Docteur en droit, avocat, Webergasse 8, 9000 ST GALLEN - M. Urs MAURER , Avocat, LLM, Etude Bär & Karrer, Buchholzstrasse 9, 8053 ZÜRICH-WITIKON
"FORMER YOUNG REP. of MAC."/ "EX-REP. YOUNG de MAC."	
TURKEY/TURQUIE	- Mme Lale SIRMEN , Professeur, Faculté de Droit, ANKARA - Mme Nurkut INAN , Professeur, Faculté de Droit, ANKARA
UKRAINE	
UNITED KINGDOM/ ROYAUME-UNI	

Footnotes

Footnote 1

"New technologies: a challenge to privacy protection?", Council of Europe, Strasbourg, 1989, ISBN 92-871-1617-2.

Footnote 2

Prof. Dr. B. de Schutter, Rapporteur General of the Conference on "Access to Public Sector Information, Data Protection and Computer Crime", organised jointly by the Council of Europe and the Commission of the European Communities, Luxembourg, 27-28 March 1990.

Footnote 3

Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Norway, Spain, Sweden, United Kingdom.

Footnote 4

Prof. Brian Napier (London), Prof. Allan Philip (Copenhagen) and Mr. Laurent Faugerolas (Paris)

Footnote 5

Model UNCITRAL: Arbitration provision

Model arbitration clause or separate arbitration agreement

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."

Model ICC: Arbitration provision

Standard ICC arbitration clause

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."