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**United Nations Commission on  
International Trade Law**  
Working Group on Electronic Commerce  
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## **Draft report of the Working Group on Electronic Commerce on the work of its forty-third session**

### **Addendum**

#### **IV. Electronic contracting: provisions for a draft convention**

##### **Article 14 [16]. Error in electronic communications**

1. The text of the draft article was as follows:

“Variant A

“[Unless otherwise [expressly] agreed by the parties,] a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message and:

“(a) The automated information system did not provide the person with an opportunity to prevent or correct the error;

“(b) The person notifies the other party of the error as soon as practicable when the person making the error learns of it and indicates that he or she made an error in the data message;

“[(c) The person takes reasonable steps, including steps that conform to the other party’s instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

“[(d) The person has not used or received any material benefit or value from the goods or services, if any, received from the other party.]



“Variant B

“1. [Unless otherwise [expressly] agreed by the parties,] a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message and the automated information system did not provide the person with an opportunity to prevent or correct the error. The person invoking the error must notify the other party of the error as soon as practicable and indicate that he or she made an error in the data message.

“[2. A person is not entitled to invoke an error under paragraph 1:

“(a) If the person fails to take reasonable steps, including steps that conform to the other party’s instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; or

“(b) If the person has used or received any material benefit or value from the goods or services, if any, received from the other party.]”

2. A widely shared and strongly supported view was that the draft article should be deleted, as it dealt with substantive matters of contract law that the draft convention should not address. It was said that errors between individuals and automated information systems were not substantially different from errors made in traditional means of communication, so that no special rules were needed or advisable. Problems that might arise in an electronic environment should not be solved by the draft convention, and should instead be governed by the applicable law. Concern was also expressed about the possible impact of the draft article on existing laws on error. While the initial version of the draft article (contained in A/CN.9/WG.IV/WP.95, annex I) was only concerned with ensuring the availability of means to correct errors in messages exchanged with automated information systems, the current version deprived the entire contract of its validity, a result that might not be provided for under domestic law.

3. Another argument against retaining the draft article was that the provision might interfere with the operation of financial systems, stock markets or commodity trades, if the parties were allowed to later withdraw from their offers or bids on the basis that they had been the result of a mistake. Legal uncertainty in those time-critical markets required that parties should be bound even if they acted unintentionally. The draft article, it was said, was more appropriate for consumer protection than to the practical requirements of commercial transactions. Furthermore, the draft article, by focusing on automated information systems, was not technology-neutral, being thus inconsistent with one of the basic principles of the UNCITRAL Model Law on Electronic Commerce. All that was needed in connection with such systems was a positive rule affirming their use in the context of contract formation, but not a substantive rule dealing with errors in automated transactions.

4. The countervailing view, which also gained broad and strong support, was that the draft article contained useful provisions to deal with particular problems that arose in electronic commerce. There was a need for such a provision in the light of the relatively higher risk of human errors, such as keystroke errors, being made in transactions made through automated information systems than in more traditional

modes of contract negotiation. For example, while it would be unlikely for a person to deliver documents unintentionally to a post office, in practice there were precedents where persons had claimed not to have intended to confirm a contract by hitting "Enter" on a computer keyboard or clicking on an "agree" icon on a computer screen. Thus, the draft article was not intended to be media neutral; on the contrary, it was intended to deal with a specific issue affecting certain forms of electronic communications. However, in doing so the draft article did not overrule existing law on error, but merely offered a meaningful addition to it by focusing on the importance of providing means of having the error corrected.

5. It was pointed out that the contract law of some legal systems confirmed the need for the draft article. This was the case, for example, in connection with rules that required a party seeking relief from mistake to show that the other party knew or ought to have known that a mistake had been made. While there were means of making such proof if there was an individual at each end of the transaction, awareness of the mistake was almost impossible to demonstrate when there was an automated process at the other end.

6. However, most expressions of support to the principles underlying the draft article also emphasized the need for reformulating it so as to define more narrowly its scope of application and its operative provisions. The draft article, it was suggested, should be circumscribed to errors that occurred in interactions between individuals and automated information systems that did not offer the individual an opportunity to review or correct the errors. Rather than requiring generally that an opportunity to correct errors should be provided, the draft article should limit itself to providing consequences for the absence of such a possibility. Those consequences, it was further suggested, should be concerned only with avoiding the effects of error contained in a data message, and should not automatically affect the validity of the contract.

7. It was suggested that the draft article could provide, for example, that in a transaction involving an individual and an automated information system, the individual might avoid the effect of an unintended action of that individual that resulted from an error made by the individual in dealing with the automated information system of another person if that system did not provide an opportunity for the correction of that error. Such a provision might be further subject to the remaining conditions set out in subparagraphs (b) to (d) of Variant A of the draft article and might be complemented with a provision to the effect that if the conditions set forth in the draft article were not met the consequences of the error would be as provided for by other law including the law of mistake and any agreement between the parties.

8. The proposals to reformulate the draft article so as to narrow its scope of application and limit the consequences contemplated by it were welcomed by the Working Group. Nevertheless, several comments emphasized the view that the preferable alternative should be simply to delete the draft article rather than to attempt to reformulate it.

9. Questions were raised concerning the proposed focus on actions taken by individuals and on the right of the individual to correct any errors made in communications with automated information systems. The question was asked whether it would be appropriate to limit a provision on errors only to errors

committed by individuals, since errors might also occur in communications initiated by automated information systems. Furthermore, it was said that it would be problematic to introduce the notion of “individual”, since any contract negotiated through automated information systems would ultimately be attributable to the legal entity which such individual would represent. Any new version of the draft article should make it clear that the right to correct the mistake was not a right of the individual but of the party or legal entity on whose behalf the individual was acting. Lastly, if the draft article was retained, the Working Group should consider whether the provision should also deal with electronic mails sent by mistake, since there was no reason for limiting the provision only to communications with automated systems.

10. Criticism was also voiced on the basis that the proposed new version would retain parts of the draft article that conflicted with the existing law on error in some legal systems. That was the case, in particular, with respect to subparagraphs (c) and (d) of Variant A, since some legal systems did not subject a person’s right to avoid a contract that was vitiated by mistake to the types of conditions set forth in those provisions. Also, if the draft article was retained, it should make it clear that it dealt with unintentional acts, but not with other types of errors that might occur, for example, when the sending party was unconscious at the point of sending.

11. Furthermore, it was said that the notion of avoiding the consequences of an act might not be understood in the same manner in different legal systems. In some legal systems, for example, that notion would inevitably be interpreted as referring to the validity of an act, and lead to discussions as to whether the act was null and void or voidable at the party’s request. One alternative solution might be to focus on a party’s ability to rely on a data message erroneously transmitted or drafted or to provide that a message that resulted from an error could not be invoked against the person who committed the error, if that person had not had an opportunity to review the message and correct the error. In response, it was said that the proposed shift in approach should be carefully considered in the light, for instance, of subparagraphs (c) and (d) in Variant A, which indicated that in some cases, goods or services might have been provided in reliance on the error. The party receiving the message should be able to rely on the message, despite the error, up to the point of receiving a notice of error.

12. Another alternative suggestion was to recast the draft article as a presumption according to which, save for proof to the contrary, a statement that a person had acted in error in dealing with an automated system, would be presumed to be true if the automated information system did not provide a method to correct the error. Such a presumption would leave it for the domestic law to determine the consequences of the alleged error on the contract and the remedies of the parties in that connection. With the same intention of avoiding interference with any domestic law on error, it was also proposed that the draft article should elaborate on the distinction between the effects of the error and the right to correct or withdraw the error. If the rule was expressed in terms of nullifying or avoiding or having an impact on the consequences of the error, it would invade the sphere of domestic laws on mistakes. Instead, the draft article should provide for the right—unconditional or subject to specific conditions—of the individual or the party on whose behalf the individual acted to exceptionally withdraw the erroneous statement.

13. The Working Group considered at length the various views that were expressed and the different alternative approaches proposed to the draft article. The prevailing view within the Working Group was that, despite the strong expressions of support for the deletion of the provision, the draft article deserved to be retained for further consideration, in a revised form. The Secretariat was requested to reformulate the draft article in a manner that shifted away from the notion of avoidance of a contract or the effects of a data message and focused instead on providing the person in error with an opportunity to correct the error or to withdraw from its manifestation of intent, possibly subject to further conditions on the basis of subparagraphs (b), (c) and (d) of Variant A. An additional provision might be further included to the effect that the general law of mistake was not otherwise affected.