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WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Article X

DISCHARGE (RENUNCIATION)

(Draft Article with Comments prepared by Professor A. Hartkamp)

Rome, May 2003

Article X

Discharge (or renunciation)

(1) An obligation is extinguished by a contract between the obligee and obligor whereby the obligee renounces his claim.

(2) An offer by gratuitous title to renounce a claim addressed by the obligee to the obligor shall be deemed accepted if the obligor does not reject the offer without delay, after he has become aware of it.

COMMENT

1. A creditor may release his debtor from his obligation (*discharge*) either for value or gratuitously (*à titre onéreux-à titre gratuit*).

In the civil law vocabulary this would probably be expressed in the following wording: a creditor may renounce his claim vis-à-vis his debtor either for value or gratuitously (*à titre onéreux-à titre gratuit*).

2. The 'value' may consist e.g. of a counter discharge (both parties to an executory contract renounce their claims arising out of that contract); of payment of an amount of money; or of the debtor (or a third party) assuming another obligation towards the creditor in lieu of the discharged obligation.

3. In most legal systems discharge is brought about by *agreement* between the parties. This is evident in case of a discharge *for value*.

4. In the case of a *gratuitous* discharge it is also evident in the common law, because consideration is required, which has to be provided by the debtor. In the civil law systems an agreement is required by e.g. German law (art. 397 BGB), Swiss law (art. 115 OR), French and Belgian law (De Page III, nr 674, Boris Starck, Droit civil, Obligations, 1972, nr. 2466) and Dutch law (art. 6:160 BW).

5. In the continental legal systems mentioned under 4 a unilateral declaration is not considered to be sufficient because a debtor should not be compelled to accept a benefit against his will. On the other hand, a debtor will normally be happy to accept the benefit of a gratuitous discharge. For this reason the Italian Code has accepted an intermediary rule: a unilateral declaration by the creditor is sufficient, but the debtor may refuse the discharge (art. 1236 Cci).

In the Dutch Code, which follows the model of discharge-by-agreement, this idea has been expressed in a different way. Art. 160 para. 2 provides that an offer by gratuitous title to renounce a claim addressed to the debtor shall be deemed accepted if the debtor does not reject the offer without delay after having become aware thereof.

6. It is proposed:

- (i) in a first paragraph, to accept the idea of discharge-by-agreement both for discharge for value and for gratuitous discharge (because it is convenient to have one and the same construction for all kinds of discharge);
- (ii) in a second paragraph, to accept the rule of Art. 160 para. 2 BW;
- (iii) in the comments, to make clear that consideration is not required (it would seem that a reference in the comments to Article 3.2 is sufficient, because this article speaks generally of ‘contract’).