

가

· 法律關係

1. 討議
- 2.
3. ISDA

· 體制

1. 契約書
2. 附屬書
3. 確認書
4. 留意點

· 法律問題

1. 期日前終了
2. 相計
3. 清算金
4. 擔保

· ISDA EMU

1. 契約書
2. EMU 特約
3. ISDA EMU
- 4.

< >

Swap Guaranty

ISDA Swap Schedule ()

(,)

I.

1. 討議

- 가.
- 가.
- 가.
- (termination; 解止) 가.
- 가.
- 가.
- (netting) (set-off) 가.
- EMU 가.

국제 · 派生商品協會(International Swaps and Derivatives Association, Inc.; ISDA) (Master Agreement) 主 , 確認書 (Confirmation) 附屬書 (Schedule) 1)

ISDA 92 改訂版 , 株價 , 債券 派生 全國銀行聯合會
1996 5 「 」 ISDA
個別 汎用化

1) 81 IBRD IBM 史上 IBRD 對
가 가 , IBM
· 貨 가 ·
社가 IBRD가 US IBM , IBRD IBM SFr ·
DM , IBRD가
契約書 가

2.

(derivatives) 派生 . 가 가 基礎資產(underlying assets);
 . CD) 가 가
 (swaps) , 先物(futures) . (options)
 固定 (cash flow) 變動
 , 가 가 派
 生 . 先物 , 가
 가
 保險性 . , 千 가
 , ,
 70, 80 ,
 投機的
 가 現物 . 80
 . 가가 規制緩和(deregulation)
 가
 ,
 派生 (risk averter)
 投機 (risk taker)
 가
 가 . 派生 가
 가
 BIS 派生 가 簿外
 (off-balance sheet) 가 가
 가

3. ISDA

ISDA 1985

1985

2) 1993

and Derivatives'

ISDA

1985/86 - ISDA Codes of Standard Wording, Assumptions and Provisions for Swaps

1987 - Interest Rate Swap Master Agreement

(for single jurisdiction, US\$ transactions only)

- Interest Rate and Currency Exchange Master Agreement

(for multi-currency, multi-jurisdiction transactions)

- 1987 ISDA Interest Rate and Currency Exchange Definitions

1988 - Tax Provisions for ISDA Agreement (1987 Master)

1989 - Caps Addendum: 1987

caps, collars,

floors

1990 - Option Addendum:

1991 - 1991 Definitions: 1987 Definitions

1992 - 1992 Master Agreement: 1987

- Single Currency, Single Jurisdiction Master Agreement

- Form of OTC Equity Index Option Confirmation

- 1992 US Municipal Counterparty Definitions

- 1992 FX and Currency Option Definitions

1993 - User's Guide to the 1992 Master Agreement

- ISDA Commodity Derivative Definitions

1994/5 - , , Credit Support Annex

1997 - Bullion/Currency Option/Government Bond Option Definitions

1998 - 貨 EMU Protocol<<http://www.isda.org>>

體制

1. 契約書

契約書

, 用語集

單一 (single agreement)

가 , 效力 가 .

(1) 前文 1 (Interpretation;)

(title), ,

가

(2) 2 (Obligations;)

(payment) 雙務契約 (delivery)

(3) 3 (Representations;)

認·許可

租稅

(4) 4 (Agreements;)

認·許可가

가
印紙稅

先行條件(conditions precedent)
(covenants)

(5) 5 (Events of Default, Termination Events;)

가

(6) 6 (Early Termination;)

가

가

가

(7)

7 (Transfer;)

, 8 (Contractual Currency;

) , 9 (Miscellaneous; 補則)

, 10 (Offices,

Multi-branch Parties;

) 가

, 11

(Expenses;) 有責

(Default Side)

, 12 (Notices;)

, 13 (Governing Law and Jurisdiction;

)

, 14 (Definitions;)

用語

2. 附屬書

- (1) 1 (Termination Provisions;)
- (a) 5 特定組織(specified entity) 3
- 3 ,
- (b) 5 特定 (specified transaction) 92
- , 株價指數 , 信用補強
- (\$14).
- 가
- (c) 5 (a)() 交叉 (cross default)
- (threshold amount) 絕對額(: US\$ 10)
- (: net worth 3%) .
- (d) 5 (b)() 合併 信用不安 (credit event upon merger) 被合併
- (e) (events of default) 6 (a)
- (automatic early termination;)
- 가 () ,
- 法的 가 가 ,
- 가
- 英美法 가 가
- (f) 6 (e) 清算金()
- (payments on early termination) (i) 가 (market quotation)
- (loss) (ii) 1 制

限的 (limited two way payment), 2 完全 (full two way payment)

1 一方 가
有責 , 有責
가 'Walk Away'

2 有責 制裁(sanction) 가
有責 가
가 2

(g) 清算金 (termination currency)

(h) (termination events) 가
清算金 (set-off) 가

(2) 2 (Tax Representations; 租稅)
3 (e),(f)

(withholding tax) (payer) (payee) 가
記帳 (booking office) 稅制

每 (trade or business)

OECD 非
利자가 (, 日本, 濠洲), 受取人
(美國
) 源泉課稅

(3) 3 (Agreement to Deliver Documents; 書類)
4 (a)(i), (ii) 内部
理事會 가
委任狀(power of attorney)

(4) 4 (Miscellaneous; 補則)
(multibranch) , 計算 (calculation agent),
信用補強(credit support)

子會社(affiliate)

信用 , 美 (TN, TB, 有擔保)

派生 가 (collateralization) 가

適狀 (契約) 相計 가 相計

(payment netting), (novation netting), ³⁾(close-out netting)

가 異種 가 92 改正版

, 株式, 商品

가 , BIS 가

(5) 5 (Other Provisions;) 가
(Modification to the Agreement)

裁判管轄 가 , 5 가
가 相計(set-off) 同意

(consent to recording) 가

(Non-Reliance/Risk Disclosure Statement)

3. 確認書

가 書面 “

”

名目元金 元金
去來日字()

3) (52)
日本 1998 「

)
(滿期)

定義

計算

(,)

4. 留意點

信

用

가

無擔保

擔保不提供 (negative pledge)

가

(hybrid)

가

相違點

ISDA

附則(Addenda)

用語集(Definitions)

(credit support

documents)

法律意見書

法律問題

가
權利能
가, 가, 가
信用 가
가
擔保
相計 ,

1. 期日前終了

5 가 破産,
歸責 가 (events of
default) , 法令 稅制
가 去來終了 (termination events)

가. 債務不履行

5 (a) (i) 不履行 (ii) 合意 () 未 (credit
support default) () (v) 特定去來 () 交叉 () 破
産 () 債務 合併 8가 .
1998 . 가

5)

4) 地自體가

가 地自體 1991 自治區가
違法 ([1991] 1 All E.R.
545 (H.L.) 拙著 pp.236 239) 가 가
(拙著 pp.242 243).

5) 破産 :

- (1) (.)
- (2) ,
- (3)
- (4)

가 가.

告知義務

州法 가
, 英國法

가 .

. 去來終了

5 (b) (i) 違法 (ii) 稅法
() 合併 適用稅法 () 信用不安 (v)
(가 가) 가 .

. 解止

6 가
가 ()

20

가 .

(automatic early termination;

6)

가 .

(prudent choice)

가

(A)

(B)

30

가

(5) , (.)

(6) , , , , (

)

(7) 가 , 가 , 가

, 가 30 . , 가

(8) 가 (1) (7)

(9)

6) 가 , , 가 5

(a)(vii) (1), (3), (5), (6)

(8)

가

, (4)

(8)

가

2. 相 計

	信用危險		(相計適狀)
	.7)	(set-off)	
相計		5	
(解止)	(:)	가
, 記帳			, 가
異種			가 善意

492 가

.8)

3. 清算金

			가
		責任	
派生			
(exposure)	評價益		時價
	(reemployment cost, 再構築)	가	
가			가

7) “ 가 ”(In addition to any rights of set-off

...) 가 가

8) , ,

가. 損害賠償(Loss)

) 가
 損害額 가
 現在價值 가 假定
 가 現在價值化
 가 固定
 가
 TB
 代替 取得額
 가
 代替 固定
 社債

· 市場價額(Market Quotation)

(가)
 () , 不調和,
 가가 , 日本
 市場가

清算金

가 ,
가

· 1 2
 1 (First Method)
 有責

가

가

‘Walk

Away' (sanction)
 2 (Second Method)
 가 가 가
 , 2

4. 擔保

가. 信用補強

95 가

BIS 94 7 "派生 管理
 指針"(Risk Management Guidelines for Derivatives) 3

1994 有擔保化 가 ISDA
 (Credit Support Annex) , 1995
 CSA Credit Support Deed, 1996

CSA
 1997-98 9)

(collateralization)

. 人的

. 非

派生 (例
). 保證 簿外

去來 , Letter of Comfort/Support, Letter of Awareness, Keep-Well
 Agreement 가 保證豫約

가 , 가

9) BOA, Bankers Trust, Chase, CIBC, Citibank, Deutsche Bank, Jardine Fleming, J.P. Morgan, Standard Chartered, UBS 歐美 15 'Asia Collateral Working Group'

가

· 物的

損害金

最終

時價評價(mark-to-market)

가

純額 (net basis)

ISDA

(Credit Support Documents)

要

(credit support amount)

가 (posted credit support)

(delivery amount)

가 (collateral

at hand) 要

(draw down

excess collateral)

, 設定

(return

amount)

(每月 每週)

가

被擔保

根抵當權

要

(threshold amount)

, ‘

貸出

根擔保

가

根質權

· ISDA

美 國債(US

Treasuries)

가 ,

(G-7)

가

가

追加擔保

.10)

美

RP(Repurchase Agreement;

10)

, 가

가

가 ,

가

‘credit support amount’

(ISDA

§3).

, 가

가

가 -

,

가

가

가

(ISDA

§4(d)).

가

가 가

) 가 RP
· , 國債
가
美

債務자가 債權者
最終
· ISDA 가
· 賣却
가 가
· 權

(ISDA §8(a)(b)(c)).

· 擔保物

가 가. ISDA
가 現金 , 國債 再擔保
(NY-UCC §9-207(2)(e)) · ISDA 6 (c)
, , ,
償還權(right to redeem)
,
· 强行規定 善意
3 損益 (ISDA §6(c)).

· ISDA EMU

1999 1 1 (EU) 11 (, , ,
; Euro-zone) 가 (Euro) 가
· 公定 ,
가

1. 契約書

(governing law)
EU 가 EU
(Article 235 Regulation)
(legal instrument) 가 “
,
, 가 ”
(continuity of contract)
(3) EU 가.
, EU 가 (Financial Law Panel)
, , 가
.

2. EMU 特約

EMU
. 가 가 ,
(i) (ISDA)가 標準約定 , (ii)
類推 (iii) EMU 가
가 (early termination)
,
(net payment) 가
解止 가
. 가 , 가
가
EMU 가.
(amendment) EMU 가 .

가 ISDA 同意書 가,
 EMU (schedule) . 가
 ISDA EMU
 , 5 (Part 5) 가 .

3. ISDA EMU

ISDA 가
 . 가
 (multilateral protocol approach)

ISDA EMU EMU 가
 多者
 間 議定書 . ISDA (i)
 , (ii) ECU 가 . (price sources), (iii) . (iv)
 EMU (definitions), (v) (bond options) 特約 (annex)
 , 가 ISDA 1998 9 30
 同意書(Adherence Letter) .
 ISDA
 EMU 特約 (agent) (U\$500) ISDA
 特約

(EMU
 §1(c)).

EMU:

(a) (b) , .
 , 가 ,
 , 가 ,
 ()

- (i) ,
- (ii)
- (iii) ECU

(iv)

(v)

(vi) ECU

法貨

가

가

(sponsor)

가 ,

(b)

9 (b)

4.

가

(*lex monetae*; theory of money),
.11)

涉外私法上

ECU가

EU

EMU

ISDA

EMU

特約

EMU

가 가

가

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Guaranty ¹²⁾

Guaranty, dated as of _____ by ABC Bank, a banking corporation organized and existing under the laws of the Republic of Korea (the "Guarantor"), in favor of XYZ Bank (the "Counterparty")

1. Guaranty ¹³⁾

In connection with that certain Master Agreement dated as of _____, 19__ by and between ABC Co., a wholly owned subsidiary of the Guarantor and the Counterparty (the "Swap Agreement"), the Guarantor hereby unconditionally and irrevocably guaranties to the Counterparty, its successors and assigns the prompt payment when due, subject to any applicable grace period under the Swap Agreement, of all present and future obligations and liabilities of all kinds of ABC Co. to the Counterparty arising out of the Swap Agreement (the "Obligations"). Capitalized terms used and not otherwise defined in this Guaranty shall have in this Guaranty the respective meanings provided for them in the Swap Agreement.

2. Absolute Guaranty ¹⁴⁾

The Guarantor's obligations hereunder shall not be affected by the genuiness, validity or enforceability of the Obligations or any instrument evidencing any Obligations, or by the existence, validity, enforceability, perfection, or extent of any collateral therefor or by any other circumstance relating to the Obligations which might vary the risk of the Guarantor or otherwise constitute a defense to this Guaranty. Further, the Guarantor shall not be discharged, nor shall its liability be affected, by any other circumstance that might otherwise constitute a legal or equitable discharge or defense of a guarantor. The Counterparty makes no representation or warranty in respect of any such circumstance and has no duty or responsibility whatsoever to the Guarantor in respect of the management and maintenance of the obligations or any collateral therefor. The Counterparty shall not be obligated to file any claim relating to the Obligations in the event that ABC Co. becomes subject to a bankruptcy, reorganization or similar proceeding, and the failure of the Counterparty so to file shall not affect the Guarantor's obligations hereunder. This Guaranty constitutes a guaranty of payment when due and not of collection. In the event that any payment by ABC Co. or the Guarantor in respect of any Obligations is rescinded or must otherwise be returned for any reason whatsoever, the Guarantor shall remain liable hereunder in respect of such Obligations

12)

(credit support)

13) ISDA 保證

14) 保證人 原 , , 가 擔保 , , , 가
抗辯

as if such payment had not been made.

3. Consents, Waivers and Renewals

The Guarantor agrees that the Counterparty may at any time and from time to time, either before or after the maturity thereof, without notice to or further consent of the Guarantor, extend the time of payment of, exchange or surrender any collateral for, or renew any of the Obligations, and may also make any agreement with ABC Co. or with any other party to or person liable on any of the Obligations, or interested therein, for the extension, renewal, payment, compromise, discharge or release thereof, in whole or in part, or for any modification of the terms thereof or of any agreement between the Counterparty and ABC Co. or any such other party or person, without in any way impairing or affecting this Guaranty. The Guarantor agrees that the Counterparty may resort to the Guarantor for payment of any of the Obligations, whether or not the Counterparty shall have resorted to any collateral security, or shall have proceeded against any other obligor principally or secondarily obligated with respect to any of the Obligations.

4. Expenses

The Guarantor agrees to pay on demand all out-of-pocket expenses, including without limitation the reasonable fees and disbursements of Counterparty's counsel, in any way relating to the enforcement or protection of the rights of the Counterparty hereunder; *provided*, that the Guarantor shall not be liable for any expenses of the Counterparty if no payment under this Guaranty is due.

5. Subrogation

The Guarantor shall not exercise any rights which it may acquire by way of subrogation in consequence of its payment of any of the Obligations until all the Obligations shall have been paid in full. If any amount shall be paid to the Guarantor in violation of the preceding sentence, such amount shall be held in trust for the benefit of the Counterparty and shall forthwith be paid to the Counterparty to be credited and applied to the Obligations, whether matured or unmatured. Subject to the foregoing, upon payment of all the Obligations, the Guarantor shall be subrogated to the rights of the Counterparty against ABC Co., and the Counterparty agrees to take at the Guarantor's expense such steps as the Guarantor may reasonably request to implement such subrogation.

6. Continuing Guaranty

This Guaranty is absolute and unconditional and shall remain in full force and effect and be binding upon the Guarantor, its successors and assigns until all the Obligations have been satisfied in full. If any of the present or future Obligations are guaranteed by persons, partnerships or corporations in addition to the Guarantor, the death, release or discharge, in whole or in part, or the bankruptcy, liquidation or dissolution of one or more of them shall not discharge or affect the liabilities of the Guarantor under this Guaranty.

7. No Waiver; Cumulative Rights

No failure on the part of the Counterparty to exercise, and no delay in exercising, any right, remedy or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise by the Counterparty of any right, remedy or power hereunder preclude any other or future exercise of any right, remedy or power. Each and every right, remedy and power hereby granted to the Counterparty or allowed it by law or other agreement shall be cumulative and not exclusive of any other, and may be exercised by the Counterparty from time to time.

8. Waiver of Notice

The undersigned waives notice of the acceptance of this Guaranty, presentment to or demand of payment from anyone whomsoever liable upon any of the Obligations, presentment, promptness, diligence, order, notice of nonpayment by ABC Co., demand, notice of dishonor, protest, notice of any sale of collateral security and all other notices whatsoever.

9. Representations and Warranties

- (a) The Guarantor is a Korean bank duly organized, validly existing and in good standing under the laws of the Republic of Korea and has full power to execute, deliver and perform this Guaranty.
- (b) The execution, delivery and performance of this Guaranty have been and remain duly authorized by all necessary corporate action and do not contravene any provision of the Guarantor's certificate of incorporation or By-laws, as amended to date, or any law, regulation, rule, decree, order, judgement or contractual restriction binding on the Guarantor or its assets.
- (c) All consents, licenses, clearances, authorizations and approvals of, and registrations and declarations with, any governmental authority or regulatory body necessary for the due execution, delivery and performance of this Guaranty have been obtained and remain in full force and effect and all conditions thereof have been duly complied with, and no other action by, and no notice to or filing with, any governmental authority or regulatory body is required in connection with the execution, delivery or performance of this Guaranty.
- (d) This Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable against the Guarantor in accordance with its terms, subject, as to enforcement, to bankruptcy, insolvency, reorganization and other laws of general applicability relating to or affecting creditors' rights and general equity principles.

10. Assignment

Neither the Guarantor nor the Counterparty may assign its rights or interests or delegate its obligations hereunder to any other person without the prior written consent of the Guarantor

or the Counterparty, as the case may be; *provided*, however, that the Counterparty may assign its rights, interests and obligations hereunder to an assignee or transferee to which it has transferred its interests and obligations under the Swap Agreement pursuant to Section 6(b) or Section 7 thereof.

11. Governing Law and Jurisdiction

- (a) THIS GUARANTY SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED WITHIN SUCH STATE, WITHOUT REFERENCE TO CHOICE OF LAW DOCTRINE.¹⁵⁾
- (b) Section 13(b) of the Swap Agreement is hereby incorporated in this Guaranty by reference. For purposes of interpreting such Section as incorporated herein, the words "this Agreement" in such Section shall be deemed to refer to this Guaranty, the words "each party" in line two of such Section shall be deemed to refer to the Guarantor and the words "either party" in line eleven of such Section shall be deemed to refer to the Counterparty.
- (c) The Guarantor irrevocably consents to service of process given in the manner provided for notices in Section 14 of this Guaranty. Nothing in this Guaranty will affect the right of the Counterparty to serve process in any other manner permitted by law.

12. Taxes

(a) Section 2(d) of the Swap Agreement is hereby incorporated in this Guaranty by reference. For purposes of interpreting such Section as incorporated herein, (i) the words "this Agreement" in such Section shall be deemed to refer to this Guaranty, (ii) any references in such Section to defined terms shall have the same meanings as defined in the Swap Agreement, except that for purposes hereof (A) all references in such defined terms to the words "this Agreement" shall be deemed to be references to the word "Guaranty", and (B) the references in such defined terms to the words "or a Credit Support Document" shall be deemed to be deleted, (iii) the words "Section 2(d)" in such Section shall be deemed to refer to such Section as incorporated herein, (iv) other references in such Section to Sections of the Swap Agreement shall continue to refer to such Sections and (v) "X" in such Section shall be deemed to refer to the Guarantor and "Y" in such Section shall be deemed to refer to the Counterparty.

(b) The occurrence with respect to the Guarantor of any of the following events constitutes a Termination Event for purposes of the Swap Agreement:

- (i) as a result of the failure by ABC Co. to have made payment of an amount under the

15)

Swap Agreement, subject to any applicable grace period, the Guarantor shall be required on the next succeeding date on which a payment is due by ABC Co. under Section 2(a) of the Swap Agreement to make such payment to the Counterparty and the Guarantor shall be required on such date to pay to the Counterparty an additional amount in respect of an Indemnifiable Tax (as such term is defined in Section 12(a) hereof) under Section 12(a) hereof (except in respect of interest under Section 2(e) of the Swap Agreement); or

(ii) as a result of the failure by ABC Co. to have made payment of an amount due under the Swap Agreement, subject to any applicable grace period, the Guarantor shall be required on the next succeeding date on which payment is due by ABC Co. under Section 2(a) of the Swap Agreement to make such payment to the Counterparty and there is a substantial likelihood (as confirmed by a written opinion of independent legal counsel of recognized standing) that the Guarantor shall be required on such date to pay to the Counterparty an additional amount in respect of an Indemnifiable Tax (as such term is defined in Section 12(a) hereof) under Section 12(a) hereof (except in respect of interest under Section 2(e) of the Swap Agreement) and such substantial likelihood results from an action taken by a taxing authority, or brought in a court of competent jurisdiction, on or after the date on which the Swap Transaction to which such payment relates was entered into (regardless of whether such action was taken or brought with respect to Guarantor or a party to a Swap Agreement).

Upon the occurrence of a Termination Event described above and provided that such Termination Event is then continuing after giving effect to the provisions of Section 6(b)(ii) of the Swap Agreement, the Guarantor shall be entitled, by not more than 20 days notice to the Counterparty, to designate an Early Termination Date (as defined in the Swap Agreement), no earlier than the day such notice is effective, in respect of the Swap Agreement, and ABC Co. shall be deemed to be the Affected Party that made such designation for purposes of the Swap Agreement.

13. Contractual Currency

Section 8 of the Swap Agreement is hereby incorporated in this Guaranty by reference. For purposes of interpreting such Section as incorporated herein, the words "this Agreement" in such Section shall be deemed to refer to this Guaranty and the words "Section 8" in such Section shall refer to such Section as incorporated herein; *provided*, however, that in line two of Section 8(a) of the Swap Agreement, the words "this Agreement" shall continue to refer to the Swap Agreement.

14. Notices

Section 12 of the Swap Agreement is hereby incorporated in this Guaranty by reference. For purposes of interpreting such Section as incorporated herein, (a) the words "this Agreement" in such Section shall be deemed to refer to this Guaranty and (b) the address and numbers of the Guarantor described in line three of Section 12(a) of the Swap Agreement shall be deemed to be the following:

ABC Bank New York Branch

IN WITNESS WHEREOF, this Guaranty has been duly executed and delivered by the Guarantor to the Counterparty as of the date first above written.

ABC Bank

By _____

Name:

Title: