

法的問題

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 - 1. 事例

I.

母會社가 IMF 子會社가
 母會社가 貸主 貸主
 가 .1) 保障 法的 貸主
 (comfort) ‘ (letter of comfort)
 .2)
 母會社-子會社 法的 (legal commitment)
 政治的 (political assurance) ,3)
 , (contingent liability) , 正
 式 .4)

*

1) 過去型 IMF

, 美 (TB)

2) , 「 」, 1995, 45 .

3) ‘letter of assurance’, ‘letter of awareness’ .

4) Philip R. Wood, *Comparative Law of Security and Guarantees, Law and Practice of International Finance Series*, Sweet & Maxwell, 1995, p.346.

가
 가 .5)
 가
 比較法的 .6)
 - (keep-well
 agreement: KWA)가 . KWA
 (CP, MTN)
 母 ,
 是正 . KWA
 保證 債券 가 等級査定機關(credit
 rating agency) .7)
 가 . IMF
 的 比較法

II. 意義

1. 主要 內容

가 (awareness of

5) *Ibid.* See *Jones v. Vernon's Pools Ltd.* [1938] 2 All ER 626.

6) Philip Wood (*supra* note 4)가 , 1992 3 가 ,

. Ian E. Davidson, Jonathan Wohl and Deborah Daniel, "Comfort Letters Under French, English and American Law", *Journal of Banking and Finance Law and Practice*, The Law Book Company Limited, March 1992, pp.3-15.

7) 「 - 」, 1996, 301 275) .

financing), 가
 持分 (maintenance of ownership interest),
 가 (statement of policy)
 .8)

(management) ‘ 가
 (funding) ‘ 가
 (policy) (no asset-stripping) ‘ 子會社 ,
 (intention) .9)

2. 法的 問題點

(1) 文言

法 文句

(letter of guarantee: L/G)

‘ 가
 ’(It is our policy to ensure that the business of
 our subsidiary is at all times in a position to meet its liabilities to you)
 道義的 責任(moral responsibility)
 .10) 現行

8) , “ ”, 「 」, , 17 (2002.2), 28 30

9) Wood, *op.cit.*, p.348.

10) *Kleinwort Benson Ltd. v. Malaysia Mining Corporation Berhad* ([1989] 1 All ER 785,
 [1989] 1 WLR 379, CA. 1審

抗訴審 가

, 意圖(intention)
가
3
가
.11)
가
損害賠償
(substantive damages) 가 .12) 가
가
.13) 가
‘ 가 가
’(it is our practice to ensure that our affiliate . . . will
at all times be in a position to meet its financial obligations as they fall due)
.14)
가
,
.15)

(2) 準據法

(applicable law) 가 ,
가 . 英國法¹⁶⁾
商事契約 가

11) *Re Augustus Barnett & Sons Ltd.* (1986) 2 BCC 98, 904.

12) Wood, *op.cit.*, p.348.

13) *Chemco Leasing SpA v. Rediffusion plc* (1987), 1 FTLR 201, CA.

14) *Banque Brussels Lambert v. Australian National Industries Ltd.* (1989) NSW S.Ct.

15) *Exchange National Bank of Spokane v. Pantages*, 133 P 1025 (SC Wash. 1913).

16) ‘English law’ 英國 地方分權化(devolution)

가 .

,17)

가 .18)

法院

(agreement to agree)’

, 가

가 相異

國際私法

가

特徴的

履行

가 가 가

(26 2).

가 .19)

(reimbursement)

(place of performance)가

가

가

.20)

III. 法的 效力

1. 事例

17) Wood, *op.cit.*, p.346. See *Edwards v. Skyways Ltd* [1964] 1 All ER 494.

18) , , 29 .

19) . 契約法(Contracts (Applicable Law) Act 1990, 1991.4.1)
가 (most closely connected)

20) Davidson, Wohl and Daniel, *op.cit.*, p.5.

A 1994 1995 (“ ”)
 B
 가 A
 가 B

A
 A B
 涉外私法
 ,21)

The facility has been arranged between B Bank, Seoul Branch and the Borrower, and we are fully aware of its terms and conditions.

We now beneficially own fifty point three seven percent (50.37%) of the voting right share capital of the Borrower and we will retain our majority shareholding in the Borrower as long as any amounts are outstanding under the facility.

Furthermore as controlling shareholder of the Borrower, we are informed about its financial condition on a regular basis.

We will see to it that the Borrower will be managed and financially structured in such a way that it will be able to meet its obligations under the facility.

If the Borrower is unable to fulfill its obligations under the facility, we shall endeavor to cause the Borrower to have the necessary funds available to meet its obligations to you. This does not constitute our formal guarantee, but it is our continuing policy to have the Borrower meet its obligations to you under the facility.

2. 内容

21)

. Ibid.

義務

1
2 가
, 3 4 가
, 가

IMF B ()
本店
22)

A B 4 “we shall endeavor to
cause the Borrower to have the necessary funds available to meet its obligation
to you”(1 : 가
) “This does not constitute our formal guarantee,
but it is our continuing policy to have the Borrower meet its obligations to you”
(2 : , 가
)

, B
() A 2
B 1
A 書面 約束 損害賠償(substantive
damages)

3. 法的 爭點

保證責任 가 損害賠
償請求

22) 1990 가 (L/G)

, B 가 A
가 因果關係

A
相當因果關係가

, A B 가
가 歸責事由가 違法性

IMF

A
債權者

A

株主
義務

A
違法

1999

A

B

,²³⁾

B
保證(guarantee)

A

23)

(優待)

外貨債權

逆

差別

가 ,

, “ 가 ,

가 ” ,

, ,

, .

가 “ []

(3), [] 가 , [] 가

(4) , [] 가 (4

(4) ” “ ” .

가 ,

가 가

,

[] .

“ , 가

, ,

[] 가 ,

, [] 가

, [] 가

25) 2002.4.26 2001가 29150 .

5. 比較法的 考察

(1) 英美法

對 가 , 27) 가 (intention to create legally enforceable obligations)가

約因(consideration)

가

(

26) Davidson, Wohl and Daniel, *op.cit.*, pp.8- 15.

27) *Supra* note 10).

‘past consideration’). , (antecedent debt)
가 .28)
가
‘ (representation and
warranty) 가 .
美國 (promise)
(forbearance)
.29)
約定 (legal commitment) 가
(actionable) . 가
가 (it would do everything possible to see that this
is settled *as per* agreement) 保證
.30)
31)
가
가
.32)

28) UCC §3-408

約因

29) Restatement of Contract Second §90.

30) *Hernado Bank v. Bryant Electric Co. Inc.*, 357 F.Supp. 575 (DC Miss 1973).

31) *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464 (S.D.N.Y. 1983).

.; *Barclays Bank of New York v. Goldman*, 517 F. Supp. 403 (S.D.N.Y. 1981);
State of North Carolina ex rel. Utilities Commission v. Edmisten, 333 S.E. 2d 453
(N.C. 1985).

32) Davidson, Wohl and Daniel, *op.cit.*, p.13.

가

가

(2) 法

33)가

34)

(corporate authorization)

35)

가

(moral obligation), (guarantee),
(undertakings to accomplish, *obligation de faire*)³⁶⁾

33) 'lettre de confort', 'lettre d'intention', 'lettre de patronage', 'lettre de support', 'lettre d'apaisement', 'lettre de soutien' . Ibid., p.4.

34) (Loi No.66- 537, 24.7.1966) 98 2000 商法(Code de commerce) L225-35 , (obligation de resultat) . Ibid., p.8.

35) Ibid., p.4.

36) (obligation de faire) 가 (obligation de resultat) 가 (obligation de moyen) 가 가 (confirm) , 가 (undertake) (substitute) 가

(best efforts) 가 . Ibid., p.7.

V.

가

policy) ‘ (ensure, assure) ‘ (guarantee) (support

가

가

因果關係

違約

가

가

“

”

(express promise

to pay)

가

(breach of contract)

가

.37)

.38)

: , , , , , , , ,

37) 違法行爲留止 (402) 代表訴訟(403) 理事

38) Wood, *op.cit.*, p.346.

Abstract

Enforceability of Letters of Comfort:
A Case Review of the Recent Court Decision

Whon-Il Park

In Korea, letters of comfort had been widely used for international borrowings or derivative transactions until the foreign exchange crisis took place in late 1997. The letter of comfort is written by a parent company for the purpose of inducing a lender or other creditor to extend credit to its subsidiary. The parent company prefers to give the creditor a letter of comfort to avoid formal guarantee thereby reducing a contingent liability on its balance sheet, and to stave off unfavorable tax or lending limitations.

The letter of comfort issued by a parent company ordinarily contains its awareness of financing by the subsidiary, maintenance of its shareholdings of the borrower, and statement of policy on the management of the subsidiary. So the letter of comfort is viewed as providing the comfort of a halfway house somewhere between the full guarantee and mere assurances. More often than not, the wording of the letter of comfort purports a moral obligation of a parent company, but it selects to observe it for fear of losing its name and reputation in the business circle.

As a result, the legal enforceability of a letter of comfort has been at issue as in the case recently determined by the Seoul District Court. See the case 2001 GaHap 29150 delivered on April 26, 2002 by the Seoul District Court. In this eight million dollar damages case, five foreign banks filed a suit with the Seoul District Court against a Korean bank, which had issued five letters of comfort for the 24 million dollar loan

extended by the plaintiffs to its subsidiary leasing company in Korea during 1994 and 1995. When the defendant left its debt-ridden subsidiary afloat and finally bankrupt in the midst of financial restructuring following the 1977 financial crisis, plaintiffs demanded that the defendant should cause the borrower to have the necessary funds available to meet the obligations to plaintiffs as stated in the letters of comfort.

So the Seoul District Court heard the case in accordance with the Korean law, and held that the defendant owed no legal obligations but mere moral responsibilities because it wrote down the letter of comfort does not constitute its formal guarantee. If the defendant abode by its promise stated in the letter of comfort, its management would stand trial on the breach of legal responsibility to preserve the company assets on behalf of its shareholders and stakeholders.

Consequently, where the issuer of a letter of comfort wishes to avoid the imposition of any legal obligations under that letter, it must be expressly stated that the letter is not intended to affect the legal relations of the issuer and recipient, or that the letter is only intended to record a moral commitment or a representation as to the present intention of the issuer.

This article analyzes the general content and nature of the letter of comfort and its legal consequences. The writer agrees on the decision of the Seoul District Court. But it remains to be seen that this case could be determined in a different fashion in France on the matters of the applicable law and the place of performance, while an English/American court would reach a similar conclusion as the Korean court did.