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REFLECTIONS ON LETTERS OF COMFORT

Does a letter of comfort constitute a promise enforceable against its issuer or is its effect confined to the creation of a moral rather than a legal obligation? This question arises in modern trade mainly because businessmen frequently fail to reach a consensus in their bargains about the nature of the letter of comfort to be issued as a collateral. The object of this article is to compare the answers given to the question in English and Australian cases with the solution provided in civil law countries.

THE Court of Appeal's decision in *Kleinwort Benson Ltd.* v. *Malaysia Mining Corp. Bhd.*[1] has generated a controversy concerning the legal nature and effect of letters of comfort.[2] In certain business circles their Lordships' decision was greeted with surprise as it was thought to be inconsistent with the reasoning of the Court of Appeal's earlier decision in *Chemco Leasing SpA* v. *Rediffusion Pic.*[3] Notably, *Kleinwort Benson* was not followed by Rogers J. in the Supreme Court of New South Wales in *Banque Brussels Lambert S.A.* v. *Australian National Industries.*[4] It is also noteworthy that their Lordships' approach is at variance with the analysis of letters of comfort in civil law systems.[5] The controversy centres on the question of whether, prima facie, the issuer of a letter of comfort intends to assume a legal obligation or restricts himself to the giving of a purely moral but legally unenforceable duty. The object of this article is to consider the problems involved from a comparative point of view.

A consideration of the background of the facility sheds some light on the origin of the current debate. The letter of comfort - known as *Patronatserkldrung* in German and as *lettre de confort* in French - is of recent origin. Schtitze suggests that, in Germany, letters of comfort

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1 [1989] 1 W.L.R. 379, reversing Hirst J.'s decision reported in [1988] 1 All E.R. 714.
2 See Brown, "The Letter of Comfort: Placebo or Promise?" [1990] J.B.L. 281.
3 [1987] F.T.L.R. 201, affirming Staughton J.'s unreported decision of 19 July 1985.
4 Unreported, Sup. Ct. of N.S.W., decision of Rogers C.J., Comm. D., of 12 December 1989. And see also *Paulger* v. *ButlandIndustries Ltd.,* unreported, C.A. (N.Z.), decision of 25 October 1989.
5 Schiitze, *Miinchner Vertrags-Handbuch,* 2nd ed., Vol. 3, p. 430 *et seq.* (Germany); Trib. Com. Paris, 27.10.1981, flange 1981, 1455; Mont. 10.1.1985, Banque 1985, 305. And see the excellent comparative analysis of Bohlhoff, "Letter of Responsibility" (1978) 6 Int. Bus. Lawyer 288.

made their appearance in the mid-sixties.[6] A comparative study, conducted under the auspices of the International Bar Association,[7] confirms this dating and suggests that the popularity of the facility increased steadily during the seventies. It is, indeed, clear that, in the course of that decade, letters of comfort became widely used in both civil and common law countries.[8] At one stage they were, for instance, issued by multinational banks to enhance investors' confidence in offices and subsidiaries opened in Luxembourg.[9] Predominantly, though, letters of comfort have always been issued by a parent company, or by a holding company, in order to back the affiliate's financial commitments, such as the repayment of loans obtained from banks or the settlement of balances due for the acquisition of goods and services acquired on credit.

Originally, the use of letters of comfort in lieu of traditional security devices, such as guarantees or letters of indemnity, was motivated by the wish of the issuer - the parent company - to refrain from granting a facility that would have to be disclosed as a contingent liability in the balance sheet.[10] It was also considered a suitable substitute where the execution of a guarantee was ultra vires the issuer's powers or thought to be precluded by a particularly widely phrased negative pledge clause included in a charge executed by the parent company.

One significant consequence of this background is that, right from the time of their introduction, letters of comfort have fallen into a legal twilight zone. On the one hand, their object is to furnish some security to the addressee. On the other hand, they are not meant to constitute a clearly defined, and hence a readily classifiable, obligation of the issuer. This patent ambiguity has been underscored with the growth in their popularity. At present, they are frequently used - even in a situation in which the issuer has the power, the ability and the right to issue a guarantee - with the object of giving the addressee "something" but not "everything" furnished by a proper security. One result of this ambiguity of intention is that the exact wording of a given letter of comfort often constitutes the subject of protracted negotiations. Occasionally, the final text of a letter of comfort is the result of the exchange of numerous drafts.[11]

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6 *Op cit,* p. 432. And see Stecher, *"Harte" Patronatserklarungen,* Koln 1974, p. 3, who points out that the German collection of standard bank forms, of 1966, did not include a reference to letters of comfort.

7 Bohlhoff, *op cit,* p. 288 at p. 303 *per* Schneider.

8 My first experience with problems relating to letters of comfort was in a seminar conducted in Melbourne in 1977, in which a participant raised the question of whether such a facility could be regarded as a standby credit.

9 Stecher, *loc cit.*

10 Schfltze, *loc cit;* Stecher, *loc cit.;* Brown, *op cit,* p. 281.

11 See, for instance, *Banque Brussels Lambert S.A.* v. *Australian National Industries Ltd., ante* note 4, where the parties appear to have exchanged well over ten drafts! See also Stecher, *op cit,* p. 8, who suggests that occasionally there is a battle over each word of the final text.

The unclear language resulting from such protracted negotiations - occasioned by the fact that the parties are at cross purposes - is the very cause of the controversy and uncertainty respecting the nature and effect of letters of comfort, reflected in the cases mentioned at the outset. It is only natural that courts are hard pressed to provide a clear cut answer about the intention of parties who, in reality, are in disagreement. The difficulty of providing a conclusive analysis is exacerbated by the fact that letters of comfort do not follow a set text or standard form. However, Continental writers have tried to introduce some order by means of a basic classification of the most familiar versions. They suggest that letters of comfort can be broadly divided into two groups: the "hard" form and the "soft" form.[12]

In the "hard" type the issuer usually incorporates a statement in which he confirms his awareness of the transaction involved and, in one way or another, indicates that it is his intention or policy to persuade the affiliated company to stand by its commitments. Some facilities include also a disclosure of the issuer's interest in the affiliate, such as, for instance, his holding 40% of its share capital, coupled with a promise either to maintain the stake involved or to give the addressee notice if a disposal of the shares becomes imminent. As indicated by its title, the "soft" type of letter of comfort is less conclusive than the hard form. The issuer confirms his awareness of, and possibly his support for, the transaction but refrains from giving any express assurance respecting his policy or future intentions.

Whilst the two types of letter of comfort are treated as having different effects there is one fundamental principle which applies to both: a letter of comfort is not a guarantee.[13] The only exception to this principle arises where a letter of comfort includes words denoting the issuer's intention to bind himself as a guarantor. Thus, in *Chemco Leasing SpA* v. *Rediffusion Pic*™ Staughton J. held the issuer to have assumed the liability of a guarantor because he undertook, in the letter of comfort, to assume responsibility for the payment of the affiliate's debts and was to be subrogated to the addressee's rights upon their discharge.

An even more extreme case was *Paulger* v. *Butland Industries Ltd.*[15] The managing director of D Ltd., which was facing financial difficulties, circulated a letter, written on the firm's letterhead, in which he asked for the "tolerance" of all creditors whilst a certain deal concerning the acquisition of the firm's business by another entity was being finalised. He advised that D Ltd. "would make good all outstanding matters within 90 days" and added: "The writer personally guarantees that all due

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[12] Schiitze, *op cit,* pp. 432-433; Stecher, *op cit,* p. 8.

[13] See, in particular, Hirst J. *inKleinwortBensonLtd. V.Malaysia Mining Corp. Bhd.* [1988] 1 All E.R. 714 at pp. 722-723.

[14] *Ante,* note 3.

[15] Unreported, decision of 25 October 1989.

payments will be made". Delivering the judgment of the New Zealand Court of Appeal, Hardie Boys J. held that a reasonable man would have concluded that the general manger's intention was to give a personal assurance that the creditors would be paid. The letter, therefore, constituted a guarantee.

Clear words, of the type used in *Chemco* or in *Paulger,* are, however, rarely used in letters of comfort. Indeed, the usual forms - including "hard" letters of comfort - refrain from defining the issuer's undertaking. German writers describe these standard types of letters of comfort as akin to guarantees but as "falling short of them".[16] The main reason for this is that, even in the "hard" type of letter of comfort, the issuer does not give an express undertaking to pay the affiliate's debt on its default.[17] The very same distinction is emphasised in an Australian authority[18] and is implicit in an unreported English case.[19] The point is of considerable practical significance. Unlike a creditor, who is entitled to sue the guarantor in debt upon the debtor's default, the addressee of a letter of comfort is, at best, entitled to bring an action in damages. The amount recoverable may not necessarily equal the sum lent to the affiliate.

But whilst there is agreement on this specific aspect concerning the addressee's rights, there is no consensus respecting the extent, the nature and the scope of the issuer's liability. To date, the neatest analysis is provided by German writers. The "soft" letter of comfort is treated as a manifestation of the issuer's intention of inducing the affiliate to perform its contracts. At the same time, the inconclusiveness of the text is thought to demonstrate the issuer's refusal to assume a legally binding commitment. German writers describe the facility as a mere expression of goodwill, aimed to reassure the addressee.[20] By contrast, the "hard" letter of comfort is considered a legally binding undertaking, although the reasoning supporting this conclusion is not uniform. Thus, Stecher[21] regards the "hard" letter of comfort as a contract for the benefit of a third party, in which the issuer undertakes to compensate the addressee for losses sustained from the non-performance of the promises made in the facility. More recently, Schiitze[22] describes it as a

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16 *BeTgstiom,SchultzandK.asei,GarantivertrageimHandeslverkehr,* 1972,p. 32;Schutze, *op cit,* p. 433. The point has been accepted judicially, OLG Stuttgart, 21.2.1985, WM 1985, 455; and see LG Frankfurt, 21.10.1981, (1982) 3 *Zeitschrfit fur Wirtschafisrecht u. Insolvenzrecht,* App. 013.

17 Stecher, *op cit,* pp. 70-71; Franken, "The Force of Comfort Letters" [1985] Int. Fin. Law Rev., pp. 14 - 15.

18 *Banque Brussels Lambert S.A.* v. *Australian National Industries Ltd., ante* note 4, *per* Rogers J.

19 *Re Augustus Harriett & Son Ltd.,* unreported decision of Hoffman J. of 7 December 1985.

20 Schutze, *op cit,* p. 433; Bergstrom, *op cit,* p. 32.

21 *Op cit,* at pp. 73 *et seq,* 161.

22 *Op cit,* p. 433; and see Gerth, *Atypische Kredisicherheiten,* 2nd ed., 1980, p. 29.

Gewdhrleistungsvertrag, which means, basically, a contract for the performance of a specific service or act. This analysis leads him to the conclusion that there is need for the addressee's acceptance, which, however, may be implied from the circumstances.[23] A similar view has been expressed by a French author,[24] who describes the letter of comfort as an *obligation de faire,* which means a commitment to perform.

It is, thus, clear that civil law systems, just as common law systems, have certain difficulties with the precise analysis of the legal nature of a letter of comfort. Their strength lies in the recognition of the distinction between the "hard" and the "soft" type and in the formulation of certain criteria for distinguishing between the two. Basically, a letter of comfort is considered "soft" if all it includes is the issuer's statement of his awareness of his transaction and a description of his connection with the affiliate. A mere indication that the issuer does not have the intention of decreasing his stake in the affiliate in the foreseeable future does not necessarily change the nature of the facility. It becomes a "hard" letter of comfort only if the issuer assumes a commitment of one type or another, such as his undertaking to see to it that the affiliate remains in a position to perform its financial duties or a promise to retain the existing shareholding.[25] Although this broad distinction may not always provide a ready determination of a specific facility it furnishes a reasonably clear general yardstick. Whilst the common law systems may, in many cases, reach the same conclusion about the binding nature of a given letter of comfort, the route by which they reach their destination tends to be more winding.

Chemco Leasing SpA v. *Rediffusion Pic*[26] - the first case in which letters of comfort were considered in detail by an English court - furnishes a good illustration of the current common law analysis. A member of the Chemical Bank group, Chemco, granted a manufacturer of electronics, CMC, certain lease financing facilities. One of the securities obtained by Chemco was a letter of comfort issued by R Ltd., which owned CMC's share capital. In this document R Ltd. confirmed its awareness of the transaction and its holding 99.1% of CMC's shares and that, accordingly they would "be in a position to exercise sufficient control over the administration and management of [CMC] to ensure that its obligations to Chemco are maintained." A further undertaking set out in the letter read:

> We assure you that we are not contemplating the disposal of our interest in [CMC] and undertake to give Chemco prior notification

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[23] Schfltze, *loc cit.*

[24] Proscour, in Bohlhoff, *op cit,* p. 302; and see Mont. 10.1.1985, *Banque* 1985,305, which describes the "hard" letter of comfort as constituting an *obligation de resultat.*

[25] Schiitze, *loc cit;* Gerth, *op cit,* p. 50 *et seq.;* Kohler, 1978 WM, 1338 *el seq.*

[26] [1987] F.T.L.R. 201, affirming Staughton J.'s unreported decision of 19 July 1985.

> should we dispose of our interest during the life of the lease. If we dispose of our interest we undertake to take over the remaining liabilities to Chemco of [CMC] should the new shareholders be unacceptable to Chemco.

Subsequently, in November 1981, R Ltd. disposed of its shareholding in CMC, giving Chemco just three days' notice by telex. Chemco, though, raised no objections until CMC, eventually, went into liquidation in July 1982. It was only about one month later, in August 1982, that Chemco advised R Ltd. that it found CMC's new shareholders unacceptable and made a claim under the letter of comfort.

As pointed out earlier, Staughton J. held that the letter of comfort here issued constituted a legally binding undertaking on R Ltd.'s part. He reached this conclusion on the basis of the language of the document, holding that the evidence of the parties as to their individual intentions respecting the negotiations and the contract was irrelevant. Referring to the ambiguity in the document in front of him, his Lordship observed:

> When two businessmen wish to conclude a bargain but find that on some particular aspect of it they cannot agree,... it is not uncommon for them to adopt a language of equivocation, so that the contract may be signed and their main objective achieved. No doubt they console themselves with the thought that all will go well, and that the terms in question will never come into operation or encounter scrutiny; but if all does not go well, it will be for the courts and the arbitrators to decide what those terms mean. In such a case it is more than somewhat artificial for a judge to go through the process, prescribed by the law, of ascertaining the common intention of the parties from the terms of the documents and the surrounding circumstances; the common intention was in reality that the terms should mean what a judge or arbitrator should decide that they mean, subject always to the view of a higher tribunal.

In the instant case, his Lordship concluded that the words of the letter of comfort indicated that R Ltd. had assumed a legally binding undertaking. However, its obligation to take over CMC's liabilities was subject to Chemco giving reasonable notice of its finding a substituted shareholder unacceptable. As Chemco had failed to give such notice it was unable to recover. The Court of Appeal affirmed.

Whilst the language of the letter of comfort issued in *Chemco* left little doubt as regards the issuer's intention to be bound, the position was considerably less certain in the case of the facility issued in the next case, *Kleinwort Benson Ltd.* v. *Malaysia Mining Corp. Bhd.*[21] M

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[27] [1988] 1 All E.R. 714, reversed in [1989] 1 W.L.R. 379.

Ltd., an English based subsidiary of a Malaysian corporation, MMC, applied for a loan facility to be granted by KB. Initially, KB suggested that it either issue a joint facility to MMC and M Ltd. or that MMC execute a guarantee of a loan to be provided to M Ltd. In the end, though, the loan was granted to M Ltd. against MMC's letter of comfort, the operative part of which read:

> [1] We hereby confirm that we know and approve of these facilities and are aware of the fact that they have been granted to [M Ltd.] because we control directly or indirectly [M Ltd.].
> [2] We confirm that we will not reduce our current financial interest in [M Ltd.] until the above facilities have been repaid or until you have confirmed that you are prepared to continue the facilities with new shareholders.
> [3] It is our policy to ensure that the business of [M Ltd.] is at all times in a position to meet its liabilities to you under the above arrangement.

As a result of the collapse of the tin market, M Ltd. was unable to meet its obligations. MMC resisted KB's call under the letter of comfort on the argument that, whilst the first two paragraphs of the letter of comfort created contractual duties, the third paragraph constituted a mere statement of policy and not a legally binding undertaking.

Holding that the paragraph in question embodied a contractual undertaking, Hirst J. gave judgment for KB. His Lordship relied on *Rose & Frank Co. v. J.R. Crompton & Bros. Ltd.*[2]* and on *Edwards v. Skyways Ltd.*[29] for the proposition that a document issued in the context of a business transaction was presumed to have a legally binding effect. He added:[30]

> ... in business matters, it is a prerequisite for defeating the presumption that such a stipulation had contractual force that it be expressed to the contrary 'so precisely that outsiders may have no difficulty in understanding what they mean.' This paragraph signally fails that test.

Hirst J. concluded that MMC had given an undertaking that as long as M Ltd. was owed any monies by KB under the facility arrangement, MMC's policy was to ensure that these liabilities would be met.

The Court of Appeal disagreed. Ralph Gibson L.J. pointed out that the presumption, based on *Edwards* v. *Skyways Ltd.*, relied upon by Hirst J., applied only once it was established that a commitment given in the course of business negotiations was meant to be of a contractual

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[28] [1923] 2 K.B. 261.
[29] [1964] 1 W.L.R. 394.
[30] [1988] 1 All E.R. 714 at p. 724.

nature. In that type of case, the onus would rest on the party that sought to establish that, despite the words used, the undertaking was not meant to be legally enforceable.[31] In the instant case, paragraph 3 of the letter of comfort, which did not constitute any contractual promise, was - on its face - no more than a representation of fact. His Lordship supported his conclusion by referring to the difference between the language of this paragraph and the first two paragraphs of the letter of comfort, adding that if paragraph 3 were contractual there would have been no need to incorporate the other two.

Ralph Gibson L.J. added that, whilst the intention of each party during the negotiations was immaterial, it was legitimate to draw inferences from the general commercial setting of the transaction. He emphasised in this context R Ltd.'s refusal to assume a joint liability or to execute a guarantee. His Lordship concluded:[32]

> ... I find it impossible to hold that the words in paragraph 3 were intended to have any effect between the parties other than in accordance with the express words used. For this purpose ... the onus of demonstrating that the affirmation appears on evidence to have been intended as a contractual promise must lie on the party asserting that it does but I do not rest my conclusion upon failure by [KB] to discharge any onus. I think it is clear that the words of paragraph 3 cannot be regarded as intended to contain a contractual promise as to the future policy of [MMC]. If paragraph 3 had been drafted by [KB] and submitted in the form in which Hirst J. formulated its meaning, namely 'as an undertaking that now and at all times in the future, so long as [M Ltd.] are under any liability to [KB] under the facility arrangements, it is and will be [MMC's] policy to ensure that [M Ltd.] is in a position to pay its liabilities' it must have appeared to both parties ... as a radically different term from that which was in fact submitted and accepted. Such an undertaking does not fit as a matter of commercial probability with the factual background.

The difference between the approach of Hirst J. and that of the Court of Appeal is best explained on the background of the most recent decision on the subject: *Banque Brussels Lambert S.A. v. Australian National Industries.*[33] S Ltd., which was a fully owned subsidiary of SH Ltd., wished to obtain a loan facility from the B Bank of Brussels. As a means of backing the loan, A Ltd., which held 45% of the share capital of SH Ltd., issued their letter of comfort. They confirmed in this document that they were aware of the loan in question and that the arrangement

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[31] His Lordship cited *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30 at p. 38 and *Esso Petroleum* v. *Mardon* [1976] 1 Q.B. 801 at p. 804.

[32] [1989] 1 W.L.R. 392.

[33] Unreported, Sup. Ct. of N.S.W., decision of Rogers C.J., Comm. D., of 12 December 1989.

had their approval. A Ltd. further confirmed: "it would not be our intention to reduce our shareholding in [SH Ltd.] from the current level ... during the currency of this facility. We would, however, provide your Bank with ninety (90) days' notice of any decisions taken by us to dispose of this shareholding ...". The actual assurance given by A Ltd. read: "We take this opportunity to confirm that it is our practice to ensure that our affiliate [S Ltd.] will at all times be in a position to meet its financial obligations as they fall due."

In disregard of this letter, the text of which had been finalised after the exchange of many drafts, A Ltd. sold its shares in SH Ltd. without giving the agreed 90 days' notice to the B Bank. This course of action was adopted deliberately as it was feared that, if the B Bank was given notice, it would call up the loan. This, in turn, would have had the effect of substantially reducing the value of the shares and of precluding their sale at the favourable price negotiated by A Ltd.

Subsequently S Ltd. went into liquidation. The B Bank brought an action to recover its loss from A Ltd. The main issue in the case was whether the letter of comfort constituted a legally binding undertaking, which A Ltd. had broken when it failed to give the B Bank the required notice and as it did not ensure that S Ltd. remained able to meet its liabilities.

Rogers J. accepted that the letter of comfort did not constitute a guarantee. That much was clear from its language. Consequently, A Ltd. was not liable in debt upon S Ltd.'s default. But this did not mean that A Ltd. was exonerated from all liability. It could still be liable in damages for breach of contract, provided the letter of comfort constituted a binding undertaking.

Rogers J. then turned to the analysis of the document in front of him. Referring to *Edwards* v. *Skyways Ltd.*[34] and emphasising that the letter of comfort was issued after protracted negotiations regarding a business transaction, Rogers J. said:

> There should be no room in the proper flow of commerce for some purgatory where statements made by businessmen, after hard bargaining and made to induce another business person to enter into a business transaction would, without any express statement to that effect, reside in a twilight zone of merely honourable engagement. The whole thrust of the law today is to attempt to give proper effect to commercial transactions.

His Honour conceded that the letter of comfort issued in the instant was not couched in language more indicative of an intention to assume a legally binding undertaking than the letter considered in Kleinwort

[34] [1964] 1 W.L.R. 349 at p. 355, noting also *Nemeth* v. *Bayswater Road Pty Ltd.* [1988] 2 Qd. R. 406 at p. 416.

Benson. Expressing concern about the minute textual analysis to which the Court of Appeal had subjected that letter, Rogers J. observed:

> Courts will become irrelevant in the resolution of commercial disputes if they allow this approach to dominate their consideration of commercial documents.

His Honour added that the construction given to the comfort letter in *Kleinwort Benson* rendered the document scrap paper.

It is clear that Rogers J.'s reasoning is diametrically opposed to the approach of the Court of Appeal *in Kleinwort Benson,* adopting, in effect, Hirst J.'s robust approach in the judgment reversed by their Lordships. The most interesting aspect of the controversy, though, is that Rogers J. - just as Hirst J. - relied on *Edwards \. Skyways Ltd.* for the very proposition refuted on the basis of this authority by Ralph Gibson L.J.!

A closer look at these decisions, in the light of *Chemco,* gives a clearer indication of the exact nature of the disagreement on the question involved. *Chemco* - just as the Court of Appeal's decision in *Kleinwort Benson* - shows that their Lordships would uphold the liability of the issuer of a letter of comfort, provided his intention to be bound was clearly discernible from the document. The letter of comfort issued in *Chemco* was, of course, perfectly clear as regards this point. The Court of Appeal indicated that it was, however, unwilling to take the matter further and imply a contractual undertaking into a document that did not do so expressly. To reach a conclusion about the specific letter of comfort confronting them, their Lordships went into a detailed legal analysis of the three paragraphs of the *Kleinwort Benson* facility. The crucial point, emphasised by Ralph Gibson L.J., was the contrast between the language of the first two paragraphs and the third.

By contrast, Hirst and Rogers JJ. were prepared to imply such a contractual intention - or an intention to enter into a legal relationship - on the basis of the meaning attributed to the document in the business world. This aspect of the decisions is clearly stated in the passages quoted from Rogers J.'s decision. It is equally to be seen in Hirst J.'s emphasis of the commercial setting of the transaction.[35] Their conclusion, in other words, was based on the meaning attributed to a statement of policy, of the type found in the third paragraph of the *Kleinwort Benson* facility, by merchants.

Both approaches have their shortcomings. On the one hand, there is a flaw in Rogers J.'s criticism which, it will be recalled, focuses on the impropriety of subjecting contracts drawn up by businessmen to the same rigid verbal analysis as an Act of Parliament or a "lawyers document" such as a mortgage. There is, in reality, little evidence to

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[35] [1988] 1 All **E.R.** 714 at pp. 723-724.

support his Honour's assumption that letters of comfort are documents drawn up - without much scrutiny - in the course of simple business negotiations. In point of fact, the text of the very letter of comfort considered by his Honour was the end result of the exchange of numerous drafts, meticulously perused by the legal advisers of both parties. Moreover, his Honour's preference for attributing to a contract its natural business meaning is fraught with practical difficulties. These are best explained by recalling Staughton J.'s observation that often businessmen intentionally adopt vaguely drafted clauses, hoping that "if all does not go well, it will be for the courts and the arbitrators to decide what those terms mean". Is it really sound to expect courts to discern the commercial meaning of something purposely drafted in an indefinite or - to adopt the language of one author - in a "woolly" manner?[36]

On the other hand, Rogers J.'s criticism highlights the difficulties emerging from the decision of the Court of Appeal. Its effect is to leave the determination of the legal nature of any letter of comfort to a meticulous analysis of the specific text under consideration. Too much may depend on the meaning attributed to the presence, or to the absence, of specific words. The law respecting letters of comfort is, in consequence, left uncertain. It may be retorted that the problems involved are occasioned by the absence of clarity in the bargain leading to the issuing of the letter of comfort. Whilst this is, undoubtedly, the case, it would, nevertheless, have been helpful if the courts had given a clearer indication of the likely interpretation to be given to the common types of the letter of comfort.

It is at this juncture helpful to recall the analysis of civil law systems, involving the division of letters of comfort into the "hard" and "soft" varieties. If the letter of comfort issued in *Kleinwort Benson* were considered by a German court, it would be readily classified as being of the "hard" type. Consequently, it would, in all probability, have been held to constitute a binding legal undertaking even in respect of the undertaking incorporated in paragraph 3 of the facility. The court would have reached its conclusion be comparing the text in question with the banking forms set out and analysed in leading texts. The significant distinction between the two approaches is not so much in the end result, or in the final determination, but in the route leading to the conclusion. The deductive reasoning likely to have been adopted by a German court emphasises the general commercial understanding of the subject whilst the inductive common law approach tends to lead to a piecemeal result based on attempts to ascertain the indiscernible intention of individual parties.

Notably, a route similar to that of civil courts is available at common law. However, it could be used only if the general business understanding of the facility were established by expert evidence. If, for

[36] Wood, *Law and Practice of International Finance,* 1980, §13.5, cited by Staughton J. in *Chemco.*

instance, such evidence had been called to show that the facility in *Kleinwort Benson* was regarded a binding undertaking by the business community in general, an English court would have had no difficulty in treating the parties as having entered into their bargain on the basis of that practice. Experience, though, shows that expert evidence - especially on a question as unsettled as the nature of letters of comfort - may vary to a considerable extent. The civilian tendency of placing considerable weight on texts written on the basis of the author's familiarity with a subject has the advantage of relying on what is, hopefully, a well-informed and, definitely, an unsolicited view.

Two further arguments can be raised in support of the civilian approach. First, it has the advantage of introducing greater certainly into questions of law of the type here considered than the common law analysis. The reason for this is that the general understanding of a type of document is given greater weight than the significance of specific words or minute points of draftsmanship. Secondly, it enhances the value of standard forms used in given mercantile situations. Thus, Schiitze[37] cites three variants of the letter of comfort and comments on their understanding in current trade. When parties adopt one of these forms they can be reasonably certain about the legal significance of the document involved.

E.P. ELLINGER*

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[37] *Loc cit.*

* M. Jur. (Israel), D. Phil. (Oxon.), Advocate (Israel), Professor, Faculty of Law, National University of Singapore.