

# 商事債權

# 擔保手段

## - 國際機構

- I.
- II. 擔保手段
- III. 非占有型 擔保權
- IV. 賣出債權讓渡方式 擔保
- V. - 統一 示竣點

### I.

商事債權

商人

商行爲

가

가

Reconstruction and Development: EBRD)<sup>1)</sup> 1994  
on Secured Transactions)

東歐  
外資

(European Bank for  
模範擔保法(Model Law

擔保權

가

私法統一

(International Institute for the Unification of Private Law: UNIDROIT)

」( ‘Capetown Convention’)

<sup>2)</sup> UNIDROIT

(railway rolling

1) EBRD 舊

中·東歐

가

가

1991 4

(EU)

(EIB)

60 가

가

200 ECU

26

stock), (space property) .  
 (United Nations Commission on International Trade Law: UNCITRAL)<sup>3)</sup> (account receivables)  
 「 」 2001 12  
 .4) (EU) 1997 1998  
 (retention of title) 指針 (draft Directive on Delays of Payment)  
 (World Bank) (ADB)  
 . 美洲機構  
 (Organization of American States: OAS) .  
 .5)  
 가  
 가

## II. 擔保手段

商事債權 民事債權 6)

.7) 物的擔保

- 
- 2) 2001 10 11 「 」(Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment) . “ ”, 2001 (2002.2.22) .
- 3) UNCITRAL 1980 擔保 가 , (unattainable) 가 1990 倒産法 制(insolvency regime) 가 (Working Party) 가 . UNCITRAL, *Possible future work in security interests*, A/CN.9/496, 18 April 2001, p.3.
- 4) 2001. 12. 12 56 (A/RES/56/81) 「 」(Convention on the Assignment of Receivables in International Trade) .
- 5) UNCITRAL, *SECURITY INTERESTS: Current activities and possible future work*, A/CN.9/475, 27 April 2000, p.9. <<http://www.uncitral.org/en-index.htm>> [2002.5.15]
- 6) , 1% (54, 55 ) , 連帶債務・連帶保證 (57 ) 商事留置權 (58 ) , 流質 (59 )
- 7) 擔保手段 가 , (ABS) 가 ,

擔保手段

가.

(credit risk)

(financial terms)

가

가

가

가

8)

가

가,

가

가

前者 工場抵當權

가( 7 )

後者 判例가

集合物

9)

가

가

(asset-based finance)

가

高

價

가

100%

가

非占有(移轉)型

(non-possessory security right)

가

資産流動化

가

(SPC)

가

8) UNCITRAL, A/CN.9/496, p.5.

9) “ 가

가

가

가

”

舊共産圈 가 .<sup>10)</sup>  
가 가 가  
公示 (public notice filing system) 3  
(perfection) ,<sup>11)</sup> (information technology: IT)  
/ <sup>12)</sup>(electronic  
registration) .<sup>13)</sup>  
, 企業倒産法  
. 가 (stay)  
. <sup>14)</sup> 가  
가 가 (diminution) , (insolvency administrator)  
. 가  
가 .  
. (choice of laws)가

.<sup>15)</sup>

10) 東歐圈 가 動産 非占有型 ,  
信託 (fiduciary transfer of title) .  
EBRD式 . Tom  
Oliver Schorling, "Secured transactions in the Czech Republic - a case of pre-reform", *Law in  
transaction*, EBRD, Autumn 2000, pp.66-69;  
非占有型 動  
産擔保 , 1999 「 」 「 」

11) 2001 12 UNIDROIT 外交會議 「 」  
(International Registry)  
(International Registrar) (Supervisory Authority) .  
( : )

12) 登記 登録 , 가  
. 가

13) 1999 2001 7 1 (Uniform Commercial Code: UCC) 9  
(Article 9) 電子的  
電子登録 . 國生一彦, 「改正 米國動産擔保法」, 商事法務研究會, 2001, 19

動産 證書

硬直性

統一時代

北韓

가

### III. 非占有型 擔保權

#### 1. 體制轉換國 擔保制度 整備

舊 가

(transition)

國有

가

가

.16)

舊蘇聯

1991

EBRD 東歐 社會主義 가

1994

. EBRD

.17)

EBRD

舊 가

15) UNCITRAL, A/RES/56/81, Preamble & Art.28

16) EBRD

가 가

. Frederique Dahan & Gerard McCormack, "Secured Transactions in Countries in Transition (The Case of Poland): From Model to Assessment", [1999] *European Business Law Review*, p.85.

17) EBRD

<<http://www.ebrd.com/trans/index.htm>> [2002.5.15]; 佐藤安信/赤羽 貴/道垣内弘人, “歐州復興開發銀行·模範擔保法の紹介と解説 (上)”, NBL No. 695 (2000.8.15), 73 75 ; EBRD

가

가

. Dahan & McCormack, *op.cit.*, p.85; See 'Eastern Europe: Graduation time', *The Economist*, 12 April 1997.

私的自治

EBRD

가

共産黨政府가

北韓

(Big Bang approach)

(gradual approach)

EBRD가

EBRD

18)

EBRD

가

## 2. EBRD 模範擔保法 特色

1994

EBRD

19)

商事債權

東歐

精緻

20)

1980

私有化(privatization)

가

18)

EBRD

(UCC) 9

1999

擔保附去來令(

165 )

가 1996

7

, 9

(ADB)

가 1999

新政令 1995

( 3 5 )

1989

經濟契約令

1997

新政令

가

金子由芳,

“ベトナムの擔保付取引に関する新政令”, 國際商事法務 Vol.28, No.6 (2000.6), 681-688

19) EBRD

;

佐藤/赤羽/道垣,

(上·下), NBL 695, 696

EBRD가

日本

;

試譯

<http://

onpark.netian.com>

20)

EBRD

1992 EBRD  
1 (Round Table discussion)  
EBRD  
, EBRD  
EBRD 模範擔保法<sup>21)</sup>  
(guidance)  
EBRD (civil law) (common law) 東歐  
西歐  
가 .<sup>22)</sup>  
가 大陸法  
英美法  
EBRD 立法化  
立法例 .<sup>23)</sup> 柔軟性  
(flexibility) .<sup>24)</sup>

21) EBRD 英國 Know-How Fund, 日本 歐洲協力基金 1992  
(General Council) (Secured Transaction Project)

22) EBRD Jan-Hendrik M. Rover 15  
John Simpson EBRD  
法域 20 가( )

23) EBRD  
(UCC) 9 . UCC 50  
가  
EBRD  
IRIS(Institutional Reform and the Informal Sector Central Europe), (ABA)  
CEELI(Central Eastern European Law Initiative)가 . IRIS (USAID)

24) EBRD 1994 , 가 , 가 , , ,  
(IMF) 10 EBRD

### 3. 主要 概念

EBRD , 5章, 35  
(commentary)

1 總則  
가 擔保權(charge) (1.1 ).  
(registration) (registered charge),  
(unpaid vendor's charge),<sup>25)</sup> (possessory charge)  
(6.1 ).

(2 ).  
( ), EBRD  
( 가 ),

被擔保債權 , .  
가 物權法定主義  
가  
EBRD 被擔保債權(secured debt)  
가  
(charged property)  
(conditional) ,  
(5.1 , 5.2 , 5.5 , 5.8 , 5.9 ).

特定性(identity) EBRD  
集合物  
,<sup>26)</sup> (ABS)  
浮動擔保(floating charge) 가 繼續企業(going

25) 代金債權擔保權(purchase money security right)

26) *supra note 9)*



concern)

集合擔保權(class charge)

(5.6 ).

EBRD

金錢債權(debt for money)

(chargeholder)

(5.4 )

(charge manager)

(trustee)

(security agent)

3

#### 4. 登錄制 擔保權管理人

(registered charge)

(registry)

(registration statement)

가

(possessory charge),

(unpaid vendor's charge)

(charge grantor, chargor)

(defence)

公示方法

(charging instrument)

利益相反

가

(7.6 ).

16

가

가

(syndicated loan)

(agent)

信託

5. 去來 安全 擔保權者保護

가 , (license) , (chargor) 3 가

(17.3 ).

3

가 .  
(in the ordinary course of business)

(19.2 ),

( : )

가

(19.6 ).

(negotiable instrument))(21.2.6.1 ),

(21.2.6.2 )

가

( 高價가 )

(believe in good faith)

( 善意取得 )

(21.2.5 ).

6. 私的 實行 利害關係

(enforcement)

가

EBRD

法制

私的 實行

가

自助的

(self-help)

救濟(court remedies)

, 가 가  
 , 自律  
 . 3  
 (enforcement notice) (22.4 , 22.5 ) , 60  
 (24.1 ).  
 公正 가 (fair price) 가 가  
 (24.3 , 24.4 , 24.5 ). 代金  
 (proceeds) (proceeds depository) ,  
 가 (27 ).  
 가  
 1.3  
 . 3 가  
 3  
 가  
 登錄 가  
 .  
 物的 編成主義가 ,  
 人的 編成主義가

#### IV. 賣出債權讓渡方式 擔保

##### 1. 概要

, , 가  
 賣出債權<sup>27)</sup>(account receivables)  
 ,<sup>28)</sup> 가 가  
 .

---

27) 企業會計基準( 1998.12.11 ) “  
 ” ( 13 4 ). UCC ‘  
 , , , ,

28) (outright assignment) 가  
 , (discount) , (assignment by way of  
 security) 가 가 .

UNCITRAL 29) “ (assignor) (assignee)  
 3 (debtor)  
 (receivable) 가 ”  
 (2 (a)).  
 가(licensing)  
 ,  
 和解(settlement)  
 (UNCITRAL A/CN.9/489< > 32).  
 , , , ,  
 ( 7 13)  
 30) 1998 가 國家不渡  
 31) 가

2. 協約

國際性 32) (assignments of  
 international receivables) 가 33) (international  
 assignments of receivables) , 締約國  
 . ‘所在’ (located) 自然人 常居所(habitual  
 residence) , 法人 가  
 (place of central administration/chief executive office) ( 67 69).

29) 1999 UNCITRAL 「Convention on Assignment in Receivables Financin  
 註釋」

(UNCITRAL A/CN.9/489) 2001 12  
 ‘Financing’ ‘in International Trade’ 가

30) ‘購買者金融’ ,  
 2002.4.11 33 .

31) 1998  
 ( 6 ) ING 1 2  
 1998.4.28 2 .

32) 原 가 ( 3 ).  
 33) ( 3 ).

가 , 節稅

가 . 5 26 32 (conflict of laws)

.<sup>34)</sup> 가

가 國際性

가 . 가 . 가 ( :

, . ), 가 (4 1 ). . ,

가 . . . , , (4 2 ).

( . ) . 가 . 가 ( :

) . (4 3,4 ),

가

(4 5 ).

### 3. 將來債權 讓渡禁止 特約

金錢債權 (2 (a)),

(future receivables)

. , 條件附 假定的(purely hypothetical)

原契約(original contract) 가 特定

(identifiable) (8 1 ; 59).<sup>35)</sup>

34) 26 ( ), 27 ( ), 28 ( .  
) , 29 ( .  
) , 30 ( .  
) , 31 ( ) , 32 (公序良俗).

가

5

國際私法

“ ”(34 1 )

“ 가 , 3  
”(34 1 )

35) 擔保 特定性(specificity)

通說

(contractual limitations)

(9 1 ).

가(loan participation)

가

(bulk assignment)

( )

가

가

(

99 100).

#### 4. 方式 登錄

書面

(electronic message)

( 60).

가

, 가

(5 (c)).

(notification)

(payment

instruction)

(13 1 ).

3

强行規定

가

가

, 3

排他的 歸屬

( 62

64).

가

(30 1 ).

(倒産節次

가 )

36)

가

가

가

가

, 判例 “

特定

同一性

”(大判 1997.7.25. 95 21624)

가

, 資産流動化

가 가

가

36)

數人

(24 )

(25 )

登録 UNCITRAL

(priority)

登録

.37)

(search)

가

38)

### 5. 效果

大量

39)

가 (undivided interests)

( 34).

가

(

) 特定

優先順位가

“ , 가  
優劣  
對抗力

, 가 3

同時  
3

, 3

”(大判 1994.4.26. 93 24223; 1994.5.10. 93

30495)

37) Annex to the Convention Sections I-IV.

債權登録機關

38) 日本 1998 10  
律」 (

「債權讓渡 對抗要件 民法 特例 法  
)

日 民法 467 ( 450 )  
가

가 3  
가 가

登記官

가

購買者金融

(receivables

financing)

가

(가 )「

」( )

B2B

39)

(future cash flow)

V.

- 統一 示唆點

EBRD

北韓

가

‘法 支配’

40)

EBRD

東歐圈

가 가

私法

41) EBRD

42)

40)

北韓

가

가 ,

白紙

動産擔保

가

가

가 , 가

가

가

美國式

南 北

韓半島

가

41) Duncan Fairgrieve, "Reforming Secured Transactions Laws in Central and Eastern Europe", [1998] *European Business Law Review*, 245; UCC Article 9 1998 , 2001 7 1 州別

國生一彦, , 25 .

42) EBRD 擔保(charge) 債務가 物權 . , , , 登錄 가 가 EBRD .

EBRD , 1996 12 (Act on



(financial innovation)

가 .

가 ,43)

(asset-backed securitization: ABS)

( 7 )

가 .44)

가 가

特定

가 가 .

(ABS)

.45)

EBRD

가

가

非占有型

, 가

[ 「2002 」 , 2002.4.26]

: , , , , , , ,

, EBRD, UNCITRAL

Registered Pledges and Register of Pledges: 1998.1.1 )

登録 가

簡易 , 浮動 , 集合物(stock in trade) ,

Dahan & McCormack, *op.cit.*, pp.88-90.

43) (independent power producer: IPP)

PFI(private finance initiative)

. 佐藤/赤羽/道垣,

(上), 72 73 .

44) 가 가 動産登記

‘電子登記制’ 가 . , “ ”, 2002.5.28 7 .

45) 가

가 統一 物的 擔保가 北韓

- , “ ”, 「 」 3 ,  
, 1999.12.
- , “UN ”, 「 」, , 1999.10.
- , 「 . 가 , ,  
2001.
- / , 「 」, , 2001.
- / / / , 「體制轉換國 經濟開發費用 」, , 2000.
- 法務部, 「東歐諸國 - 法制・司法改革 體制不法清算」, 1996.
- , 「 . 」, 1995.
- 國生一彦, 「改正 米國動産擔保法」, 商事法務研究會, 2001.
- 金子由芳, “ベトナムの擔保付取引に関する新政令”, 國際商事法務 Vol.28, No.6, 2000.6.
- 佐藤安信/赤羽 貴/道垣内弘人, “歐州復興開發銀行・模範擔保法の紹介と解説 (上)(下)”, NBL  
Nos. 695, 696, 2000.8.15, 9.1.
- Bogudar Kordasiewicz and Marek Wierzbowski, "Polish Civil and Commercial Law", *Legal Reform in Post-Communist Europe - The View from Within*, Edited by Stanislaw Frankowski and Paul B. Stephan III, Martinus Nijhoff Publishers, 1995.
- EBRD, *Law in transition - Advancing legal reform*, Autumn 2000.
- \_\_\_\_\_, *Reforming the Romanian Laws on Secured Transaction*, March 1998.
- \_\_\_\_\_, *General Principles of a Modern Law on Secured Transactions*, June 1997.
- \_\_\_\_\_, *Feasibility Study for a Computerised Registration System for Charges in Hungary*, July 1996.
- \_\_\_\_\_, *Model Law on Secured Transactions with Official Commentary*, March 1994.
- Frederique Dahan and Gerard McCormack, "Secured Transactions in Countries in Transition (The Case of Poland): From Model to Assessment", [1999] *European Business Law Review*.
- Duncan Fairgrieve, "Reforming Secured Transactions Laws in Central and Eastern Europe", [1998] *European Business Law Review*.
- William H. Lawrence, William, H. Henning and R. Wilson Freyermuth, *Understanding Secured Transactions* (2nd Ed.), LexisNexis, 2000.
- EBRD <<http://www.ebrd.com/new/index.htm>> [2002.5.15]
- UNCITRAL <<http://www.uncitral.org/en-index.htm>> [2002.5.15]

Abstract

## **In Search of New Types of Security Right Facilitating Business Transactions in a Unification Era**

*Whon-Il Park*

In late 2001, two epoch-making conventions took place for the secured transactions of mobile equipment at UNIDROIT, and receivables financing at UNCITRAL, respectively. In 1994, however, the EBRD Model Law on Secured Transactions introduced a non-possessory type of security right like a registered charge to transition economies in Central and Eastern Europe.

In the meantime, the European Union published a draft Directive on Delays of Payment with respect to retention of title, and the Organization of American States has just begun work toward a model law on secured transactions influenced by the U.S. and Canadian laws.

In principle, the new types of security rights should be:

- conducive to both creditors and debtors by reducing the credit risks and improving the financial terms;
- helpful to make the most of the collateral value of all types of assets;
- simple and non-possessory enabling the quick and cheap creation of a security right without depriving the chargor of the use of the assets;
- enforceable in the insolvency of the chargor through prompt realization at market value of the assets; and
- effective in the cross-border transactions.

There are many advantages that a creditor can reduce overall credit risks while the debtor can lower financing costs and utilize new types of security interests, thereby facilitating business operations at home and abroad.

In view of the foregoing principles, the EBRD model law has represented a good example to Korea, which could alleviate the strict application of secured transactions in the country and herald an appropriate means of security in the transition economy like North Korea.

In addition, the assignment of account receivables, as recently codified by

UNCITRAL, constitutes an effective financing tool. To this end, it is necessary to block an agreement not to assign account receivables, and to positively allow future or conditional receivables. The UNCITRAL convention on assignment of receivables is expected to bring a momentum in creating security rights in the international trade.

From the perspective of Korea, these new types of security interest should be verified through legislation and practices before a suggestion for secured transaction law is made to North Korea.