

改正 美 動産擔保法 國內 擔保法制 示峻點

1990 (BIS) (capital adequacy ratio) 가
가 商
事債權
가 善循環
가 商去來
2)

*
1) , “ ”, 「 」 21 1 (2002.5), 145 .
2) (insolvency regime) (debt financing)

國際機
 構 歐洲開發銀行(EBRD) (Model Law on Secured Transactions)
 . 舊蘇聯
 1991 EBRD 中·東歐 舊社會主義 가
 1994 模範擔保法
 . EBRD
 ,
 .³⁾
 EBRD .
 . 舊 가
 EBRD 私的自治 가
 .
 1988 私法統一
 國際協會(UNIDROIT) 2001 11 「移動裝備 國際擔保權協約」⁴⁾
 . 國際去來法委員會(UNCITRAL) 2001 12 「國
 際賣出(債權讓渡協約)」⁵⁾ . UNCITRAL 2002
 (Working Group VI) .⁶⁾

3) EBRD <<http://www.ebrd.com/english/trans/sectrans/modellaw/modlaw0a.htm>>; 佐藤安信·赤羽 貴·道垣内弘人, “歐洲復興開發銀行·模範擔保法の紹介と解説 (上)”, NBL No. 695 (2000.8.15), 73 75 ; EBRD

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

4) 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」.

5) 1999 UNCITRAL 「Convention on Assignment in Receivables Financing」

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

(EU) 1997 1998 (retention of title)
(draft Directive on Delays of Payment) ,

. 美洲機構(Organization of American States: OAS)

7)

1967 (Uniform Commercial Code: UCC)
9 (Article 9. Secured Transactions) (“動産擔保法” “UCC-9”
) 9 1998
2001 7 1 .

. 美國 動産擔保法

1. 美國 統一法 UCC 第9編

가 州法
(secured transactions) 私人 (UCC)
. 50 法域(jurisdiction)
統一法
(National Conference of Commissioners for Uniform State Law: NCCUSL)
(American Law Institute: ALI) 200 ,
, UCC

6) UNCITRAL, Report of Working Group VI (Security Interests) on the work of its first session (New York, 20-24 May 2002), A/CN.9.512. UNCITRAL
(model law) 가

7) 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>>[2002.9.10]

州 .⁸⁾ UCC 法 無

形 가 .

UCC 1990 NCCUSL ALI

9 ,

電子化 (part, sub-part) ,

1970 , 1962

1970 動産擔保法 1998 2001 7

1 .⁹⁾ 1 , 2

3 , 5 , 3 () , 4

3 , 5 , 6 , 7

UCC-9 (fixture)

(§9-109(a)). 擔保權

(interest) 가

(agricultural liens §9-102(a)(5), (deposit account), .

, (account) . (chattel paper) . (payment intangibles) .

,¹⁰⁾ 1 委

託(consignment) (§9-109(a)(4)) UCC-9 .

interest; PMSI) (purchase money security (§9-324(f)).

所有權留保附

. UCC-9

8) 50 가

UCC 3 4 1990 1992 , 4A 1990 , 5 1999 , 8 1994

9) 1998 UCC-9 2

가 2001 7 1 (§9-701).

2001 40 가 . UCC <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>

10) UCC-9 民法 擔保物 , UCC-3 (promissory notes)

(securitization) UCC-9

UCC-9가 賃貸借
(lease) 가
UCC-9가 聯邦法 法
定 UCC-9가 聯邦法¹¹⁾
UCC-9가 3
UCC
, 判例法 制定法 UCC-9가
, 不動産 賃貸 (premise)
留置權(landlord's lien) UCC 가
(materials) 留置權¹²⁾ UCC-9
, 非契約上 (statutory agricultural lien)
UCC-9 UCC가 (wage
assignments),
, (set-off),
(§9-109(d)). 3
UCC-9
債權(account),
UCC-9가
UCC-9 , 消費者金融 UCC-9
準據法
準據法
州 (§9-307(2)) 가
, 外國人 DC 市

11) 船舶抵當法(Ship Mortgage Act of 1920), 聯邦航空法(Federal Aviation Act of 1958), 聯邦著作權法(Federal Copyright Law)

12) (lien) ‘先取特權’
(common law), (statutory), 前後 司法節次上(judicial)
. 國生一彦, 「改正 米國動産擔保法」, 商事法務研究會, 2001, 43 .

2. 擔保去來 要素

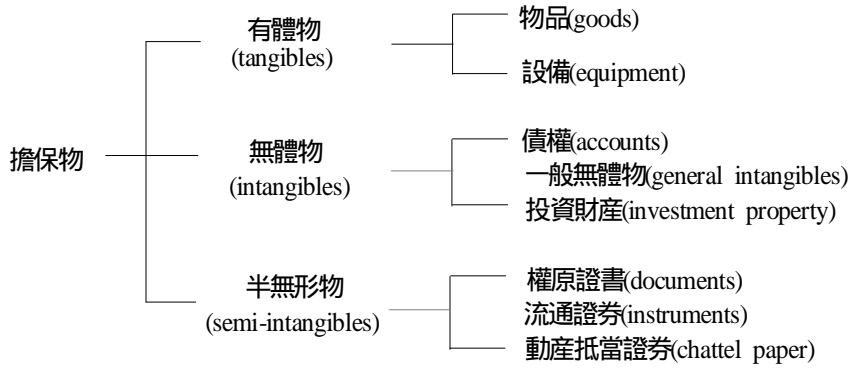
UCC-9 (old version) (§ 9-102).¹³⁾ (exception)

가 .

有體物(tangibles) 無體物(intangibles), 半無形物 (semi-tangibles)

가 가 分類

UCC 9 擔保物



가. 有體物

有體物 , , ,

‘物品 (goods) 가 (movable)

立木 動物 ,

作物 ; , 權原 , , 債權 動產 , 無體 (, 가) . CD, DVD

13) 가 (common law lien) , UCC-9 (securitization) . Barkley Clark, “Revised Article 9 of the UCC: scope, perfection, and default”, 4 N.C. Banking Inst., Apr. 2000, p.131.

CD, DVD
 (license) 가 .
 (: UCITA)

‘消費者用品’(consumer goods) , 가

‘在庫品’(inventory) (lease) ,

‘農産物’(farm products) (crops), 가 (live stock), 農家 (: ,) 未加工 (: , ,) 農家 가

‘定着物’(fixture) 3
 (identity) (:) 價值가
 (: 가) .

‘設備’(equipment) . 債務者 ,

.
 .

. 無體物

無體物 , 가 가 .

‘債權’(account) , , ,
 가 , 動産 .

賃金 , UCC-9가 .

‘一般無體物’(general intangibles) , (chose in action),
 (letter of credit rights), 가 (deposit accounts),

.
 .

‘支給無體物’(payment intangibles) 3 가

participation) 가 (loan), 가(loan
 ‘商業的 不法行爲請求權’(commercial tort claims) UCC-9

가 支給無體物
 ‘投資財產’(investment property) (securities account), (securities
 entitlement), (commodity contract), (commodity account)

半無形物

半無形物
 ‘權原證書’(documents) (B/L), (warehouse receipt)
 保管證書(receipt)
 ‘證券’(instrument) 流通證券(negotiable instruments) 株券, 社債
 가 (securities)
 ‘動產抵當證券’(chattel paper) (chattel) 擔保權
 (paper), 代金
 買受金 (PMSI)
 (instrument)
 動產 UCC-9 가
 (electronic records) (§ 9-105).
 , , , 代錢(proceeds)
 , , , UCC 擔保權 (§
 9-102(a)(64)).

UCC (after acquired property: 가)
 (future advance) (§9-204).

· 對抗要件

先順位(priority) , 3 優
 , 가 가
 公示(notice)
 UCC-9 金融明細書(financing statement)¹⁸⁾
 (filing) (perfection)
 公示方法 登記가
 , 가 가
 質權(pledge)
 가
 가 (: collateral
 mortgage, conditional sale)가 UCC-9 가
 UCC-9 動産, 債權
 19) , 가 20)

18) ‘融資說明書’ (documents
 filing) (notice filing) UCC-9
 (debtor) / , (secured party) / , (§ 9-502).
 (original debtor)

19) NCCUSL, ALI 1952 UCC 動産擔保登錄
 1960 가
 EBRD , UNCITRAL · UNIDROIT

20) 가
 가 (public registration) 가
 가 債權 가 動産
 , 投資有價證券

. Philip R. Wood, *Comparative Law of Security and Guarantee*, Sweet & Maxwell, 1995, pp.4-5.

가
 非占有型 擔保權(non-possessory security right)
 (, ,) ,
 가 .
 UCC-9 占有
 支配 完成(automatic perfection) 가
 (§9-521), (debtor)
 1 21) / , /
 郡(County)
 州法 . 5
 (security agreement) , 6
 (continuation statement) 5 .
 가 (public finance transaction) (manufactured
 home transaction) 30 (§9-515).
 , 占有 支配 .
 , (certificated security, negotiable document, instrument)
 (temporary perfection) .22)
 UCC-9 , (negotiable documents of title),
 (instruments), (certificated securities), 有體動産 (tangible chattel paper)
 金錢
 (§9-312(a), 9-313(a)).
 (§9-330(d)). 가
 (§9-331). 破産管財人
 (debtor's trustee in bankruptcy) (secured creditor) ,
 가

21) UCC-9

22) 對價

가 (electronic chattel paper) ²³⁾ 支配 (investment property)

가 (electronic copy) 가 가 UCC-9 (§ 9-107) 가

²⁴⁾ 가 가 (§ 9-106). (PMSI)

自動的 (assignment for the benefit of all creditors) (§ 9-309). UCC-9 (health-care -insurance receivable) 가 (common law trust)

(§ 9-309(13).²⁵⁾ (§ 9-308(d)).

4. 債務不履行 擔保權

(event of default) 가 ,

23) Barkley Clark, *op.cit.*, p.144.

24) *Ibid.*, p.148.

25)

Ibid., p.143.

(acceleration),
(enforcement of security interest) 가
UCC-9
司法的 3
非司法的
(mortgage) (judicial foreclosure) (sale by power of
sale) 競賣(public sale, auction)
(private sale) 가

26)
가 가 , UCC-9
(commercial reasonableness) (§ 9-610(b)), (notice)가 (§
9-611(c)(3)) 가 (rebuttable
presumption rule) 가
(deficiency judgment) (§
9-626(a)(3)).

가
 foreclosure) 司法的 (§ 9-601),
債權 3 (collection)
 (§ 9-607). (proceeds) UCC-9
 (§ 9-608(a)(1)).

私的
執行 (§ 9-609, 610)
 (§ 9-610(a)). 가
代物辨濟 가 (§ 9-621).

26) 國生一彦, , 195 196 .

擔保法制 示峻點

1. 擔保法 原則

UCC-9 가

UCC-9 가

UCC-9 가

EBRD EBRD
(Core Principles of for
Secured Transactions Law) 27) EBRD
西歐

信用危險 (Reduce risk of credit)

非占有型 擔保權 (Simple and non-possessory security)
가

擔保物 (Claim satisfied out of charged assets)
가

市場價格 (Prompt enforcement at market value)
가 (market value) 가

27) <http://www.ebrd.com/english/region/legtran/secured_trans_core.thm> [2002.7.20]

有效性(Effective in insolvency)

가

가

費用 (Low cost)

非差別性(All types of assets/debts/persons)

公示性(Publicity)

優先順位(Priority)

가

3

融通性(Commercial flexibility)

가

2. 擔保法制 가

가 民法改正

根抵當權

28)

가

가

北韓

南韓

28)

(CISG),

가

, 「民法(財産編)改正 公聽會」

, 2001.12.13 14, 196 197 .

가 , 調和
 ,
 가 ,²⁹⁾
 ,³⁰⁾

EBRD ‘擔保法 10大 原則’

信用危險

가 , , 物權(329 372)
 , 가

非占有型 擔保權

가 가 31) 抵當權

質權(329)

가 .
 (fiduciary transfer of title)

, 가 가 (가 2

1). EBRD 前近代的 .³²⁾

29) 憲法 3 “ ” , (大判

1961.9.28 4292 48).

30) 東歐 가 EU 가 EU

吸收統一

가 , 「 , 」, 98-01, , 1998, 79 80 .

31) , , 가 動産 (가 2 , 2 , 2), (7).

32) 大陸法系 가 (publicity) , 浮動擔保(floating charge)

擔保物
가
가 ()
329 , 356).
市場價格
가 (market value)
「民事執行法」 競賣
倒産時 有效性
가
가
別除權 (84 , 44),
가 (123)
費用
私的 實行
[競賣優先]
非差別性
3 가 ,
가 (331 , 346),
가 (1) ()
2 , 2 , 2)

公示性

占有,

가

가 가

EBRD

가

가

優先順位

가

3

가

優先順位

融通性

가

, 가

1

가

物權法定主義

가

3. 擔保手段 條件

物的擔保

가

(46 19), 流動化(asset-

backed securitization)

(

8, 13) 가

.33)

擔保手段

(credit risk)

(financial terms)

가

가

가

가

가

가

前者 工場抵當權 가(7)

後者 判例가 集合物

가

[asset-based finance]

가

高價 가 100%

가

非占有型

33) 擔保手段 가 (ABS) 가 (SPC)

가 資産流動化 가

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

35) 가 가

가

가 . 大判 1988.10.25. 85 941. 1988.12.27. 87 1043; 1999.9.7. 98 47283.

가
 .36) 가 3 (information technology: IT)
 notice filing system) (perfection) ,37) (public)
 . 38)(electronic registration) .
 , 企業倒産法
 가 (stay)
 追及力 ,39) 가 (insolvency administrator)
 가 가 (diminution) ,
 , 가 (choice of laws)가
 가 .40)
 動産 證書
 硬直性

36) 東歐圏 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
 37) UNIDROIT 「 」 (International Registry) (International Registrar)
 (Supervisory Authority)
 가
 38) 가 登記 登録 ,
 가 , ,
 ,
 39) UNCITRAL, A/CN.9/496, Para.24, p.6.
 40) UNCITRAL, A/RES/56/81, Preamble & Art.28 .

, 統一時代 北韓 가

(II)

41)

42)

43)

가 革命的 變化가

44)

45)

(“

”),

2002

外上賣出債權擔保貸出

46)

41)

가
東歐

가

42)

電子認證

確定 日字

金融決濟院

가

公證人協會

3

43)

1970

, 日

本

1998

(ABS)

「

登記

池田眞郎, 「債權讓渡法理の展開」(債權讓渡の研究

第二卷), 弘文堂, 2001, 214-221 ;

UCC-9

電子的

電子登録

國生一彦,

, 2001, 19-21 .

44)

‘電子登記制’

가
가

動産登記

“ ”,

2002.5.28 7 .

45)

‘購買者金融’

2002.4.11 33 .

46)

“B2B

”, 「

(1) -

對抗力

가

47)

가, 2002-3, 2002.5.16; , “
 ”, 2002.8.22, 7 42 e- - e-
 가
 47)
 CD
 (DART <<http://dart.fss.or.kr>>)