All the speakers at the BIICL workshop on Reform of the Law on Secured Transactions were agreed on the need for a workable secured transaction legal framework, either at global, regional and domestic level. As the panellist from UNCITRAL, UNIDROIT, EBRD and English Law Commission pointed out, what is required is the creation of a quick, cheap and simple registration system for security rights allowing a third party to find out whether assets are encumbered by security, and the ability to realize the charged assets in case of non payment, in priority to other creditors.

Against this background, with the aim of encouraging countries to modernise their security laws, the United Nations Commission on International Trade Law (UNCITRAL) will deliver by the end of this year its final Recommendations contained in a Legislative Guide discussing the various policy issues facing legislators and providing a comparative analysis of the approach taken in various jurisdictions.

The need to extend the availability of security over all types of assets (movable property, tangible and intangible, except immovable properties, securities and wages) and to secure all types of rights serving security purposes, has been highlighted since the first session of the UNCITRAL Working Group. Moreover, the charged assets and the secured debts should be capable of general description (eg, all machinery in a factory, all debts arising under sales contracts). It should also be possible to charge constantly changing pools of assets such as inventory, debts receivable and stocks of equipment and to secure fluctuating debts such as the amount due under a bank overdraft facility. The Draft Legislative Guide also proposes that the security right should continue to be effective and enforceable after the bankruptcy or insolvency of the debtor.

Creation, effectiveness against third parties, priority, enforcement, insolvency and private international law are all covered in the Guide.

Similarly, on the basis of experience in Central and Eastern Europe, the European Bank for Reconstruction and Development (EBRD) has produced Principles on the basic requirements for designing or assessing a charges registry, designed to publicise security
rights created over movable assets by debtors. The EBRD Principles have been accompanied by implementing Guidelines. The Principles are non-binding.

When EBRD was established in 1991, none of the countries where it operated had a workable law for taking security over movables; today virtually all do. But the rules and practices concerning the publicity of security rights remain far from satisfactory.

The International Institute for Unification of Private Law (UNIDROIT) has instead decided to go for a two-tier structure: the Convention on International Interests in Mobile Equipment (the Cape Town Convention) – which would not be equipment-specific – with a separate Protocol for each category of equipment covered by the Convention, namely helicopters, aircraft equipment, railway rolling stock and space assets.

At the heart of the Convention is the novel concept of “International Interest” which would be registered in a fully electronic International Registry in which the first, as well as subsequent international interests, registrable non-consensual rights or interests and notices of national interests, will be registered.

As with UNCITRAL, insolvency law is critical. The Cape Convention tries to establish an international regime which provides proper protection for security interests and title-retention rights which should reduce risks for creditors and with corresponding benefits for debtors in terms of expansion of credit and reduced borrowing costs.

Although limited to the England and Wales (and Northern Ireland), the English Law Commission Proposals were driven by the same aim: to ensure that key information about companies’ secured borrowing is accessible to all those who need to know. The desired outcome is again a scheme that does not depend upon the issue of a certificate by the Registrar of Companies that is conclusive evidence that the requirements for registration have been satisfied. There is overwhelming support for changing to a system of electronic registration. The priority of a charge would depend on the date of registration.