Why the draft convention on foreign judicial sales of ships must be adopted across globe

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Imagine this legal nightmare – you purchase a vessel following a court-ordered sale, only to find that the flag state refuses to transfer the ship off its books.

Or you pick up the phone one morning and find that a court in some far-flung jurisdiction has sold the vessel you were mortgagee of, without any prior notice that there were proceedings underway.

Even if such events seem uncommon, decisions from various courts show that they have taken place from time to time.

Given the international actors involved in such dramas – vessel owners, mortgagees, creditors, flag states, courts – an international solution appears necessary.

So who better to find one than the Comité Maritime International (CMI)?

The CMI is non-profit organisation based in Antwerp that has been promoting the uniformity of international maritime law since 1897. Its current president is Australia's Stuart Hetherington.

CMI has a long history of developing international agreements through the cooperation different countries' maritime law associations. The draft agreements are then put before an interested country or an international organisation, such as the United Nations Conference on Trade and Development (UNCTAD) to begin the long process of becoming a binding treaty.

All going well, they will arrange a diplomatic conference, and the agreement will be signed by states, which will then make the convention part of their domestic law.

The would-be treaty currently going through this CMI-led process is the *Draft International Convention on Foreign Judicial Sales of Ships and their Recognition*. Mercifully, this has been abbreviated to the "Beijing Draft", after the city in which its text was hammered out.

As its title suggests the draft agreement deals only with sales that are ordered by a court as part of legal proceedings. The key aim is to improve the price agreed to in such sales by limiting the opportunity to challenge the sale – especially in the courts of the ship's flag state.

To achieve this the convention would give all parties interested in the vessel, such as owners and mortgage-holders, the right to notice that proceedings are underway before any sale can be effected.

Then, once a sale has taken place, a certificate is issued that other parties to the convention would have to recognise, in particular the flag state.

This should ensure that the ship is sold with a "clean title", or at least with a clear statement of any mortgages remaining against the vessel.

The convention also provides for a limited number of situations in which the sale can be challenged. For example, if the ship was not physically present in the jurisdiction of the state when the judicial sale was conducted.

The mode of [illegible] and the distribution of the proceed[illegible]sale, remain questions to be resolved by each state's domestic laws.

This document was the focus of an international CMI conference in Hamburg on June14-18, attended by maritime lawyers and other industry figures from around the world.

The Maritime Law Association of Australia and New Zealand (MLAANZ) was represented at this conference by Matthew Harvey and Neil Beadle.

Mr Harvey, a Melbourne-based barrister is the current MLAANZ president, while Mr Beadle, an Auckland-based partner at DLA Phillips Fox is the New Zealand vice-president.

Over two days of negotiations the final details of the text were tweaked into a final draft.

Speaking of this process Neil said that: "There was forthright debate on points of detail which were resolved by majority voting by states at the conference. At the assembly, the Beijing Draft was approved by 22 votes in favour with two abstentions and no opposition."

While getting to know Germany's great maritime city, the MLAANZ duo also enjoyed the opportunity to learn about the challenges facing Arctic shipping, some of which may also arise in our southern waters, such as how to minimise environmental and shipping risks in polar regions.

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Mr Harvey was also interested to learn about the work of the Hamburg-based UN Tribunal on the Law of the Sea – the International Court of Justice's salty little brother.

"Australia and NZ have both conducted matters in the tribunal. The third and fourth cases before it were proceedings brought by our nations against Japan over its experimental fishing of Southern Bluefin Tuna".

The challenge now facing the Beijing Draft is a significant one. If the document is taken on as the project of a country or international organisation, and signed by a number of countries at a diplomatic conference, it may still sink into obscurity.

The Rotterdam Rules, agreed to in 2009, were supposed to represent a new international cargo liability regime, taking us away from the Hague-Visby Rules and their carrier-friendly exceptions and defences.

But despite being signed by 25 states, the 2009 rules are steadily gathering dust with just three states having given them effect in their domestic law.

The news is even worse for the convention most closely related to the Beijing Draft, namely the Maritime Liens and Mortgages Convention 1993, which promotes international recognition of these important security interests.

In over 20 years this agreement has gathered just 18 state parties, [illegible] of which are smaller maritime nations such as Albania, Monaco and Peru.

Perhaps unsurprisingly, once the conference is over and the ink dries on the treaty, governments appear very difficult to rouse into taking action over matters of private international maritime law.

However, as the preamble to the Beijing Draft states "the needs of the maritime industry and ship finance require that the judicial sale of ships is maintained as an effective way of securing and enforcing maritime claims".

The preamble goes on to reason that if the maritime industry cannot purchase vessels being sold through court processes for fear of having the vessel re-arrested weeks later for claim that pre-dates the judicial sale, then they will not pay much when courts advertise such vessels.

And if prospective buyers are not prepared to pay much, then the original claimants may not have their claims met out of the proceeds of sale, damaging their financial position.

The final word belongs to MLAANZ president Matthew Harvey: "It has long been the position in the UK and other common-law jurisdictions like Australia and NZ that a vessel, once sold by a court, is sold free of any encumbrances. To have this principle extend to other maritime nations would be a significant benefit to maritime trade. "Having taken part in its development in Hamburg, it is my hope that governments move quickly to ratify this succinct and useful piece of international maritime law."