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Interaction between a future instrument on the judicial sale of ships and selected HCCH Conventions

Note by the Secretariat

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I. Introduction

1. At its thirty-fifth session, the Working Group considered the interaction between a future instrument on the judicial sale of ships and several Conventions adopted by the Hague Conference on Private International Law (HCCH), namely:

(a) the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) ("Judgments Convention");

(b) the Convention on Choice of Court Agreements (2005) ("Choice of Court Convention"); and

(c) the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) ("Service Convention").

2. This note analyses how a future instrument might interact with each of these Conventions, using as a reference point the revised Beijing Draft set out in document A/CN.9/WG.VI/WP.84.

II. Analysis

A. Judgments Convention

3. The Judgments Convention was concluded on 2 July 2019 and is not yet in force.

4. The Judgments Convention applies to the recognition and enforcement of foreign judgments in civil or commercial matters (article 1).[1] As pointed out at the thirty-fifth session of the Working Group,[2] the recognition regime under the Judgments Convention only applies to a "judgment", which is defined as "any decision on the merits given by a court" (article 3(1)(b)). Whether the Judgments Convention applies to the recognition of judicial sales, and how it interacts with a future instrument on the recognition of foreign judicial sale of ships, thus depends on whether the subject of the recognition regime under the future instrument can be characterized as a "decision on the merits given by a court".

5. The revised Beijing Draft provides for the recognition[3] of "judicial sales", which are defined in article 1(c) to mean sales that are ordered or carried out by a court or other authority. Many judicial sales within the scope of the instrument would therefore be ordered by, or carried out pursuant to, a decision given by a court.[4] It does not follow, however, that the judicial sale itself is a decision on the merits (or the "res judicata"). Rather, the sale is a measure by which the judgment on the merits is enforced.[5] In the revised Beijing Draft, it is the judicial sale, not the underlying decision, that is the subject of recognition.

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[1] As noted in the Working Group, some maritime matters are expressly excluded from the Judgments Convention (article 2(1)(g)), while judicial sales of ships themselves are not (A/CN.9/973, para. 24). As discussed further in paragraph 20 below, the draft explanatory report on the draft Judgments Convention states that maritime liens and mortgages are included in the scope of the draft convention (ibid.). See Francisco Garcimartín and Geneviève Saumier, "Judgments Convention: Revised Draft Explanatory Report", *Preliminary Document No 1 of December 2018 for the attention of the Twenty-second Session of June–July 2019*, available at https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf, para. 49. The final explanatory report has not yet been published.

[2] A/CN.9/973, para. 24.

[3] On the use of the term "recognition" in the revised Beijing Draft, see paragraph 8 of document A/CN.9/WG.VI/WP.84.

[4] In some States, the decision may even be contained in the same instrument that decides the merits of the claim giving rise to the judicial sale: see, e.g., Federal Court of Australia, *Norddeutsche Landesbank Girozentrale v. The Ship "Beluga Notification" (No. 2)*, Judgment, 10 June 2011 (unreported).

[5] The draft explanatory report on the draft Judgments Convention notes that "enforcement orders, such as garnishee orders or orders for the seizure of property, do not qualify as judgments" on

6. This characterization is consistent with the distinction emphasized at the thirty-fifth session of the Working Group between the judicial sale on the one hand, and the decision on the merits of the claim giving rise to the judicial sale on the other hand (A/CN.9/973, paras. 21, 24, 68 and 87).[6] It is also consistent with the treatment of foreign judicial sales in several relatively recent court decisions, which have characterized the judicial sale as a foreign event establishing a particular property regime to be given effect as a matter of applicable law, rather than as a foreign decision to be given effect as a matter of the recognition and enforcement of foreign judgments. Specifically:

(a) In a 2013 decision concerning the deregistration in Saint Vincent and the Grenadines of the ship "The Phoenix", which had been subject to a judicial sale in the Democratic People's Republic of Korea, the Eastern Caribbean Supreme Court observed that "a foreign judicial sale is to be recognized and given effect qua assignment/transfer of title".[7] In doing so, the court followed the 1870 decision of House of Lords of the United Kingdom in the case of *Castrique v. Imrie*, which viewed the legal effects in England of a judicial sale in France as an application of the general choice of law rule that personal property disposed of in a manner binding under the *lex situs* is binding everywhere, and not as an application of the rules governing the recognition and enforcement of foreign judgments;[8]

(b) In France, the Court of Cassation stated in a 2005 decision that, for the purposes of giving effect to a judicial sale conducted in Gibraltar of the ship "R One", the judgment of the Supreme Court of Gibraltar ordering the sale was a legal fact to be taken into account in determining the property rights of the parties, and that it was unnecessary to recognize the judgment under the rules governing the recognition and enforcement of foreign judgments – in that case, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) ("Brussels Convention") – to give effect to those rights.[9] In doing so, it upheld the decision of the lower court, which reasoned that the judicial sale was not a "judgment" within the meaning of article 25 of the Brussels Convention but rather a "simple enforcement measure" for the foreign judgment;

(c) In the Netherlands, the Amsterdam District Court held in a 2004 decision that the effects of a judicial sale in China with regard to ownership of the ship "The Katerina" were to be determined as a matter of applicable law without recourse to the rules governing the recognition and enforcement of foreign judgments.[10] The court

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the grounds that they are not decisions "on the merits": see Garcimartín and Saumier, "Judgments Convention: Revised Draft Explanatory Report" (footnote 1), para. 82.

[6] A similar distinction is observed by Walter Muller in his critique of the recognition regime under the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1967): "La reconnaissance internationale d'une exécution forcée contre un navire de mer", *Droit Maritime Français*, issue 444 (December 1985), p. 719.

[7] Eastern Caribbean Supreme Court, Court of Appeal, *BCEN-Eurobank v. Vostokrybporm Company Limited*, Case No. SVGHCVAP2011/0011, Judgment, 10 June 2013, *Lloyd's Law Reports*, vol. 1 (2014), p. 409, available at www.eccourts.org/bcen-eurobank-v-vostokrybporm-company-limited-et-al/. See also *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (London, Sweet & Maxwell, 2012), paras. 14–110.

[8] House of Lords of the United Kingdom, *Castrique v. Imrie*, Judgment, 4 April 1870, *Law Reports: English and Irish Appeal Cases and Claims of Peerage before the House of Lords*, vol. 4 (1869–1870), p. 429.

[9] Court of Cassation of France, *Coopérative du lamanage des Ports de Marseille et du Golfe de Fos v. Cruise Invest One S.A.*, Case No. 02-18.201, Judgment, 4 October 2005, available at www.courdecassation.fr/jurisprudence_2/chambre_commerciale_574/nbsp_arr_843.html. See observations on the case by Pierre Bonassies in *Droit Maritime Français*, issue 666 (January 2006), p. 47. See also critique of the decision by Horatia Muir Watt in *Revue Critique de Droit International Privé*, vol. 95 (2006), p. 405.

[10] Amsterdam District Court, *Esquire Management Co. v. ETA Petrol Akaryakıt Ticaret ve Nakliyat A.S.*, Case No. KG04/912P, Judgment, 7 May 2004. See commentary in Lief Bleyen, *Judicial Sales of Ships: A Comparative Study* (Springer, 2016), p. 95. A similar approach is taken in Germany: see Karl Kreuzer, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 3rd ed. (1998), Band 10, Anhang I, paras. 157–158.

concluded that, "since the judicial sale took place in China under Chinese law, the effects of that sale regarding the property of the ship are determined in accordance with Chinese law";[11]

(d) In South Africa, the Western Cape High Court held in a 2003 decision that the recognition of clean title in the ship "The Aksu", conferred by judicial sale in Denmark, was a matter for the application of the choice of law rules – i.e., the rule that the law governing the transfer of moveable property (including ships) is the *lex situs* – without recourse to the rules governing the recognition and enforcement of foreign judgments.[12]

7. It follows from the foregoing analysis that the subject of recognition in the revised Beijing Draft (i.e., the judicial sale) is not a "decision on the merits" within the meaning of the Judgments Convention, and therefore that the future instrument will not enter into the scope of application of the Judgments Convention. In saying this, it is important to acknowledge that this characterization of a foreign judicial sale as distinct from the foreign judgment is not generally reflected in the preparatory work of the Comité Maritime International on the Beijing Draft, where much of the commentary on the recognition of foreign judicial sales proceeds on the basis that giving effect to clean title conferred by the foreign sale is a matter of the recognition and enforcement of foreign judgments.[13]

B. Choice of Court Convention

8. The Choice of Court Convention is currently in force in 31 States and the European Union.

9. At the thirty-fifth session, a query was raised as to the relationship between the Choice of Convention and a provision (in article 7(3) of the Beijing Draft and article 9(1) of the revised Beijing Draft) conferring exclusive jurisdiction on the courts of a State to hear challenges to a judicial sale that is ordered or carried out by a court in that State (A/CN.9/973, para. 51). The Choice of Court Convention aims at ensuring the effectiveness of exclusive choice of court agreements, which are defined as agreements concluded between two or more parties "for the purposes of deciding disputes which have arisen or may arise in connection with a particular legal relationship" (article 3(a)). It does this by, among other things, conferring exclusive jurisdiction on the court designated in the choice of court agreement (article 5), and denying jurisdiction to any other court (article 6). In this context, the relationship of the revised Beijing Draft with the Choice of Court Convention depends on whether a challenge to a judicial sale can be the subject of a choice of court agreement.

10. The Choice of Court Convention is concerned with original (first instance) jurisdiction and not with appellate jurisdiction. In other words, it deals with jurisdiction to "decide a dispute" between the parties (article 5), not jurisdiction to hear a challenge (or appeal) to the decision of the designated court.[14] The revised

[11] Ibid. "De slotsom van het voorgaande is dat, nu de veiling in China volgens Chinees recht heeft plaatsgevonden, op de gevolgen van die veiling ten aanzien van de eigendom van het schip Chinees recht van toepassing is".

[12] High Court, Cape of Good Hope Provincial Division, *Bridge Oil Limited v. Fund Constituting the Proceeds of the Sale of the MV "Mega S" (formerly the MV "Aksu")*, Case No. AC 58/2002, Judgment, 12 June 2003, *South African Law Reports*, vol. 3 (2007), p. 202, available at www.saflii.org/za/cases/ZAWCHC/2003/24.html.

[13] See, e.g., Frank Smeele, "Recognition of the Legal Effects of Foreign Judicial Sales of Ships", CMI Yearbook 2010 (Antwerp, 2011), available at https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf, p. 225.

[14] The explanatory report on the Choice of Court Convention notes, in discussing the scope of the Convention, that "[i]t was not intended that the Convention would affect the procedural law of Contracting States". It then goes on to specify that "national law decides whether, and in what circumstances, appeals and similar remedies exist": see Trevor Hartley and Masato Dogauchi, "Explanatory Report", available at https://assets.hcch.net/upload/expl37final.pdf, paras. 88 and 92.

Beijing Draft does not deal with original jurisdiction to decide the kinds of disputes that lead to the judicial sale of a ship (e.g., proceedings to enforce a maritime lien or mortgage).[15] Rather, the starting point for the revised Beijing Draft, like the draft considered by the Working Group at its thirty-fifth session, is that a court in the State of judicial sale has *already* exercised jurisdiction in such proceedings and has proceeded to order or carry out the judicial sale.[16] The revised Beijing Draft deals only with appellate jurisdiction (i.e., jurisdiction to hear a challenge to the judicial sale).

11. It follows that a challenge to a judicial sale cannot be the subject of a choice of court agreement within the meaning of the Choice of Court Convention, and therefore that the Convention does not apply to such a challenge. Put in another way, the conferral of exclusive jurisdiction under a future instrument on the courts of the State of judicial sale to hear a challenge to a judicial sale does not interfere with jurisdiction conferred under the Choice of Court Convention.

C. Service Convention

12. The Service Convention is currently in force in 74 States.

13. The Service Convention makes provision for the transmission of documents between Contracting States for service abroad. It does not make provision for substantive rules relating to the actual service of documents; rather, it is the law of the forum (i.e., the State from which the documents are transmitted) that determines whether or not a document is to be transmitted for service abroad.[17] As such, the Service Convention applies "where there is occasion to transmit" a document (article 1(1)). The scope of the Convention is further circumscribed in that it applies only in "civil or commercial matters", provided that the document is a "judicial or extrajudicial document" (article 1(1)).

14. The revised Beijing Draft, like the draft considered by the Working Group at its thirty-fifth session, not only establishes substantive rules relating to the giving of the notice of judicial sale (i.e., what is to be given and to whom) (article 3(1)-(2)), but also prescribes the means of transmitting the notice to the addressee (i.e., how it is to be given) (article 3(3)). At the thirty-fifth session of the Working Group, it was observed that the Service Convention potentially applies to the service of a notice of judicial sale under a future instrument (A/CN.9/973, para. 72). Whether the Service Convention applies depends on whether (a) the instrument provides occasion to transmit a document for service abroad, (b) the document is a judicial or extrajudicial document, and (c) the judicial sale can be characterized as a civil or commercial matter. If the Service Convention applies, the question then becomes whether the means of transmitting the notice prescribed in the revised Beijing Draft are compatible with the channels of transmission under the Service Convention.

1. Applicability of the Service Convention

(a) Occasion to transmit a document for service abroad

15. Article 3 of the revised Beijing Draft provides for a notice of judicial sale to be "given" to specified persons. The Service Convention does not define the term

[15] Indeed, it has been suggested to the Working Group that a future instrument should not deal with jurisdiction in such proceedings: A/CN.9/973, para. 21.

[16] Original jurisdiction may be conferred under national law or under other applicable law. In this regard, it is conceivable that the Choice of Court Convention might apply to the proceedings leading to the judicial sale (e.g., where there is a choice of court agreement between the shipowner and the mortgagee). As noted in paragraph 20 below, the explanatory report to the Choice of Court Convention notes that, while "marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage" are expressly excluded from scope (article 2(2)(g)), "[o]ther maritime (shipping) matters" are included, such as "marine insurance, non-emergency towage and salvage, shipbuilding, ship mortgages and liens".

[17] *Practical Handbook on the Operation of the Service Convention*, 4th ed. (2016), p. XLV.

"service", although the Permanent Bureau of the HCCH has stated that it "generally refers to the delivery of judicial and/or extrajudicial documents to the addressee".[18] On this interpretation, it is likely that the process of giving the notice of judicial sale constitutes "service" within the meaning of the Service Convention. Moreover, it is highly likely that some of the persons to whom the notice is to be given will be present outside the State of judicial sale. It follows that there will be judicial sales in which there is occasion to transmit the notice for service abroad.

16. Article 3(4) of the revised Beijing Draft provides for the notice to be published by press announcement in the State of judicial sale and possibly with wider circulation, as well as for the notice to be given to a centralized repository for publication online. It seems unlikely that submission of the notice to a printing house or the centralized repository for publication constitutes transmission for service abroad.

(b) Judicial or extrajudicial document

17. The Service Convention does not define the concept of "judicial and extrajudicial document". In practice, this concept includes instruments of contentious or non-contentious jurisdiction, or instruments of enforcement.[19] The notice of judicial sale is a document that is issued in the context of, and relates directly to, a measure of enforcement (i.e., the judicial sale) that is ordered or conducted by a court. As such, it is reasonable to characterize the notice as a "judicial document" within the meaning of the Service Convention.

(c) Civil or commercial matters

18. As a measure of enforcement, a judicial sale would ordinarily take the character of the proceedings giving rise to the judicial sale, which typically involve the adjudication of maritime claims (e.g., claims of the kind recognized in article 1(1) of the International Convention relating to the Arrest of Seagoing Ships (1952)). Significantly, the revised Beijing Draft excludes from scope judicial sales in tax, administrative and criminal proceedings (article 2(1)(a)).

19. While the Service Convention does not define the term "civil or commercial matters", it seems clear that maritime claims can be characterized as such. Maritime claims ordinarily involve the vindication of private rights as between parties at least one of which is acting in the context of commercial or private maritime (shipping) operations. This conclusion is reflected in practice, where the term is interpreted liberally,[20] and where the Service Convention is used to serve documents in relation to maritime claims.[21]

20. This conclusion is supported by reference to how the term "civil or commercial matters" has been interpreted in other conventions concluded by the HCCH. As noted in document A/CN.9/WG.VI/WP.84, the term "civil or commercial matters" is used to define the scope of the Judgments Convention and Choice of Court Convention. The explanatory report to the Choice of Court Convention notes that, while "marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage" are expressly excluded from scope (article 2(2)(g)), "[o]ther maritime (shipping) matters" are included, such as "marine insurance, non-emergency towage and salvage, shipbuilding, ship mortgages and liens".[22] While caution should

[18] Ibid., para. 23.
[19] Ibid., para. 77.
[20] Ibid., paras. 58–69.
[21] Recent (unreported) decisions of the Federal Court of Australia ordering service under the Service Convention in maritime matters include: *Beluga Shipping GmbH & Co v. Suzlon Energy Ltd (No. 5)*, 4 March 2011; *Thompson v. RCL Cruises*, 6 December 2013; and *Dollar Sweets Company Pty Ltd v. Peaceline (Shipping) GmbH*, 14 March 2014.
[22] Hartley and Dogauchi, "Explanatory Report" (see footnote 14), para. 59. See also Garcimartín and Saumier, "Judgments Convention: Revised Draft Explanatory Report" (footnote 1), para. 49.

be exercised when importing the meaning of a term from one convention to another,[23] there is nothing in the object and purpose of the Service Convention to suggest that the term should be given a narrower meaning in that Convention.

(d) Preliminary conclusion

21. It follows from the foregoing analysis that the Service Convention would ordinarily apply to the service abroad of a notice of judicial sale under the revised Beijing Draft.

2. Compatibility with the Service Convention

22. Where it applies, the Service Convention provides one main channel of transmission (through a central authority designated by the State in which the document is to be served (article 5)) and several alternative channels of transmission (through diplomatic and consular agents (articles 8 and 9), the postal channel (article 10(a)), and through judicial officers (articles 10(b) and 10(c)). Conversely, the revised Beijing Draft prescribes the following means of transmitting the notice of judicial sale (article 3(3)):

(a) registered mail or courier;

(b) any electronic or other appropriate means; and

(c) any means agreed to by the person to whom the notice is to be given.

23. The first means of transmission is compatible with the Service Convention, so far as it falls within the scope of the postal channel provided in article 10(a). In this regard, the practice of the Service Convention suggests that private couriers are equivalent to postal services and therefore within scope.[24] Importantly, however, the Service Convention allows a Contracting State to object to the use of the postal channel (as well as the use of judicial officers), and approximately 40 per cent of the Contracting States have done so for the time being. For giving notices in these States, the first means of transmission would not be compatible with the Service Convention.

24. For the second means of transmission, a preliminary question arises as to whether giving a notice by electronic means involves the transmission of the notice abroad, and therefore whether the Service Convention even applies (see para. 5 above). Drafted in the 1960s, it is understandable that the drafters of the Service Convention did not contemplate service by electronic means, let alone attempt to ascribe a physical location to such service. If a "functional equivalence" approach is taken to the interpretation of the Service Convention, it is arguable that giving a notice by electronic means to a person located outside the State involves transmission of the notice abroad, and therefore that the Convention applies. A similar approach is adopted in article 15(4) of the UNCITRAL Model Law on Electronic Commerce, which, although not applicable on its terms to data messages dispatched in the context of litigation, provides that a data message is deemed to be received at the place where the addressee has its place of business. But even if giving the notice by email involves transmission abroad, it is not clear that such transmission falls within any of the channels provided in the Service Convention. While the Permanent Bureau and some commentators posit that, on a "functional equivalence" approach, the postal channel in article 10(a) may include email or other forms of information technology,[25] other

[23] A special commission convoked by the HCCH in 2003 to review the practical operation of the Service Convention cautioned that "the meaning of 'civil and commercial' appearing in other instruments should not be relied on for interpretation without considering the object and purpose of such other instruments": *Conclusions and Recommendations adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003)*, para. 72, available at https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf.

[24] *Practical Handbook on the Operation of the Service Convention* (see footnote 17), para. 255.

[25] Ibid., Annex 8, para. 35; David P. Stewart and Anna Conley, "E-mail Service on Foreign Defendants: Time for an International Approach?", *Georgetown Journal of International Law*, vol. 38, No. 4 (2007), p. 799.

commentators question this result,[26] and States are divided on the issue.[27] Overall, it is questionable that the second means of transmission is compatible with the Service Convention, even if it is limited to service by electronic means, and even in those States that have not objected to the use of the postal channel.

25. For the third means of transmission, the Service Convention does not allow for the party being served to agree to a particular means of service other than the channels of transmission in the Service Convention. Accordingly, unless the agreed means are within one of the channels of transmission provided in the Service Convention, this means of transmission is not compatible with the Service Convention.

26. From the foregoing analysis, it is clear that the means of transmission prescribed in the revised Beijing Draft are not entirely compatible with the channels of transmission provided in the Service Convention.

3. Options for the Working Group

27. In light of this conclusion, the Working Group may wish to consider how the future instrument can operate in a manner that is compatible with the Service Convention.

28. One option is for the future instrument to defer to the channels of transmission provided in the Service Convention (where it applies) by not prescribing the means for transmitting the notice of judicial sale. As such, it will be up to the law of the State of judicial sale to determine which channel of transmission to use. It is questionable whether this option will achieve the efficiency desired by the revised Beijing Draft, as explained at the thirty-fifth session (A/CN.9/973, para. 67). While the HCCH has reported that 75 per cent of service requests received under the main channel are executed in less than two months,[28] this is longer than what can be expected under the means prescribed in the revised Beijing Draft. Moreover, if the notices must be given at least 30 days prior to the judicial sale, differences in execution times will likely make it difficult at that time to schedule the judicial sale, which in turn will invoke the option, in article 3(2)(b) of the revised Beijing Draft, for the place and time of the sale to be notified in as little as seven days prior to the judicial sale. This may rouse the concern, raised at the thirty-fifth session, that this option might have the effect of superseding the default 30-day notice requirement (A/CN.9/973, para. 75).

29. A second option is for the future instrument, assuming it takes the form of a treaty, to rely on article 25 of the Service Convention. This provides that the Service Convention "shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties". This "give way" clause ensures that, even if the future instrument prescribes means for transmitting the judicial notice that are not compatible with the channels of transmission provided in the Service Convention, the former prevails.

30. A third option, which builds on the second option, is for the future instrument not only to prescribe the means for transmitting the judicial notice, but also to allow the notice to be given using the channels of transmission provided in the Service Convention.

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[26] See, e.g., Richard Hawkins, "Dysfunctional Equivalence: The New Approach to Defining 'Postal Channels' under the Hague Service Convention" *UCLA Law Review*, vol. 55 (2007), p. 29.

[27] *Practical Handbook on the Operation of the Service Convention* (see footnote 17), Annex 8, para. 35.

[28] Ibid., para. 200. Presumably some of the additional channels – namely the postal channels and use of judicial officers – allow for expedited services. However, as noted above (para. 23), these channels are not available in the approximately 40 per cent of Contracting States which have objected to their use.

III. Conclusion

31. In its present form, the draft instrument on judicial sales does not enter the scope of application of the Judgments Convention or the Choice of Court Convention.

32. Conversely, the Service Convention is applicable to giving the notice of judicial sale. The provisions of the revised Beijing Draft prescribing the means for transmitting the notice of judicial sale for service abroad are not entirely compatible with the channels of transmission provided in the Service Convention. There are a number of options available to the Working Group to ensure that a future instrument operates in a manner that is compatible with the Service Convention.