



CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL



Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

MODULE III

SUBJECT 7 - ADDENDA

**REGULATION (EC) Nº 2201/2003 (I):
*International jurisdiction and recognition
of decisions in matters of divorce,
separation and annulment***

AUTHOR

Ana Paloma ABARCA JUNCO
Full Professor of International Private Law at the
National Distance Learning University (UNED)

DISTANCE LEARNING COURSE
A SYSTEMATIC STUDY OF THE EUROPEAN
JUDICIAL AREA IN CIVIL AND COMMERCIAL
MATTERS: COMPETENCE, RECOGNITION AND
ENFORCEMENT OF JUDICIAL DECISIONS
2009-2010



Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l'Union Européenne

ADDENDUM TO ISSUE 7

1. The doubts which have worried judges and magistrates in relation to the application of *Council Regulation (EC) No 2201/2003 of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*, since coming into effect, have been of variable gravity.

At this point there have been many judgements in which judges have had to pronounce on different issues relating to the application of this instrument: those relating to the inscription of divorce judgements in the Civil Register or those referring to the temporal scope of its application, for example, have not caused any problems.

Furthermore, the concretion of the *modus operandi* of the powers initiated a series of doubts which have been cleared up definitively, in the sense defined in this same issue, by the Court of Justice in its recent sentence of 29.11.2007 (Case C-68/07)

2. The concretion of the scope of personal application of the Regulation in terms of the international jurisdiction has become one of the most polemic aspects of this instrument and has created differences in interpretation between our courts.

It is well known that Regulation 2201/2003 has the same prerequisites for application in the area of *recognition* as Regulation 44/2001 (namely, that the disputed Resolution has been dictated by the courts of a Member State). However, the same is not true of the personal application prerequisites of the regulation in matters of *international jurisdiction*.

3. On this point, it is also known that the application prerequisite of Regulation 44/2001 is that the defendant is domiciled in the Community (with the known exceptions: exclusive powers, extension of jurisdiction), while Regulation 2201/2003, on the contrary to what was initially claimed, does not have any application prerequisites on this point: neither nationality nor habitual residence of the defendant in the Community are necessary.

In which case, in order that the competent powers set out in Regulation 2201/2003 are applied, it is sufficient that the case has *cross-border implication (repercussions)* – according to article 65 EC – and that this is established in one of the jurisdictional powers of article 3 (article 2 in Regulation 1347). In principle, given cumulatively both prerequisites, the international jurisdictional powers of the community instrument are applicable.

4. Despite the apparent simplicity of both prerequisites, one question remains which transcends the effects of application of the controversial rule: the scope of what should be understood as cross-border implication (repercussions). And it is that, if we understand by that only strict intercommunity repercussion Regulation 2201/2003 should not in principle be applied in the case of deeds of extra-community nationals resident in a Member State (for example two Moroccans with habitual residence in Spain). If, on the other hand, the cross-

border implication (repercussion) in question also includes international repercussion, the Regulation would be applicable to such a case.

Evidence of the relevance of this distinction on the effects of application of the community Regulation in matrimonial matters is found in our own jurisprudence, as there are several judgements which in similar cases arrive at contradictory solutions on the application of the Regulation.

This has happened in cases of Moroccan nationals with habitual residence in Spain. For some of the decisions the Moroccan nationality of the parties makes the application of the Regulation impossible. For others the criteria of habitual residence (through a competent power as detailed in article 3) is the enabling factor for its application: the fact that the defendant has more than one year of residence in Spain converts the case, unceremoniously, in one of the examples envisaged in article 3. And in virtue of this situation, the Regulation on matrimonial matters was applicable.

5. It is paradoxical still the fact that in the case where both husband and wife were Spanish and had not changed their residence to another Member State, the application of the community regulation to determine the jurisdiction of our courts would not even be suggested (reverse discrimination), while in its application it is suggested (in our view erroneously) when the husband and wife are foreign: in the case of two Moroccans who have not exercised the freedom of circulation because either they have not been able to (not had long term permission for residence for example) or because even though they have been able to, they have not left Spain.

6. Another problem that has been raised in the personal application of the Regulation, although much less polemical, is the application of Regulation 2201 to determine the international jurisdiction of the Spanish courts when the defendant does not reside in a Community country. Surely it is the confusion between the different prerequisites for application of Regulation 44/2001 and of Regulation 2201/2003 (supra 3) which can give rise to this error.

7. Lastly, the Court of Justice of the European Community, in a Judgment handed down on 11 July 2008 (the first case of Urgent Prejudicial Proceedings) Case C-195/08 PPU (Rinau), rules on various questions raised in connection with this Regulation. The first of these questions, and the only one we will examine here given that all the others refer to "parental responsibility" - a field not covered in this unit - reads as follows: "Can an interested party within the meaning of Article 21 of the Regulation apply for non-recognition of a judicial decision if no application has been submitted for recognition of that decision?" The Court gave an affirmative answer: "Except where the procedure concerns a decision certified pursuant to Articles 11 (8) and 40 to 42 of the Regulation (...), any interested party can apply for non-recognition of a judicial decision, even if no application for recognition of the decision has been submitted beforehand."

Ana Paloma Abarca Junco