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MODULE III

SUBJECT 8

REGULATION (EC) Nº 2201/2003 (II): International jurisdiction and recognition of decisions regarding the protection of minors. Overall application of different international instruments

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UNIT VIII

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SUMMARY

1 Specifications regarding the subject matter of the unit.

Regulation (EC) 22001/2003 cannot be analysed in an isolated manner in terms of its context, without the risk of obtaining a biased vision of its importance and its meaning, especially from the point of view of jurisdictional practice. On a Community scale, it is positioned in the process that began with the Maastricht Treaty[2] of 1992 and the Amsterdam Treaty[3] of 1997, which was given a final push forward in the Council of Tampere of May 1999, when the option was taken to build the space of convergence for civil procedure based on the (mandatory and directly applicable) Regulations with the defined purpose of fostering an effective common area in Europe in civil matters, which has ended with the enactment of the Treaty of Lisbon on 1 December 2009, which takes common legislation into consideration. The defined goal was to facilitate an effective common European area in civil matters. The study of this instrument, common law to all of the Member States of the Union, should be tackled from the broadest perspective. This covers the instrumental Regulations of judgments (notification of documents, citations, summonses, hearing of evidence), together with the Regulations on jurisdiction, applicable law and enforcement as well as the important precedent of the Treaty of Brussels 1968 relating to judicial jurisdiction and the enforcing of judicial decisions in civil and commercial matters. Even though this excluded issues concerning the family and parental responsibility, it established the technical basis of the new form of civil cooperation, without overlooking the extra-community framework of the Conventions of the Conference of The Hague on private international Law.

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[2] The MAASTRICHT TREATY of 7.2.1992 entailed the configuration of these subjects within the Third Pillar of the Community. On the basis of this, intense activity was undertaken in the intergovernmental field, in order to arrange a system of multilateral conventions. However, this was with the exclusion, unless there is agreement to the contrary, of the jurisdiction of the CJEC. The Conventions on notices and notifications, the one on insolvency and the so-called Brussels II, of May 20, 1998 date from this time. We will analyse this precedent, which never came into force.

[3] THE AMSTERDAM TREATY entailed the incorporation of public cooperation into the First Pillar, this being extracted from the governmental field and being reinforced as a jurisdiction of the Commission.

Finally, consideration must be given to the fact that in the European Union two new texts are being drafted in connection with the regulations in question here. These texts are the green papers on applicable law and jurisdiction in matrimonial matters and the matrimonial economic system, enacted by Regulation 4/2009 on claims for alimony.

1.1. Setting out of the matters dealt with.

The jurisdiction, recognition and enforcement of judicial decisions in matrimonial and parental responsibility issues constitute the subject matter of the Regulation 2201/2003 (EC), of November 27, 2003 (hereinafter known as R 2201). Its contents have been broken down into three subjects in this course; one on the decisions of a matrimonial nature (unit 5), another on the provisions on the law on visits and the displacement of minors (unit 7) and a further one, which is the one that concerns us here, which refers more specifically to parental responsibility (these three could really have been the subject of three different sets of Regulations). Nonetheless, all of these issues are related to each other, in such a manner that they systematically make up one single unit, with common references and provisions. It is important not to lose sight of this perspective or mistaken conclusions could be drawn. On the other hand, the consequence of this thematic form of distribution is that certain issues have to be tackled under the three subjects. Far from being an inconvenience, this provides a certain advantage since an analysis of this subject necessarily will be richer in terms of the nuances it provides.

In this unit, reference is made to the historical setting, to the background of the Regulations and to the standard terminology, so as to move on to an analysis of the scope of application, jurisdiction, the most characteristic procedural aspects, recognition of the decisions, enforcement and cooperation between the States for the effective undertaking of the aims that constitute the subject matter of the regulation. This is all undertaken from the perspective of the specific subject matter of parental responsibility.

1.2. Methodological indications.

A systematic approach to the Regulations based on a correlative analysis of their stipulations is not going to be followed in setting out the subject matters, and neither is the legal text going to be reproduced. This task must be undertaken by the student, so it is essential that s/he has the legal material available that is referred to, along with the complementary studies that are mentioned. To this end, references are made to the same, stating the links to the web page on which these materials can be obtained. These are fundamentally the Regulations themselves, the vademecum on civil and commercial matters prepared by the European Judicial Network, and the reports explaining the texts and the preceding ones from the Conventions of the Hague Conference on private international law.

The text of the Regulations can be obtained from the following web pages:

- EUR-LEX REPERTORIO DE LEGISLACIÓN VIGENTE: [EUR-LEX DIRECTORY OF LEGISLATION]
http://europa.eu.int/eur-lex/es/lif/ind/es_analytical_index_19.html
- WEB PAGE OF THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS
http://europa.eu.int/comm/justice_home/ejn/index_es.htm
- HOME PAGE OF THE HAGUE CONFERENCE
http://www.hcch.net/f/index.html

2 Historical setting of the Regulation.

2.1. Background to the legal institution.

As a legal institution, “parental responsibility” is the modern conception of a typical social relationship that has historically taken shape. It is based on an interpersonal bond of a natural character; it existed in all societies prior to being codified in law and has been transferred to the sphere of legal matters with a great deal of dependency on issues that are moral, ideological, religious, and economic, and on the ethical principles that have governed in diverse societies at specific historical times.

We can find the configuration of this bond within the sphere of holy matters in Egyptian, Greek and Roman mythologies, with a great weight of significance in all religions, from Oedipus to Abraham, Jesus Christ and Mohammed. Classical Roman law developed the institution with the characteristics that have been maintained until our times and that have been analysed by economicist theories of law, especially because of their importance in rural society.

The absolute sense of the authority, the power over children for very diverse purposes, involving health care, educational and even political ones, has evolved due to the concurrence of five diverse factors: a) the equalising of men and women in the system regarding relations with children (the particular term paternal authority was misrepresented); b) the implementation of divorce which has lead to the need to share the responsibilities and rights deriving from the institution (the initial trend of linking the “innocence” of a spouse with respect to the breakdown with the criteria for the assigning of custody has passed by); c) the emergence of new forms of family (single parents, blended families, etc.); d) the reinforcing of the care nature of the functions that are particular to it, with the generating of supra-family functions, which are shared with the community, in a trend of progressive secularization of the subject matter, which has come to hold a role of monitoring proper compliance with parental responsibility, with faculties of the suspension, elimination or conditioning of paternal and maternal functions by means of an extensive system of protective measures which, in many cases, are a temporary or definitive substitute; e) the consolidation of the universal legal principle of the “interest of the child”, as the prevalent criterion in the taking of decisions in cases of dispute.

Other circumstances of a sociological nature have converged into the need to provide supranational regulation over parental responsibility, such as the insufficiency of the current models of family in providing a response to children’s´ needs, migratory phenomena and the processes of internationalisation in which we live. It should not be overlooked that both Regulation 1347/2000 and R 2201, which replaces it, mention “the goal of creating a space for freedom, security and justice, in which the free movement of persons is guaranteed”[4] in order to justify community regulatory jurisdiction. Accordingly, it is logical that the facilitating of geographic mobility in the sphere of the E.U, and the forecast of marriages and family unions of individuals of different nationalities, both bring about a significant

[4] For an analysis of the background, scope and meaning of R (EC) 2201/2003, a reading of the “Explanatory report” undertaken by Professor Dr. ALEGRIA BRRAS , on the Convention of May 28, 1998 is of utmost interest. Even though the latter did not come into force it was used as the basis for R (EC) 1347/2000 and was approved by the commission (OD C221, of July 26 1998, pages 27-64).

increase in cross-border disputes in issues of parental relations, which may lead to conflicts about jurisdiction that require a swift and effective solution.

2.2. Main characteristics of parental responsibility.

2.2.1. Definition

Parental responsibility is defined in the following way in article 1.2 of the Hague Convention of October 19, 1996: *"the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child"*[5]. Article 2.7 of the R 2201 technically specifies this term, with a view to providing the conceptual clarity necessary in order to avoid problems of interpretation, by considering that it refers to *"the rights and obligations conferred on a private individual or legal person by virtue of a judicial decision, in relation to the person or property of the child. The term particularly includes custody and visitation rights".* Accordingly, the definition is broad and extends to responsibility over: a) the person of the child (feeding, education and health); b) the property of the same; c) the issues on his/her representation; d) custody; e) the right of relationship with the progenitors who do not have custody or do not habitually live with the child; f) the classical supplementary institutions of fostering, guardianship, custodianship and legal administration given that this can also be exercised by third parties (legal or natural persons of a private nature, or institutions of a public nature), even when the parental responsibility normally lies with the mother and father, in the case of death, inadequacy or unsuitability of the parents, or in cases of abandonment or risk to the children for a range of causes contained in the domestic laws of each State.

[5] PAUL LAGARD, "Explanatory report of the Hague Convention of October 19, 1996, relating to Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Issues of Parental Responsibility and measures for the protection of children". Available (translated into Spanish) at the web page of the Hague Conference referred to (ref. in heading 1.2 of this unit).

2.2.2. Material law on parental responsibility

From now on it should be noted that R 2201 is not a material right rule over parental responsibility, but rather it is essentially an instrument of private international law to provide a solution to conflicts of jurisdiction, and to provide the recognition and enforcement of decisions on this matter; in it there are not even rules relating to the applicable law (unlike the Hague Conventions). Accordingly, the particular legislation of the States is observed. These have their respective particular laws regulating the issue, by virtue of a kind of pragmatic compromise based on the mutual confidence that they express: a) the absence of rules on the conflict of laws (a remarkable difference with the Hague Convention of 1996 which will remain in effect with respect to this matter); b) the rule with respect to the recognition of decisions contained in article 26, by virtue whereof decisions cannot under any circumstances be the subject of a review in terms of their substance; and c) the assessed causes giving rise to the refusal of recognition that article 23 contains, practically all of those referring to procedural issues, with the exception of the public order clause of the required State, which is qualified by the appeal to the greater interest of the child[6].

It is however true that not just the instrumental regulations analysed in this course are available for the construction of the European judicial area. There is also a common policy, of wider-ranging scope, whose objective is the convergence of the material legal institutions on the basis of a shared legal tradition, and which serves to consolidate the case law of the Court of Justice of the European Communities and of the ECHR of Strasbourg in the supra-community field. The bringing together of procedural rules is the second of the instruments of standardisation, and for this reason the system of the Regulations that we analyse is an instrument of great utility, as has already been stated with the generalisation of the rules that guarantee a writ of summons, with the treatment of implied contempt of court, or with the requirement that the children be heard, prior to any decision that could have a bearing on his/her rights (articles 11.2, 23.b).

In the strictly material sense of the institution, as regards parental responsibility as a set of rights and duties that ensure the overall welfare of the child, a legal institution is being consolidated in its material sense (and consequently regardless of the purpose of R 2201, and therefore external but tangential to the subject studied), and which is imbued with the nature of international public order, as a set of values codified by the Treaty of Rome and the Universal Declaration of the Rights of the Child, which are essential in the community.

2.2.3. International public order in parental responsibility

There is a principle that is generally accepted by the States of the Union, that the monitoring of the exercise of parental responsibility and of the effective respect of the rights of children by public institutions certainly represents interference in the private life of the families. However, this is essentially supplementary and based on the principle of minimum intervention. It is important to remember that the ECHRR 24.3.1988 (the case of Olson against Sweden), lays down five criteria that justify the intervention of the State in parental responsibility, which naturally correspond to the progenitors: a) that all public intervention dealing with this matter is subject to

[6] ALEGRIA BORRAS, "The interest of the child as a factor of progress and unification of private international law". Academy of Legislation and Jurisprudence of Catalonia, Barcelona 1993 (speech of admission into the same).

the principle of legality (in terms of its foreseeability); b) that it is necessary; c) that its purpose is legitimate; d) that the measurements that are adopted are proportional to the risk that may be present; and e) that guarantee impartiality (specified in the need to know –hear- all points of view).

The legitimate purpose and need for the measures that the legal systems establish means that, even when they belong to the sphere of social protection of an administrative nature in setting out the social welfare policies, they must in any event be inspired by the principle of the interest of the child and be subject to jurisdictional control, from the perspective of the fundamental rights of the individual. Such measures are justified in a limited number of cases whose cause may lie in a crisis of paternal authority due to the non-existence of the persons who are called on to exercise it or because it is impossible to exercise it or it is exercised in an unsuitable manner, or due to a crisis in interpersonal relations (separation or divorce), when the distribution of functions by means of consensus is not possible. It may also follow external causes deriving from the mobility of individuals and immigration (displacements, expulsions, and asylum). In any event, it is a common principle of international public order that the State must guarantee the following basic rights to all of the children present in its territory: a) health; b) physical and moral well-being; c) education; d) maintaining relations with its progenitors and e) the general respect of the fundamental rights of the individual. On the other hand, the obligations of children are the learning of the acceptance and of the non-infringement of the essential rules of the community. On the basis of this point, internal State legislations have their own regulatory systems which are at the same time multiple in certain countries such as is the case with Spain, where there are a total of 12 laws of autonomous regions, in addition to the regulations of the civil code.

2.3. Background to the Regulation.

The background to the rules goes beyond the community area. Amongst the international texts of reference in terms of the material right of the protection of the child it is necessary to cite, because of its importance in the European field, the "*Recommendation 4/1981 of the Committee of Ministers of the Council of Europe"*, and within the UNO, the "*United Nations Convention on the Rights of Childhood" of 13.5.1981, and the "Universal Declaration of the Rights of the Child*" of 20.11.1989, ratified by 187 States. This is a milestone that has marked an inflection in the legislations of most States on the planet, in spite of its purely illustrative nature of principles and with a very reduced degree of forcibility.

The background to these Regulations, insofar as parental responsibility is concerned in the governing rules of private international law, is the European Convention of *20.5.1980, relating to the recognition and enforcement of decisions concerning the custody of minors.*

However the nearest legal and technical principles are found in the work and the production of multilateral treaties of The Hague Conference on private law. This experience has generated the Regulations. Amongst these it is worth mentioning: a) the "*Convention of 5.10.1961 on the jurisdiction of authorities and the applicable law concerning the protection of minors"*; b) the "*Convention of 25.10.1980, on civil aspects of the international abduction of minors".* This is of extraordinary importance and became part of the Community governing rules by virtue of the terms laid down in article 4 of the Regulation 1347/2003. This is another one of the texts of The Hague that has become communitised, with the significant modifications introduced in the R 2201, studied in the following unit , concerning visitation rights and the unlawful movement of children and c) the "*Convention on*

jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children", of October 19, 1996. This is an instrument which it is essential to consult in order to study R 2201 and is an immediate precedent of this text which has now largely been communitised. This is demonstrated by the Council Decision of 19.12.2002, by which the Member States were authorised to sign this instrument in the interests of the Community (Official Journal no. L 048, of 21/02/2003), in spite of the fact that the Regulation 1347/2000 on the same subject had already come into force (however this has been rendered insufficient as it was limited to children born to a marriage), and in consideration of the fact that the Community already possessed exclusive jurisdiction with respect to these subjects.

Within the sphere of the European Union, article 24 of the Charter of Fundamental Rights makes reference to this subject in specifically encompassing the rights of minors. As regards the regulatory production of community private international law, the promulgation of R 2201 was preceded in a very short space of time, by two community regulatory documents: a) the *Convention of 28.5.*1998, with the same object, which never came into force due to the Community's option of implementing a system of directly applicable regulations and, b) especially *Regulation (EC) 1347/2003, relating to jurisdiction, recognition and the enforcement of judicial decisions in matters of matrimony and parental responsibility on common children* (Official Journal no L 160 of 30/06/2000), in force from March 2001 and repealed by R 2201.

The R (EC) 1347/2000 was subsumed by the new R 2201, which completely replaced it (in force from 1.7.2004 and fully and completely applicable from 1.3.2005, ex article72). Its object and scope were extended and the technical elements for its effectiveness notably improved, especially in matters of cooperation of central authorities and judicial bodies[7]. Since R 1347 came into force, it has been the subject of numerous criticisms regarding the treatment of parental responsibility, as it is reduced to responsibility over the common children of marriage, leaving apart the other cases, such as those of non-common children or the children of unmarried couples. Neither did it properly resolve the problems stemming from the modification of circumstances subsequent to the termination of the matrimonial proceedings or the problems of visitation rights. Finally, international cooperation through Central Authorities was outlined but there was a lack of depth and of a more complete and effective form of development.

In conclusion, R 2201 is a text anchored in a long conventional tradition, with numerous precedents (which are essential to consult in order to successfully comprehend it) from which it has developed. It is, on the other hand, a mature regulation, which represents a risky bet for the future. On the one hand, it endows the community system with certain flexible rules for disputes that are based on the principle of mutual confidence. On the other hand it means the assumption of significant obligations by the Member States in order to facilitate cooperation. This is not only going to place a burden on the public administration (central authorities), but it also very significantly involves the jurisdictional bodies on an individual basis, the implementation of mediation as an auxiliary element in the administration of justice in order to attempt to resolve these conflicts in a consensual manner, and the work of coordination, consultancy and enablement of the European Judicial Network in civil and commercial matters created by the Decision 2001/470/EC.

[7] QUIÑONES ESCAMEZ, Anna, "First reflections on the proposal of Council Regulations relating to jurisdiction …", Ed. SEPIN, COLEC Persona y Familia. July – August 2003, pages 19-38.

The decision handed down by the ECJ on 29 November 2007 (c-68/07 Sundelin López) has strengthened the mandatory nature of the application of this regulation, which is applicable in preference to common legislation, except for cases in which the respondent is not a national or resident of any state of the Union.

3 Standard terminology.

In order to avoid possible legal conflicts over a lack of interpretation, R 2201 contains a series of definitions of concepts that can be subject to different forms of understanding. The experience of the precedent instruments demonstrates that the legal codes stemming from very different legal traditions use -in a non-one-sided manner- terminology, which could give rise to serious difficulties in the translation of terms. For this purpose, the definitions of the most frequently used terms are included in article 2.

"Jurisdictional body": Reference must be made to the issue of functionality. For the purposes of the Regulations, it is necessary to understand that these are all of the entities of the Member States that have jurisdiction in the issues that this instrument regulates, attributed thereto by their internal law. This is a technical legal concept that goes well beyond the particular sense of the words, given that systems co-exist within the Community area in which any decision about parental responsibility has to be adopted by the courts of justice, whilst in others this lies with very diverse administrative bodies. This means that some entities and others have equivalence. This has a great deal of importance, since it could come about that one decision of a municipal entity -that has these functions assigned to it in a State- is issued and this has to be enforced by a jurisdictional body in another State in the particular sense of the term, and vice-versa.

"Judge": This is the subjective element of the previous definition. For the purposes of the regulation, it is determined that any reference to a judge applies to any authority, whether a uni-personal or collegiate tribunal, a public entity or municipal authority, that exercises the functions of a "jurisdictional body" in relation to the parental authority. One clear practical example is the hearing of children: when the legislation of a State establishes that a Judge has to be the party that hears a child directly, this could be interpreted in another State as being a situation in which this hearing is undertaken by an administrative authority or a person delegated by the same, in accordance with its internal legislation. This is because such a formality is not undertaken by a judge, in the particular sense of the word, but rather by another individual; this will not be invalid for the purposes of the regulation.

"Judicial decision": in a nominative sense, this includes both judgments and decrees, but also any other form that concerns a decision by a competent authority with respect to parental responsibility in each State, in accordance with its internal law.

In the three previous definitions, the principle of mutual confidence excludes any type of indirect control of the jurisdiction of the body that took the decision, or of the nature of the same, as set forth in article 24 of the Regulation. The veracity that this body is the competent one, that the authority is the "judge" of the convention and that the decision is the correct one from the formal point of view is guaranteed by the certificate envisaged in article 39 of R 2201.

A further new feature is the assimilation that the Regulation makes of the public documents and the agreements between the parties, with the condition that these be enforced in the Member State in which they were issued or signed. One result of this is, for example in Spain, that a private agreement signed between Spanish

people in the national territory that has not been judicially approved lacks efficacy, whilst the same agreement should be recognised if it has been signed in Finland, because the internal law of this country allows this.

"Member state of origin": it does not refer to the origin of the child, but rather to that of decision or resolution which it is intended to be recognised or enforced in another State. Evidence of this is provided by the definition of a "Member State of enforcement" which is the one in which the corresponding judicial decision will be attempted to be asserted. R 2201 is applied by all of the States of the European Union, with the exception of Denmark.

"Parental responsibility": the definition has already been commented on in heading 2.2 above. This gives rise to the meaning of "holder of the parental responsibility", which may be the mother and the father, jointly or separately, the guardian, the custodian, the foster parent or any other legal or natural person or public entity which has the parental responsibility attributed thereto by virtue of the internal law of the State. The importance that this term has been agreed on (as a result of extensive discussions) by consensus is extraordinary. This term has finally been granted prevalence in contrast to the traditional ones of "authority", "control" or "parental authority" which contained archaic connotations.

"Right of custody": for the practical purposes of the regulation, this is the right to decide about the habitual residence of the minor, which is generally associated with the duties of care and supervision. This can be predicated to both progenitors jointly and one of them (in the case in which they live apart), as well as to guardians, custodians, private individuals or legal persons or public or private institutions. This right can be determined "ex lege" or by judicial decision.

"Visitation right": this lies with the mother and the father. The right of other relatives, such as grandparents, is not specifically contemplated in the regulation, even when it is the internal law of each State that provides content on the subject. This includes the right to move the minor to a place other than that of the habitual residence during a limited period of time. Because of its importance in R 2201, this issue is extensively developed in the following unit.

4 Scope of application.

The scope of application contemplated by article 1.2 is those matters of a civil nature relating to parental responsibility and the protection of minors, in the sense of the definition of the term that has already been set forth. As has been criticised with regard to R (EC) 1347/2000, this is without making any distinction between children of marriages and those that are not, and regardless of whether they are associated with a matrimonial procedure or not (paragraph 5 of the preamble). In this respect, the doctrine has highlighted that the viewpoint from which the issue is tackled is that of care for minors. This entails a radical change with respect to the repealed regulation which was focused on the parents. The inclusion of the objective of guaranteeing equality of the children (paragraph 5) and of the relevance of the interest of the child in the solutions adopted (paragraph 12) in the preamble, highlights the basic lines of the regulation[8].

Notwithstanding the foregoing comment, there are problematic elements in R 2201 insofar as it refers to the scope of application, in spite of the effort made to set out

[8] RODRIGUEZ PINEAU, Elena. "The new Community regulation on matrimonial litigation and parental responsibility". LA LEY – European Union, Year XXV, no 5944. This contains an interesting and clarifying article that compares R (EC) 1347/2000 and the 2201/2003 and the scope of the reform.

the casuistic of the measures (inclusions and exclusions). The connection with the Hague Convention of October 19, 1996 will allow for solutions to some of these problems, since we start from the ratification of the said convention by all Member States, and its parallel form of functioning. This occurs with the reference to "civil matters", which could give rise to interpretative doubts with respect to certain administrative matters aimed at the protection of children, or the measures adopted in criminal cases (both with respect to minors who break the law and in cases of domestic violence, for example), or in the area of asylum law and family regroupings related to migratory processes. There are also problems due to the absence of a reference to the age limit of the child subject to parental responsibility (article 2 of the Hague Convention refers to the age of 18), while no mention is made of persons disabled from childhood, subject to the age of parental authority which has been extended from the legal age of majority (adult disabled). The inclusion of this was debated in the previous work, and was finally left out of the express scope of the Regulation. No exception is made either to the so called “big children", insofar as this refers to the partial capacity for certain acts (consulting the doctor, surgical operations, purchase of contraceptives, disposal of certain property or income) and the advisability of a special regime for tackling the problems of being a parent in this sector of youth, which is subject to emancipation in many States. This is attributed to the internal law of the State that has jurisdiction by virtue of the habitual residence of the minor.

4.1. Express inclusions.

In general, the object of R 2201 is the responsibility associated with the child, the responsibility relating to his/her property, the representation of the minor, parental responsibility, the supplementary institutions of the same, legal administration, custody, guardianship and protection measures. The expression referring to the “completion of parental responsibility” likewise covers the decision concerning the removal of parental authority and logically, suspension of the same.

The text of the regulation (article 1.2.b) mentions the following in particular: a) custody and visitation rights; b) guardianship, custodianship and other similar institutions, with which a range of protective institutions established in the internal law of the States is covered; c) the designation and functions of the persons or organisms responsible for the person or property of the minor, for representing it, or providing care for it, a formula that is very extensive and open to casuistic factors; d) the fostering of the minor in a family or an establishment, which covers both fostering in professionalized families and in voluntary families, or centres or institutions whose purpose is to substitute the paternal and maternal responsibility; and e) protection measures for minors associated with the administration, conservation or disposal of the property of the minor.

Insofar as the property of the minor is concerned, Regulation 2201 is solely applied to protection measures, that is to say, a) concerning the designation and the functions of the person or organism in charge of administering the property of the minor, representing it and providing it with care, and b) the measures relating to the administration, conservation or disposal of the property of the minor. Going beyond these measures, the corresponding regime is the general one on property, that is to say, R (EC) 44/2001.

The scope of application also extends to the costs and the enforcing of any decision relating to the same, with the exception of the enforcements relating to procedures involving recognition and enforcement of decisions regarding

compliance with visitation rights and the recovery of the minor (article 49), which are understood to be free of charge.

4.2. Exclusions.

Certain rights of the minor, such as those to food (maintenance) or those relating to filiation, adoption, emancipation or the young persons penal correction regime (protection measures in juvenile justice), are not included for different reasons.

The regulatory text (article 1.2.b) in particular mentions: a) the determination and challenging of filiation, since this deals with an issue that is considered to be different from the allocation of parental responsibility and so still pertains to the sphere of the internal rules of each State, in the same way as any other right relating to the person (capacity, for example). This is without prejudice to the fact that R 1206/2001 may be used in evidentiary matters; b) the measures on adoption, and the actions that prepare for this (pre-adoptive fostering, procedure for obtaining consents and assents), or the measures on the cancellation or revocation of the adoption; thereby the States that have ratified it are bound, outside the Community scope, by the Hague Convention of 1993; c) questions relating to the name and surnames of the minor; d) emancipation, since this is rather a question of an institution contrary to a protection measure; e) food (maintenance), which is excluded as it is understood that its object pertains to the scope of the R (EC) 44/2000, although the preamble (paragraph 10) stresses that generally jurisdiction over the question of providing food must coincide with that for parental responsibility by virtue of the terms laid down in article 5.2 of the Regulations referred to. Therefore, in many cases, it could be possible to raise claims regarding the recognition of both in an accumulated form before the same jurisdictional bodies; f) trusts and successions, with the exception of measures for the administration of property and precautionary intervention in successory transactions, for which it may be necessary to appoint a representative for the minor; g) measures adopted as a consequence of criminal offences committed by minors (even when the limits between the protection measures and those of a corrective penal nature are very hard to distinguish).

Issues relating to social security, general measures on health or education (not the specific and individualized measures), the right to asylum and immigration (with the exception of the protection that has to be ensured for these children), are also outside the Regulation. Nonetheless, it is necessary to interpret these exclusions flexibly in the practical sense of the application of the Regulation. This is because, for example, it would be no use to have the recognition of a decision on the regime covering visits or the administration of property to a non-resident Community father, who is not at the same time provided with the right to movement and leave to stay in the State of residence of the minor, in any of the existing modalities.

Special mention must be made of the fact that alimony has been dealt with in the latest European legislation on matters known as personal and family law, which is Regulation (EC) 4/2009, dated 18 December 2008, on applicable law, jurisdiction, recognition, enforcement and cooperation in alimony matters (DOCE 10/01/2009), which came into effect 20 days after it was published and which has been a very important step forward in jurisdictional cooperation and cooperation between administrative authorities in these matters.

5 Jurisdiction.

The rule that is expressly established in article 8, from the territorial viewpoint, is that of a Community connection (with the exception of Denmark, as was explained in the preamble –paragraph 31), by reason of the residence of the minor. This criterion, conceived of on the basis of the interest of the minor, starts from the prevalence of the proximity of the jurisdictional body of habitual residence. This further justifies the special set of rules in the case of a change of residence of the minor, in the event of there being agreement between the holders of the parental responsibility, or of opportunity, when the competent jurisdictional body considers that another body is better positioned for the taking of the decision that lies with it (article 15). Nevertheless, problems are raised in the text (for example, in article 12.4) which the doctrine has called "excess communitising" in which it is harder to justify the community connection on the basis of the principle of "forum conveniens", when the minor is a resident in a third non-Community State, which is not a State that is a party to the Hague Convention of 1996[9].

In order to determine the habitual residence, it is established that regard must be had to the address at the time of submitting the matter to the jurisdictional body, except in the cases of abduction of minors (articles 10 and 11). Neither is it possible for the place at which the child is in compliance with the visitation rights, where s/he is spending its holidays or being educated, to have the status of habitual residence. The general principle, adopted from The Hague Convention of 1996, is that a lawful change of habitual residence removes the jurisdiction for taking measures for protecting the child from the authorities of the former residence[10].

The connection with the habitual residence of the minor is nonetheless subsumed by the "force of attraction" of the process of divorce, judicial separation or matrimonial nullity (article 12), when other issues relating to the parental responsibility over the children are being dealt with jointly with the question about the civil status of the progenitors. This is provided that the following three conditions exist concurrently: a) that at least one of the spouses exercises parental responsibility at the time, b) that the jurisdiction of the judicial divorce body has been unequivocally accepted by the spouses or holders of the parental authority, and c) that the interest of the minor is guaranteed. When the main process (of divorce, nullity or separation) is brought to an end, the bond of connection ceases, and so the subsequent measures that can be adopted or the modification of the previous ones will correspond to the State of habitual residence again.

5.1. Exceptions to the general rule of the attribution of jurisdiction.

The cases in which the rule of the habitual residence of the minor that the regulatory text establishes is not applied are based on different reasons.

In the first three months following a legal change of residence, the jurisdiction is preserved (perpetuatio fori) by the body corresponding to the State of previous residence for decisions relative to the guaranteeing of the right of visit to the progenitor who continues habitually residing in the same (article 9).

In the case in which the minor is closely associated with a Member State other than the one of its habitual residence, and the jurisdiction of the jurisdictional body of that Member State is unequivocally accepted by all of the parties, provided that the greater interest of the child is guaranteed. This is what is known as "forum

[9] RODRIGUEZ PINAU, E. Opus cit.
[10] PAUL LAGARDE, "Explanatory report on The Hague Convention of 19.10.1996, opus cit.

conveniens" (article 12.3), and it establishes cases such as those of a citizen of Ecuadorian nationality who resides in Spain and receives a visit from a child, where the latter requires a measure relating to parental responsibility or a protection measure, with the mother of the minor appearing without objecting to the jurisdiction of the Spanish body.

In the cases in which it is not possible to determine the habitual residence of the minor, or there are minors who are refugees or who are internationally displaced (due to disturbances in their own country), the jurisdiction is attributed to the Member State in which the minor is present (article 13).

5.2 Referral to a better situated jurisdictional body.

Article 15 contemplates the exceptional transference of jurisdiction to an appropriate forum, decided by the body of the habitual residence of the minor, on the grounds that a competent body of a third State is in a better position, having regard to the particular circumstances of the case, to observe the greater interest of the minor. This observation must be undertaken by the body that normally has jurisdiction either at the instance of a party or at the petition of the body of the third Member State that is better situated, or ex-officio, provided that at least one of the parties grants its consent.

In order for the association of the minor with the better situated body of another Member State to be observed, it is necessary that some of the following circumstances occur: a) that the habitual residence of the minor has been determined in the other State after the submission of the claim; b) that the minor has habitually resided there before the application was made; c) that the minor is a national of the said State; d) that the third State is the habitual residence of any of the holders of the parental responsibility, or e) that the objective of the protection measures is the estate of the minor located in the said third Member State.

Notwithstanding the preceding observation, the body that transfers the case must ensure that the body of the third State is declared competent in the period of six weeks from the time at which the claim is filed before the same.

In order for this mechanism to be decided upon, cooperation is established (article 53) between the Central Authorities and the assistance of the European Judicial Network in civil and commercial matters created by the Decision no 2001/470/EC.

6 Procedural aspects.

6.1. Ordinary rules.

The 3rd. Section of Chapter II of R 2201 contains a set of rules of a procedural nature that are of utmost importance when it comes to preventing differences in interpretation and making the subsequent recognition and enforcement of the decisions that are issued possible. These include the time at which it is considered that a procedure has been commenced (article 16), the imposition ex -officio of the choice of the proper jurisdiction on the examining judge (article 17), with the mandate of a declaration of non-jurisdiction if there is no element of connection of jurisdiction, the cases of lis pendens and of the suspension of second actions insofar as the first ones that are brought are not settled, the provision of measures of a provisional or precautionary nature (article 20) and the need to verify the admissibility in the cases of contempt (depending on whether it be strict or implied), in order to comply with the provisions of (EC) Regulation 1348/2000.

The applicants who have wholly or partially obtained free justice in the most favourable sense of the term and the broadest form of exemption from costs (article 50) in the Member State of origin will enjoy such benefits.

6.2. "Certificate" models.

The facilitation of the circulation of decisions is expressed by means of the certificates covered in article 39 (appendix II of the Regulation contains a model of the form that must be used for the cases of decisions concerning parental responsibility, and appendix III contains that corresponding to the visits procedure). These must necessarily be attached to the rest of the documents that are required (article 39).

Nevertheless, it should be noted that fulfilment of the formal requirements has been made more flexible with the provision of a rectifications period, in a prudential term. The aim of this is that no claudicate claims arise due to defects of form in questions of parental responsibility, and with the discretional power of the authorised judge to dispense with the obligatory rule for the filing of certain documents when s/he considers that s/he has sufficient information. In this respect, article 55 institutes a system of cooperation between authorities aiming at facilitating the effective protection of the minor. This even contemplates free communication between jurisdictional bodies in order to ensure cross-border cooperation, with a view to observing the safeguarding of the welfare of the minor in any event (heading 9).

6.3. Translation and legalisations.

The Member States accept that the forms are drafted in the language of the Member State requested, or translated by a qualified individual to this end in one of the States, into one of the languages accepted by the same in the declarations made following the coming into force of Regulation 1348/2001. These are contained in the Decision of the Council of 25.9.2001 (DOC L298), which can be consulted on the web page:
http://europa.eu.int/eur-lex/pri/es/oj/dat/2001/l_298/l_29820011115es00010478.pdf
The web site of the European Judicial Network in Civil and Commercial matters can be consulted for further information about the declarations and reservations:
http://europa.eu.int/comm/justice_home/ejn/index_es.htm
In the same manner, a consultation of the European Judicial Network and its accessory instruments is very useful:
http://europa.eu.int/comm/justice_home/judicialatlascivil/html/index.htm

With respect to the remainder of the documents, the same form as the one featured in article 55 of Regulation 44/2001 is used (Brussels I). That is to say, judgment is left to the jurisdictional body before which recognition and enforcement is claimed. Thus, as stated in the vademecum, it is appropriate in applying the Regulation to furnish a translation into the language of the Member State requested, even when a partial translation of the aspects of the decision that are determining and necessary may be sufficient (article 45) in certain cases.

It is not possible to require legislation or apostille (or any analogous formality", as article 52 states), of the certificate or of the documents or of a power of attorney for lawsuits.

7 Recognition of decisions.

R 2201 establishes the principle of mutual recognition in law of the decisions concerning parental responsibility. This is equivalent to granting the same status to the decisions of any Member State and to the decisions of the particular jurisdictional bodies. However, it is necessary to draw a distinction here, in the sense that we need to distinguish between:

7.1. Modalities of recognition.

a) Automatic recognition, without the need for any procedures, but without an attempt being made thereby to adopt any enforcement measure. This is a question of considering the effectiveness of the measures adopted in another State, whatever the way in which knowledge of these becomes available, and the evidence from which these may arise (this is not a formality that can be required). This is the case of the representation of a minor that arises from a power of attorney, or the authorisation for a surgical operation by the party that holds the parental responsibility, or any circumstance relating to the minor in the Civil Register. This automatic recognition regime is based on mutual confidence, and it is further applied, with particular features, - and without a need for an exequatur- to decisions on the rights of visits or the recovery of a minor ordered by a decision of the Member State of origin, that make use of the special regime of articles 40 to 45, and that are analysed in the following unit.

b) In all cases, the party that proposes that the decision is not recognised is the one that has to exercise the preventive action of non-recognition which is introduced by article 21.3. (and, as appropriate, this is the party that has to request the corresponding provisional or precautionary measures). There is no provision existing with respect to the procedural modality for this action, and therefore the internal law of each State will govern this matter in this respect.

c) A declaration of exequatur requires that this be requested by the interested party in the cases in which it is intended that the Member State of enforcement adopts measures of such a nature (heading 7.3 deals with the exequatur procedure).

d) The regulatory text also establishes an incidental application for recognition, when a question relating to parental responsibility, or any measure adopted in this respect, arises at the location of another principal procedure (article 21.4). This would be the case, for example, of the question being raised in a process on civil liability deriving from an accident and where the mother or father disagree about who holds the representation of the minor in order to receive compensation.

7.2. Grounds for refusal of recognition.

Article 23 of the R 2201 contains the grounds for rejection of recognition by the jurisdictional body of the Member State in which it is sought to assert it. The reasons that are considered, imposed in an obligatory manner (not optional as provided for by The Hague Convention of 1996), do not include –and this is a significant new development- neither an examination of the jurisdiction of the jurisdictional body that adopted the measure in the State of origin (article 24), as an expression of the mutual confidence that the said body has already examined its own jurisdiction in an ex -officio manner, nor does it include the "absolute" nature of the decision, even when it could lead to the proceeding being suspended in such

a case, even if an ordinary appeal had been brought against the same in the State of origin (article 27). Grounds for refusal are:

a) Public order, but taking account of the interest of the minor.

b) The omission of the hearing of the minor, in the sense that the child has not been given an opportunity to express his/her viewpoint, in violation of article 12 of the Universal Convention on the Rights of the Child. However, this provision cannot be applied mechanically, especially because there are many national legislations that alter this procedural public order formality considerably[11]. In the explanatory report on the 1996 Convention, Paul Lagarde highlights the fact that it is not always in the interest of the child to give his/her opinion, especially if both progenitors agree with the measure to be taken and this is not reasonably detrimental to the minor. In every case, it will be necessary to analyse the psychic situation of the minor, his/her age and the rest of the circumstances that arise, so that no prejudice occurs to the same at the hearing that is greater than that which could be avoided (for example, in the parental alienation syndrome). In the cases of urgency, this requirement can be made flexible.

c) In the cases of contempt, if it is not recorded that the other party has been granted the possibility of objection, defence or appeal.

c) Upon petition by the interested party, if any person who is the holder of the parental responsibility has had this right to a hearing infringed in the process in which the decision was adopted.

e) Due to incompatibility of a subsequent decision issued in the Member State requested.

f) Due to incompatibility with a subsequent decision issued in another Member State, or in the non-Member State of habitual residence of the minor (provided that the conditions for recognition are met).

g) Particularly, in the cases in which the fostering of the minor in another State different from that in which the measure is adopted is ordered, and no consultation has been made to the latter on the cooperation of its authorities for the effectiveness of such a measure, pursuant to the provisions of article 56.

7.3. Special consideration for the exequatur procedure.

Only the decisions declared to be enforceable in the Member State of origin (a term different from “absolute”) can be the object of recognition. This is because a large part of the decisions concerning the protection of the minor (including those in the social area) are automatically enforceable, even when an appeal is lodged against the same (article 28 mentions the particular features in force in the United Kingdom in this respect).

[11] In “The Child´s Voice”. The *Judges´ Newsletter*, the periodic Publication of The Hague Conference on Private International Law, Volume VI, Autumn 2003, pages 18 to 52, contains an extensive and illustrative study of the different forms of legislation in diverse countries on the undertaking of the examination or the hearing granted to minors. This can be obtained in English or French at the web page of the conference that has already been mentioned (some issues are translated into Spanish and the subscription in paper format is free for judges).

With a view to being subsequently enforced, enforceable public documents or private agreements that have such a status in the Member State of origin (article 46) can be recognised by means of this procedure.

The jurisdiction for a decision over an exequatur is either of the jurisdictional body of the habitual residence of the person against whom the enforcement is brought, or of the habitual residence of the minor (or in the absence of these, the place of enforcement).

A standard procedure has not been selected, but rather one that makes reference to internal legislations, with some special characteristic notes. In addition to the usual formula that the party instigating the action must have a representative or designate a domicile for notices, articles 30 to 34 set out a fast track procedure, for which the forms and certificates set out in articles 37 and 39, which have already been referred to, will form the basis.

The hearing body at first instance (designated by each Member State in its declaration) does not have to judge any type of dispute at this first stage, since no pleas can be entered by the minor or any of the parties in the same. It is limited to checking admissibility in terms of compliance with the requirements of the Regulation, and to making such declarations as appropriate, notifying the parties of the decision.

An appeal can be lodged in the period of one month from the notification of a decision (or of two months if the habitual residence is in another Member State). During this appeal stage (before the body designated for this purpose by each State), a genuine cross-examination process will be followed, either because the decision has not been recognised or because whilst it has been recognised, the party interested opposes the same. The admission of a subsequent appeal depends on the declarations of each State which is a party, these can be consulted on the web page of the European Judicial Network in civil and commercial matters.

8 Enforcement.

Once the decision has been recognised by means of an exequatur, it will be enforced at the instance of the interested party, following the procedures of the internal law, as if it were a decision of a body of the particular State of enforcement (article 47), even when there are particular provisions to this effect in the Regulation., such as the ones mentioned below.

A partial enforcement of the decision is possible (article 36), either because this is so requested by the party, or because enforcement can only be granted with respect to one or some of the pronouncements of the claim.

Decisions on visitation rights and recovery of minors have their own enforcement regime, which is dealt with in the following unit.

The principle that a subsequent decision repeals the previous one is established, as long as the former meets the conditions for being recognised (article 47.2, final paragraph). This is measure that is particular to parental responsibility and the protection of minors and which is inspired by the essentially evolutionary nature of family relations, and by the preponderance of the interest of the minor. Accordingly, the principle of res judicata does not prevail in this matter, but rather all of the measures can be modified in light of a subsequent alteration in the circumstances which has been duly judged by the corresponding jurisdictional body, and that

avoids the effects of the accumulation of decisions of different functional bodies in the particular jurisdiction.

In order for the enforcement measures to be effective, the Member States have to cooperate with the reinforced system that is set out in Chapter IV.

9 Cooperation.

Chapter IV of the R 2201 is wholly concerned with setting out the principles of cooperation between Central Authorities. This comprises the tradition of the Convention of the Conference of The Hague on private international law. Every Member State must have an administrative structure of a public nature for such purpose (or several if this is so required by the territorial structuring of each State), although it is not appropriate for the jurisdiction to be fragmented due to the degree of specialisation that must be required. The objective of this is that the services that have to be implemented can enjoy greatest efficacy.

In order to improve the provisions of the regulation and to strengthen cooperation, article 54 presents a significant new development in this Regulation as against R 1347/2000 that preceded it and, obviously, The Hague Conventions. It sets up a special association between the Central Authorities, which pertain to the field of governmental work, and the European Judicial Network in Civil and Commercial matters created by the Decision no 2001/470/EC, which is built up in the area of the Judicial Branch (or of the Public Prosecutors Authority, which also shares these functions in some countries, such as Spain).

Decision 568/2009/CE of the Parliament and of the Council, dated 18 June 2009 (DOCE 30/06/2009) has substantially amended the configuration of the European Judicial Cooperation Network in that it has increased the number of legal professions in the network to include clerks of the court and notaries public; it has also strengthened the figure of the so-called "points of contact".

9.1. General functions concerning parental responsibility.

Both legal and natural persons, public or private, and the Central Authorities of any Member State can activate the cooperation mechanisms (article 57), addressing themselves to the Central Authority of the State in which the measures are to be enforced (article 55), where the minor has residence or is present. This in turn may act on its own or by working through other public authorities or organisms. The party that proposes the cooperation has to attach the application and the appropriate certificates. The functions that they exercise carry a cost in such a manner that each Central Authority will assume its own expenses. These functions are:

a) In relation to a specific case, tasks concerning the information about the situation of a minor, concerning the litigiousness of the same or the decisions taken that may have a bearing on him/her.
b) In relation to the rights of visit and the recovery of the minor, to provide information and assistance to the holders who so request it.
c) To facilitate communication between jurisdictional bodies and provide them with information and assistance. This field contains the inscription of the institutions that are established as “meeting points”, specialised in supervised compliance with the system of communication and visits between the minors and the progenitors who do not live with them.

d) To promote the signing of agreements through mediation. This is an instrument that has been highlighted in the countries in which it is implemented as being the most suitable one, since it encourages consensus and the settling of the disputes through understanding and negotiation. This is more appropriate and effective in many cases in this context. It is true, however, that to do this it is necessary to employ highly skilled mediators to whom these functions can be delegated. Accordingly, the publication of Directive 52/2008, dated 21 May 2008, of the European Parliament and the Council (DOCE 24/05/2008) on mediation in civil and mercantile matters, which must be implemented before the month of September 2011 by all the member states, will give an important push forward to the systems for solving cross-border conflicts in parental responsibilities, even though these matters belong to the area of public order and will, in most cases, require the judicial approval of the agreements.
e) Reciprocal consultations on possible fostering of the minor in another Member State, by means of the mechanism laid down in article 56.

9.2. Monitoring of the cooperation.

The Regulation lays down the establishing of a stable structure that coordinates the implementation and carries out the monitoring and assessment of the cooperation between the Member States, within the framework of the European Judicial Network.

A manual of good practices, the "vademecum", has already been prepared for this purpose so that the activity that the Regulation sets out can be carried out[12]. This guide, which is not regulatory in nature, and which has had to be adapted to the needs of practice, formulates the mechanisms for cooperation in the broadest possible terms. It promotes direct communication by all types of means between the judicial bodies, between the network of Liaison Magistrates, the Points of Contact and territorial members of the European Judicial Network.

10. Relations with other International Instruments.

A set of provisions for reconciling the parallel co-existence of international bilateral and multilateral agreements in force, regarding the principle of the prevalence of the norms of Regulation 2201 between the Member States of the European Union is established in Chapter V. Complete substitution operates with respect to some of these agreements, and partial repeal in terms of the matters regulated in this instrument with respect to others.

The principles that are established are: A) non-discrimination on the grounds of nationality between the citizens of the Union; B) exclusive jurisdiction of the European Community in the regulation of these matters, in such a manner that control mechanisms are set up for the whole of the conventional activity that is carried on in this field between States of the Union; C) supremacy of the Regulation 2201 with reference to international instruments of different territorial areas.

[12] This can be consulted on the European Union web page and on the site of the European Judicial Network in the international relations section of the Spanish CGPJ. The web page of the Ministry of Justice is also useful: http://www.justicia.es/servlet/Satellite?pagename=Portal_del_Derecho/Page/PD_CanalInternacional

The Hague Convention of October 19, 1996 merits special treatment because it does not just declare the primacy of the Regulation, but it further extends the application of this with respect to non-member third States which have however ratified the aforesaid convention when the minor has its residence in a member state, or when there is a decision issued by the non-member State in which the minor resides, if this state is a party to the international instrument. It should be considered that there are issues, such as those relating to conflicts on the applicable law, that are going to be regulated by the said agreement since they are not the object of the Regulation.