

## ACKNOWLEDGEMENTS

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Nevertheless, the perspective of the thesis remains that of French and European law; the book was translated into English with the hope that the reflections presented here may appeal beyond the French-speaking public.

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This book is dedicated to my parents, Jean-Pierre and Annonciade.

Directive, Art. 4, articulating the law of the market and the law of the issuer) or case law (*BP plc* ruling of the ECJ, for example) show that specific solutions cannot be understood without examining the technical and regulatory context of market operations.

The research mandate was, therefore, starting from a scrupulous examination of French and European regulations, never to omit conflicts of laws in public law, in other words to ‘do private international law’ outside the known paths of pure private law. Augustin Gridel has courageously taken up this challenge. His subject, initially limited to one aspect of the problem (the law of security interests in listed securities), has been rationally extended to explain in all its dimensions the interaction, in international matters, of the law of instruments and the law of financial markets. The law of the market must be reconciled with the law of the issuance, then with the law of the issuer when it is distinct (see the example of the aforementioned Takeover Directive), with the law of the countries of marketing and finally with that of the law applicable to the holding and settlement mechanisms. The entire work, through its logical divisions and opportune summaries in the concluding proposals, is devoted to this anatomy of international financial law and to the optimal articulation of the laws involved. The result is a ‘truly comprehensive survey’, as one member of the thesis jury put it.

The study is up to date with current events: the federalisation of administrative supervision is extensively covered, and the technology of distributed registers can be found here and there. The truth is that the economic and technological constraints, and consequently the regulatory environment, has changed fundamentally since dematerialisation and digitisation. As recently as fifty years ago, in the days of physical trading, things were simple because many of the relevant connections could be seen: there was a place where securities were located, and a trading venue subject to its law. Today, these connections remain, but they are no longer visible. The law of the trading platform or infrastructure has become the law of a system: a computer system backed by market rules subject to a necessarily single law. Secondly, the functions of the trading infrastructure have been split up into various institutions and systems, which is likely to increase the fragmentation of laws. In a pro-competitive and liberalising move, the lawmaker (particularly in Europe) has finally recognised the diversity of types of platforms (regulated or unregulated markets), of technologies and of the status of participants. This has shifted the focus of conflict of laws issues and made them more complex.

The originality of this book lies in the fact that it is built entirely around the study of the institutional connecting factors specific to stock market and financial matters. In a fine exposition of domestic law, the author analyses the contractual nature of ‘market rules’ (or system rules for mechanisms other than trading platforms), but argues that in international matters, the

law of the system, a modern form of *lex mercatus* (to use a concept coined from observation of medieval markets), is not determined subjectively and voluntarily (free choice by the manager and participants), but objectively (law of the place where the system manager is established). This conclusion, which has unequal explanatory power for the law in force (see nos. 267 to 277 of the book), does not, however, have a decisive impact on the rest of the doctoral thesis.

The very principle of an institutional law is thus justified and determined by means of a specific allocation rule, and its area of relevance is clarified in terms of the system's respective relationships with issuers and investors. The thesis then takes up classic questions and deals with them in the European and French context, not without some important notes on foreign law: the law applicable to the issuance, the regime governing public offers of securities and their marketing, the impact of the prospectus on conflicts of laws and jurisdictional issues, multi-listing and the conduct of takeover bids, etc.; to which is added the repression of market abuse.

The third and final part of the book contains other in-depth and original developments relating to the status of securities and financial contracts. The first title takes up the well-known question of the proprietary connecting factor applicable to financial securities. Contrary to some mainstream analyses (American law and The Hague Convention, in particular; the so-called PRIMA principle), Mr Gridel rebuts – with courage and a certain talent – the fragmented conflict-of-laws treatment of securities from a proprietary point of view, by refusing to consider each entry in an account with an intermediary as a relevant location of the security and proprietary rights, capable of determining the law applicable to questions of ownership. In the author's view, only a primary book entry is authentic and only transactions affecting that book entry are decisive in domestic law; this should dictate the conflict-of-laws rule applicable to proprietary issues in cross-border cases and lead to the view that the books and accounts of the central depository are equivalent to the legally relevant location of the securities. The holding and settlement systems, which tend to be intangible, constitute the technological reference environment within which securities are held and moved. Once again, these primary systems appear to be subject to their own institutional law (which also depends on the intellectual alternative of an objective or voluntary connection: the law of the account or system, or the law of the country in which the account keeper or system operator is established). The law of the primary registration system becomes, at least in part or as a matter of principle, the law applicable to the regime of ownership of registered assets. This unitary reasoning, based on the primary registration of intangible assets, is discussed at length and deserves to be considered very carefully. It has a serious chance of prevailing in the

future as the technology of financial intermediation changes (distributed ledger technology, also taken into account in the book).

With the methodology he has chosen and in the field in which he has deployed it, Augustin Gridel has been a pioneer. Originally educated in private law and endowed with a solid generalist and comparative culture, he took up the challenge of climbing the regulatory mountain of financial law to reach the fundamental and technical discussions of the sector in question and offer, in terms of conflict-of-laws, a systematisation of proven or conceivable solutions. As far as doctoral theses are concerned (if we omit older works dealing, for example, with the ‘admission to listing of foreign securities’), this is the first in France to have approached all the issues in an analytical way, from the bottom up; independently of public international law, which in this area prescribes so little.

The work we are about to read, which has won a number of academic and professional prizes attesting to its value, will probably give rise to others in line with technological and regulatory innovation. It will also have paved the way for a reflection on the institutional links and connecting factors applicable in international and European financial market law. In this respect, and irrespective of the fate of each of its multiple conclusions, we can expect the book to set an example.

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## FOREWORD

If the realm of the conflict of laws has been traditionally depicted as ‘a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon’,<sup>1</sup> no less sophisticated has become nowadays the law of financial markets. In the latter, the multiplicity of actors, the heterogeneity of the legal situations and relationships which connect them one with the other and, not least, their geographical dispersion makes for a complexity which is only at par with the relevance they have gained in today’s economy.

It can therefore appear a daunting task the one that Augustin Gridel has undertaken for his doctoral research, to analyse the realm of financial markets through the lens of the conflict of laws, thereby combining the subtle intricacies of these two highly technical fields. A daunting task, but a welcome one, whose results are presented in this book, that constitutes the crowning achievement of Dr. Gridel’s long research and reflection [under the *magisterium* of Professor Louis D’Avout], offered in English version to the legal community of academics, private practitioners and public authorities.

The objective of Dr. Gridel’s work, and one of its distinguishing features, is not to explore some specific aspects or area of the law of the financial markets, but rather to encompass the wider spectrum of legal relationships and situations which are established in the operations of those markets, and test the soundness of their regime when regarded under the conflict of laws perspective, offering proposals *de lege ferenda*, where appropriate.

In doing so, the conflictual reasoning, guided by the rigorous methods and concepts of the French doctrinal tradition of the *conflit de lois*, is preceded by an accurate overview of the substantial – national and supranational – regulation governing those relationships and situations. Substantive private laws – notably, contract and personal property law – and, to a lesser extent, public law, notably criminal law, have a key role to play in the application of financial regulation. Dr Gridel’s reconstruction further factors in the analysis the administrative law underpinnings of financial markets, pointing out the similarity of their *procédé* with the one of private international law.

Far from being of academic interest only, the analysis of such relationships also has concrete policy implications. In the case of the EU, they are part and

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<sup>1</sup> W.L. PROSSER, ‘Interstate Publication’ (1952-1953) 51 Mich L Rev 959, at 971.

parcel of the journey towards European integration. Questions around the role that private law can play in the process of European financial sector integration, and whether private law diversity can hamper the functioning of European markets have been the subject of extensive academic scrutiny. Similarly, both the literature and institutional actors, including the European Commission, have explored the question of the eventual harmonisation of private law.

One of the many reasons why Dr. Gridel's research is valuable is because it explores, in considerable depth, the different points of connection between financial markets and national legal orders, bringing to light the legislative and administrative dimensions of their interconnection. Dr. Gridel's research also highlights the less-well understood and under-researched role that market operators and financial market infrastructures play in circumscribing the conflict of laws context in which those connections are to be understood. In his research, he also draws attention to the international status of financial contracts and the discrepancy between that status and national civil law.

It might be argued that, without a common core of basic private law rules, supra-national financial regulations are either doomed to fail on the coherence front or are destined to only unfold a fragment of their true potential. In the case of the EU, it is broadly accepted that the Union legislator lacks a general competence to harmonise private law rules. Moreover, where the EU legislator has asserted such a competence, its scope only covers those aspects of private law where national law discrepancies are considered to materially obstruct the establishment of an internal market.

This is where private international law becomes relevant, by providing a path through which those discrepancies can be negotiated. And one can only concur with the conclusion by Paul Lagarde, which Dr Gridel recalls in the very forefront of the Introduction to this book, on '*le rôle coordinateur irremplaçable de la théorie des conflits de lois*'.

I would like to conclude by praising the contribution of the work of Dr Gridel to the creation of a much needed genuinely European legal scholarship in the field of financial markets regulation, by meticulously mapping, through his research, the intersection between financial markets and private international law. One of the hallmarks of such a scholarship is the acknowledgement of the crucial role that private law as well as conflict of laws rules can play for the success of EU financial regulation. By providing the foundation for future research on the optimal degree of substantive private law harmonisation which will inform the future harmonisation agenda of policy makers and legislators, research such as the one conducted by Augustin provides a great input into the success of our common, European project.

Christine Lagarde  
President of the European Central Bank

# ABBREVIATIONS

## EUROPEAN LEGISLATION

**AIFM Directive** – Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers

**Brussels Ia Regulation** – Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

**CRD IV** – Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 relating to the taking up and pursuit of the business of credit institutions and the prudential supervision of credit institutions and investment firms

**CRR Regulation** – Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms

**CSD Regulation** – Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories

**EMIR Regulation** – Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on over-the-counter derivatives, central counterparties and trade repositories

**ESMA Regulation** – Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)

**Finality Directive** – Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems

**Financial Collateral Directive** – Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements

**IFD Directive** – Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms

**Insolvency Regulation** – Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

**Investment Services Directive** – Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field

**Market Abuse Directive** – Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive)

**Market Abuse Regulation** – Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse

**MiFID** – Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments

- MiFID 2** – Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments
- MiFID Regulation** – Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments
- Rome I Regulation** – Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
- Rome II Regulation** – Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
- Prospectus Regulation** – Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market
- Resolution Directive** – Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms
- Regulation on the resolution of clearing houses** – Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties
- Short Selling Regulation** – Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps
- Solvency II Directive** – Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance
- SSM Regulation** – Council Regulation (EU) No 1024/2013 of 15 October 2013 entrusting the European Central Bank with specific tasks concerning policies relating to the prudential supervision of credit institutions
- SRM Regulation** – Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and procedure for the resolution of credit institutions and certain investment firms under a single resolution mechanism and a single bank resolution fund
- Takeover Directive** – Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids
- TFEU** – Treaty on the Functioning of the European Union
- Transparency Directive** – Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
- UCITS Directive** – Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
- Winding up Directive** – Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions

## SYSTEM RULES

**Euronext Market Rules (Book I)** – Euronext Market Rules, Book I: Harmonised Rules. Issue date: 9 November 2020.

**Euronext Market Rules (Book II)** – Euronext Market Rules, Book II: Special rules applicable to French regulated markets. Issue date: 2 July 2019.

**Clearing Rules** – LCH. SA Clearing Rules published on 6 August 2021.

**Euroclear's operating rules** – Operating rules of the Central Depository, Euroclear France, Decision of 16 April 2019 on the authorisation of Euroclear France SA as a central securities depository and approval of its operating rules.

## JOURNALS

Banque et droit	Revue banque et droit
Banque	Revue Banque
BJB	Bulletin Joly bourse
D.	Recueil Dalloz
Dr. et patr.	Droit et patrimoine
Dr. soc.	Revue droit des sociétés
Études Joly soc.	Études Joly Sociétés.
Europe	Revue Europe
Gaz. Pal.	Gazette du Palais
JCl. Banque crédit bourse	Juris-classeur Banque crédit bourse traité
JCP E.	Juris-classeur périodique (semaine juridique), édition entreprise
JCP G.	Juris-classeur périodique (semaine juridique), édition générale
JCP N.	Juris-classeur périodique (semaine juridique), édition notariale
JCl. soc.	Juris-classeur société traité
JCl. Eur	Juris-classeur société traité
JDI	Journal de droit international
JORF	Journal officiel (France)
OJ	Official Journal of the European Union
JPIL	Journal of private international law

Rev. CMF	Revue du Conseil des marchés financiers
RCADI	Recueil des cours de l'académie de la Haye
RDC	Revue des contrats
RDIP	Revue de droit international privé
RCDIP	Revue critique de droit international privé
RDBD	Revue de droit bancaire et de la bourse
RDBF	Revue de droit bancaire et financier
REDBF (Euredia)	Revue européenne de droit bancaire et financier
RISF	Revue internationale des services financiers
RJ Com.	Revue de jurisprudence commerciale
RTD civ.	Revue trimestrielle de droit civil
RTD com.	Revue trimestrielle de droit commercial
RTD Eur.	Revue trimestrielle de droit européen
RTDF	Revue trimestrielle de droit financier
S.	Recueil Sirey
TCFDIP	Travaux du comité français de droit international privé

## INSTITUTIONS

ACPR	Autorité de contrôle prudentiel et de résolution
AIF	Alternative investment fund
AMF	Autorité des marchés financiers
CA	Cour d'appel
Cass.	Cour de cassation
CCDVT	Caisse centrale de dépôts et de virement de titres
CE	Conseil d'État
ECtHR	European Court of Human Rights
Civ.	Chambre civile (de la Cour de cassation)
COB	Commission des opérations de bourse
Com.	Chambre commerciale (de la Cour de cassation)
Cons. const.	Conseil constitutionnel

Crim.	Chambre criminelle (de la Cour de cassation)
EBA	European Banking Authority
ECB	European Central Bank
ECJ	European Court of Justice
ESCB	European System of Central Banks
ESMA	European securities and markets authority
HCJP	Haut Comité Juridique de la place financière de Paris
NCB	National central bank
RG AMF	Règlement général de l'Autorité des marchés financiers
SICOVAM	Société interprofessionnelle de compensation des valeurs mobilières
SRB	Single Resolution Board
SRF	Single Resolution Fund
UCITS	Undertakings for collective investment in transferable securities

## OTHERS

Art.	Article
Ass. plén.	Assemblée plénière
Comp.	Compare
Concl.	Conclusions
<i>Contra</i>	Contrary to
Et al.	Et alii
<i>Ibid.</i>	<i>Ibidem</i>
<i>Infra</i>	See below
<i>Op. cit.</i>	<i>Opus citatum</i>
p.	Page
<i>Supra</i>	See above
t.	Tome
V°	<i>Verbo</i>
Vol.	Volume

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