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The Application of the Public Order Clause on the Financial Market as One of the Elements for Building Sustainable Finance in a Comparative Perspective

Abstract: The public order clause is an instrument of private international law that limits the possibility of applying the law of a designated country in cross-border contractual relations. The role of the clause is to protect the specific interests and values of a given legal order, the importance of which is so significant that it justifies refusing to apply foreign law or limiting the scope of its application. From the point of view of the subject of this study, the public order clause could potentially be applied by national supervisory authorities in a situation of a threat to the security and stability of a given financial market. Thus the purpose of this article, in which the author uses the functional approach of the comparative legal method, the historical-descriptive method and the dogmatic method, is to verify the thesis about the possible use of the public order clause as an instrument supporting the process of building sustainable finance, along with its limitations in the form of the French concept of *effet atténué* and also from a comparative and cross-border perspective.
Keywords: public order, financial markets, sustainable finance, French law, *effet atténué*

Introduction

The global financial crisis of 2008 (Zajdler, 2013, p. 28), the pandemic and the war in Ukraine have meant that some economic and financial assumptions have begun to be questioned, while others, such as the idea of sustainable finance, have begun to gain significantly in importance. It has been noted that legal security and financial stability are values that should not only be built over the years, but should also be constantly protected. Thus the financial market, which is the subject of analy-

sis in this article, has turned out to be an environment not fully capable of self-regulation, and in consequence requiring actions and regulatory instruments to allow it to return to equilibrium or to prevent destabilization. The increased role of cross-border relations on the financial market and the need to make use of rules about conflicts of law have made international private-law regulations more important than before (Mariański, 2020, p. 19). One such non-obvious instrument, developed on the basis of conflict-of-law rules, that could be applied in relation to the development of a sustainable financial market, may be the public order clause. The application of this clause on the financial market as an additional security mechanism, to strengthen legal security and legal certainty, also results from the fact that, after the bankruptcy of Lehman Brothers, we are no longer talking about the absolute security of global financial institutions, and thus about the absolute security of the entire market.

This security of the financial market, understood broadly as an environment in which the exchange of capital is carried out, can be ensured by implementing the idea of sustainable development as a basis for building a stable and crisis-resistant financial system in the long term. The concept of sustainable development may be defined as a tool leading not only to economic growth, but in the long term also to the elimination of the disproportions and instabilities within a given society. In this context the financial system, composed of financial institutions and markets, plays a key role in the realization of goals of sustainable development. This is why the potential application of a public order clause could be an interesting mechanism that would ensure the system's stability. The interconnection between the financial market, sustainable finance and a public order clause refers to the fact that today, we have overlapping processes on the financial markets between general investment based on financial efficiency and investment concerning social responsibility – including environmental, social and governance (ESG) criteria (Dziawgo, 2019, p. 24) or even general clauses about public morals (Kubuj, 2022, p. 101). Also, in the light of the growing importance of the concept of sustainable development and turbulence in the economy caused by exogenous factors (the Covid-19 pandemic and the war in Ukraine), new methods of assessing the functional risk have an increasingly important role (Rogowski & Lipski, 2022, p. 33). Thus the purpose of the present article is to verify the thesis about the possible application of a public order clause as an instrument supporting the process of building sustainable finance, along with its limitations in the form of the French concept of *effet atténué*, and also in a comparative and cross-border perspective. The verification of the potential effectiveness of a public order clause in the specific legal framework of the financial market and in relation to sustainable development rules will require the analysis not only of the specifics of the financial market but also of the limits of how the public order clause might be applied.

The methodology used to achieve the goals of the article refers to the functional approach of the comparative legal method, the historical-descriptive method and the dogmatic method. The comparative legal method in relation to financial markets and

sustainable development can be perceived not only in theoretical terms as *ex post* guidance for legislatures, but above all in a practical sense as an element which is useful in the application of legal regulations (Tokarczyk, 2008, p. 25). Comparative law is both a science and a research method, and the effects of research conducted from this perspective is not limited to only one legal order. Comparative legal studies are aimed at learning and understanding law in a broad context, at the level of legal relations related to more than one country, and therefore at the supranational level (Szymczak, 2014, p. 37). It is this aspect that makes comparative research extremely important in the field of financial-market and sustainable-development rules, which are both characterized by their cross-border and often international nature.

Thus the modern supranational financial market, in which parties can choose the law applicable to their transactions, should be subject to certain restrictions, which may include, among others, a public order clause. This clause may, in addition, support and secure the economic, environmental and social perspective that is necessary in conducting sustainable risk-management processes. It is also worth noting that financial markets and sustainable development are fields that interpenetrate each other. This is related to the fact that they have both a cross-border and, often, an international nature. Also, sustainable development needs to be financed through the mechanisms ensured by the financial market, and the financial market is a legal environment where new, innovative solutions are very quickly adapted and implemented.

One of the many aspects of the gradual implementation of the idea of sustainable finance on the financial market is the requirement to publish a strategy for tackling risks related to sustainable development within a given activity and ensuring the transparency of such an introduction, based on the EU disclosure regulation of 27 November 2019.[1] In addition, the EU has introduced a legal framework for classifying financial products and services as compliant with the implementation of environmental objectives, regulations providing for the obligation to take into account the sustainability risk, regulations addressed to brokerage houses concerning a product management area (product governance) or taking into account customer preferences related to sustainable development in the distribution process. This process is supported by the development of regulatory technical standards by the authorities which form the system of supervision over the financial market in the EU – the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Supervisory Authority.[2] The creation of this supervision system at the European Union level was preceded by a long debate

1 The disclosure regulation (EU 2019/2088), in conjunction with the Taxonomy Regulation (EU 2020/852), defines new standards for dealing with sustainability risks, negative sustainability impacts and advertising social and ecological aspects, as well as sustainable investments.

2 Those bodies shall develop further regulatory technical standards to specify the content, methods and presentation of information related to sustainability indicators.

(Jurkowska-Zeidler, 2010, p. 95), and the final impulse to accelerate work in this area was the financial crisis of 2008 (Nieborak, 2010, p. 97). It was this crisis that made us aware of the need for a new approach to institutional regulation of the financial market that would take into account the cross-border aspect to a greater extent than before (Mariański, 2020, p. 267). French doctrine emphasizes that the crisis has shown the limited effectiveness of national supervision in relation to processes of a supranational nature (Valette, 2013, p. 22). Thus there was a need to create a model that would strengthen national supervision in relation to the cross-border, complex and technologically innovative nature of operations on the financial market. The doctrine rightly points out that the modern financial market additionally intensifies the development of a digital economy, and in consequence changes in the traditional method of regulation (Szostek, 2021, p. 44) as well as the process of financialization, understood as increasing the impact of the financial sphere in everyday life (Nieborak, 2021, p. 161).

Financial market law as a new research specialization was distinguished in France as early as the 1980s (Causse, 2015, p. 23), while in Polish doctrine it was fully recognized after Poland's accession to the European Union (Kosikowski & Olszak, 2010, p. 195). Its cross-border nature, understood as a connection with more than one legal area, allows the parties to transactions on the financial market to shape their legal relationship in a way in which they can choose the final law applicable. In this context, there is an additional risk, consisting in the possibility of using conflict-of-law rules in such a way as to avoid EU regulations in the field of sustainable finance. Therefore, there is a risk that many entities on the financial market, for whom ESG criteria are a cost and an organizational problem, will look for legal systems where such requirements do not apply. One of the mechanisms developed by private international law capable of protecting the financial system against the use of conflict-of-law rules to avoid the application of the principles of sustainable finance could be the public order clause.

1. The concept of the public order clause in the financial market

It needs to be emphasized that the goal of sustainable finance is to ensure long-term financial and legal security. At the same time, due to the internationalization of the financial market and the frequent connection of transactions concluded within it with more than one legal area, it is necessary to find a mechanism that could protect European regulations against the indication of such applicable law that would avoid regulations in the field of sustainable development. Thus, if we consider that regulations relating to sustainable finance and sustainable development are part of the basic principles of a given legal order (Polish, French or European), then it would be possible to apply the public order clause known in private international law. It is worth noting that the jurisprudence of French courts has identified the principles that con-

stitute *l'ordre public* and, among other things, the possibility for every country to create the scope of this term independently and individually. I will therefore very often refer to French law as a legal system where the analysed clause, as well as its limits, was developed and afterwards adopted in many other EU Member States.

The public order clause is understood as a way of protecting a given legal order against the interference of foreign legal solutions, but only when the effects of this interference would be irreconcilable with the elementary legal principles of this legal system (Ziemblicki, 2014, p. 97). It may potentially be very important in the case of protecting participants in the financial services market (Lijowska, 2006, p. 699); therefore its role in ensuring legal security and the stability of regulations relating to sustainable development may be significant. It is worth underlining that the doctrine of financial-market law has already noted the possibility of a subsidiary application of this clause as a tool to strengthen institutional market supervision (Mariański, 2020, p. 184).

The public order clause is an instrument of private international law (understood as conflict-of-law rules) that limits the possibility of applying the law of the state designated by the parties as applicable. The role of the clause is to protect the special interests and values of a given legal order, if the importance of these values is so significant that it justifies the refusal to apply foreign law (Bagan-Kurluta, 2017, p. 168). From the point of view of the subject of this study, the potential application of the public order clause could limit or eliminate the use of conflict-of-laws rules to avoid the application of national or EU regulations on sustainable development on the financial market.

As part of the comparative law aspect, it is worth noting that the concept of the public order clause has its roots mainly in French law. The basis for this statement refers to Art. 6 of the French Civil Code, which, despite the reform of 2016 that made revolutionary changes in terms of *causa* (Cvetkova, 2021, p. 91), continues to exist unchanged (Lemonnier & Mariański, 2017, p. 295). The article in question states that it is not possible to circumvent legal provisions falling within the scope of public policy (*l'ordre public*) or good morals by means of contractual arrangements. French doctrine emphasizes that this article contains many vague terms and therefore should be analysed each time by the competent court or authority that intends to refer to it (Terré, 1996, p. 3). In view of this, it is assumed in France that we are dealing with many national public orders, not with one universal and common public order even at the European level (Redor, 2001, p. 85). In addition, especially with regard to cross-border financial markets functioning largely on the basis of so-called soft law regulations, an alternative concept of international public order has appeared, referring, among other things, to global security and financial stability (Poillot-Peruzzetto, 2009, p. 93).

In Polish law, the concept of the public order clause was originally contained in Art. 55 of the Obligations Code of 1933. This article provided that parties conclud-

ing a contract may arrange their relationship at their discretion, as long as the content and purpose of the contract are not contrary to public order, law or good morals. However, the public order clause was not maintained in the Civil Code of 1964, and appeared in Art. 6 of the Private International Law Act of 12 November 1965. The original wording of this article provided that foreign law could not be applied if its application would have consequences contrary to the fundamental principles of the legal order of the People's Republic of Poland. Subsequently, the new Private International Law Act of 2011 also incorporated this clause, specifying in Art. 7 that foreign law shall not apply if its application would have consequences contrary to the fundamental principles of the legal order of the Republic of Poland. It is also worth noting that both Polish and French law have a certain common part relating to this clause, as it is also present in international and European Union law, such as, for example, the Rome I regulation (Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, 2008).

From a historical perspective, going beyond Polish and French law, the origin of the public order clause has been found by some authors as early as in the views of the medieval statuters, and especially in the concept of the so-called *statuta odiosa* (Zachariasiewicz, 2018, pp. 6–7). Provisions with a similar function to today's public order clause were also developed in the 12th century by the Bologna scholar Aldricus, who argued in particular that one should take conflicting norms into account and apply the one that seems more right, which from the judge's perspective is the one that will allow the obtaining of a fairer result. Although this theory was not significantly developed in European continental law, it nevertheless survived in the common law system in the form of Robert A. Leflar's better-rule test as a tool for strengthening the international rule of law and applying a legal standard better adapted to given circumstances. It is also worth noting the concept of the Italian lawyer Bartolus de Saxoferrato, who justified the refusal to apply foreign law not only by its contradiction with the fundamental principles of a given legal order, but also by its territorial scope (Zachariasiewicz, 2018, pp. 7–8).

A contemporary way of understanding the construction of the public order clause, both in French (Poillot-Peruzzetto, 2009, p. 94) and Polish doctrine (Ludwiczak, 1990, p. 74), is with an analysis through the prism of its purpose, which is related to the sufficient protection against the application of foreign law providing the regulations that threaten the basic (including constitutional) values accepted in a given legal order (Pazdan, 2011, p. 28). Thus the public order clause is a kind of reservation of a certain legal system, as a result of which the provisions of foreign law indicated by conflict-of-law rules are, exceptionally, not applied, and is in the procedural dimension – that a foreign judgment is not recognized or declared enforceable if it would be difficult to accept from the perspective of the interests of the forum state (Przyśliwska, 2017, p. 69). Due to this, this clause is often identified as a certain security filter, which in some important cases may limit the application of foreign law. So,

for example, the Polish Supreme Court, in its decision of 11 October 2013, reference I CSK 697/12, confirmed that the public order clause sets the limits within which the application of foreign law is allowed. It is also aimed at protecting the significant political, social, economic or moral values preferred by the legal system of a given state. The analysis of the public order clause in reference to French law is related to the fact that the Polish legal system has modelled itself on French solutions in this field, as well as in the field of financial-market law and sustainable development.

It is worth mentioning that the reference under the public order clause to effects contrary to the fundamental principles of the legal order applies not only to principles that are hierarchically the highest in the legal system, but also to those that are particularly important due to their functions in the legal system. Therefore, apart from the fundamental constitutional principles, this category also includes the guiding principles governing individual areas of substantive and procedural law, including in particular civil law, but also financial law or financial-market law. The Court of Justice of the European Union has also commented on the application of the public order clause to the norms of EU law. For example, in the judgment on *Diageo Brands BV v. Simiramida-04 EOOD* of 2015, it was stated that Member States remain free in principle to determine what the requirements of their public order are, according to their own national conceptions, and what the limits of that concept are. Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State. In another judgment, *Rūdolfs Meroni v. Recoletos Limited* of 2016, it was added that a judgment shall not be recognized if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. This shows an awareness of the use of the above-mentioned institutions also in relation to EU law, and thus in the context of European regulations and standards in the field of sustainable development related to the financial market.

2. Limits of the public order clause

As the application of the public order clause is considered an instrument of last resort, doctrine and jurisprudence have developed a number of limitations in its application. In my opinion, the public order clause, despite its limits, could be a very useful tool for protecting the domestic financial market against the operation of cross-border entities trying, for example, to admit products or solutions onto the EU market that were created without respecting the principles and requirements of sustainable finance and development.

Restrictions on the possible use of the public order clause have been most fully developed in France, where the concept is referred to as *effet atténué* (weakness effect), translated by representatives of Polish doctrine as the concept of restrained interference of the public order clause (Zachariasiewicz, 2018, p. 241). The idea of *effet atténué* has its genesis in the jurisprudence of the French Supreme Court (Cour de Cassation); it was expressed for the first time in the judgment of this court of 17 April 1953 in the case of Rivière (Legrand, 2020, pp. 62–69), related to matrimonial matters but having a much broader application. Thus, the French Supreme Court ruled that the reaction to a provision contrary to national public order cannot be automatic and identical every time. Based on this judgment, part of French doctrine states that the application of the public order clause is significantly weakened in a situation where only the disposition of the law of a foreign state previously indicated as applicable to a given legal relationship is going to be applied or recognized. In other words, the scope of impact of the clause is different when a given entity, based on applicable foreign law, demands a new interpretation or the creation of certain rights by French regulations, compared to when the entity only requests that the effects of the applicable foreign law be taken into account. The condition that somehow activates the weakening of the scope of the public order clause is the emergence of a given legal relationship at a certain distance, which may be spatial or temporal. The spatial character refers to the emergence of a legal relationship in a foreign territory; the temporal nature refers to the emergence of the relationship at an appropriate time interval, which would justify the French authorities tolerating the relationship (Hammje, 1999, p. 87).

We may also underline the connections between the French concept of *effet atténué* and the theory of acquired rights. Thus an additional justification for limiting the scope of the potential application of the public order clause is respect for the sovereignty of other legal systems (Zachariasiewicz, 2018, p. 242). French doctrine has also developed the concept of *ordre public de proximité*, which refers to certain territorial restrictions in the application of the general public order clause (Foyer, 2005, p. 297).

The practical effect of the influence of restrained application of the public order clause is a rather sceptical attitude on the part of the judiciary regarding its application. Apart from the precedent-setting judgment in the Rivière case already discussed, French jurisprudence is very cautious in applying the public order clause, in line with the case law adopted in 1953. In addition, the requirement to apply the clause with restraint was extended by the Cour de Cassation judgments of 28 January 2009 on property matters, of 1 December 2010 on the issue of liability for damages and of 7 November 2012 on the validity of the legal form of a document issued abroad. Also, in Polish jurisprudence, the public order clause is rarely used; much more often there is a refusal to apply it, as was the case in the judgments of the Su-

preme Court of 11 October 1969, 12 June 1980and 20 January 1983, and in many other judgments that refer to these (Pazdan, 2001 73).

In my opinion, the use of the public order clause by national institutions, including financial-market supervisory authorities and courts, to protect the financial market may have significant potential to be used in the future. Currently, the concept of the weakened effect of the clause derived from French law seems to be quite firmly established in the European legal order and jurisprudence. However, this concept was shaped on the basis of matrimonial cases, i.e. cases of a completely different nature from transactions concluded on the financial market that are characterized by the mutual penetration of public and private law. The latest French doctrine, including that dealing with the problem of indirect regulation of the financial market (Mariański, 2023, p. 60), also with the use of the public order clause, recognizes its possible application in order to block the possibility of concluding certain financial transactions whose elements are foreign to European legal standards (Mariański, 2020, p. 192). In addition, the doctrine emphasizes that the scale, scope and efficiency of trade on the financial market result not only from the provision of an appropriate organizational environment, but also from the standardization of legal relations. Although international transactions are a permanent element of the global financial market, legal regulations in this area are not free from interpretation problems regarding the indication of the applicable law (Glicz, 2022, p. 56). This undoubtedly affects the level of legal security in this field, and the public order clause is an element that, especially in the context of the unconditional application of the principles of sustainable finance, can additionally strengthen legal security in the dimension of conflict of laws.

To sum up, doctrine emphasizes that the public order clause is not an instrument whose era of application has passed, and that the experience of recent years proves that new, previously unknown challenges appear before this instrument (Szpunar, 2022, p. 211). However, one should be aware that in practice, the protection of fundamental rights and values, which also include the fundamental rights and values of sustainable development in the European Union, may be implemented by means of various instruments, and the public order clause, with all its limitations, may be one of them (Szpunar, 2022, p. 213). Also it seems that sustainable development has become such an important issue that its protection and respect of the rules regulating it have the potential to be part of public order, and thus to have special protection, at least in EU Member States.

Conclusions

The key element of building sustainable finance and a financial market that respects the principles of sustainable development in its regulatory environment is to ensure legal certainty not only in classical terms, but also from a conflict-of-laws per-

spective. Thus, from a cross-border perspective, the public order clause is an instrument that may contribute to the sustainable development of the financial market. The key issue determining the application and effectiveness of this clause seems to be the recognition of ESG integration standards, under European Union regulations and directives on financial products (e.g. ELTIF[3], UCITS[4], MiFID II[5] or PRIIPS[6]), as basic principles of the legal order both at the national and the EU level. With this assumption, the public order clause could support the implementation of the goals set out by the United Nations in the 2030 Agenda for Sustainable Development, from a conflict-of-laws perspective, i.e. related to more than one legal area,.

Thus, by providing greater opportunities to ensure legal certainty, the public order clause could positively affect a faster and more durable standardization of a sustainable market by allowing investors to compare different sustainable-investment products and make their choices without the possibility of violating ESG standards. This may be an incentive to accelerate the development of safe and stable market standards referring to sustainable finance, such as the rules on green bonds, a framework defining the features of a financial product that provides financing for sustainable development (such as the French TEEC label)[7] or the rules of ecological investment funds (Dziawgo, 2013, p. 74).

At the same time, it should be emphasized that from the perspective of a stable and predictable legal framework, an investor must be aware that when starting business in a given country, the law may change, but in a way that maintains certain standards and basic principles of the legal order. These standards include the sustainable development regulations that the public policy clause may protect. Summing up, the potential use of the public order clause to protect and ensure the development of the financial market in accordance with the standards of sustainable development is possible, although it is difficult to implement immediately due to the lack of case law

3 Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 amending Regulation (EU) 2015/760 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules (ELTIF).

4 Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

5 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

6 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

7 Under TEEC *(fr. Transition énergétique et écologique pour le climat),* threshold requirements determine how funds should invest in green industries.

in this area. This, along with technological progress, may change in a situation where courts will update their jurisprudence, including in particular if they come to the conclusion that the security and stability of the domestic financial system, combined with the idea of sustainable development, is one of the fundamental principles of the legal order in EU Member States. Thus, in my opinion, the inclusion of conflict-of-law provisions in both EU and national regulations on sustainable-development standards on the financial market is a postulate worthy of attention. In this regard, the choice or indication of the applicable law by the parties will be limited by the application of the public order clause as an institution that may protect the basic principles of a sustainable financial market. Thus the thesis about the possible effectiveness of the public order clause in the process of building sustainable finance, along with its limitations in the form of the French concept of *effet atténué*, has been positively verified. The potential application of a public order clause in the specific legal framework of the financial market and in relation to sustainable development rules is not only possible but also requested.

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