1 INTRODUCTION

1.1 Background

The volume of global securitisation issuances declined significantly after the 2007/08 global financial crisis.[1] This was mainly due to lack of demand from investors, occasioned by the perceived role of securitisation in the financial crisis, and the inhibitive regulatory reforms that were introduced after the crisis.[2] The regulatory agenda has since changed from one of inhibition to that of revitalisation,[3] the argument being that a revitalised securitisation market is crucial for financial stability and the growth of economies.[4] This has resulted in various legal and regulatory reforms, at both national and supranational levels, aimed at reviving the market.[5] Recent global challenges, such as climate change and the Covid-19 pandemic, have also added a new impetus to the revival efforts. Securitisation is considered a key funding tool to finance a green energy transition and a recovery from

1 Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions, *Criteria for Identifying Simple, Transparent and Comparable Securitisations* (Consultative Paper, Bank for International Settlements 2014) 3f. For the historical data report of issuances in Europe and the United States of America see Association for Financial Markets in Europe, 'Securitisation Data Report – Q4 2014' (AFME 2015) 3 <https://www.sifma.org/wp-content/uploads/2017/05/afme-securitisation-data-report-fourth-quarter-2014.pdf> accessed 08 May 2024.

2 Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions (n 1) 3f. For discussion of some of the reforms introduced in the European Union see Graham Penn and Thomas Papadogiannis, 'Regulating Securitisation in the Aftermath of the Global Financial Crisis: Lessons from Europe' (2021) 36 Journal of International Banking Law and Regulation 225, 236ff.

3 See e.g. Bank of England and European Central Bank, 'The Case for a Better Functioning Securitisation Market in the European Union' (May 2014) <https://www.ecb.europa.eu/pub/pdf/other/ecb-boe_case_better_functioning_securitisation_marketen.pdf> accessed 08 May 2024. See also International Monetary Fund, 'Global Financial Stability Report: Navigating the Financial Challenges Ahead' (IMF 2009) 77.

4 E.g. the European Commission considered securitisation as the bedrock of its ambitious Capital Markets Union and estimated in 2015 that a revived securitisation market could provide more than €120 billion to the economy whilst at the same time enhancing financial stability. See European Commission, 'Action Plan on Building a Capital Markets Union' (Com 468 final, 2015) 4.

5 E.g. the Basel Committee on Banking Supervision published in 2016 an updated standard for the regulatory capital treatment of securitisation exposures, which introduced a preferential capital treatment for "simple, transparent and comparable" securitisations. See Basel Committee on Banking Supervision, *Revisions to the Securitisation Framework: Amended to Include the Alternative Capital Treatment for "Simple, Transparent and Comparable" Securitisations* (Bank for International Settlements 2016) paras 113ff. For an outline of the revitalisation efforts in the EU, England, France and Scotland, see section 3.3.

the Covid-19 crisis.[6] Yet global issuances remain impaired.[7] This is especially true in Europe (including the United Kingdom), where issuances have been steadily declining since the financial crisis, with the total issuance in 2023 declining by almost 21% from 2018 and 47% from the 2007 pre-crisis level.[8]

Securitisation involves the sale of a pool of receivables (typically loans) by an originator to a special purpose vehicle (SPV) for the purpose of transforming the receivables into liquid assets (such as bonds and commercial papers). It is a complex financial technique, and its success depends on whether a particular jurisdiction has the legal infrastructure to enable every aspect of the transaction. It has been noted that any deficiencies in meeting the legal requirements of the transaction can lead to "a complete transactional bar".[9] Various jurisdictions address these requirements differently, with each solution having differing effects on the scope and development of securitisation in the relevant jurisdiction.

A major requirement that arises when structuring securitisation transactions is the need to effect a true sale of the receivables and related security rights. Legal systems generally require a publicity act to be completed before the transfer of property rights can be fully effective (see discussion in chapters 5, 6 and 7). The following has been written about property rights and the need for publicity:

> [b]ecause property rights affect third parties, natural justice requires that such rights should only arise in circumstances where they are apparent to third parties. In other words, property rights should be public.[10]

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6 See e.g. Organisation for Economic Co-operation and Development, *Mobilising Bond Markets for a Low-Carbon Transition* (OECD 2017) 85ff; Council Regulation (EU) 2021/557 of 31 March 2021 amending Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation to help the recovery from the COVID-19 crisis [2021] OJ L116/1.

7 A major exception is the United States of America, where issuances have generally recovered. This is mainly due to the activities of government-sponsored entities like Fannie Mae and Freddie Mac. See Association for Financial Markets in Europe, 'Securitisation Data Report – Q2 2019' (AFME 2019) 6 <https://www.sifma.org/wp-content/uploads/2019/09/Europe-Securitisation-Quarterly-2019-09-23-AFME-SIFMA.pdf> accessed 08 May 2024.

8 Association for Financial Markets in Europe, 'Securitisation Data Report – Q4 2023 & 2023 Full Year' (AFME 2024) 22 <https://www.afme.eu/Portals/0/DispatchFeaturedImages/Securitisation%20Data%20Report%20Q4%202023%20and%202023%20Full%20Year.pdf> accessed 08 May 2024. For the 2007 data see Association for Financial Markets in Europe, 'Securitisation Data Report – Q4 2009' (AFME 2010) 3 <https://www.sifma.org/wp-content/uploads/2017/05/afme-esf-securitisation-data-report-2009-q4.pdf> accessed 08 May 2024.

9 YA Dvorak, 'Transplanting Asset Securitization: Is the Grass Green Enough on the Other Side?' (2001) 38 Houston Law Review 541, 542. See also Philip Wood, *Law and Practice of International Finance* (Sweet & Maxwell 2008) para 28.07.

10 Joanna Benjamin, *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (Oxford University Press 2000) 105f.

Although the above quotation relates to the creation of property rights, it is also true for the transfer of property rights. The nature of the publicity required depends on the type of property and the legal system involved. In some jurisdictions, the standard publicity act required for loan receivables is debtor notification. In respect of security rights, registration is typically used.

The difficulty is that a securitisation transaction typically involves multiple loans and related security rights.[11] Notifying each debtor, or registering the transfer of each security right, can be commercially inconvenient. The originator may also wish to keep the sales confidential for genuine commercial reasons. In addition, the requirement of publicity can make transfers of future receivables impracticable since there will be no debtor to notify, or security right to register, at the time of the transaction.

Existing literature has discussed various aspects of these transfer issues in the context of loan receivables.[12] There is, however, scant attention paid to issues involving the related security rights. Yet the value of ensuring the transfer of security rights in securitisations is considerable. For example, in determining the capital requirement of securitisation exposures for banks and other similarly regulated financial institutions, the risk-mitigating effects of security rights attached to receivables are considered.[13] Also, security rights are key factors considered by credit rating agencies in determining the credit quality of securitisation products.[14]

This book addresses this gap by focusing mainly on the transfer of security rights. It examines and compares the legal solutions for transferring security rights in securitisations, using a law and economics approach. It considers the solutions available in a common law system (using English law as a case study), a civil law system (using France) and a mixed legal system (using Scotland), and aims to determine a model solution that is most efficient for securitisations.

This book acknowledges that a security right is inherently tied to the related loan. The purpose of a right in security is to ensure the performance of a loan. There can be no security where there is no underlying obligation.[15] The loan is the principal right, while the right in security is an accessory. This means that a discussion of the property law principle

11 E.g. the Elland RMBS 2018 Plc transaction involves 39,000 mortgage loans. See Elland RMBS 2018 Plc (Prospectus, 13 December 2018) <https://www.rns-pdf.londonstockexchange.com/rns/5340K_1-2018-12-14.pdf> accessed 28 May 2024.

12 See e.g. Florian Burnat, 'Titrisation v securitisation: a legal comparison of securitisation in France and the United Kingdom' (2008) 2 Law and Financial Markets Review 143–157; Tom Burns, 'The Transfer of Future Rights in Securitisations: A Comparative Study of the Law in England and Scotland' (2009) 24 Journal of International Banking Law and Regulation 35–43.

13 See e.g. Basel Committee on Banking Supervision, *The Basel Framework* (Bank for International Settlements 2022) para 40.94.

14 See Moody's, 'Rating Methodology: Moody's Global Approach to Rating SME Balance Sheet Securitizations' (Moody's Investors Service, July 2021) 2.

15 William M Gordon and Scott Wortley, *Scottish Land Law*, vol 2 (3rd edn, W Green 2020) para 19.07.

of accessoriness is crucial for this book. In particular, this book explores the extent to which *accessorium sequitur principale* applies in the regimes discussed herein. As a general rule, that principle requires that where the principal right is transferred, any accessory rights are automatically transferred with it.[16] If the principle prevails, the transfer of the debt will be enough to carry the related security right. If it does not prevail and a further step is needed to transfer the security right to the SPV, it makes a stronger case for undertaking research (such as this), which focuses principally on the transfer of security rights. Another implication of the accessory nature of the security right is that the transfer of the security rights cannot be discussed in isolation from the related debt. Hence, frequent references to the transfer of the debt are made in this book.

1.2 Structure

This book is organised into two parts. Part I is the introductory part and comprises chapters 2 and 3. The global financial crisis brought securitisation into the limelight. Two influential reports on the financial crisis, the Financial Crisis Inquiry Report and the Turner Review, firmly place securitisation at the heart of the crisis.[17] Also, the inhibitive regulatory reforms and the subsequent revitalisation efforts are direct consequences of the crisis. It is, therefore, relevant to look back at the crisis and discuss the role securitisation played. It is also relevant to consider why securitisation still appeals to businesses despite the crisis, and why a supposed catalyst of the financial crisis became a key solution to the crisis. Part I focuses on these issues. Chapter 2 discusses the nature and process of securitisation, and its role in the lead-up to the crisis. Chapter 3 considers the economic function and value of securitisation.

The analysis in Part I lays the background for the attempt in Part II to offer solutions that will further the efforts to revive securitisation. Part II focuses on the comparative analysis of the transfer solutions in Scotland, England and France. It comprises chapters 4, 5, 6, 7 and 8. Chapter 4 discusses the research methodology. It concludes that the functional approach, the law and economics approach, and the legal transplant are all relevant for the research. Chapters 5 (Scotland), 6 (England) and 7 (France) identify and discuss various solutions available in the focus regimes for transferring security rights, using a doctrinal

16 Other aspects of the accessory principle relate to: (i) the extent and nature of the security right created; (ii) the discharge of the security right; and (iii) the enforcement of the right. But these aspects are beyond the scope of this research and thus will not be discussed. For discussion of the accessory principle in relation to security over land in Scots law see AJM Steven, 'Accessoriness and Security over Land' (2009) 13 Edinburgh Law Review 387.

17 See e.g. Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (2011) xxiii; JA Turner, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (FSA, March 2009) 41.

approach. Chapter 8 compares these solutions with a view to determining the solution, or a model solution, that is most efficient for securitisation. The analysis in this chapter is based on a novel law and economics approach, which uses a leximetric methodology to measure the transfer solutions against six policy objectives. Both Pareto efficiency and Kaldor–Hicks efficiency are used as criteria for measuring efficiency.

The focus on the transfer of rights means that the primary area of research is property law, particularly the law of assignment (or assignation, as it is called in Scotland) in relation to securitisation.