

Contract means contract?

Step-in risk, safeguards and resolution

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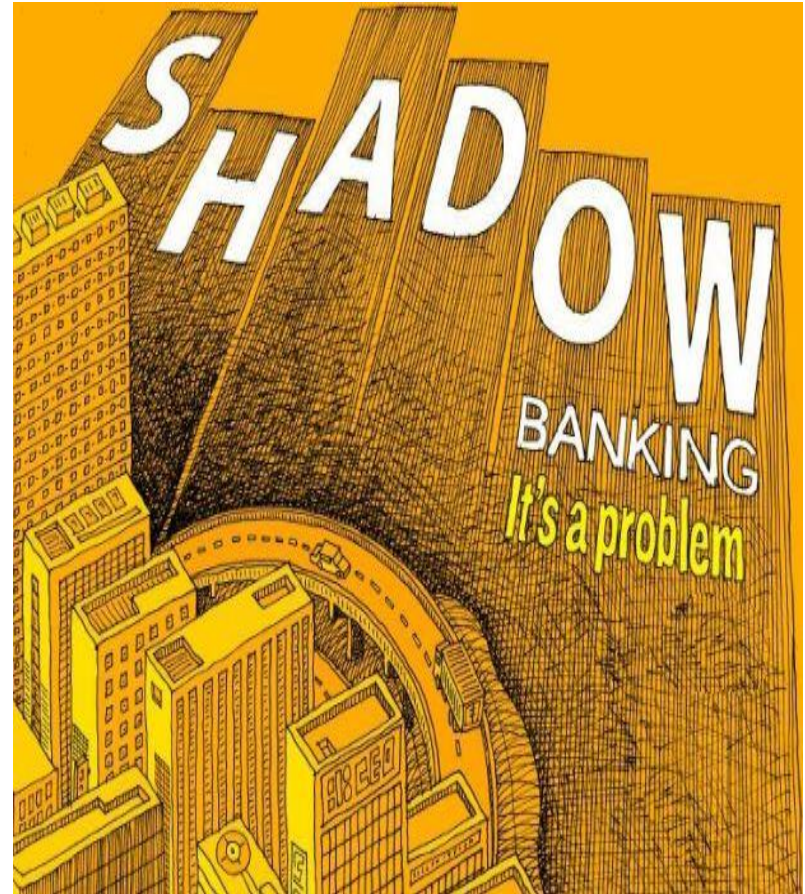
GFC and shadow banking

In wake of GFC:

- resolution framework
- shadow banking regulation

Shadow banking = credit intermediation by:

1. unregulated entities (eg securitisation)
2. unregulated transactions (eg repos and sec. lending)

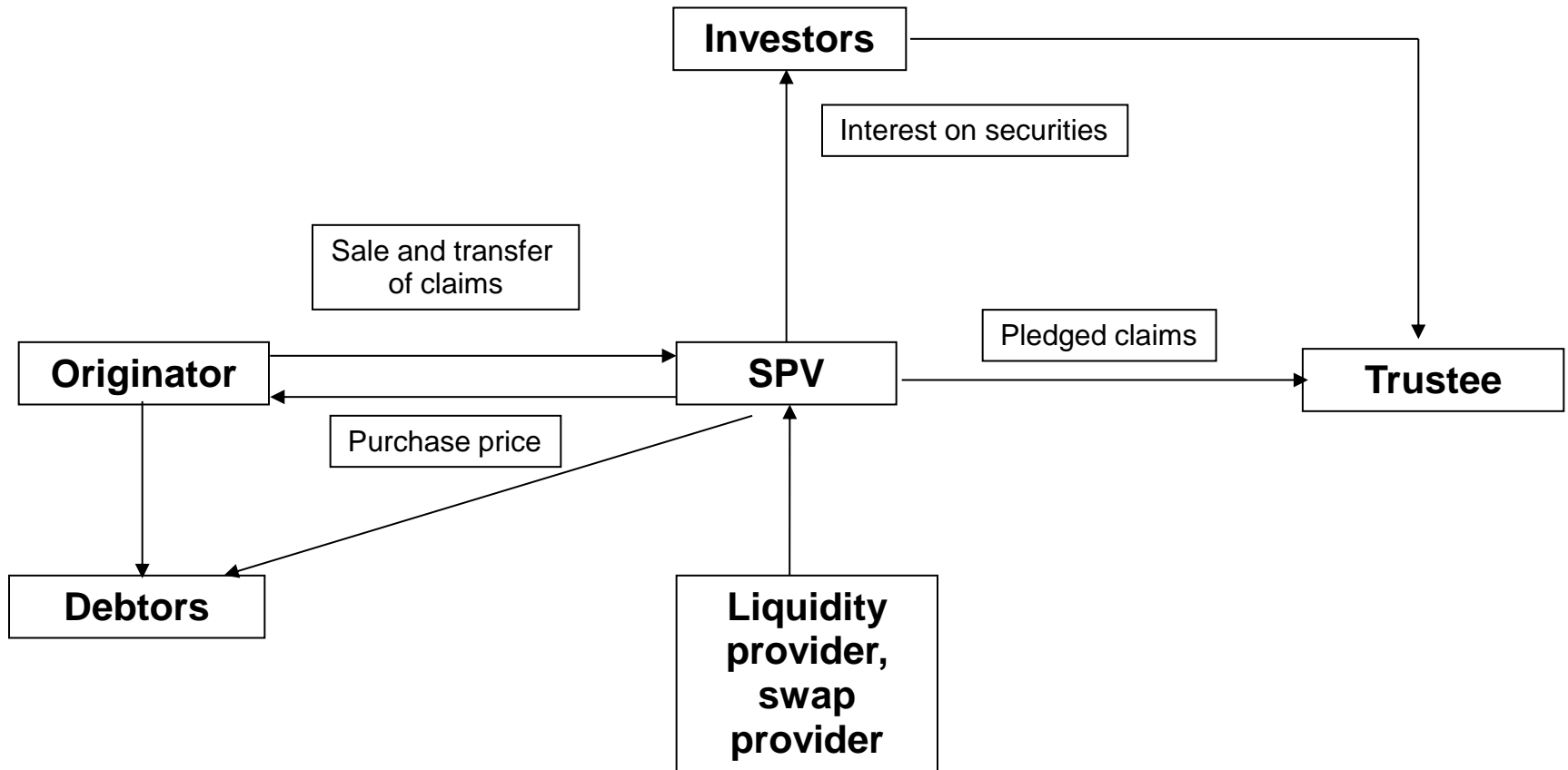


Party autonomy v. public policy

New regime curbs party autonomy in securitisation:

- resolution powers
 - transfer of rights, assets, liabilities
 - termination and modification
 - bail-in
- capital requirements
 - prohibition of implicit support

Securitisation (true sale)



Transfer and termination

Resolution powers

- Art. 63(1)(d) BRRD: power to transfer rights, assets, liabilities
- Art. 64(1)(f) BRRD: power to cancel or modify terms

Safeguards

- BRRD
 - Art. 76(1)(a), 79(1)(a): no partial transfer
 - Art. 76(1)(b), 79(1)(b): no termination or modification
- Proposed Delegated Regulation of 18 March 2016
safeguards to apply restrictively...
 - Only if SPV is under resolution (art. 6(1)(a) Proposal)
 - Only where it regards ‘underlying assets’ (art. 6(2) Proposal)
- ...but discretion for resolution authorities (art. 6(3) Proposal)

Safeguards

public policy (viz. resolution objectives)

- safeguarding critical functions
- protection public funds
- preservation financial stability

v.

party autonomy

public welfare (viz. reduction systemic risk, disintermediation, decentralisation)

- Limit of contractual freedom starting point
- Reversal of traditional private law dogma

Bail-in, capital requirements

Support by Originator:

- contractual, eg:
 - repurchase obligation
 - deferred payment price
 - implicit (to limit reputational risk)
 - risk protection/liquidity provision
- Bail-in limited to contractual claims?
- art. 44(1) BRRD: 'all liabilities'
 - art. 6(1) Proposal: 'any form of risk protection or providing liquidity shall be considered as a liability'

'Prohibition' of implicit support

- Art. 248 CRR: an originator shall not provide support to the securitisation beyond its contractual obligations.

public policy (viz. resolution objectives, reduction systemic risk)

v.

party autonomy (but: systemic consequences?)

→ Contrary to traditional private law dogma

Autonomy v. policy: balance?

- Limitations aim to:
 1. protect economically weaker party
 2. protect third parties
 3. serve public policy
- Public welfare may take priority over autonomy, provided:
 1. benefit to public welfare is unequivocal;
 2. proportionality and optimisation principles are observed; and
 3. balancing is made explicit

Contract...

...does not and probably should not always mean contract in securitisation.



Deuteronomy 23:19

“but unto thy brother thou shalt not lend upon usury”