

## Asset Ownership and Investor's Protection under Sukuk Ijarah

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**Abstract:** The outstanding and enormous growth of sukuk industry has stood as an alternative for conventional bonds and sukuk have been massively used in financing for the last ten years. The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) has classified sukuk in 14 different categories but sukuk ijarah are chosen as they are the most popular structure due to their unambiguous Shariah conformity and familiar leasing formula. This paper analyses the issue of asset ownership and the issue of investors' (sukuk holders) right and protections. It is important to highlight this issue as it could pioneer the solution towards sukuk investors' protection and rights to further improve the development of sukuk worldwide. This paper found that asset-backed sukuk ijarah seem to give more protection to sukuk investors and therefore, it is necessary to focus on asset-backed sukuk rather than asset-based sukuk. However, standardization and harmonization of Shariah ruling among jurisdiction is very much needed before foster this shifting.

**Key words:** Asset-backed sukuk · Asset-based sukuk · Asset ownership · Investors' right · Investors' protection

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### INTRODUCTION

The outstanding and enormous growth of *sukuk* industry has stood as an alternative for conventional bonds and sukuk have been massively used in financing for the last ten years. It is a reaction to the rapid growth in Islamic finance industry and provides an access to the massive Islamic liquidity pool. Although *sukuk* have gained popularity in financing, the series of high profile *sukuk* defaults in the Gulf Corporation Countries (GCCs)<sup>1</sup> and the United States<sup>2</sup> have stunned the market's confidence in the global Islamic finance industry. According to Raja Teh Maimunah [1], the feasibility and viability of *sukuk* in providing long-term financing were badly affected by the problematic *sukuk* in GCC. In addition, the default *sukuk* revealed the weakness of the *sukuk* structure and fanned the debate on investors' rights and protection.

The ownership of underlying assets under *sukuk ijarah* has been debated among Islamic finance scholars

in the past. In the default of East Cameron *Sukuk*, the cash flow from oil and gas was used as the underlying assets. After filing for bankruptcy in 2008, the court has decided that the investors (sukuk holders) have no rights to claims against the underlying assets. Thus, clarification of the legal ownership would increase the investors' (*sukuk* holders) protection and right on underlying assets. In discussing the issue of ownership, it is unavoidable to discuss on the concept of asset-backed and asset-based *sukuk*. These concepts could explain who actually own the underlying asset associated with the issued *sukuk*. However, it has raised another debatable issue namely the protection and rights of *sukuk* investors.

Therefore, this study focuses on the issue of asset ownership under *sukuk ijarah* and will be extended to the discussion on *sukuk* investors' protection and right. *Sukuk ijarah* are chosen as they are the most popular structure due to their unambiguous *Shariah* conformity and familiar leasing formula. International Islamic Financial

Market (IIFM) has reported in December 2009 that *sukuk ijarah* were the most popular structure used in issuing *sukuk* with 38% of the total global issuance. In addition, the presence of underlying asset in issuing *sukuk* is a must to strengthen its structure as well as to comply with *Shariah* principles.

The study contributes to *sukuk* literature by providing comprehensive discussion on the ownership of underlying assets under *sukuk ijarah*. It is important to highlight this issue as it could pioneer the solution towards *sukuk* investors' protection and rights under the conventional law. For instance, investors' rights and responsibilities in Malaysia are governed by English law i.e. Contract Act 1950. Moreover, it is essential to establish the Islamic law or at least to amend the existing law for the sake of contractual parties. Clarification on this issue is crucial in ensuring the reliability and sustainability of *sukuk* in international market. This study aims to provide an elaboration and thoughts on the issue of asset ownership under *sukuk ijarah* in both *Shariah* and legal perspective.

**Research Background:** The presence of asset in *sukuk* structure is very essential in order to meet and conform to the *Shariah* principles. The issue of asset ownership, as mentioned above has been debated in the past years among scholars. Although continuous improvement and development have been done, it seems that the focus is on the conformity of *Shariah* law. One of the issues that might have been overlooked is the *sukuk* investors' right and protection. *Sukuk ijarah* are chosen to facilitate the discussion on this issue. Consequently, it is crucial to understand the definition of *sukuk* as well as the *sukuk ijarah* structure and documentations needed to underpin

the deal, before proceeding to the discussion on *sukuk* investors' right and protection.

**Sukuk Definition:** *Sukuk* have been used by Muslims thousand years ago in commercial activities but the structure was different from the current *sukuk* structure, which is similar to securitization [1]. However, *sukuk* and conventional bonds must be differentiated as bonds are contractual debt obligations [2] and *sukuk* refer to the ownership claims against assets. The Accounting and Auditing Organization for Islamic Financial Institutions –AAOIFI (2002) defines *sukuk* as “certificates of equal value representing undivided shares in ownership of tangible assets, usufructs and services or (in the ownership of) the assets of particular projects or special investment activity”. Accordingly, Bank Negara Malaysia (BNM) and Securities Commission of Malaysia (SC) (2009) refer *sukuk* as “an ownership claims on a pool of assets, or rights to receivables or participation”.

There are 14 types of *sukuk* as defined by AAOIFI, which can be classified as tradable and non-tradable, ranging from simple and common structure to complex structure such as financing a real estate development. However, the most common principles used in *sukuk* structuring are *ijarah*, *mudharabah*<sup>3</sup>, *musharakah*<sup>4</sup>, *murabahah*<sup>5</sup>, *salam*<sup>6</sup> and *istisna*<sup>7</sup>.

**Sukuk Ijarah:** *Sukuk ijarah* represent ownership of equal shares in a rented real estate or the usufruct of the real estate. Figure 1 illustrates the common structure of *sukuk ijarah*. Basically, the *sukuk* owners hold the rights to own the asset collect the rental payment or dispose the *sukuk* at any time. The following are the common features of *sukuk ijarah* as outlined by Nisar [3]:

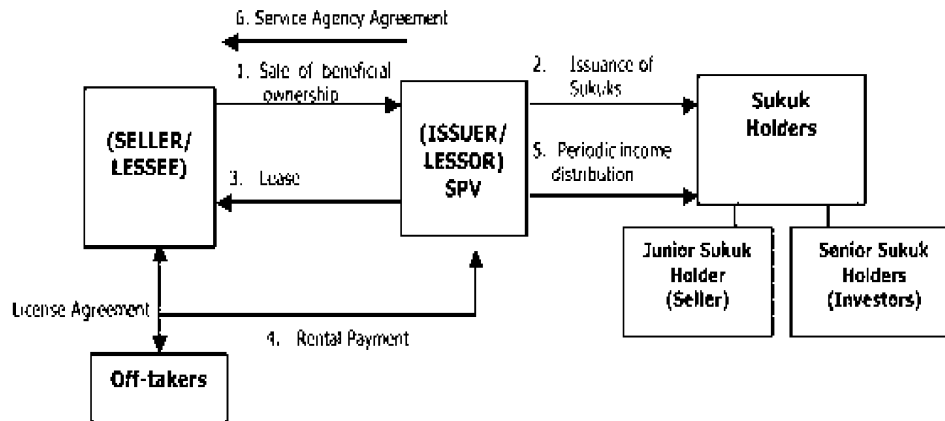


Fig. 1: Common structure of *sukuk ijarah*  
Source: Azmi and Associates (2008)

Table 1 Steps in the *Sukuk* ijarah:

Step	Description
1-2	<ul style="list-style-type: none"> <li>▪ Seller sells its asset to the SPV. SPV will raise Sukuk certificate in equivalent to purchase price to finance the purchase of the asset. Sukuk certificate can be a combination of Senior Sukuk and Junior Sukuk, where Senior Sukuk are subscribed by the investors and Junior Sukuk are solely sold to the Seller.</li> <li>▪ The Sukuk represent the beneficial rights in the asset and the Sukuk holders shall have an undivided proportionate beneficial interest in the asset.</li> <li>▪ The SPV shall declare a trust via a trust declaration over the asset for the benefit of the Sukuk Investors. The Sukuk investors will therefore have a pro-rata undivided beneficial ownership of the asset. (Suggestion: Appointment of co-trustee as an independent trustee for the asset).</li> <li>▪ Appointment of Co-trustee: to ensure there is no conflict of interest arising out of the Issuer's role as initial trustee and to ensure that the interest of Sukuk investors are represented by an independent and professional trust company.</li> </ul>
3-5	<ul style="list-style-type: none"> <li>▪ SPV leases back the underlying asset to the Lessee under Ijarah Agreement(s) for certain ijarah (lease) period.</li> <li>▪ The income received by Lessee from the Off-Takers (from the License Agreement), will be used to pay ijarah rental payments to the SPV. Then, SPV will allocate the rental payment to Sukuk holders as periodic income distribution payment.</li> </ul>
6	<ul style="list-style-type: none"> <li>▪ Seller and SPV will enter service agency agreement to ratify that the Seller is liable for any related maintenance and insurance payments of the underlying asset.</li> <li>▪ Purchase and Sale Undertakings will be exercised by Seller and SPV in the event of dissolution, default or at the maturity of the lease period (the last of which will coincide with the maturity date of the Sukuk). SPV sells back the underlying asset to Seller at exercised Price and the proceeds are used to redeem the Sukuk.</li> <li>▪ Declaration of trust over the asset must be established upon completion of the sale of asset to the Seller. After this declaration, SPV and Sukuk investors no longer have any right or interest on the underlying asset.</li> </ul>

Source: Azmi and Associates (2008)

Table 2: Documentation for Sukuk Ijarah

No	Documentation	Description
1	Asset Purchase Agreement	The agreement is between seller and SPV. It provides descriptions of asset sold by the Seller to the SPV at Asset Purchase Price.
2	Ijarah Agreement	This agreement is between lessor and lessee. It presents the structure of the Sukuk Al-Ijarah as well as the rights of the Lessor and the Lessee under the Ijarah arrangement.
3	Trust Deed	This deed is between Issuer and the Trustee (on behalf of Sukuk holders). It provides the obligation of the Trustee to hold the Asset, denominations and duration of the Sukuk and the form of the Sukuk.
4	Service Agency Agreement	This agreement is between the Seller (service agent) and SPV to assign the Seller as the service agent who bears the responsibility of maintaining the underlying asset.
5	Purchase Undertaking (s) by the Lessee	<ul style="list-style-type: none"> <li>▪ Unilateral, unconditional and irrevocable undertaking to purchase the asset from the SPV at the exercise price (any amount to the nominal value of the Sukuk plus the expenses).</li> <li>▪ Lessee gives undertaking to the SPV to purchase the identified asset from the SPV in the event of default. Once the Trustee's declares default has occurred, the Lessee buyback the asset at the exercise price.</li> </ul>
6	Sale Undertaking(s) by the Issuer	<ul style="list-style-type: none"> <li>▪ Unilateral, unconditional and irrevocable undertaking to sell the asset to the Seller at the Exercise Price.</li> <li>▪ SPV undertakes to sell the asset to the Lessee on the maturity date(s) of the Sukuk (provided that all the outstanding Sukuk and expenses incurred (if any) have been paid in full) at a nominal value of RM1.00.</li> </ul>
7	Seller's Declaration of Trust	The Seller, upon completion of the sale transaction under the Asset Purchase Agreement, will declare that the Seller as bare trustee, and shall remains as the legal owner of the asset only for and on behalf of the Issuer, as the beneficial owner of the asset for the purpose of facilitating the granting of the Ijarah.
8	Declaration of Trust by the Issuer	The Issuer shall declare that it shall act as an initial trustee and hold the asset on trust, either in its name or an appointed nominee or jointly with any person, absolutely for the benefits of the Sukuk holders.
9	Other documents	Deed of Covenants, Subscription Agreement, Depository and Paying Agency Agreement, Issue Agency Agreement, Security Agency Agreement (other documents as may be advised by Lead Arranger).

- Comprehensive details on contract are important and contractual parties must be clearly notified on the leased asset and the amount of rental. It is crucial to ensure the asset/building that is being leased will be ready by the time of delivery.
- Rental payment throughout the period must be determined at the beginning and must be in clear terms.
- In accordance to *shariah*, expenses related to underlying asset will be borne by the owner and lessee will be liable to upholding expenses related to its operation.
- SPV purchases the asset to enable them to issue *sukuk ijarah*. In common practice, the asset will be leased back to the original owner.
- *Sukuk ijarah* are tradable in secondary market as it is entirely negotiable.

**Sukuk Ijarah in Practice:** The execution of transfer of ownership (sale of asset) and *ijarah* contract at same time is prohibited under *shariah* law.<sup>8</sup> In common practice, contractual parties use sale and purchase undertaking to legitimate the transactions. Purchase undertaking act as SPV's (lessor) initial commitments to purchase a particular asset from the originator (lessee). Similarly, sale undertaking could be taken to commit to sell back the asset at maturity to the originator. Although sale and purchase undertaking is not a contract, it is critical in attending to contingencies during the course of the lease such as accelerating the outstanding rentals if the lessee fail to fulfill its obligation [4].

Documentation is crucial towards success in any Islamic contract including *ijarah* contract. For instance, transaction documents for *sukuk ijarah* are based on the negotiation and requirements of all parties. The common documents used to facilitate the transactions of *sukuk ijarah* are shown in Table 2.

**Literature Review:** Although the issue of asset ownership has gained very much attention from Islamic finance scholars, the study on this issue in relations to *sukuk* investors' right and protection are very limited. The discussion and debate among scholars have engineered the improvement of the application of *sukuk* globally. In reflection to this issue, AAOIFI has published six principles as guidance in issuing *sukuk* in 2008. According to AAOIFI, rights and commitment of the underlying asset must be legally sold to *sukuk* holder to make *sukuk* tradable. In other words, asset ownership should be legally transferred in full from originator to *sukuk* holders. Supportively, Howladar [5] has stressed the importance to transfer the asset ownership to *sukuk* holders via true sale to avoid the risk of 'claw back'.<sup>9</sup> By owning the asset legally, *sukuk* investors are entitled to liquidate the asset in the event of originator become insolvent. If the investors are unable to liquidate the asset should the default occurred, the underlying asset has no genuine role in *sukuk* structure [6].

According to Jobst [7] although capital invested in *sukuk* are guaranteed by exercising repurchase agreement, most *sukuk* are still unsecured. It means that the trend in issuing *sukuk* is moving towards asset-based *sukuk*. *Sukuk* has evolved from asset-backed to asset-based *sukuk* [8]. He also highlighted the emergence of asset-light *sukuk*, where the requirement of tangible asset seems to be rather minimal.

**Asset-Backed Sukuk:** Asset-backed and asset-based are the common concepts in securitization process. In the early introduction to Islamic finance, these concepts applied in similar way to conventional process. However, it has improved in accordance to *Shariah* principles. Abdul Aziz and Gintzburger [9] defined Islamic asset-backed securities (*sukuk*) as products derived from securitization process which is converting illiquid assets into cash. *Sukuk* investors are enjoying asset backing and rank above unsecured creditors [10]. The process should be done on true sale basis<sup>10</sup> where the asset ownership changes hands in exchange for *sukuk* certificate. By having these characteristics, asset-backed *sukuk* enable the investors to sell the underlying asset in the case of default, to recover most of their investment.

**Asset-based Sukuk:** Asset-based *sukuk* are capital market securities that are derived from the debt originating from the sale of assets [11]. Under this structure, the originator will repurchase the underlying assets at maturity (or early termination) at par value by exercising repurchase undertaking [12]. As the *sukuk* holders' rights on the underlying asset are restricted in the event of default, asset-based *sukuk* are nearer to debt securities. These *sukuk* purely depend on originator's creditworthiness to fulfill its repayment obligations. Thus, if the originator fails to buy back the asset (e.g. in the occurrence of default), *sukuk* holders have no preferential position in claiming their investment and ranked *pari passu* along other senior unsecured creditor [13]. In contrast to the asset-backed *sukuk*, the latter ignored true sale of the underlying asset.

## MATERIAL AND METHOD

Discussions in this paper is also extended to the application of English law in determining the investors (*sukuk* holders) rights and responsibilities. This study employs qualitative or descriptive research method, which concerns the growing issues and idiographic descriptions. *Sukuk ijarah* are chosen as the legitimacy of the structure is heavily dependent on the presence of underlying assets. Furthermore, *sukuk ijarah* are the most popular manifestation of *sukuk* certificates due to their unambiguous *Shariah* conformity and familiar leasing formula. Data sources include observation, documents and texts (i.e. archival research), annual report, newspaper and the researcher's analyses on the subject matter.

**RESULTS AND DISCUSSION**

**Asset Ownership:** The issue of asset ownership has been discussed and debated worldwide for the last few years. Bay' Bithaman Ajil (BBA) contract raises various legal and *Shariah* issues in Malaysia including the ownership of the asset that strengthen the deal. This issue can be seen on court cases such as *BIMB v Adnan bin Omar* and *Dato' Hj Nik Mahmud bin Daud v Bank Islam Malaysia Bhd*. The disputes have arisen due to the difference interpretation on the transaction under *Shariah* and English law. In citing the above cases, Engku Rabiah [14] concluded that “*the premise of Islamic law is in any transactions of sale contract, it would result in transfer and acquisition of ownership (tamlik wa tamalluk). However, under the English law, the judge only considered the general law on sales of land and transfer of title under the National Land Code 1965 to conclude. The judge seemed to think of the sales as just 'procedural' to facilitate Islamic banking transactions, as if they were not real sales, and thus, no legal transfer of ownership had been effected.*” In jurisdictions where Islamic and English laws are applied, it is essential to consider every concern in both perspectives to avoid future dispute. For certain extent, some of Islamic transactions may purposely design to comply with the *Shariah* law without considering the consequences after the transactions are in practice.

In *sukuk ijarah*, the underlying asset (physical asset of usufruct of the asset) plays important roles to underpin the transaction as well as to fulfill the *Shariah* law requirement. Basically, when the originator sell the underlying assets to the buyer i.e. Special Purpose Vehicle (SPV), the asset ownership also must be transferred to the SPV. In other words, true sale must occur, where underlying asset is legally owned by the Special Purpose Vehicle (SPV). In most case, SPV is acting as a trustee on the underlying asset. As a result of

owning the asset, SPV is able to issue *sukuk ijarah* and sell to the *sukuk* investors to finance the purchase of the underlying assets. Should the true sale does not occurs and the SPV issues *sukuk*, it may violate the *Shariah* principles. In *sukuk* investors’ side, by holding the *sukuk ijarah*, they are actually acquiring the equal *ownership* on the underlying assets and legally own the asset. According to Ahmad Lutfi [15], the customers must own the underlying asset<sup>11</sup> and the ownership should be unqualified or unconditional. Any attempts to qualify the ownership, could make the sale contract voidable. Accordingly, AAOIFI has stressed that the underlying asset of *sukuk* must be owned by the investor and the investors should have right on the underlying assets. However, majority of the *sukuk* in the market ignored true sale on the underlying assets and therefore, *sukuk* investors are mostly not protected against default risk for the whole tenure of the *sukuk*.

**Sukuk Ijarah Classifications:** Abdul Aziz and Gintzburger [16] made a remarkable work in classifying *sukuk* as shown in figure 2. They categorized *sukuk ijarah* under asset-based as they are certificates that represent unbroken possession on leased asset and the right to the leased asset’s cash flow. Furthermore, *sukuk ijarah* fall under *taskik* i.e. *Shariah* compliant illiquid assets are converted to investment certificates and traded in secondary market.

However, *sukuk ijarah* can generally be classified into two broad categories i.e. asset-backed or asset-based *sukuk*. It depends on the nature and the purpose in structuring *sukuk ijarah*. Application of true sale and transfer of underlying asset ownership are the main factors that differentiate both structure. *Sukuk* are categorized as asset-backed when the *sukuk* investors are able to claims against the originator in the event of default. In other words, the sale of underlying asset to SPV would give asset ownership to *sukuk* investors.<sup>12</sup>

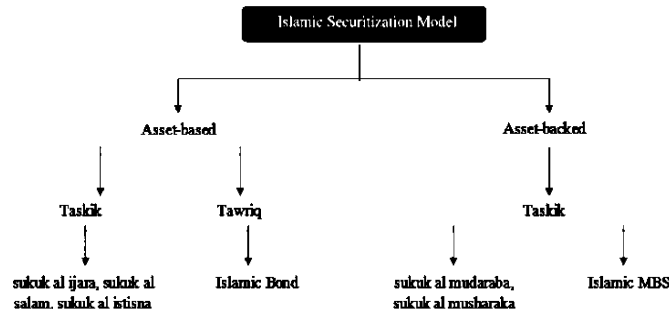


Fig. 2: Classification of sukuk  
Source: Abdul Aziz and Gintzburger (2009)

Under asset-based *sukuk*, the true sale does not occur and thus there is no transfer of ownership. As such, *sukuk* holders have recourse to the originator should shortfall in payments occur i.e. akin to unsecured securities.

The first purely asset-backed *sukuk ijarah* came into practice in 2001 when Government of Baharin issue USD\$250 million *sukuk ijarah* and backed by USD\$250 sovereign assets [17]. It then followed by USD\$150million Gutrie *Sukuk*, which are backed by parcel of land in Malaysia worth than USD\$150 million in December 2001. Subsequently, asset-based *sukuk* were first initiated by Government of Malaysia in 2002 through the issuance of the Malaysia Global Sukuk totaling USD\$600 million. Initially, Malaysia Global Sukuk were asset-backed but have been restructured to asset-based *sukuk* to overcome legal constraint.<sup>13</sup> Therefore, the ownership on the underlying asset was a beneficial ownership rather than legal ownership held through the *sukuk* trustee (SPV) for the whole tenure of the *sukuk* [18]. (Haneef, 2009).

**Sukuk Investors' Right and Protection:** *Sukuk* have been used extensively as a financing method for corporate bodies and governments around the world. The massive growth of *sukuk* issuance was astonished by the series of *sukuk* default in the GCC and East Cameron in the US. As a result, the issue of *sukuk* investor's right and protection has become a major issue as most of the investors realize that they were in position of losing their money. It therefore, leads to the dispute on the underlying assets ownership.

From the above explanation, asset-backed *sukuk ijarah* can therefore be defined as certificates representing the equal undivided ownership on the underlying asset or it usufructs. Hence, the *sukuk* investors are the legal owner of the asset and its usufructs and have total control on the asset. By this definition, asset-backed *sukuk ijarah* investors are categorized as secure creditors and have the absolute right on underlying asset that is being used to issue *sukuk*. Should the default occurs, the *sukuk* investors hold the right to liquidate the asset and may recover most of their investment. Furthermore, *sukuk* investors are also ranked above the others unsecured creditors tied with the underlying asset. The asset-backed *sukuk* issued by Tamweel PJSC were one of the first *sukuk* to apply the concept of true sale in its transaction.<sup>14</sup> In this *sukuk*, the freehold titles to the underlying asset i.e. single family homes were transferred to the *sukuk* holders along with the associated *ijarah* cash flows [19]. As such, any cash

flows arising from the underlying asset are passed to *sukuk* investors. Accordingly, the asset creditworthiness has direct effect on the ability to pay to the *sukuk* investors. In other words, the investors are directly exposed to the asset risk. Nevertheless, the assets will continue to pay the *sukuk* investors upon the insolvencies of Tamweel [20].

In contrast, *sukuk* investors under asset-based *sukuk ijarah* are the beneficial owner of the underlying asset. Through beneficial ownership, the original owner only transfers the benefits and responsibilities of ownership but the property title is remains with the original owner. Therefore, asset-based *sukuk ijarah* are categorized as unsecured creditors and has recourse to the *sukuk* originator in the occurrence of default. As mentioned above, Malaysia Global *Sukuk* were the first international asset-based *sukuk ijarah*. This *sukuk* has transferred the beneficial ownership of underlying assets (government administrative buildings, hospitals and academic institutions) to the *sukuk* investors through the *sukuk* trustee (SPV) for the whole tenure of the *sukuk*. It means the *sukuk* investors are only entitled for the cash flow of the asset and not the entire asset. The *sukuk* investors also are incapable to sell the asset in the event of *sukuk* default but the trustee must sell back the underlying asset to the originator. By law, *sukuk* holders would be treated as unsecured creditors once the *sukuk* trustee disposes the asset to the Government of Malaysia [21].

The subscribers of *sukuk* issued in Malaysia enjoy certain protection as *sukuk* issuance in Malaysia is more lenient compared to other jurisdiction. The resolution by Shariah Advisory Council of Securities Commission allows the principal invested to be guaranteed by third party. It means neither in asset-backed nor asset-based *sukuk*, that the initial investments are considered risk free. In certain extent, originator may not always pay the specified rental or profit at specified time that may lead to the late payment and default. Basically, penalty will be charged on late payment or default but it is prohibited under *Shariah* principles as it is not derived from the underlying asset. However, SAC has permitted the investors to be compensated (*ta'widh*) due to late and default payment. [22-24]. The rate of compensation for late payment of profit is 1% per annum and for failure to settle the principal payment; current market rate in Islamic inter-bank money market will be used to determine the *ta'widh* [25-27]. Furthermore, the *sukuk* investors are also allowed to receive a rebate (*ibra'*)<sup>15</sup> on early settlement [28-29].

## CONCLUSION

Despite the massive development in *sukuk* market, some issues must be clearly defined. The issue of asset-backed and asset-based *sukuk* as well as the application of true sale in *sukuk* transaction is very critical to be resolved in determining the real owner of the underlying assets. Accordingly, true sale is fundamental to avoid the underlying assets to be combined with other originator's assets in the event of the bankruptcy [22-24]. The asset-backed *sukuk ijarah* clearly fulfill the *Shariah* principles and the *sukuk* investors seem to have more protection compared to asset-based *sukuk ijarah*. As such, there is an urgency to move towards asset-backed *sukuk* for the sake of investors' protection as well as the survival of *sukuk* as an innovative financing instrument.

However, before shifting to asset-backed *sukuk*, standardized *Shariah* rulings (*fatwas*) must be established. In current practice, most jurisdictions have its own *Shariah* board that oversees the conformance to the *Shariah* principles. As the result, different fatwa are in practice based on the heterogeneity of Islamic scholar opinion on *Shariah* compliance as well as Islamic school of thoughts. Although some efforts to consolidate the *Shariah* rulings have been carried out by leading organizations such as AAOIFI, Islamic Financial Services Board (IFSB) and the *Fiqh* Academy, the guidelines are not fully implemented in every jurisdiction. Inconsistent *Shariah* rulings could weaken investors' confidence to invest in *sukuk* and hijack the massive *sukuk* development.

<sup>1</sup> Investment Dar, Saad Group and Dubai World's Nakheel *Sukuk*

<sup>2</sup> East Cameron *Sukuk*

<sup>3</sup> Mudharabah is a contract between *rabb al-mal* (capital provider) and *mudarib* (entrepreneur) to fund a business venture. Profit from the business will be distributed according to pre-agreed ratio. However, only *rabb al-mal* is liable for any losses that arise from the venture

<sup>4</sup> *Musharakah* refers to a partnership between two or more parties to fund a business or project, where all parties are contributing capital. Profits and losses arise from the partnership will be shared among contractual parties based on capital contributed.

<sup>5</sup> *Murabahah* refers to sale and purchase contract to funding a particular asset. Cost and mark up of the asset must be notified and agreed upon by all contractual parties. The redemption for the purchase

must be clearly specified in the agreement and it can be done through deferred lump sum or on an installment basis

<sup>6</sup> Salam refers to a contract between two parties to finance a purchase of an asset. In this contract, cash payment must be made at contract date but the asset is only delivered later at pre-determined date

<sup>7</sup> *Istisna'* refers to a contract to purchase assets that will be delivered in the future. Under this contract, the buyer requires the contractor to build the asset and deliver in the future based on the specifications under sale and purchase contract.

<sup>8</sup> Sale of asset (transfer of ownership) cannot be executed along with *ijarah* contract as it may create uncertainty. Should this occurs, it means the contract is signed in advance and become effective at a future date (after sale contract is completed).

<sup>9</sup> Claw back refers to the possibility that those assets may now be reclaimed by the administrator of the insolvent estate and will not be available to repay *Sukuk* investors (Howladar, 2006).

<sup>10</sup> True sale means ownership, rights and commitment on the underlying assets are "legally transferred" to *Sukuk* holders.

<sup>11</sup> Or at least the customer is duly authorized and empowered to deal with the underlying asset.

<sup>12</sup> *Sukuk ijarah* are backed by the asset and they represent the equal undivided ownership on the asset.

<sup>13</sup> "The Federation of Malaysia had previously issued international bonds and some of them were still unredeemed in 2002. All international bonds have a standard negative pledge which restrains the bond issuers from issuing in future any bond that is not in pari passu with the existing unsecured bonds. Given that the Malaysian international bonds were all unsecured bonds, the proposed *Sukuk* issuance was seen as a direct breach of the negative pledge clause given that the *Sukuk* would be backed by the ownership of the underlying assets. As such, the *Sukuk* became effectively a secured bond and would be given priority over all unsecured bonds of the Federation of Malaysia". (Haneef, 2009)

<sup>14</sup> Tamweel PJSC actually issue two types of *Sukuk* i.e. asset backed and asset based *Sukuk*.

<sup>15</sup> According to *Shariah* Advisory Council (SAC), *ibra'* clause in the primary legal document is considered as *syart* (condition) which in compliance with *muqtadha 'aqd* (purpose of contract). SAC has advised that the *ibra'* clause can be inserted in the payment and settlement section.

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