Şukūk in Various Jurisdictions: Sharī‘ah and Legal Issues
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Abstract:

Şukūk are active Islamic finance instruments offered in various jurisdictions and have experienced various events in the recent years. Several şukūk defaults in 2009 highlighted a number of Sharī‘ah and legal issues that are necessary to be discussed. As a part of the prerequisites to fulfil Sharī‘ah requirements, compliance to the relevant laws is also a necessity. Among the issues that will be touched upon is ownership of the asset of the şukūk which will include discussion about ‘al Qabd’ (taking possession). Next, rights of the şukūk holders will be discussed to see whether their interests are well protected and in this context the concept of asset backed will be differentiated from that of the asset based securities. Discussion on the contentious purchase undertaking in şukūk dealings will follow in order to highlight its status and effect on the şukūk and parties to the transactions. Then, the practice of tranching in şukūk issuance will be discussed followed by legal documentation of şukūk issues. In the end, the paper will present way forward for şukūk, so that these issues are further addressed for better şukūk issuance.

Key Words: Şukūk, Şukūk defaults, Şukūk trading; Islamic finance instruments, Purchase undertaking, Tranching in Şukūk, Islamic capital market, Maqasid.

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1 The author is Executive Director at International Sharī‘ah Research Academy (ISRA), Kuala Lumpur, Malaysia. The paper was presented in ICIB 2011 organized by the Riphah International University in February, 2011 at Islamabad. It is mainly based on findings of two ISRA research projects; namely “A Synthesis of Sharī‘ah Issues and Market Challenges in the Application of Wa‘ad (Undertaking) in Equity-Based şukūk” and “A Diagnosis of Tranching in Light of Sharī‘ah Principle” by Mrs. Shabnam Mohamad Mokhtar with other researchers. In fact, part of the detailed findings can be seen in ISRA Research Paper No. 8/2010, “Critical Appraisal of Sharī‘ah Issues on Ownership in Asset-based şukūk as Implemented in Islamic Debt Market”, written by Mrs. Shabnam M. Mokhtar and Dr. Asyraf Wajdi Dusuki. Some of the findings of the project were also presented in OIC Fiqh Academy Conference on şukūk by Dr. Said Bouheraoua and Dr. Asyraf Wajdi Dusuk.
1. Introduction

Islam is a comprehensive way of life, which strikes the balance between the spiritual and the material need of human being. One of the important aspects in human life is the need for an all-inclusive system in order to govern their life and to ensure that the needs are catered adequately including the material needs such as the financial management. This aspect of life is closely related to the fast growing industry in the world nowadays, which is the Islamic financial services industry. At present, over two hundred and fifty Islamic financial institutions are operating worldwide and Islamic banking is estimated to be managing funds of up to the value of US $ 1 Trillion. The annual growth of Islamic financial institutions (IFIs) has been estimated at 15 to 20% worldwide over the past 10 years and is expected to accelerate in the near future.

One of the important sources of financing in the Islamic financial services is the fund generated from the capital markets. Over the last decade, the Islamic capital market has seen significant growth and efforts to further strengthen this area of funding are going on. In Malaysia, the creation of Islamic money market and capital market is no doubt a landmark development in the area of Islamic finance. A wide range of instruments was developed to facilitate the effective management of liquidity and funding by the IFIs. This has facilitated the smooth flow of funds in the Islamic financial system.

Şukūk are one of the important instruments in Islamic capital market. Since inception, şukūk were used as a tool that has assisted in raising capital inside the country as well as funds from international investors. Globally, şukūk issuance has increased over the last decade and it has grown tremendously, even though, there was slow down of issuance during the global financial crisis. Again, the global şukūk issuance for 2011 surpassed the USD34.2 billion peak recorded in 2007.\(^2\)

However, the story of şukūk is not without critiques or blame. Since its issuance, şukūk have been accused to be identical to conventional bonds and not an alternative. This is because they posses some similar features and provide similar economic effects. As a matter of fact, such claims do not befall on şukūk only and many of Islamic finance products have

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initially been developed as replication of the conventional finance products with some modification in order to make them ‘Sharī’ah compliant’. Thus, there was call for re-examination of ṣukūk structure particularly after the famous remarks made by the Chairman of the AAOIFI’s Sharī’ah Board. Defaults in several ṣukūk in 2009 also triggered the need to re-examine the ṣukūk structures and the industry as a whole.

The above events prompted AAOIFI to reaffirm their Sharī’ah standard on ṣukūk and called for review of the current practices in ṣukūk and to move away from the conventional finance practices. The events also highlighted some flaws in ṣukūk and the hidden risks that certificate holders needed to bear as well as the disclosure of shocking results when ṣukūk undergo a legal test. Some unsettled Sharī’ah and legal issues within ṣukūk have been raised that need to be examined further and also to be acknowledge by parties in different jurisdictions who are already involved with ṣukūk or intend to associate with them in the future.

This paper will try to address some of the above concerns starting from definition of ṣukūk and their types as well as the arising Sharī’ah and legal issues. Among the important issues that will be discussed are issues of ownership on underlying asset, tranching, purchase undertaking, legal documentation, ṣukūk trading, credit enhancement facilities and guarantee to the ṣukūk holders.

2. Understanding Ṣukūk

In order to understand ṣukūk from Sharī’ah perspective, it is significant to acknowledge that ṣukūk are different from conventional bonds. It is evident from ṣukūk definition as prescribed by AAOIFI, namely:

“Investment ṣukūk are certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or (in the ownership of) the assets of particular projects or special investment activity, however, this is true after receipt of the value of the ṣukūk, the closing of subscription and the employment of funds received for the purpose for which the ṣukūk were issued”. [Sharī’ah Standard 17, Article 2 (Definition of Investment ṣukūk)]

So basically, ṣukūk are financial certificates that evidence ownership to underlying asset and the income or profit generated by it. From this definition, we understand that ṣukūk do not create indebtedness as the
certificates are not proof of investors’ loan to šukūk issuers as in the case of bonds. In contrast, šukūk certificates are an evidence of šukūk holders’ proportionate ownership of the underlying asset, usufruct or services in the šukūk and they shall receive return based on the performance of the underlying assets. Therefore, šukūk are considered as an investment facility and not a loan which shall not automatically guarantee return to the investors as it depends on asset’s performance unlike return of interest on bonds. However, there are certain structures of šukūk that allow such guarantee and there are also certain parameters for allowable guarantee.

Šukūk are significant instruments in Islamic finance as they allow for global access to capital and provides cross border liquidity management capability. Apart from access to capital, šukūk can be seen to facilitate securitization and allow for equitable wealth distribution as well as shared prosperity. Hence, šukūk are issued by various parties including corporate entities and government. Sovereign šukūk issuance by governments is also gaining popularity as they may facilitate major development projects at national and global levels.

3. Types of Šukūk

There are various ways for šukūk division. Among others are by way of the underlying contract and, therefore, šukūk can be divided as follows:

1. Sale based šukūk which include šukūk structures using the different sale based contracts including Murābahah, Bā‘i al’Inah, Salam and Istisna‘a;

2. Lease based šukūk which are based on Ijarah concept;

3. Partnership or equity based šukūk that are structured based on Mudarabah or Musharakah contracts;

4. Agency based šukūk that are based on Wakalah al Istithmar contract (agency for investment) contract; and

5. Hybrid šukūk which may combine more than two Sharī‘ah contracts to structure the šukūk.

Other classifications are asset based šukūk which are based on deferred sale contracts or Ijarah contracts, or asset backed šukūk which include šukūk structured based on equity or partnership contracts, and this is among the most popular classification. Due to the significance of these
two types of ṣukūk (asset based and asset backed ṣukūk), we need to discuss them in detail:

Based on the Principle Guidelines in IFSB 7- Capital Adequacy Requirement for ṣukūk, Securitizations and Real Estate Investment3, these ṣukūk categories were defined as the following:-

a) “An asset-backed ṣukūk structure that meets the requirements for being an asset backed structure as assessed by a recognised external credit assessment institution (ECAI): this structure would leave the holders of ṣukūk to bear any losses in case of the impairment of the assets. The applicable risks are those of the underlying assets, and these will in principle be reflected in any credit rating issued by a recognised ECAI. (This is the category explicitly covered by IFSB-2.)”

b) An asset-based ṣukūk structure with a repurchase undertaking (binding promise) by the originator: the issuer purchases the assets, leases them on behalf of the investors and issues the ṣukūk. Normally, the assets are leased back to the originator in a sale-and-leaseback type of transaction. The applicable credit risk is that of the originator, subject to any Sharī‘ah-compliant credit enhancement by the issuer. The recognised ECAI will put weight, in determining the rating, on the payment schedule of the repurchase undertaking and the capability of the originator to make the scheduled payments to the issuer (see paragraph 13). Such structures are sometimes referred to as “pay-through” structures, since the income from the assets is paid to the investors through the issuer.

c) A so-called “pass-through” asset-based ṣukūk structure: a separate issuing entity purchases the underlying assets from the originator, packages them into a pool and acts as the issuer of the ṣukūk. This issuing entity requires the originator to give the holders recourse, but provides Sharī‘ah-compliant credit enhancement by guaranteeing repayment in case of default by the originator.”

In fact, when defining these two type of ṣukūk, IFSB-7 explained in its footnotes that ” In Islamic finance, asset-backed structures involve ownership rights in the underlying assets … Asset-based structures in Islamic finance are found in cases where, given the applicable legal environment, the ownership rights over the underlying asset may not

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3 See IFSB-7, p. 3-4
reliably result in an effective right of possession in case of default, and in consequence, the sukuk holders need to have a right of recourse to the originator in case of default”

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4. 2009 Major Sukuk Defaults

Major sukuk defaults in 2009 can be considered as the most recent adverse episode in sukuk industry that has called for scrutiny of sukuk. Various issues were highlighted and more clarity on sukuk transactions was required by all parties especially the investors. This was contributed by court cases revelation on some flaws in sukuk structures. Several issues were raised that entailed the examination of certain aspects which include among others, the ownership of underlying assets, purchase undertaking, tranching and legal documentation.

4.1 Asset Ownership

It is well understood that sukuk certificate is an evidence of investor’s ownership of sukuk underlying. However, the definition of both asset-based and asset backed sukuk, as mentioned above, shows that the practice in both types of sukuk is different. In asset-backed sukuk, true sale is a requirement and thus, the ownership of the asset transfers to the certificate holders and in the event of default, they can dispose it to third party in order to obtain remedy for their losses. In the asset based sukuk, no true sale occurs and the asset is seen as a facility to enable the sukuk issuance and the only recourse the certificate holders have in the event of default is to exercise the purchase undertaking made by the issuer.

Therefore, asset-backed sukuk holders shall depend on performance of the asset for their return and must ensure that the assets generate good cash flow as well as of good value. This is because, if default occurs, their only recourse is on the asset. In contrast, asset-based sukuk holders will have more concern on the creditworthiness of the issuer or other guarantees or collaterals provided by them, rather than the asset. This is so because they shall have no claim on the asset but to enforce the undertaking made by issuer to repurchase the sukuk certificates. Such matter is evidenced in the documentation of sukuk whereby a clause on restriction to dispose the asset is found to be in existence.

Scrutiny and examination of term sheet of sukuk reveals that the above is the general practice in both types of sukuk. It implies that the asset-

4 See IFSB -7, footnote no. 2 and 3.
based 麂k麂k have departed from the Shari’a requirements as underlined by AAOIFI according to which 麂k麂k holders are owners of the underlying asset.麂k麂k documentations reveal that there is no such ownership—in asset-based 麂k麂k, asset is only used as a facility to make the deal possible. As a matter of fact, the asset remains in the issuer or the originator’s book. It is important, therefore, to ascertain the status of such practice in Islam.

Scholars of all times have discussed the importance of ownership in sale and condition to qualify a valid transfer of ownership. A sale for issuance of 麂k麂k certificate should give the effect of ownership transfer and taking possessing (Qabd) of underlying subject matter by the purchaser. Looking into the views of classic jurists reveals that most of them require Qabd to occur after sale agreement is executed. This is based on the narration of the Prophet (pbuh):

“Amr bin Syu’aib narrated from his father that ............. the Prophet has prohibited from [combining] a sale and a loan; to have conditions in a sale contract; to sell what you do not posses; or to get return without corresponding liability (for loss)”

The hadith is considered by jurist as a basis for prohibition of sale of the non-existent subject matter or what cannot be delivered. However, al Qabd can take place explicitly or impliedly. Contemporary jurists have elaborated on the matters and as evident in OIC Fiqh Academy and AAOIFI standards, transfer of ownership or possession can take place minimum via Tahliah and Tamkin (seller providing access without hindrance to the buyer to dispose the commodity as he/she pleases). Nevertheless, examination of 麂k麂k’s term sheet shows that such right is not available to asset-based 麂k麂k holders as normally there are clauses on restriction on disposal of asset although documentation states that 麂k麂k holders are the beneficial owners of the asset. Therefore, there are inconsistencies or conflict of terms in the documentation.

4.2 Purchase undertaking

Purchase undertaking is a vital feature within 麂k麂k because it gives the certificate holders some kind of protection against loss in the event of

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5 For example, see: Risk Factor relating to Mudaraba Asset, at p. 22 of the DP World Offering Circular
7 See OIC Fiqh Academy (Resolution No. 53) and AAOIFI (Shari’ah Standard No.18 ).
default. This is true especially in asset-based ṣukūk as in the event of default, their sole recourse is the enforcement of purchase undertaking by the issuer or obligor. Although Sharīʿah recognizes Waʿad, however, it is considered morally binding but not legally binding by majority of the jurist. Only in certain events it is considered as legally binding from Sharīʿah perspective.

In relation to ṣukūk, Waʿad becomes problematic when it is in the form of purchase undertaking of ṣukūk certificate at face value because at this state, it becomes somewhat like a guarantee of the capital and such is not possible where ṣukūk is an investment instrument. It must base on the principles of Musharaka / Mudaraba. This is based on the legal maxims “no return without risk”. Thus, in all forms of investments, risks are involved and only by assuming higher risk will one deserve high return. If not, the certificate holders will not bear any liability and will be seen as advancing debt or capital to the issuer in return for protected principal plus interest. Thus, not different from bond that creates indebtedness on the part of the issuer towards the certificate holders. However, if undertaking is made to purchase the ṣukūk certificate at market value, Sharīʿah has no objection.

The other controversy of such undertaking was raised in the some ṣukūk defaults where questions were raised on the status of the undertaking from legal perspective. Does the law recognize it as a guarantee or not. It is significant because it determines the priority of ṣukūk holders in claims against the originator or issuer in event of default. It shall determine whether they rank as secured or unsecured creditors.

4.3 Tranching

Further scrutiny of ṣukūk aftermath with regard to the major ṣukūk defaults revealed another questionable practice in ṣukūk that required re-examination, namely the practice of tranching. This is because many scholars raised objection on similar practice that is done in issuance of shares. However, examination of various ṣukūk documentations revealed that it has not been practiced widely but rather found only in certain ṣukūk.

Tranching refers to the practice of slicing of capital structure in ṣukūk issuance and it is done via subordination where there is a prioritization process through which losses are allocated to different layers of investors. Tranching also involves the practice of time tranche where ṣukūk holder’s

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8 OIC Fiqh Academy (Resolution No. 40 - 41)
certificates have different time of maturity. The former involves subordination where different investors are divided into different layers based on their capital contributions, the risk that they are willing to absorb and different return that they expect. Careful examination of Sharī‘ah contracts shows that such practice is not allowed especially in equity. Long before tranching in ṣukūk, scholars have discussed the issue of subordination in shares and the majority had disallowed it.\footnote{See AAOIFI Sharī‘ah Standard No. 12} Such ruling was made based on the legal maxim:

“Profit is based on the agreement of the parties, but loss is always subject to the ratio of investment.”

However, there are ṣukūk which have mentioned the term ‘Tanazul’ in their tranching practices such as Tamweel ṣukūk.\footnote{Refer p. 38 of Tamweel Offering Circular} This is a new concept that requires review on Sharī‘ah view on the practice of subordination in ṣukūk. Notwithstanding, it is argued that ‘Tanazul’ is only valid when one has actually received the return or seen the extent of loss that he has to suffer, then will only Tanazul shall take effect. One cannot waive something that he does not know or posses. It results into the unwanted uncertainty (Gharar) that makes the transaction invalid. Similarly Ibra‘, a concept that is said to be closely related with Tanazul, requires that the subject matter of waiver needs to be in existence before Ibra‘ can be executed.\footnote{Refer Ahmad Basri bin Ibrahim (2010). *Islamic Preference Shares: An Analysis in light of the Principles of Musharakah and Tanazul*, paper presented in International Conference on Islamic Banking & Finance: Cross Border Practices & Litigations, held in 15-16 June 2010 at IIUM, Kuala Lumpur at p. 15} Nevertheless, this issue needs in-depth study as deducing Sharī‘ah ruling on tranching in ṣukūk will require its examination in the light of various types of ṣukūk and the underlying contracts.

### 4.4 Legal documentation

Apart from adhering to the Sharī‘ah requirement, ṣukūk has to adhere to the legal requirements as well and thus it needs to be properly documented. As Islamic finance is still a nascent industry compared to the conventional system, the legal documentation follows much of the conventional practices. Thus, it is a requirement that Sharī‘ah scholars have the capability and ample time to scrutinize ṣukūk’s legal documents as it shall evidence the rights and obligation of the parties as well as whether justice and Sharī‘ah guidelines are followed. It has been said that
caution need to be exercised as complex transactions involve sophisticated documentation.

The default by major sukūk also caused disputes between parties and some cases were brought to courts. Legal examination revealed that there may be some legal flaws and issues as well. It is feared that courts are not familiar with Sharī‘ah based transactions and may wrongly interpret the contract as the legal documentation will be the main reference in relation to the transaction. Notwithstanding that, there is also concern that legal documents do not match the Sharī‘ah requirements thus allowing chances for the transaction to be declared as null and void. Among other issues that may come under court’s examination are non clarity and conflict of terms in the contracts. An example of this is the conflicting terms in contract in relation to asset disposal clause and beneficial ownership on trust assets. Another issue is the legal status of purchase undertaking as to whether it amounts to a guarantee or not, thus determining the priority of asset-based sukūk holders’ claim to the issuer or the obligor in comparison with their other creditors.

Apart from that, asset-based sukūk documentation reveals that underlying sukūk assets are not well elaborated in the documents. It causes injustice to the sukūk holders whereby they cannot ascertain the real asset nor can monitor its performance. Caution needs to be administered so that it does not result into ignorance of subject matter (Jahalah fi Ma‘qud ‘alaih) by the sukūk holders and the transaction becomes void due to existence of Jahalah and Gharar, the prohibited elements in Islam.

It is stressed, therefore, that Sharī‘ah scholars need to examine sukūk legal documentation as well and not only sukūk structures as the documentation will be brought to court and is expected to explain the transaction and spell out the rights and obligations of the parties. Negligence in this regard may cause a fatal judgement by court and a ground to declare the transaction non Sharī‘ah compliant and thus, invalid. In this regard, AAOIFI’s pronouncement No. 6 cannot be taken lightly as it states:-

“Sixth: Sharī‘ah Supervisory Boards should not limit their role to the issuance of Fatwa on the permissibility of the structure of sukūk. All relevant contracts and documents related to the actual transaction must be carefully reviewed {by them}, and then they should oversee the actual means of implementation, and then make sure that the operation complies, at every stage, with Sharī‘ah guidelines and requirements as specified in
the Sharī‘ah Standards. The investment of ṣukūk proceeds and the conversion of the proceeds into assets, using one of the Sharī‘ah compliant methods of investments, must conform to Article (5/1/8/5)7 of the AAOIFI Sharī‘ah Standard (17).”

5. Other Concerns on ṣukūk

The above are the unsettled issues that were raised as a result of the major ṣukūk defaults. However, prior to that, the ṣukūk industry was shocked by a different revelation. In November 2007, Sheikh Taqi Usmani declared at AAOIFI Conference that 85% of ṣukūk issued globally were not compliant to the Sharī‘ah rules. The reasons for his declaration were distributed to the public in his writing, namely “Ṣukūk and their Contemporary Applications”.12 His condemnations were mainly on ṣukūk Musharakah and Mudharabah which are mostly known as equity ṣukūk as well as partly on ṣukūk Ijarah. Following that discussion erupted and ṣukūk went through strict scrutiny globally. Among the issues raised were ṣukūk trading, protection of face value, issues in ṣukūk redemption and emphasis on adoption of Maqāṣid approach. These issues shall be discussed briefly in the following.

5.1 ṣukūk Trading

Pursuant to the pronouncement by Sheikh Taqi, AAOIFI conducted several meetings, consulted various scholars and made the following pronouncement in relation to ṣukūk trading:-

“**First**: ṣukūk, to be tradable, must be owned by ṣukūk holders, with all rights and obligations of ownership, in real assets, whether tangible, usufructs or services, capable of being owned and sold legally as well as in accordance with the rules of Sharī‘ah, in accordance with articles 2 and 5/1/2 of the AAOIFI Sharī‘ah Standard (17) on Investment ṣukūk. The Manager issuing ṣukūk must certify the transfer of ownership of such assets in its (ṣukūk) books, and must not keep them as his own assets.

**Second**: ṣukūk, to be tradable, must not represent receivables or debts, except in the case of a trading or financial entity selling all its assets, or a portfolio with a standing financial obligation, in which some debts, incidental to physical assets or usufruct, were

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included unintentionally, in accordance with the guidelines mentioned in AAOIFI Sharī‘ah Standard (21) on Financial Papers”.  

The statement affirms the provisions of AAOIFI standard on Investment ṣukūk especially on the conditions for ṣukūk trading and significance of ownership. At that moment, there were disputes on the status of ownership of ṣukūk holders as some ṣukūk appeared not to confer all rights and obligation to ṣukūk holder; for example, although ṣukūk holders are partners in the venture, but they are not entitled to dividends like the share holders. This refers to dispute on beneficial ownership that is being practiced overwhelmingly based on principle of equity and trust in common law due to difficulty to execute legal ownership transfer. In relation to this, some scholars adopted the opinion that difference of law between countries need to be recognized and what matters is an arrangement whereby the ownership by the ṣukūk holders may not be disputed following all the local law’s requirement and procedures.

The other significance is to deal with condition to issue and trade the debts. AAOIFI and Middle East scholars are against Ba‘i al dayn (sale of debt) and thus emphasise that ṣukūk with debt or receivables as underlying are not tradable. It is the other condition to ṣukūk trading apart from ownership of ṣukūk underlying by the ṣukūk holders. However, because most of the financial institutions’ assets comprise debts, hybrid ṣukūk have been innovated which include a mixture of asset, debt and equity as underlying asset so long as the debts do not exceed the tangible assets or equity. The renowned example is the 2003 IDB USD 400 million hybrid ṣukūk that were based on a combination of assets and receivables under Ijara, Murabaha and Istisna contracts (with minimum 51% Ijara asset). Nevertheless, a different practice is exercised in Malaysia because Ba‘i al dayn is approved by its Sharī‘ah committee and therefore, debt-based ṣukūk have been issued and exchanged within Malaysia. Nevertheless, most of the ṣukūk are held and redeemed upon maturity by the ṣukūk holders.

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13 See Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), accessible at: http://www.aaoifi.com/aaoifi/default.aspx, at p. 1
14 See AAOIFI Sharī‘ah standard and OIC Fiqh Academy Resolution on sale of debt prohibition.
5.2 Protection of Face Value (Principal)

It was observed that certain mechanism was installed into giáק to allow for protection of the face value, namely the purchase undertaking based on Wa‘ad. However, at that stage, only legitimacy of such Wa‘ad was examined and in-depth legal scrutiny was not made. The aftermath discussion mainly stressed on its status from Sharī‘ah perspectives as can be seen in the following.

This issue was pursuant to the finding that many equity-based giák guarantee return of capital by binding undertaking from manager or the issuers that they will buy the underlying assets or equities based on the purchase price. Such practices are not valid as it means that the issuer or manager is guaranteeing the return of capital by way that the underlying assets are loss proof. Thus, no matter how the venture goes, profitable or loss-giving, the investors’ capital is seen as somewhat always safe. Of course, this suit the appetite and wishes of the investors but it is not Sharī‘ah compliant as it impose unnecessary and invalid burden on the giák issuer or manager. In a partnership contract, the Mudarib or partner is not allowed to guarantee capital except in case of mala fide actions or negligence.¹⁵ Nor the agency contract allows the combination of Wakalah (trust) contract and guarantee.

Some argue that the undertaking is a valid unilateral Wa‘ad and thus binding and enforceable. Although this is agreed by many scholars and Fatwa institutions but it is not without cautious application and with certain conditions. For instance, an undertaking cannot be used to defeat the purpose or essence of the main contract. In Mudrabah and Musharaka giák, the undertaking applies in a way that the capital of the partnership is guaranteed that defeats the maxim of ‘no gain without risk’ and ‘profit comes with liability’, thus the giák can no longer be called as investment giák. In addition, AAOIFI Standard No. 17 has prescribed that such undertaking (to purchase at the nominal value) is not valid except if the underlying assets are to be sold according to the market rate or at a rate mutually agreed upon at the date of redemption (Clause 5/2/5). It is also confirmed in AAOIFI Sharī‘ah Standard No.12, clause 3/1/6/2 and Standard No.5, clause 2/2/1 and 2/2/2.

There may be an argument that such undertaking does not imply actual guarantee; in this respect, there is a need to emphasise that tools and

¹⁵ Partners to Musharakah and Mudarabah (the investment manager) cannot guarantee, Sheikh Taqi p. 8
mechanisms in *Sharī‘ah* based transactions cannot be observed from the form only but the substance is more pertinent. Apart from that, these instruments need to be assessed both from financial and *Sharī‘ah* aspects. Thus, in this instance, one may argue that such undertaking is an issue only when at maturity, the underlying asset’s value is less than the market price, but it is not an issue at all if it is above the market price or on equal value. But it would be a *Hilah* (trick to circumvent any prohibition). The current practice requires careful observation of *Hiyal* and *Makharij* that are being applied in Islamic finance. Hence, the above proposition needs to be reiterated.

5.3 Nature of Return

The other questionable issues included the nature of *sukūk* returns and reference to LIBOR or other interest based benchmarks to structure the returns. The former refers to any credit enhancement facility that is added to equity-based *sukūk* deal so that to ensure that *sukūk* holders receive the expected returns. This includes liquidity facility in the form of *Qard al-ḥasan*, (benevolent loan) and prescription of incentive fee. These two mechanisms allow for fixed disbursement of expected returns on *sukūk*. The former refers to stipulation of loan by the issuer or investment manager for shortcomings in the periodic distributions of profits. Since it is stipulated in the contract, it obliges the manager with this additional burden and therefore the basic rule of the partnership or investment namely sharing of risk and reward is compromised. Certainly, this is not in accordance with the objectives of the *Sharī‘ah* and it might fall under the prohibition of ‘*sale with credit*’.\(^{16}\) In addition, such arrangement serves as a form of guarantee on specific return like in conventional debt whereby interest is guaranteed apart from capital. However, it may be said that there is not any issue if the lack is in the cash to be distributed and not the actual profit? However, for distribution, the issuer undertakes to pay investors from his money with the intent to reimburse once the profit is realised. Some scholars have indicated that giving such loan by the manager is fine so long as the manager can get back the amount from *sukūk* holder’s return or their capital contribution. Nevertheless, most scholars are inclined towards another alternative remedy, a reserve fund to be created out of the periodic profits, or a third party financing may be utilized to cover the shortfalls of the distribution.

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\(^{16}\) Prohibition of sale side by side with credit as it may lead to implicit *Ribā* and exploitation of any of the parties.
In addition, the incentive fee provision refers to the practice that if the actual profit is above the prescribed percentage, all the extra sum will go to the manager as incentive fee for good management or additional profit to the issuer. Majority of the classical jurists considered such offering of incentive to the manager (an investment agent) as *Makruh* as it generates uncertainty in profit distribution. However, there is *Sharī‘ah* justification that supports the lawfulness of this arrangement.\(^\text{17}\) Majority of contemporary scholars approves this provision. This was followed by AAOIFI Standard No. 13 article 8/5. However, such arrangement is not in line with the real purpose of *Shirkah* and the objectives of *Sharī‘ah* as it fails to promote equitable distribution of profit to all investors. Apart from that, the percentage is not linked to the expected profit but to the interest rate in the market, without connection to the profitability of the venture. It is an awkward situation whereby the incentive for good management of a joint venture is given based on the prevalent interest rate and not actual performance.

Thus, there is a need for other benchmarking mechanism to be adopted other than interest based benchmark. Alternatively, actual profit calculation and apportionment should be used. The creation of an alternative benchmarking mechanism is extremely significant, not only for *ṣukūk* but also for other Islamic finance products.

5.4 *Maqāsid*

Some scholars also condemned the *ṣukūk* industry practices because they were of the opinion that although *ṣukūk* may satisfy most of *Sharī‘ah* legal requirement but they are far away from the objectives of *Sharī‘ah* which include promoting distributive justice and removing harm. The most of the *ṣukūk* posses some features similar to bond and various guarantee mechanisms negate the identity of *ṣukūk* as investment instrument. It is also because of *ṣukūk* return’s linking with LIBOR. It is timely that Islamic financial institutions move forward towards genuine *Sharī‘ah* operations and distance away from the conventional practices.

It is important for all Islamic finance stakeholders to comprehend that although *Sharī‘ah* compliance is significant but consideration of the higher purpose of *Sharī‘ah* is also not less significant. Thus, it is important to look into the products comprehensively, to include undertaking a study on their economic and social impact.

\(^{\text{17}}\) See Sheikh Taqi. 2008; p. 5.
6. The Way Forward

Looking into all the arising issues in *ṣukūk*, it can be said that reform is needed and the *ṣukūk* industry cannot be left at the current state of affairs. However, it shall not involve reform in the *Sharīʿah* scrutiny only as has been highlighted in previous discussions. Emphasis is required onto the following matters as well:-

6.1 Legal Practice Reforms

It is said that in all sophisticated transaction, like *ṣukūk*, documentation risks require paramount consideration or else it could result in substantial litigation risk. It is essential, therefore, that the legal documents are clear and the parties understand it fully and, if required, are able to present it well to the court. Lawyers and contracting parties need to clearly draw the terms and conditions of the documents and understand their implications financially, legally and from *Sharīʿah* perspective. Therefore, lawyers need to have sufficient *Sharīʿah* knowledge so that the legal documentation is in-check. Above all, it is hoped that the judiciary and the courts will get orientation on the principles of Islamic finance and recognize the essentials of *Sharīʿah* based transactions and acquire all the help needed to understand it and decide the cases accordingly.

Islamic finance has experienced many incidents where courts failed to appreciate and understand *Sharīʿah* based transactions and decided according to the English or civil laws. This has happened in the international sphere as well as in countries like Malaysia where the court looked into the transaction as similar to any conventional transaction. It is feared that parties may take the advantage of annulling the transaction by saying that it is not *Sharīʿah* compliant as declared by the court, not knowing the real deal or intention of parties. It is also suggested that a clause is included in the legal documents on alternative dispute resolution whereby parties shall opt for this type of dispute resolution before approaching the courts. This is because parties shall have better opportunity to enforce their will in conducting *Sharīʿah* transaction and the process can be facilitated by a *Sharīʿah* expert who may act as mediator or adjudicator. Moreover, the facility is in existence as there are already two regional alternative dispute resolution centres based in Dubai.

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and Malaysia. Therefore, alternative dispute resolution is a fair arrangement to the parties with the option to pursue the case in court if the former fail to resolve the matter.

The other measures that can be taken as practiced in Malaysia is by providing facility to court to become specialized or expert in handling Islamic finance cases as Commercial Division in High Court which handles Islamic business cases. According to Practice Direction No.1/2003, paragraph 2, all cases under the code 22A (Islamic banking) filed in the High Court of Malaya will be registered and heard in the High Court Commercial Division 4 and this special high Court will only hear cases on Islamic banking. Another pleasing development is that in certain cases, court calls Sharī‘ah scholars as expert witness to clarify the transaction to the court.

As a matter of fact, Malaysia has crossed over another milestone by amending the Central Bank of Malaysia Act to include provisions to make the national Sharī‘ah Advisory Council’s ruling compulsory upon courts and binding upon the parties. Such move is seen generally to be positive in order to complete the chain of Sharī‘ah compliance of Islamic finance products, but some also considered negatively as to negate the independence of court. National Sharī‘ah Advisory Council is considered as a unit of the executive and under the concept of separation of power; it should not in any way have influence on the court.

Apart from that, Islamic finance industry in every national jurisdiction should strive for initiation of a specialized court in Islamic finance which comprises a number of judges who include expert in law, expert in finance and expert on Sharī‘ah. Only then, justice is served to the parties and the industry and the chain of compliance to the Sharī‘ah is not broken.

6.2 Other Šukūk Default Rame dy
Looking into the substantial legal risk and financial uncertainty faced by the parties, considering other remedies than litigation in the event of default is worthwhile. Those remedies may include considering restructuring or refinancing šukūk as may be applied to bond in similar situation. Debt restructuring refers to “the process of a person or business negotiating and agreeing with its creditors to reduce its debt or to revise a

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19 It refers to Kuala Lumpur Regional Centre for Arbitration (KLRCA) and (IICRA) which can deal with Islamic finance dispute cases and give award.
20 See section 51 till section 58 of the new Central Bank of Malaysia Act 2009.
repayment plan”. This is applicable if the issuer or the originator and the assets are still viable and sustainable from the financial viewpoint but only facing some temporary difficulties, thus, there is no need to invoke insolvency law and risk the interests of all parties. Like debt restructuring, it is hoped that sukūk restructuring will assist the issuers or the originators who are facing troubles due to liquidity or financial distress. In fact, this alternative remedy is said to be more cost efficient. Actually the Almighty has prescribed in the holy Qur’an, clear guidelines to deal with such event whereby it is stated: “If the debtor is in a difficulty, grant him time till it is easy for him to repay. But if ye remit if by way of charity, that is best for you if ye only knew” [2: 280].

In fact, prior to global financial crisis, sukūk experienced high rise in demand and issuance. Most of sukūk performed well and provided the expected returns to its certificate holders. Although shaken in 2007 by AAOIFI Sharī‘ah Board Chairman, Sheikh Taqi Usmani’s pronouncement on the invalidity of major sukūk issues, the sukūk market continued to operate. Global financial crisis however brought about difficulty to some issuers that have caused them to experience bankruptcy or to fail in making the expected periodical payments, and it involved prominent sukūk such as East Cameron and Nakheel sukūk. Some of the defaults were taken to court for settlements and it was disclosed that investor’s rights are not well protected and they may be in great danger to suffer major losses. Such was not anticipated by the investors as they presumed that their rights were well protected in existence of purchase undertaking from issuer or obligor to purchase the sukūk certificates if default occurs. Thus, it brought about uncertainty into the interest and claim of the sukūk holders and, as mentioned above, there are many questions of law that need to be answered first. For example, when the issuer or the originator falls into bankruptcy, what will be the position of the sukūk/certificate holders, secured or unsecured creditors and does the purchase undertaking entitle them to get priority or become secured creditors? Some Sharī‘ah scholars have covered this issue into discussion. They observe whether such practice as available for bonds can be made available to sukūk as well but they need to analyze and understand the phenomenon in sukūk default first. Dr. Engku Rabiah observed that actually, if compared to the

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22 Among others were Dr. Mohd Daud Bakar and Assoc.Prof. Dr. Engku Rabiah Adawiah Engku Ali.
total sukkuk market value, only 1% of the total sukkuk has defaulted. However, it is undeniable that the default occurred globally as it involved sukkuk default in Kingdom of Saudi Arabia, Kuwait, Malaysia, United States of America and Pakistan. In fact they involve various types of sukkuk with different underlying contracts. Therefore, scholars are of the opinion that the matter is not uncomplicated. The Sharī‘ah rulings will differ depending on the type of sukkuk and the underlying contract.

Detailed studies need to be made; however, preliminary studies have brought some lights onto the issues. For instance, preliminary studies on debt based-sukuk show that it is possible for restructuring it as it involves indebtedness like the practice of restructuring bond. Apart from that, Ijarah sukkuk also can be easily restructured because of the clarity of the obligations and rights of parties. In fact in Malaysia, Ingress and Talam sukkuk have been restructured with various measures. Equity-based sukkuk appear to be more difficult to undergo sukkuk restructuring because it does not involve real indebtedness and therefore suitable Sharī‘ah compliant restructuring measure need to be explored. However, attempt to restructure asset-backed sukkuk is found to be more questionable because of the execution of true sale which makes the sukkuk holders having no recourse to the obligor or issuer but rather recourse to the asset only. Thus, it may be easier if the investors sell the assets and retain back their capital. However, the matter may need rethinking when the assets value in the market is not sufficient to cover for all losses or there are other claims on the asset.

Although sukkuk restructuring could be the preferable choice to the parties, in-depth studies need to be conduct on the best restructuring measures that not only satisfy the parties but also all Sharī‘ah requirements.

6.3 Maqāsid Approach

The concern regarding steps for achieving the ‘higher objective or purpose of Sharī‘ah by some scholars is very valid. However, the objectives of Sharī‘ah will not be achieved if transactions are conducted without parties

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23 It was based on the data obtained from IFIS as of April 29, 2010 where only 16 sukkuk defaulted.
having clear overview of what they are getting into. In addition, it is impossible to achieve the Maqāsid if relevant Shari’ah requirement are not fulfilled. It particularly includes the issue of ownership where issuers do not want to depart from their assets but design artificial transfer in order to get liquidity. Ŝukūk issuance should not be made only to get liquidity facility for some corporation, but real economic impact needs to be obtained as well. It is important that Shari’ah compliance as well as the higher purpose of the Shari’ah become the main consideration for issuing Ŝukūk and profitability is the second. Investors need to understand the unique features of Islamic finance and absorb all risks related to their investments if they wish to gain return. It is timely that genuine Shari’ah transactions are executed and Shari’ah requisites are not compromised or diluted.

7. Conclusion

Various unsettled legal and Shari’ah issues surrounding Ŝukūk may have not made bad impact so far to the current market but it will surely cause trouble to Islamic finance industry in the future, if they are not correctly responded to. Strict Shari’ah and legal scrutiny from times to times need to be carried out so that the unsettled issues in relation to different Ŝukūk deals are unveiled and corrected. Therefore, the two events that took place in 2007 and 2009 should be considered as a blessing in disguise. Nevertheless, the suggested solutions, as outlined in the way forward section, should not be neglected as they can provide immediate solution to the current problem and are believed to have the potential of lasting effect.

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