

# Critical Assessment of the Legal Recourse for the Case of Sukuk Default for the Asset-Backed and Asset-Based Sukuk structures

Mashiyat Tasnia<sup>a</sup>, Is'haq Muhammad Mustapha<sup>b</sup> and Mohammad Hassan Shakil<sup>b</sup>

<sup>a</sup> *Institute of Islamic Banking and Finance, International Islamic University Malaysia*

<sup>b</sup> *INCEIF-The Global University of Islamic Finance, Kuala Lumpur, Malaysia.*

**Abstract—** The paper critically assesses and analyze the Islamic certificate of investments (Sukuk) and its two different structures; asset-backed and asset-based. The focus in this paper is on the issue of legal recourse following the default in asset-based or asset-backed Sukuk as well as its structures. It also provides discussion on the emergence of the Sukuk market as well as the issue of legal recourse in event of default. Based on the relevant literature it is evident that Sukuk default by the institution cannot occur in its true sense, as they're not debt instruments issued by the issuer. Rather, they represent the possession of the Sukuk holders on the underlying assets. From our study, we depicted that, the default has taken place are all Asset-Based type and shared a common structure that is of debt instrument. However, none of the asset-backed Sukuk has defaulted due to following the structure of profit and loss sharing. There is an identical gap between these two instruments and it's essential to reconcile the gap. This can be done by revisiting the roots of Islamic finance and its essential requirements. Besides, we need to get the consensus on how Sukuk differ from conventional instruments and on how they need to be structured to comply with the Shariah.

**Keywords:** *Asset-Backed Sukuk, Asset-Based Sukuk, Legal Recourse, Sukuk default.*

## I. INTRODUCTION:

Sukuk are Islamic certificates of investment. They signify co-ownership of productive resources; services or investment activities known as the underlying assets, that generate fixed or floating returns according to Islamic principles. Sukuk instruments offer an alternative funding tool to conventional bonds and can be structured for a vast array of purposes. Typically, Sukuk are categorized into 'trade-based' and 'participatory', depending on whether they are issued to finance trade or investment. But, in recent years, Sukuk products have seen significant innovation with the introduction of hybrid, convertible, perpetual, retail and regulatory liquidity/capital Sukuk.

This development has been followed by some cases of defaults in issued Sukuk, which has raised several questions about the underlying structures and viability of the Sukuk as an

alternative source of funding. More pertinent concern is the issue of legal recourse in the event of default.

Sukuk are advertised as securities backed by real assets, therein case, the investors should solely be exposed to the risk of monetary loss, the danger that arises owing to fluctuations in the market value of underlying assets, and the periodic rental returns generated by these assets. But normally there would be no default of the complete principal Sukuk quantity, as Sukuk holders are presumed to own recourse to the Sukuk assets, being the legal owner of these assets.

However, notable from close observation of the cases of Sukuk default, it noticeable that most defaults so far occur mostly Asset-Based type of sukuk that shared a common structure of debt-instruments. In the case of Asset-Based Sukuk, the issuers need to guarantee the fixed income (interest) and the capital to the Sukuk holders, which is simply the replication of conventional bonds. Alike bonds, asset-based Sukuk has the possibility of default. Some scholars [2] maintained that this kind of sukuk defaulted in part due to the monetary crisis and the economic downturn that triggered it originators did not earn sufficient revenues to make the promised payments.

On the other hand, none of the asset-backed Sukuk has defaulted, due to the notion that they follow the structure of profit and loss sharing, hence they don't have any debt instrument.

The focus in this paper is on the issue of legal recourse following the default in asset-based or asset-backed Sukuk discerning their respective structures, not on viability of the Sukuk as an alternative source of funding to begin with. Like [12], we analyzed some cases of Sukuk (near) defaults from an Islamic finance perspective. More specifically, we discussed the Asset-based and Asset-backed Sukuk as contemporary types of Sukuk along with their distinctive structures. We also provided discussion on the emergence of the Sukuk market as well as the issue of legal recourse in event of default. Finally, we provided assessment on some cases of Sukuk defaults with basic information on each Sukuk issuance (issuer, arranger, SPV, term period, rate of return etc.). This analysis provides

crucial insights if the development to the Islamic capital markets is to be continued through Sukuk. The recent fragility in the conventional financial sector adds to the relevance of the topic, as investors remain keen on alternative capital market instruments.

The remainder of the paper is structured as follows. We first give a brief overview of the emergence of Sukuk in the Islamic capital market instruments (Section II). We then more sharply define the precise concept and structure of Sukuk (Section III). In Section IV, we present the legal recourse on the event of Sukuk default. Section V, discusses the case studies of Sukuk default and critical issues that emerge from the defaults. Section 6 concludes the paper.

## II. THE ISLAMIC CAPITAL MARKET INSTRUMENTS: EMERGENCE OF SUKUK

The development of modern Islamic finance began in the 1970's and the success of Islamic financial institutions led to a demand for capital market instruments for management of their balance-sheet liquidity. For the purpose, the Council of the Islamic Fiqh Academy of the Organization of Islamic Conference (OIC) legitimized the concept of Sukuk in 1988. This paved the way for an alternative source of financing to meet diverse risk-return profiles and needs of Islamic issuers as well as investors who are not allowed under the Shari'ah principles to trade in interest-bearing debt securities. More recently, the Islamic capital market (ICM) has overtaken the Islamic banking to be the fastest growing component of the overall Islamic finance system, despite being a late entrant into the industry starting in the mid-1990s [4]. Akin to the trends observed in the global capital markets, the Islamic capital market is also exposed to some volatile movements and setbacks including contractions in returns and asset values. However, the ICM has maintained a remarkable positive momentum in attracting diverse investors and issuers from around the world, maintaining steady growth in depth and size. Typically, the Islamic capital markets comprise of three major sectors: Islamic equities market facilitated by the availability of *Shariah*-compliant indices; the Sukuk or as sometimes regarded as the Islamic bond market; and the Islamic funds market. These three sub-sectors have enabled investors to achieve ethical and *Shariah*-compliant returns on their capital. However, among its three sub-sectors, the Sukuk market has garnered the most interest in recent years and issuers in as many as 31 domiciles have now tapped into the *Shariah*-compliant liquidity pool by issuing Sukuk instruments [5].

Interestingly, the first Sukuk was issued in 1990 by a foreign owned and non-Islamic corporation, Shell MDS in Malaysia. It was a Malaysian Ringgit (RM) denominated issue with a modest size of RM 125 million equivalent to US Dollar 30 million approximately [6].

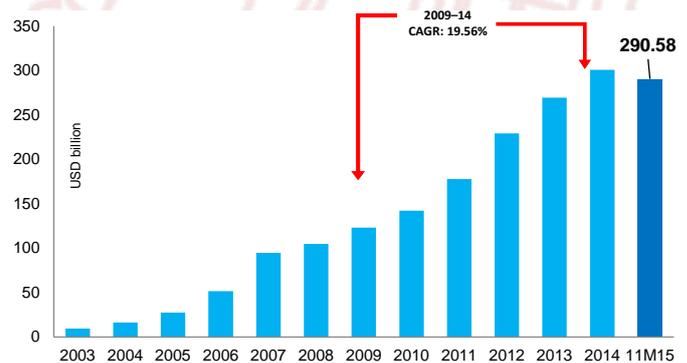
In the year 2000, the Sudanese Government issued 77 million Sudanese Pound (SDG) domestic sovereign short-term Government Musharakah Certificates (GMC's). This was followed by an international debut in the year 2001, with the issuance of the first United States Dollar (USD) denominated

international sovereign Sukuk Al Ijarah of USD 100 million (5-year tenor) and a series of domestic sovereign short-term (less than 1-year tenor) Sukuk Al Salam issued by the Central Bank of Bahrain on behalf of the Government of Bahrain. In the same year, the first 5-year international corporate Sukuk Al Ijarah of USD 150 million was issued by a Malaysian corporate Kumpulan Guthrie Berhad or Guthrie Group Limited. More so, German Saxony- Anhalt became the first non-Muslim state to tap into this market: it issued 5-year Sukuk to raise EUR 100 million in 2004 with AAA rating by Fitch3 [10]. Similarly, The World Bank issued its first Sukuk in 2005 to raise 760 million Malaysian ringgit (RM), 4 while its private sector arm, the International Finance Corporation, issued Sukuk of RM 500 million in 2005 and USD100 million in 2009 [7].

Thereafter, many sovereign and corporate Sukuk issues (domestic and international) have been offered in various jurisdictions such as the United Arab Emirates (UAE), Saudi Arabia, Indonesia, Qatar, Pakistan, Brunei Darussalam, Singapore, Kuwait etc.

Recently, the issuer base of Sukuk further expanded with debut issuances by the Sultanate of Oman and Cote D'Ivoire in the sovereign sector, and a return of issuance by the World Bank's International Finance Corporation (IFC). The global Sukuk outstanding reached an all-time high of USD300.9 billion as at end-2014, recording a resounding post-financial crisis double-digit CAGR of 19.56% between 2009 and 2014 (see Chart 1 ). This growth had been spurred by the heightened activity in the primary Sukuk market where annual issuances had surpassed the milestone USD100 billion mark for three consecutive years between 2012 and 2014 [5].

Chart 1: Global Sukuk Outstanding Trend (2003–11M15)



Source: Zawya, Bloomberg, IFSB (2016).

However, the global *Sukuk* outstanding had a 3.4% contraction at the end of 2015 compared to the record value as of end-2014 to be valued at USD290.58 billion [5]. This drop in outstanding volume has been attributed to the global financial trend and a combination of factors, including a decline in issuances activity in 2015 as well as currency exchange rate movements where local currency Sukuk outstanding are now valued lower in US Dollar terms.

The emergence of the Sukuk market as one of the main sections of the Islamic financial services industry has been well

supported by innovation its structures such as Ijarah, Musharakah, Mudarabah, Hybrid, Exchangeable and Convertible Sukuk structures.

III. CONCEPT AND STRUCTURE OF SUKUK:

The basic concept behind issuing Sukuk, however, is for the holders of the Sukuk to share in the profits of large enterprises or in their revenues [11]. In the Islamic capital market, there are two structures of Sukuk that are becoming more popular, namely asset-backed Sukuk and asset-based Sukuk.

A. Asset-based Sukuk

1) Definition:

Asset-Based Sukuk is a securitization of receivable. It involves a beneficial ownership where no right to dispose of the underlying asset.

According to RAM (Rating Agency Malaysia), the underlying asset in Asset-based Sukuk is not the one to be considered as the fund generator and the capital payments. Rather it is a mechanism to fulfil the requirement of the Shariah. As such, the entity bears the risk of non-payment in the case of redemption of Sukuk [8]. So, the danger of non-payment is rapt towards the entity just in case of redemption of Sukuk

2) Structure of Asset-Based Sukuk:

In an asset-based sukuk, although an asset may be used in the structure, it does not necessarily drive the return to the sukuk holders. Through several credit enhancement features (purchase undertaking, liquidity facility, etc.), the recourse of the sukuk holders is not to the asset but to the issuer. If the asset is not performing, the issuer may still have to pay the expected return by exercising the credit enhancements. If the issuer defaults, the sukuk holders will only have limited right of disposal because they will be required to sell the asset to the issuer. Asset-based sukuk attempts to emulate the behavior of bond issuance in the conventional space [8].

3) Secured Asset-based Sukuk:

In this structure, the originator can deliver the security for assurance and conviction to the Sukuk holders, which will be to secure their dealing. This secured asset-based Sukuk is known as Nakheel Sukuk. These securities are granted to the Special Purpose Vehicle (SPV) underneath the dealing documents to secure the investors. Usually, they don't organize directly. The establishment against the originator, the safety is implemented during the time of default and its recoveries from such are a part of the funds obligatory for the reimbursement to the investors. This security isn't additionally interconnected with the underlying quality. The following figure depicts an example of asset-based Sukuk in Malaysia.

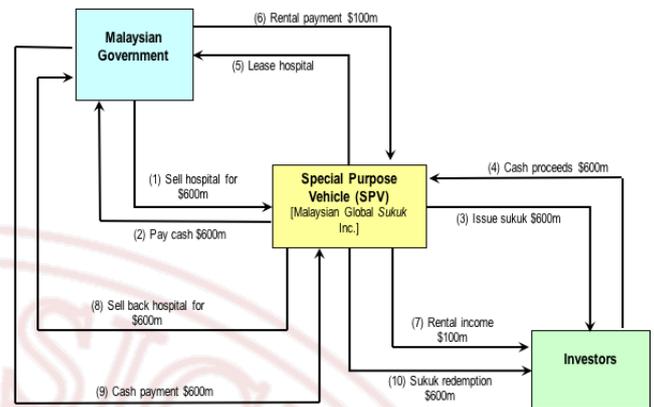


Fig 1: Example of Asset-based Sukuk – Malaysian Global Sukuk Ijarah

- a. The Sukuk investors will pay Sukuk proceeds to the Special Purpose Vehicle (SPV)
- b. Upon receiving the proceeds, the SPV then issue the Sukuk certificates to the Sukuk investors.
- c. The SPV will then purchase an asset from the obligor/ originator and obtains the ownership of the asset.
- d. The SPV in its capacity as a lessor (act on behalf of investors) will lease through an ijarah agreement the same asset back to the obligor.
- e. The obligor in its capacity as a lessee will pay rentals to the SPV of the asset.
- f. The rentals will be distributed back to the Sukuk holders.

B. Asset-backed Sukuk

1) Definition:

Asset-Backed Sukuk means the ownership of the underlying asset is fully transferred. Asset-backed Sukuk are based on true sale. It is the process of securitization of tangible assets and has a legal ownership right to dispose of the underlying asset.

Rating Agency Malaysia (RAM), outlined Asset-backed Sukuk as recourse-able Sukuk. In asset-backed Sukuk, the capital payments and profits are solely generated by the underlying asset; just in case of such Sukuk arrangements; the underlying asset's performance i.e. money flows and/or the assets' maturity price might concern the credit risk. It should be deep-seated with vigorous securitization constituents through that, the obligator will effectively delink from the credit risk profile of the Sukuk [8].

2) Structure of Asset-backed Sukuk

In this type of Sukuk, underlying asset is fully shifted to the Special Purpose Vehicle (SPV) with elements of a true sale. The recourse is to the Sukuk-holders. Thus, cases of impairment or non-performance of Sukuk asset are directly reflected in the value of the Sukuk held by the investors. As described by the Islamic Financial Services Board (IFSB), the investor in an asset-backed Sukuk, bears any losses due to the impairment of

the asset(s). More so, the Sukuk holders have recourse to the asset(s) and not to the originator. Therefore, in case of default, investors will not be able to hold the originator liable, rather, they have to recourse to the asset directly. This exposes them to losses in case of any impairment to the asset.

The following figure shows the structure of Asset-backed Sukuk

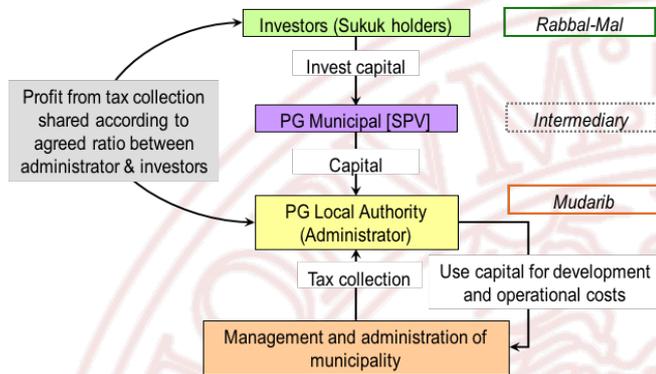


Fig 2: Asset-backed Sukuk structure

- a. The originator will sell the Shari’ah compliant assets to an SPV. In the ABS Guidelines 2004, it clearly states that any transfer of assets to an SPV in a securitisation transaction (this includes Islamic financing receivables) must comply with the criteria of a true-sale.
- b. The SPV then issues the asset-backed Sukuk to the investors. The money paid by the investors in subscribing to the asset-backed Sukuk includes the proceeds of the issuance that will be used to pay the originator in return for the sale of the assets.
- c. An asset-backed Sukuk provide Sukuk-holders with an undivided proportionate beneficial interest in the assets, thus permitting them to receive the streams of cash flow attached to the assets.

Asset-backed Sukuk lead to full transfer of the legal ownership of the underlying asset.

C. Difference Between Asset-based and Asset-backed Sukuk

There are several features that clearly distinct the two the asset-based and asset-backed Sukuk. The following table shows the differences.

Asset-Based	Difference	Asset-Backed
More debt-like structures, “similar” to conventional bonds	<b>Structure</b>	More equity-based
Murabahah, ijarah	<b>Contracts</b>	Musharakah, mudarabah
True sale does not occur, ownership merely “on paper”	<b>Occurrence of True Sale</b>	Sukuk holders genuinely own identified assets
In event of default, Sukuk holders do not have recourse to specific assets	<b>Default</b>	In event of default, Sukuk holders have recourse to specific assets
Cash flow typically fixed or tied to a benchmark (LIBOR)	<b>Cash Flow</b>	Cash flow varies with actual performance of Sukuk assets
Have been criticized as mere replication of conventional bonds	<b>Acceptance</b>	Deemed by some as “more Islamic”
Most Sukuk on issuance today are of this category	<b>Issuance</b>	There are very few asset-backed Sukuk

Table 1: 3. Difference Between Asset-based and Asset-backed Sukuk

IV. LEGAL RECOURSE IN EVENT OF DEFAULT:

With the current structure of Sukuk, the problems still revolve around form over substance of the Sukuk structures whereby asset-based Sukuk structures are prevalent in the Islamic capital market [9].

Asset-based Sukuk just has the usufruct or recipient privileges of the hidden resource. The action plan of the Sukuk is regarded to be unrealistic as the Sukuk is totally considering FICO score and record as a consumer of the gathering sorting out of the Sukuk underwriter or co-parties in commitment to its originator. Such classification of Sukuk does not award speculation testament to the holder of right to aura of hidden resource if there should arise an occurrence of default. The lawful and option approach to get the speculation declaration for the holders is to organize a meeting under the trustee of the Special Purpose Vehicle (SPV). After that, they can issue legal notification to the originator for embrace the buy-back of the hidden resource if there should be an occurrence of default or maturity. However, another legal action that could be used in case of default is the restructuring of the debt raised, by discounted pricing in the principle outstanding. This will make them legally responsible to the originator of the sukuk and the parties may agree that they may own the legal rights to the transactional documents of the restructured debt.

In case of Asset-backed Sukuk, the underlying asset’s legal ownership is transferred to the SPV on a true sale contract basis. Under this type of Sukuk, if the originator defaults, the

investment certificate holders will exercise their legal right to control over the asset. The securitization of this Sukuk structure is obligatory. The money flows that is generated from the asset can measure its credit risk performance. The securitization of the asset to the Special Purpose Vehicle is to require removed from the credit risk of the originator in order that just in case of bankruptcy of the originator for the Sukuk investment certificate holders could claim the underlying asset through the SPV. The investment certificate holder contains varieties of these instruments.

Thus the default increases when the minor defaults rise due to the slow payments by the underlying asset as the investment certificates holders will be compensated according to their respective claim classes. The Sukuk's underlying asset is transferred to the Sukuk holders or investors free of claims of creditors or others. But doing so will create an occurrence where they do not own limited interests in the assets.

## V. REAL CASE OF SUKUK:

### A. East Cameron Gas Company - Asset-backed Sukuk Default

Examining the case of East Cameron Gas Organization (ECGC) 2009 that issued a benefit Backed Sukuk, documented their insolvency insurance in a judicial court expressing that their offshore wells didn't meet the expectations of the returns due to natural hazardous situation. The question raised by the court was whether the investors really have the legal ownership in the oil & gas royalties of the company? The company denied that there was no exchange of legitimate ownership of eminences to Cayman SPV, and it totally was just an advance secured on the oil and gas sovereignties and exhorted the financial specialists to impart the weight to various loan losses inside of the occasion of liquidation of the fundamental resource. The court made the decision in favor of the Sukuk holders expressing that "*Sukuk holders invested in Sukuk as transfer of oil and gas royalties' interest as true sale*" The adjudicator affirmed the assertion of Sale and purchase between the ECGC, their properties found offshore, and conjointly pronounced that the title ought to be exchanged to the Sukuk holders in the contract. The Sukuk holders won the case owing to the Asset-Backed structure of the Sukuk that open venues for the investors to require administration over the benefit inside of the occasion.

### B. Issues and Facts behind the case:

Since the Sukuk is the first run through sponsored by the United States Oil and Gas resources, it required different thought by the non-Islamic powers. Here the legitimate standard of Shariah sees with the Shariah fund and venture view of the traditional lawful framework. Numerous lawful individual from the ECP group concurred with it. The achievement of the Shariah Compliant obligation raising (Sukuk) could have related to numerous contemplations. Firstly, Oil and Gas which are regarded as Shariah agreeable resources. This was the first Sukuk to be appraised by S&P (Standard and Poor's), the first with hedging mechanism and true sale features. The SPV was Cayman Island exempted company and it was more towards risk sharing as the corporate guarantee was absent and investors have no recourse to the ultimate issuer of the underlying assets.

The structure also included a few risk mitigating factors like security interest, reserve account etc. rather these risk mitigation factors shifted the risk away from the oil and gas royalties to the originator [1].

### C. Nakheel Group LLC –Issues on Sukuk Default

Nakheel Holdings 1 LLC is the originator of the Nakheel Sukuk. It's one among three Nakheel World LLC subsidiaries (along with Nakheel Holdings 2 LLC and Nakheel Holding 3 LLC, these 3 firms along acting as co-guarantor of the Sukuk) that are 100 percent in hand by Dubai World, a 100 percent stated-owned company of the government of Dubai. Nakheel Sukuk had 2 major problems. The legal concern and the Sukuk structure that was asset-based. The laws of Dubai didn't supply apparent pointers on however the investors would be treated and what would be the recourse. In Ijarah Sukuk, the sale and lease back concept was applied, in which there was no real transfer of asset by the originator to the SPV, rather it simply provides a leasehold interest of the asset until maturity. Under UAE law, the lease hold rights are not considered as legal or property right which limited investor claims and law to be enforced. However, there was supplementary guarantee by the Parent company to make sure that the investors are protected. This assumption misled the investors in their risk-return choices. The parent company backed off as a guarantor asking Nakheel to settle Sukuk. The investors were conjointly supplied with further mortgage security through a security agent however they were unaware of the Dubai law that within the case of recourse to such assets, they can't claim the govt. assets consistent to Law no. 10 of 2005 amending Government proceedings Code no. 3 of 1996 (as amended by Law no. 4 of 1997), which provides that a government institution may be sued, however that no liability or obligation of such establishment may recovered by means of an attachment on its assets or properties. Additionally, the Sukuk issuing conjointly restricted investor's ability to enforce the encumbered security. The concept of beneficial interest and trust at the Sukuk by the English law were not recognized in Dubai. Therefore, the outcome that typically will come back from the legal proceedings was obvious. Therefore, in 2009 December, the Abu Dhabi granted Dubai \$10billion to repay its partial debts. The Sukuk holders were paid through this loan and their claims were settled and Sukuk was ransomed rather than defaulting. The Sukuk holders during these dealings had not effectively thought about the UAE and Dubai's financial legislation; above all, they didn't take into consideration, the legal framework in Dubai regarding specific needs for granting security rights like the rights created in a very mortgage agreement. The robust legal protection and specific legal limitations regarding governmental entities under UAE law conjointly had a serious impact on the legal choices of parties. Lastly, private jurisprudence, and the social control of English judgments within the UAE, above all, formed what would be a big obstacle if legal proceedings had advanced [3].

## VI. CONCLUSION:

Islamic finance instruments occupy an apace growing niche in world capital markets. Sukuk, specifically, has been bestowed as an alternate to interest-based conventional bonds. They are often seen as asset-backed securities freed from interest and meeting the requirements of Islamic finance. Issued by Islamic and non-Islamic entities alike, Sukuk secure access to an oversized pool of capital in the Islamic world whereas eliminating the elevated risk taking incentives characteristic of conventional financial instruments.

The development of the two types of *Sukuk* created something of a crisis in the *Sukuk* industry, reflecting differing visions of Islamic securitization. One vision seeks to implement profit and loss sharing, while the other appears satisfied with replicating conventional bonds and achieving at least formal if not substantive compliance with the *Shariah*. From our study we depicted that, the default has taken place are mostly Asset-Based type and shared a common structure that is of debt-instrument. However, none of the asset-backed Sukuk has defaulted due to following the structure of profit and loss sharing. There is a gap between these two instruments and it's essential to reconcile these. This can be done by revisiting the roots of Islamic finance and its essential requirements [2].

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