

Special Purpose Vehicles and Corporate *Ṣukūk*: How True is “True Sale”?

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Abstract. *Ṣukūk* is a current hot topic in Islamic finance discussions. This paper aims to examine *ṣukūk* and focus on the initial yet fundamental requirement of “true sale”- one that can determine if a particular *ṣukūk* is, in fact, a Sharī‘ah compliant financial instrument. Ten *ṣukūk* are selected for the test, issued between the years 2004 and 2012 in seven countries. Selection is not random and based mostly on availability of information necessary for conducting the test. The *ṣukūk* are subjected to evaluation criteria developed by the paper and built on legal, financial, accounting and Sharī‘ah requirements. The evaluation reveals that only one of the ten *ṣukūk* met the “true-sale” requirements. The rest contained several violations and therefore could not be considered Sharī‘ah compliant instruments.

Keywords: True sale, SPV, *Ṣukūk*, Sharī‘ah compliance, AAOIFI.

KAUJIE Classification: K14.

1. Introduction

As the volume of *ṣukūk* issues increases over time, so does their scrutiny. Despite various standards, laws and attempts by regulators and standard setting bodies to ensure the growth in asset-backed securitization in general, and *ṣukūk* in particular, cases of default and originator bankruptcy have proven that the practice of *ṣukūk* issuance has so often deviated from those high standards.

With hundreds of pages in prospectuses full of fine print and legal terms that look almost identical for all *ṣukūk*; it is very difficult for common investors to distinguish between asset-backed or

asset-representing issues from asset-based structures. It is more often than not, that even specialists in the field of finance may confuse such structures. It takes an in-depth analysis of the accompanying literature and the governing guidelines of the *ṣukūk*, as well as governing laws of the country where the underlying assets reside to make a conclusion on the essence of the transaction. Even then, courts may have a different opinion if the case is subject to litigation.

Most *ṣukūk* in Islamic finance capital markets are issued on the basis of assets sold to the *ṣukūk* holders from the originator via an SPV. Apart from the issue

of *ʿinah* involved in the sale of assets to *ṣukūk* holders and buying them back; the argument of proponents of these *ṣukūk* is based on the premise that the assets are really sold. This paper verifies whether there is a true sale. It takes a small number of *ṣukūk* issued in different jurisdictions, under different governing laws, using varying Islamic contracts and screens them against evaluation criteria of a true sale. The criteria are established using laws and standards from three perspectives: financial / legal; Sharīʿah compatibility and their accounting treatment; to conclude as to whether or not the structure of each *ṣukūk* qualifies as an asset-representing *ṣukūk* categorization where, a “true sale” transferring assets’ ownership to the *ṣukūk* holders was consummated or not.

The case study comprises 10 *ṣukūk* issuances from Qatar, Bahrain, KSA, Kuwait, UAE, Malaysia and USA; issued between 2004 and 2012. The *ṣukūk* types range from *ijārah*, *istiṣnāʾ-ijārah*, *muḍārabah*, *wakālah-muḍārabah* to *musāṭahah* (where *ṣukūk* are issued against a right to use and develop a plot of land).

For the purpose of this paper, we exclude some *ṣukūk* types such as *murābahah*, *salam* and *istithmār* due to the absence of the true sale element in the formulation of these transactions.

This paper is structured as follows. Section 2 introduces the evaluation methodology and develops the evaluation criteria. This is followed by Table 1 which depicts the main findings. Section 3 provides a brief description of how the results were obtained and comments on each tested *ṣukūk* and section 4 suggests required actions to enhance the level of SPV independence to enable them to have “true-sale” features.

2. Paper Methodology: The Evaluation Process

Our evaluation is based on the criteria explained below that attempt to combine standards and requirements selected from financial / legal, Sharīʿah, and accounting concepts derived from the literature.

The literature on the subject matter of the article is very limited. In addition, available literature on special purpose vehicles doesn’t directly address their Sharīʿah compliance features.

2.1 AAOIFI requirements on issuance of *ṣukūk*

The Accounting and Auditing Organization of Islamic Financial Institutions (AAOIFI) has issued Standard no. 17 to cover the matter of investment *ṣukūk*. This standard sets the Sharīʿah rulings that regulate the issuance of investment *ṣukūk*. Among these rulings are:

- *The issuance prospectus should state that each certificate holder is entitled to participate in the profit and bear a loss in proportion to the value represented by the certificate he/she holds.*
- *The prospectus may not make any guarantees to compensate to the holder of the certificate up to the nominal value of the certificate or to guarantee a fixed percentage of profit. Exception to this is the guarantee in case of negligence or torts on the part of the issuer. An independent third party, however, may grant such guarantees, free of charge. The issuer may also provide tangible or personal guarantees against wrongful acts or negligence.*
- *Issuer of the certificate or its holders may follow any Sharīʿah permissible risk management approach to mitigate the risks associated with the fluctuations of profits. This may include establishing a profit equalization reserve or participating in an insurance scheme or by participating in insurance (takāful) by payment of premiums from the income of the shares of *ṣukūk* holders or through donations (tabarruʿāt) made by the *ṣukūk* holders. (AAOIFI, 2005, p. 134)*

2.2 Sharīʿah requirements on Special Purpose Vehicles

In his article on “The Special Purpose Entity: Its tasks and Sharīʿah framework,” Abozaid (2012) identified Sharīʿah requirements that must be met for the establishment and functioning of the SPV; these can be summarized as follows:

- The SPV has to be an independent entity from the party that established it both financially as well as legally in order to achieve transparency and serve the interest of the investors that it was created for. This calls for discontinuing any relation between them and to leave no power of

the establishing entity (the originator) on the SPV that may involve selling, buying, liquidation or any power that it can exercise over the SPV.

- The SPV should, in fact, serve the rights of the investors and be more than a window that the originator uses to serve its own interests at the expense of the *şukūk* holders; especially when taking into consideration the limited powers that investors can exercise to closely monitor the performance of the SPV. This can sometimes be attributed to *muḍārabah* contract under which many SPV's are established that limits the powers of *rabb al-māl* over the *muḍārib* in dictating how to carry out the latter's tasks.
- The SPV should refrain from providing any guarantees to the investors that are prohibited by Sharī'ah. These guarantees include guaranteeing capital invested, guaranteeing return, or guaranteeing re-purchase of the sold assets at its book value. This is meant to prevent any attempts to abuse Sharī'ah name to establish special purpose entities that provide such guarantees. Re-purchase of sold assets may only be done at fair market value at the time of sale at the expiration of the *şukūk*.

Post-sale re-purchase of the securitized assets by the originator would indicate that the SPV is not in fact an independent entity from the originator. This sale is forbidden as it is considered *'inah*. True sale refers to the transfer of full assets' title to the SPV without retaining any interest (Thomas, 2011, p. 177).

IFSB Standard 7 on capital adequacy requirements for *şukūk*, securitizations and real estate investments issued in 2009 (pp. 3-4) recognizes that *şukūk* in practice take the form of either:

1. *Asset-backed şukūk structures where the applicable risk of the investment is that of the underlying assets and that the holders of şukūk will be the ones to bear the loss in case of assets impairment.*
2. *Asset-based structure which is accompanied by a binding purchase undertaking.* IFSB describes the dynamics of this structure “the issuer purchases the assets, leases them on behalf of

the investors and issues the şukūk. Normally the assets are leased back to the originator in a sale and lease back type of transaction.” Under this type, investors are exposed to the originator's credit risk. IFSB refers to this structure as “pay-through” since the income generated by the assets is transferred to the investors through the issuer.

3. *Asset-based şukūk with “pass-through” structure in which a separate issuing entity purchases the assets from the originator, bundles them into a pool and issues the şukūk certificates. The originator, under this structure, provides recourse to the şukūk holders. The issuer, on the other hand, provides credit enhancement to the şukūk by guaranteeing repayment in case the originator defaulted.*

2.3 Targeted areas of the evaluation

Our evaluation targets the following areas:

(i) Status of the SPV and its rights in the assets

The SPV, as required by different standards and laws, has to be a special purpose vehicle that is incorporated for the purpose of formalizing the subject securitization transaction. Ideally, the SPV is the issuer of the certificates. The underlying *şukūk* assets are transferred to the SPV which will carry out the remaining parts of the securitization process.

The SPV should be a bankruptcy remote entity. This feature is protected by the SPV's commitment to limit its activities to those relating to the securitization transaction exclusively as not to impair its bankruptcy remoteness. Actions that could impair bankruptcy remoteness include, among other things, incurring indebtedness, involving in mergers, acquisitions and other business combinations, and dealing with parents and affiliates.

The SPV, as a representative of the certificate holders, enjoys security interests over the underlying assets. It therefore should have unfettered rights over those assets to pledge, sell, transfer, exchange or otherwise dispose of the assets without any restraining conditions.

The SPV should have the right to perfect its title to the assets when it elects to do so.

(ii) Payment of consideration and periodic distributions

Certificate holders should pay the value of the *ṣukūk* in the form of cash. The amounts are transferred to the issuer, the SPV, which will then transfer the money to the originator as the purchase price for the underlying assets or to be invested in the assets portfolio for *muḍārabah* arrangements.

Determination of the value of the consideration, i.e. the value of the *ṣukūk* assets must be done in a transparent manner. The evaluation has to be conducted and substantiated by a reputable independent party. Sale of assets has to be based on fair market value and results of the independent party's evaluation should be communicated properly to investors and should constitute part of the transaction documents.

As the underlying assets represent the pool in which the consideration is invested, income paid to certificate holders in the form of periodic income distributions should come solely from the assets' pool.

The transaction documents should clearly identify that income is exclusively derived from the *ṣukūk* assets and will only be paid by the servicing agent to *ṣukūk* holders once the same is received from the party utilizing the asset; be it a lessee in an *ijārah ṣukūk* or other parties in the different *ṣukūk* types.

(iii) Lack of originator's control and continued economic benefit

Continued originator's control over the sold assets, whether direct or indirect, can result in damaging consequences to the sale transaction and might ultimately result in re-characterizing the transaction from sale to loan.

Control is manifested in different forms. Favorable arrangements, related party transactions that are not executed at an arms-length basis, decisions that pour in the benefit of a parent or affiliate and clear evidence of influence could all signify control.

Accounting and reporting standards assess transactions' results of operation and company status depending on the essence of the situation rather than the form it takes. Consolidation of entities and their financial results into the financial statements of a company is not necessarily tied to legal and official ownership. Title deeds and legal proof of ownership

are not required to conclude on whether or not to consolidate. The existence of control or significant influence of one entity over the other is sometimes sufficient to convince an auditor that the party is not, in fact, independent and therefore should be consolidated.

If independence cannot be substantiated, and if influence is evidently exercised by the originator over the SPV and its decision making process over the underlying assets, it is clear that originator's control exists and true sale is impaired.

The SPV should be an independent entity that serves the interests of the *ṣukūk* holders. It should conduct its business and make decisions for that purpose and not become an instrument that the originator uses to continue to benefit from the assets or achieve its own objectives.

Continued originator's economic benefit from the underlying assets after they had been sold is another threat to true sale. Originator's involvement with the assets should be limited to those any other lessee, developer or investment manager would enjoy in any regular lease, land development or investment management agreement.

Arrangements to buy, sell or otherwise exchange assets should be completed at fair market value and at an arm's-length basis.

The originator should not be under an obligation to buy back the assets that it initially sold to the SPV in the form of underlying assets of the securitization transaction; or fund the repayment to certificate holders or be obligated to substitute the assets; unless stipulated under warranties agreed.

Asset repurchase agreements should grant the originator the right to elect not to buy back the assets if their prices have declined to a level below economical to complete the purchase, or if the originator no longer requires the assets.

(iv) Recourse and events of default

As owners, certificate holders should have full recourse to the underlying assets in case of default, bankruptcy or insolvency of the originator and its inability to make the due obligations.

Having full and direct recourse entails that *shukūk* holders, represented by the SPV, are able in case of default to take over the assets and dispose of them as they see fit in order to recover their receivables. *Shukūk* holders’ recourse should be exclusively to the underlying assets and not to the originator.

Restrictions on recourse to the assets and directing recourse to the originator indicates that *shukūk* holders do not own the assets but are rather unsecured debtors of the originator and would rank along other unsecured debtors in case of bankruptcy or receivership.

2.4 The Evaluation Criteria

The various standards and requirements from the three mentioned perspectives can be customized to develop an evaluation matrix to test the issuance process of the subject case studies and their accompanying documents with regards to how they meet the criteria for achieving true sale. This will combine the three perspectives mentioned earlier: the legal / financial, Sharī‘ah and accounting perspectives.

The customization process will combine common requirements between the three perspectives and try to use the most realistic and measurable items.

Although a legal opinion confirming the accomplishment of legal isolation is a pre-requisite for any “true sale” to take place and is emphasized by the standards under the three perspectives; such opinion is normally retained as part of the transaction documents and is not made public. Therefore, the matrix will cover the following requirements other than the legal opinion due to the inability of obtaining such documents.

The matrix is divided into four main categories and fifteen sub-categories. Although the significance of the requirements may vary in their impact on the achievement of a true sale, it is not possible to assign different weights to each requirement since the determination of true sale is meant for establishment of legal rights and conclusions are reached based on whether a particular case has met or failed to meet the legal requirements. It is therefore not possible to assign percentages, weights or degrees to which the requirements are met. Rather, the conclusion is determined on a pass or fail basis.

1. Status of the SPV and its rights in the assets:

- 1.1 Transferee is a qualifying special purpose vehicle.
- 1.2 SPV has unfettered right to pledge, sell, transfer, exchange or dispose of the assets free of any restraining conditions.
- 1.3 Issuer can enforce collection and other rights without hindrance resulting from bankruptcy or insolvency of the originator.
- 1.4 The transfer should be perfectible at the election of the issuer.

2. Payment of consideration and periodic distributions:

- 2.1 Sale is made on cash basis and payment should be made at the time of transferring assets to the SPV.
- 2.2 Consideration should be calculated at market value and presented in a transparent manner at an arm-length basis.
- 2.3 Funds are transferred to *shukūk* holders under the servicing agreement only once received from the lessee or other party utilizing the assets.

3. Lack of originator’s control and continued economic benefit:

- 3.1 Originator doesn’t maintain effective or indirect control over sold assets. This can be evidenced by:
 - a. Agreement requiring the transferor to repurchase the assets before maturing.
 - b. The ability to require the SPV to return specific assets other than through a clean-up call that conveys more than a trivial benefit to the originator.
 - c. Agreement where the transferee requires the transferor to repurchase the assets priced so favorably where it is very likely that the transferee will exercise the rights in the agreement.
- 3.2 Originator has no economic interest in the assets. SPV has no recourse to the originator for expense or losses.

- 3.3 Originator is not obligated to substitute the assets except in the case of breach or warranties.
- 3.4 In the case of a decline in the assets' value below economical levels, the originator has the right to refrain from purchasing the assets.
- 3.5 The originator holds power over the SPV's activities with a significant effect on its economic performance.
- 3.6 The SPV conducts business to meet the originator's specific needs.

4. Recourse and events of default:

- 4.1 Originator is not obligated to repurchase or fund the repayment of the assets.

- 4.2 The financing process should not be re-characterized by a court as secured loan.

The evaluation matrix in the following Table 1 shows the results of the analysis of the ten case studies against the above criteria. The results are based on analyzing the offering circular of each *ṣukūk* and its related agreements and undertakings, as well as reviewing other publications related to the issue, and the pronouncements of rating agencies in relation to the basis and justification in the assignment of the *ṣukūk* rating. The matrix is followed by a description of each *ṣukūk* and its securitization transaction and a brief *ṣukūk* analysis.

Table (1)
The Evaluation Matrix

Name of the <i>ṣukūk</i>	Dar Al-Arkan	Qatar AlAqaria	MBB	Al-Mana	Durrat Bahrain	Tamweel	QIIB	AlDar	GE	Injazat
<i>Ṣukūk</i> Type	<i>Ijārah</i>	<i>Muḍārabah</i>	<i>Ijārah</i>	<i>Muḍārabah</i>	<i>Istiṣnā' - Ijārah</i>	<i>Ijārah</i>	<i>Wakālah-Muḍārabah</i>	<i>Ijārah</i>	<i>Ijārah</i>	<i>Ijārah</i>
True sale requirements										
1.	Status of the SPV and its rights in the assets									
1.1	Transferee is an SPV	✓	✓	✓	✓	✓	✓	✓	✓	✓
1.2	SPV has unfettered rights without restraining conditions	×	N/A	×	N/A	✓	×	×	×	×
1.3	Issuer can affect collection / disposal without hindrance	×	×	×	×	✓	×	×	×	×
1.4	Transfer perfectible at issuer's election	×	×	×	×	✓	×	×	×	×
2.	Payment of consideration and periodic distributions									
2.1	Consideration paid in cash	✓	✓	✓	✓	✓	✓	✓	✓	✓
2.2	Consideration calculated at FMV and communicated transparently	✓	N/A	N/A	N/A	✓	×	N/A	×	N/A
2.3	Periodic distributions only made once returns are received	✓	✓	✓	✓	✓	✓	✓	✓	✓
3.	Lack of originator's control and continued economic benefit									
3.1	Free of originator effective or indirect control	×	×	×	×	✓	×	×	×	×
3.2	Free of originator economic interest in the assets	×	×	×	×	×	×	×	×	×
3.3	Originator free from obligation to repurchase or fund repayment of or substitute the assets	×	×	×	×	✓	×	×	×	×
3.4	Originator has the right to decline purchase if assets declined below economical	×	×	N/A	×	✓	×	×	×	×
3.5	Originator has powers over SPV's economic performance	✓	✓	✓	✓	×	✓	✓	✓	✓
3.6	SPV conducts its business to meet originator's needs	✓	✓	✓	✓	×	✓	✓	✓	✓
4.	Recourse and events of default									
4.1	Transaction not re-characterizable as loan	×	×	×	×	✓	×	×	×	×
4.2	Investors have recourse to underlying assets not originator	×	×	×	×	✓	×	×	×	✓
	True sale achieved	NO	NO	NO	NO	YES	NO	NO	NO	NO

3. Evaluation Results

3.1 Dar Al-Arkan *Shukūk*

This issue launched as a *shukūk* program with an offering of US \$1 billion trust certificates. The main purpose of the issuance is to collect necessary finance for the company's operations; i.e., for internal cash flow purposes that the company required to benefit from a booming real estate market in KSA. The *shukūk* underlying assets are four properties located in Riyadh.

The transaction involves two Special Purpose Vehicles; the Saudi SPV which is a company owned by two Saudi individual shareholders who are independent and unrelated to Dar Al-Arkan, the originator. The second SPV, the issuer, is Dar Al-Arkan International *Shukūk* Company which is a limited liability company incorporated in the Cayman Islands.

Under the transaction structure, the Saudi SPV enters into a Real Estate Rights Transfer Agreement (The RERT Agreement) with the Issuer (the Cayman Islands SPV) whereby the Saudi SPV sells rights and interests in and to certain land and developments of the property, i.e. the underlying assets, allowing it as stated in the prospectus to participate in the risks and rewards related to those assets.

Under the transaction structure, the originator undertakes to purchase the underlying assets from the Saudi SPV in certain circumstances. Another purchase undertaking obliges the Saudi SPV to purchase the *shukūk* assets from the issuer, the Cayman Islands SPV.

The *shukūk* incorporates an assets substitution agreement authorizing the originator to replace the *shukūk* assets with similar assets at its own discretion which represents a continued involvement that the originator exercises over the assets as well as continued benefit that it enjoys. It is rather difficult, despite the confirmation in the circular, to prove that such an arrangement is done without bias in favor of the originator in order to enable it to conduct its business as if the assets were not sold, and using the SPV's undertaking to sell the assets if called by the originator to achieve its own purposes.

As per the offering circular: “Saudi SPV and the shareholders of Saudi SPV agree to sell the property (or any substitute property) held by Saudi SPV, to satisfy any obligations of Dar Al-Arkan (in any capacity) or Saudi SPV (in any capacity) owing under any of the transaction documents promptly following instructions received by it by or on behalf of the Issuer” (2007, p. 122).

The SPV issuer doesn't have unfettered rights in the assets. It doesn't have any right to cause the sale or disposition of the assets. It could only exercise its rights under the purchase undertaking to require the obligor to pay the exercise price. Accordingly *shukūk* holders do not have recourse to the underlying assets. Their recourse is to the originator. The offering circular states that the issuer shall not “sell, transfer, assign, participate, exchange, or pledge, mortgage, hypothecate or otherwise encumber (by security interest, lien (statutory or otherwise), preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever or otherwise), any part of its title to any of the Trust Assets or any interest therein except pursuant to any transaction document (or permit such to occur or suffer such to exist)” (2007, 38-39).

The different transaction documents and parties are subject to three laws, English, Saudi and Cayman Islands. Enforceability of legal judgments outside its jurisdiction is doubtful.

3.2 Qatar Al-Aqariya *Shukūk*

This issuance is in the form of *shukūk al-muḍārabah* with a total value of US\$300,000,000. The proceeds from the issuance are to be used in tangible and non-tangible assets with at least one third of the proceeds to be invested in tangible assets through an investment plan that the originator publicized at the beginning of the transaction.

Profits generated from the investments under the *muḍārabah* agreement are distributed at a ratio of 90 percent distributed to the issuer as the representative of the *shukūk* holders and 10 percent to the *muḍārib*, i.e. the originator.

The certificates are issued by Qatar Al-Aqaria *shukūk* Company, an SPV incorporated in the Cayman Islands. The originator, Qatar Real Estate Investment

Company (Al-Aqariya) serves as the investment manager of the *muḍārabah* arrangement.

Ṣukūk holders' recourse is to the originator by obliging it to perform under the purchase undertaking. The state of the assets and their economic performance, or the originator's business requirements of the assets are irrelevant to satisfying the purchase undertaking. Such a stipulation is clearly a violation of *Sharī'ah*.

The transaction is subject to English, Qatari and Cayman Island laws. There is no guarantee of enforceability of English court judgments in Qatar, the country where both the originator as well as the assets are registered and present. The offering circular states: *"There can be no assurances that a Qatari court would compel a liquidator of Al-Aqaria to perform or cause to be performed any of its respective obligations under any of the transaction documents during a winding-up period"* (2007, p.7).

Profits generated in excess of the agreed rates are retained by the originator, in its capacity as investment manager, as an incentive fee. The value of such excess profits is not determined and no ceiling is stipulated as to how much the originator may retain. It is clear that the originator, especially at times of positive market trends, will continue to benefit greatly from the assets. Except for the value of the periodic payments, the originator seems to be the major beneficiary from the arrangements.

The transaction structure allows the originator to buy any of the *ṣukūk* assets at any time while deferring payment of the purchase price until expiration of the transaction, which will then be offset with any remaining it will retain as incentive fees. Under the agreements, the originator has the right to buy any of the *ṣukūk* assets without paying their value to the SPV. At the end of the transaction term, the originator will use the uncollected balance of the incentive fees to net off the unpaid amounts of such purchased assets. The purchase is made at the initial purchase price. This is other evidence of continued originator benefit and control. Open arrangements providing for price fixing at original cost instead of fair market value indicate that the transaction serves the originator at the expense of the certificate holders.

3.3 MBB *Ṣukūk*

This offering is for *ijārah ṣukūk* with a total value US \$300,000,000.

The proceeds from the issuance will be used to finance the originator's Islamic banking operations and for general Islamic banking purposes. More particularly, the bank will use the proceeds to refinance its existing conventional notes amounting to US \$380 million.

The issuer of the *ṣukūk* is MBB *ṣukūk* Inc., a special purpose vehicle incorporated in Labuan, Malaysia with limited liability.

The *ṣukūk*'s underlying assets represent beneficial ownership interest in a portfolio of assets in hire-purchase contracts and their relevant assets.

The transaction is subject to English Law as well as the law of Malaysia. Judgments adjudicated in English courts are not necessarily enforceable in Malaysia.

The transaction grants the originator the right to retain excess profits as fees unconstrained by a value or rate. This indicates continued originator benefit.

The assets are transferred by way of equitable assignment whereby the transferee doesn't receive legal title to the assets, but will only hold beneficial ownership in them. Such arrangement doesn't allow perfection of title at the election of the issuer; a requirement that is mandatory under IFSB to achieve true sale.

Ṣukūk holders' recourse is to the originator and not the *ṣukūk* assets.

The SPV doesn't enjoy unfettered rights to the assets.

"The documents disclaim from making any representations that the certificates, the transaction structure or any of its documents are Sharī'ah compliant" (2007, p.15).

3.4 Al-Mana *Ṣukūk*

The *ṣukūk* offering amounted to AED 600,000,000. The issuance was in the form of *muḍārabah ṣukūk*. The proceeds are used for general corporate purposes and to be invested in accordance with the investment agreement between the parties to the transaction. The *ṣukūk* issuer and trustee of the *ṣukūk* holders is Al-

Mana *Shukūk* Limited, a limited liability company established in the Cayman Islands.

The Middle East Real Estate Investment Company is assigned the role of investment manager to manage and invest the proceeds of the issuance.

The investment plan allows the investment manager to invest the issuance proceeds in Sharī‘ah compliant assets including the purchase of head-lease usufruct or *musātaḥah* over a parcel or parcels of land in Doha from Al-Mana Group and/or any member of Al-Mana group as well as investing in the originator’s business.

Profits of the *muḍārabah* are distributed among the two parties as ninety nine percent (99%) to be distributed to the trustee and one percent (1%) to the investment manager.

The transaction is subject to English, Cayman Islands and Qatari laws. Judgments awarded in an English court are not necessarily enforceable in Qatar where the assets and the originator reside (2011, p.16). *Shukūk* holders are therefore subject to uncertainty in case of disputes or even bankruptcy of the originator, especially given the fact that their recourse in case of default is to the originator and not to the *shukūk* assets.

The SPV doesn’t enjoy free and unrestricted rights to the assets as required by the standards.

As in the previous two cases, the transaction involves granting the originator the right to collect any profits in excess of the pre-set profit rates that are distributable to *shukūk* holders. Elements of benefits and control discussed in the previous cases from such arrangements are also applicable here.

The transaction also entitles the investment manager to purchase any of the *shukūk* assets at any time at the initial purchase price (2011, p. 7). Like the previous case, payment of the purchase price of these assets is deferred until termination of the agreement and the purchase price is fixed at the initial value of the assets despite when the purchase will be made and what the prevailing market value will be. All are evidence points to continued originator benefits that do not serve the benefits of *shukūk* holders as well as to issues relating to lack of transparency and proper disclosure which are not even required by the transaction documents.

Control and potential for significant influence that the originator could exercise is present in the close relationship between the investment manager and the originator. The investment manager is owned and managed by members of the originator and family members of it, who also serve as executives of the originator. Arm-length relationships are difficult to establish here.

3.5 Durrat Khaleej Al-Bahrain

This *shukūk* is issued by Durrat *Shukūk* Company B.S.C., a special purpose company incorporated as a closed Bahraini Joint Stock Company.

The issuance is for US\$120,000,000, variable rate *istiṣnā’* and *ijārah shukūk*.

The proceeds of the *shukūk* issue are used to fund the construction of the first phase of the Durrat Project (the underlying assets). The property represents a right over water on which reclaimed land will be placed and where construction will be established.

As the proceeds are not used in their entirety to pay contractors at once, as this will be made upon the completion of each segment of the project; the excess funds will be invested by an investment agent for the benefits of the *shukūk* holders and will represent part of the *shukūk* assets. Such investments will be made, as the transaction documents state, in Sharī‘ah compliant commodity *murābaḥah* instruments. Such arrangements might be criticized as controversial.

The entire transaction documents and the parties involved are subject to Bahraini law.

The issuer enjoys legal title and unrestricted rights to the *shukūk* assets.

In case of default, the issuer has the right to seize the property and sell it. Full and direct recourse to the *shukūk* assets is available to *shukūk* holders.

The offering circular states that in the event of default by the project company to make the due payments under the *ijārah* agreement, this “will entitle the Issuer to appoint a receiver and administrator to seize the property secured under the deed of security, to be sold and the proceeds paid into the Trust.” (2004, p. 25).

3.6 Tamweel *Ṣukūk*

These certificates are issued as *ijārah ṣukūk* but it also has an *istiṣnāʾ* element to it, whereby a portion of the underlying assets are still to be constructed. The originator will also act as *ṣāniʿ* for the remaining assets.

The issuer and trustee of the *ṣukūk* is Tamweel *Ṣukūk* Limited, a limited liability company incorporated in the Cayman Islands. The *ṣukūk* issuance size is AED 1,100,000,000.

One third of the proceeds of the issue of the certificates will be used by the issuer to purchase the originator's rights, title and interest in and to the original leased assets, and the remainder of the proceeds will be used by the issuer to purchase (by way of *istiṣnāʾ*) Tamweel's rights, title and interest in and to the original *istiṣnāʾ* assets.

This *ṣukūk* is subject to legal risk caused by the uncertainty of enforcement of legal awards from English courts under English law that governs part of the transaction in the UAE where the assets and the originator exist and by whose laws the purchase undertaking and the *istiṣnāʾ* agreement are governed.

Ṣukūk holders do not have rights in the *ṣukūk* assets. This is explicitly mentioned in the Tamweel Sukuk Offering Circular (TSOC): "*The Certificate holders will not have any rights of enforcement as against the Portfolio Assets and their rights are limited to enforcement against Tamweel of its obligation to purchase the Trustee's co-ownership interest in the Portfolio Assets pursuant to the terms of the Purchase Undertaking.*" (TSOC, 2008, p. 30). It also stipulates that title may not be perfectible at the election of the issuer as required by the standards. It is also covenanted in the documents that the SPV will not pledge, exchange, sell or encumber the assets.

The purchase undertaking by the originator commits to buying the assets on an "as is" basis (without any warranty express or implied as to condition, fitness for purpose, suitability for use, or otherwise and if any warranty is implied by law, it shall be excluded to the full extent permitted by law) at the Exercise Price." (Ibid. p. 5). This is another departure from the standards that require that the originator has the right to refuse to purchase the assets if the deal becomes uneconomical.

Ṣukūk holders' recourse is to the originator and not the assets. Moody's based their rating of the *ṣukūk* on the originator's creditworthiness due to this fact.

The transaction grants excess profits generated by the portfolio that are above the rates determined in the offering circular, to be retained by the investment manager as an incentive.

The originator states that, due to the fact that the *ṣukūk* holders' only recourse is to enforce performance of the purchase undertaking: "*any such restriction on the ability of Tamweel to make a "true sale" of the rights, title and interest in and to the Portfolio Assets to the Trustee is likely to be of limited consequence to the rights of the Certificate holders*" (Ibid. p. 18).

The originator itself recognizes that "true sale" is not achieved under this securitization transaction.

3.7 QIIB *Ṣukūk*

The issuer of the *ṣukūk* is QIIB *Ṣukūk* Funding Limited, a limited liability company incorporated in the Cayman Islands. The subject *ṣukūk* represent *wakālah-muḍārabah* certificates. Value of the *ṣukūk* is U.S \$700,000,000.

The *ṣukūk* assets comprise a *wakālah* portfolio and a *muḍārabah* portfolio.

The *ṣukūk* is subject to Qatari, English and Cayman Islands laws. Uncertainty of judgment enforcement in the previous *ṣukūk* is also present here.

Certificate holders recourse is limited to the originator, QIIB, and not to the portfolio of assets, a fact recognized by Moody's in their assessment of the *ṣukūk* and assignment of the rating which is entirely based on the credit worthiness of QIIB. As per Moody's analysis, the certificate holders "*have no preferential claim or recourse over the ṣukūk assets, or rights to cause any sale or disposition of the such assets except as expressly provided under the transaction documents; and (iv) only have rights against QIIB, ranking pari passu with other senior unsecured obligations as provided in the transaction documents.*" (2012)

Ṣukūk holders do not have rights in the assets. They cannot cause sale or disposal of the assets and their only recourse is to cause the originator to fulfill its obligation under the purchase undertaking.

Perfection of ownership is not guaranteed due to legal constraints. The issuer, therefore, doesn't have the right to perfect ownership as it elects.

3.8 Al-Dar *Shukūk* Funding (no. 2)

This *shukūk* is structured as *ijārah*. Al-Dar, the originator and owner of the underlying assets, grants to the trustee the *musātaḥah* interest for a term of 50 years in the *shukūk* assets. The Trustee will lease the *musātaḥah* interest to Al-Dar (as lessee) for a period of five years. The *musātaḥah* interest is the grant of a right to use and develop certain land located at Al-Dar's Al-Raha Beach development for a term of 50 years. The total certificates' value is AED 3,750,000,000.

The issuer and trustee of the *shukūk* is *Shukūk Funding (No.2) Limited*, a public limited liability company incorporated in Jersey.

The proceeds of the issue of the certificates will be paid to Al-Dar as consideration for the grant of the *musātaḥah* interest.

The *shukūk* are subject to English and UAE law and to all the uncertainty that comes with such an arrangement of having a set of different laws governing the transaction and the issues of enforceability and priority of judgments.

SPV rights in the assets are constrained by the covenants of not selling, exchanging or transferring the assets except pursuant to the transaction documents.

The *shukūk* documents include a substitution agreement that allows the originator/lessee to replace any of the *shukūk* assets at its discretion.

As the transaction is meant as *musātaḥah* of a certain land/plot that the issuer has undertaken and later contracted the originator/lessee to perform the development; allowing for substitution of the original plot for any other asset indicates that the *musātaḥah* arrangement is not meant for itself and is merely used to formalize the financing process. Giving the originator the option to substitute the underlying assets with any others clearly shows the originator's continued involvement with the assets and its continued benefit from them, which contradicts the “true sale” requirements for cessation of originator's involvement and benefit.

Shukūk holders do not have full and direct recourse to the assets. Their recourse is exclusively to the originator. Moody's has accordingly based their rating of the *shukūk* on the creditworthiness of the originator and not the underlying assets.

As expressly stated in the transaction documents, the *musātaḥah* interest, which is the underlying asset of the transaction, may not be registered with Abu Dhabi's Land Department as there is no system to register such interest. “At present it is not possible to register the *musātaḥah* interest at the Lands Department because there is currently no system of registration to register such an interest” (2008, p. 23).

The requirement, therefore, that the ownership interest is perfectible at the election of the issuer is not possible to be met for this transaction.

There is uncertainty, as well, on the enforcement of the *musātaḥah* agreement and the corresponding *ijārah* in UAE courts as such interests are not registered with any recognizable entity in the UAE; another fact recognized even in the transaction documents. “It is unclear what the effect of non-registration will be and it is possible that, should an action to enforce either the *musātaḥah* agreement or the *ijārah* agreement be brought before it, an Abu Dhabi court would not recognize the validity of the transfer of the *musātaḥah* interest or the subsequent lease of it. Further, the *musātaḥah* interest granted may be considered by the Abu Dhabi courts as not legal, valid, binding and enforceable.” (2008, p. 23).

Such uncertainty, if realized, could cause the entire transaction to be invalidated and accordingly, the position of the *shukūk* holders from their investment is surrounded with a great deal of ambiguity.

3.9 GE Capital *Shukūk*

Total issuance value is US \$500,000,000. The *shukūk* structure is *ijārah*. The issuer of the *shukūk* is GE Capital *Shukūk Limited*, a limited liability company incorporated in Bermuda.

The *shukūk* assets consist of ownership interest in aircrafts and rights under lease agreements of those assets. The issuance proceeds are paid to the original aircraft owners to purchase the *shukūk* assets which comprise of aircraft assets including interests in aircrafts as well as aircraft leases.

The different *ṣukūk* documents are subject to English, Bermuda, and state laws of New York and Delaware.

The SPV doesn't have free and unfettered rights to sell, buy or exchange or encumber the assets.

Ṣukūk holders' recourse is limited to enforcing the guarantee against the originator/guarantor. They may not cause the sale or disposition of the assets. The documents also stipulate that once the *ṣukūk* holders collected due payments, they do not have any further recourse to the *ṣukūk* assets. Had the *ṣukūk* holders truly had ownership interest in the *ṣukūk* assets, they would have received full value of their assets. If a takeover event occurs, and if the realized value from the assets exceeds the value of the original investment, the surplus would be considered appreciation in the value of investment (capital gain) and investors are accordingly entitled to this appreciation.

The guarantee provided by GE is an unsecured obligation and ranks equally with other unsecured and unsubordinated obligations of the guarantor. *"The Guarantor's obligations under the Guarantee are unsecured and rank equally with all other unsecured and unsubordinated obligations of the Guarantor"* (2009, p. 27). Therefore, realization of any amounts to the benefit of the *ṣukūk* holders in case of bankruptcy is uncertain as it has no priority of payment.

3.10 Injazat *Ṣukūk*

This *ṣukūk* is issued in the form of *ijārah ṣukūk* for a total value of U.S. \$60,000,000 trust certificates. The issuer of the *ṣukūk* is Injazat *Ṣukūk* Limited, a limited liability company incorporated in the Cayman Islands.

The proceeds of the *ṣukūk* certificates are used to pay-off the entire financial obligations to the originator relating to the Al-Dow Tower and the Shuwaikh land. The originator will utilize the proceeds to:

- (i) Finance the acquisition of a (50%) interest in a property in Shuwaikh, in which Injazat Real Estate Development Company (IREC) currently owns (50%).

- (ii) Fund the development of the Shuwaikh property into a shopping center, and
- (iii) For general corporate needs.

The SPV's rights in the *ṣukūk* assets are constrained by the covenants not to sell, exchange, transfer or encumber the assets except pursuant to the transaction documents.

The *ṣukūk* are subject to three different laws; English, Kuwaiti and Cayman Islands laws.

The transaction comprises a substitution agreement that authorizes the originator to replace the underlying assets as it sees fit. Continued involvement and perhaps continued benefit of the originator from the sold assets can be expected here which contradict with the standards' requirements for such involvement and benefit to cease.

The *ṣukūk* prospectus didn't include any statement that explicitly limits *ṣukūk* holders' recourse in the assets. The documents state:

As per the offering circular: *"The ṣukūk certificates are un-secured but would benefit from: (i) irrevocable and unconditional corporate guarantee by IREC; (ii) standard negative pledge provision on IREC to keep assets equivalent to 100% of the principal amount of the ṣukūk free and clear from any encumbrances; and (iii) standard covenants on IREC including, inter alia: (a) a cap of (1.5) one and half times for the ratio of total liabilities to total equity, and (b) a floor of (2) two times the ratio of operating earnings before interest and taxes, excluding changes in fair value of investment properties, to interest expense."* (2007, p 11)

Ṣukūk holders, represented by the issuer, have the following recourse in case of default:

- (i) enforce the provisions of the *ijārah* sub-lease agreement or the guarantee against the obligor;
- (ii) take such other steps as the trustee may consider necessary to recover amounts due and/or deliverable to the certificate holders.

Steps mentioned in point (ii) above could indicate that taking over the assets and selling them to settle any amounts due to *ṣukūk* holders is one of the steps that the trustee is entitled to take.

4. Recommended Actions to Enhance The Level of SPV Independence

The case studies tested in the previous section show that out of the ten *shukūk* studied, only one satisfies the requirements for achieving a “true sale”.

There is a large gap between the literature and the practice of *shukūk*. Standards and pronouncements by AAOIFI and other standard-setters are hardly ever followed in whole.

This section aims at identifying the main areas of deviation from the standards that are common in the tested cases and recommends corrective actions that address these deviations.

4.1 Recourse

At the top of the evidence on the existence of true sale lies the status of investors’ recourse. Although the existence of recourse could vary depending on the type of the contract underlying the *shukūk* and the Shari‘ah basis of the issue, the question as to whether certificate holders enjoy direct unrestricted recourse to underlying assets is one of the key features on the status of the *shukūk* and on how *shukūk* holders should perceive their investments.

In the majority of the case studies we show that recourse to the underlying assets is not available. Investors do not have the perceived right to take over the assets, when necessary, and dispose of them as required in cases of default or bankruptcy of the originator. The *shukūk* documents comprise of multiple agreements/undertakings that aim to mitigate this deviation and the risk that investors are exposed to from the lack of recourse. The undertakings are presented as tools to assure investors that despite the fact they do not have recourse to the assets and are directly exposed to the credit risk of the originator; the strong creditworthiness of the guarantor (who is also the originator) should serve to give them sufficient comfort that such risks are well insured by the guarantor’s strong positioning.

It is, however, of pervasive risk to investors that the guarantor is also the originator itself. If a case of default does occur due to the bankruptcy or other stressful position of the originator, who is also the servicing agent and beneficiary of the assets; the guarantee would become non-useful to the transaction. This is mainly

due to the hypothetical dichotomy that the transaction documents and the *shukūk* transaction structures are trying to present on paper. The originator plays all the major roles in the transaction and actually controls the transaction from the beginning to the end and therefore, the illusion of segregation of duties and responsibilities is just that: an illusion.

In order for *shukūk* to actually serve the purpose they were created for and become a true representation of what they claim to be; recourse should be tied to the assets the *shukūk* represent *undivided ownership interest in*, which ironically is a sentence that all *shukūk* documents ensure they mention explicitly.

The lack of direct recourse to the assets is, therefore, detrimental to the transaction and alters the entire status of the *shukūk* from being asset-representing certificates to mere claims/unsecured obligations of the originator. This is a fact that rating agencies ensure they properly address when assigning their rating to the *shukūk* issuance, which always appears identical to that of the originator and varies also with originator rating changes.

It is worth mentioning, however, that certain *shukūk* types such as *muḍārabah*, require recourse to both the assets as well as the originator as in the case of misconduct, negligence or breach of contract by the *muḍārib* as stipulated by Shari‘ah Standard 13 item 6 *Guarantees in a Muḍārabah contract*. Other *shukūk* types may require recourse solely to the originator, which are the debt-based *shukūk* including *salam*, *murābahah* and *istiṣnā’* (these types are not studied in this paper).

Ijārah-based *shukūk*, on the other hand, require recourse to be directed to the underlying assets which are the subject matter of the instrument.

It is necessary, however, to differentiate between two problems that this paper identifies: recourse and *‘īnah* sale whereby the underlying assets are sold in the transaction just for the sake of formalization, as they are purchased back through a redemption process incorporated within the documents structuring the *shukūk* transaction, and where the assets are leased/sold back to the originator or a related party of the originator. This is where the other points set out in the evaluation matrix serve to best assess whether a true

sale has in fact taken place or not. In short, it takes more than just granting direct recourse to *ṣukūk* holders over the assets in case of default to determine whether a true sale was consummated or not. This is why one of the case studies, although granted recourse to *ṣukūk* holders, has failed the true sale test; due to not meeting the other true sale criteria.

4.2 Continued originator control

Despite the sale, originator control over the assets does not cease. It manifests itself in different forms and shapes. From the various agreements that give the originator unconditional rights that would not be granted under usual transactions; to the right to transfer the assets from the SPV to its name or to the name of any of its subsidiaries.

Control can be direct or indirect. Either way it impairs “true sale”.

Different *ṣukūk* offerings grant unconditional rights to the originator in its capacity as lessee/developer to buy/sell/substitute the underlying assets as it sees fit without reference to the asset owners. In one extreme case, the *ṣukūk* documents gave the originator the right to dispose of the assets to settle its own obligations under the transaction documents. Such rights, if taken in the larger context of a regular business environment, should not exist; especially when considering the impact of such actions on the shape and content of the asset portfolio.

Ṣukūk also allow the originator to buy the assets at their historical cost without regard to the fair market value which could have significantly appreciated over time, especially around periods of growth or boom of certain sectors of the economy. Although such practice is acceptable for *ijārah ṣukūk*, where the purchase price is pre-determined, *wakālah*, *muḍārabah* and *mushāarakah ṣukūk* should not entail such arrangements.

Such rights pose significant risks of lack of segregation of duties. It is debatable how the buy/sell/substitute decisions are taken and in whose favor they are made.

Control, if proven, can be damaging to the transaction and could even result in re-characterizing the deal as an unsecured loan, revoking the true sale. The ultimate result will be the consolidation of the assets with the originator estate in case of bankruptcy.

Such stipulations need to be re-examined and their unlimited nature needs to be significantly trimmed. Certificate holders’ interests need to be prioritized if *ṣukūk* are to be taken back to their original position of Sharī‘ah compliance.

Empowerment of the SPV or its representatives could be one of the actions to be taken. If substitution or buy/sell arrangements are significant to the continuity of the business and to the flow of income for *ṣukūk* holders, the services of an independent party may be hired to review and advise on the feasibility of the planned action and to guarantee that it will not adversely impact *ṣukūk* holders’ interest.

Continued originator’s involvement with the SPV and the control it exercises can also be indicated from other parties to the transaction. Close ties between the originator and the investment manager or the SPV can clearly represent a potential risk area. Family relations or executive management of the originator acting as sole directors of the SPV could all shed doubt on independence and objectivity of the parties involved. Even if bias cannot be substantiated; it is rather difficult to prove it didn’t occur and that influence is not being exercised over the decision making process.

Clear requirements on independence and elimination of threats to integrity and conflict of interest have to be established and put to practice. Investors and regulators need to be assured that conflict of interest is mitigated and effective and sufficient controls need to be established and properly implemented.

It is also important to emphasize requirements on transparency, disclosure, transactions based on fair market value and arms-length when entering into the buy, sell and substitute agreements.

4.3 Conflicting laws

Different *ṣukūk* documents are subject to a number of governing laws; English law, the law of the country where the SPV is established as well as the laws of the country where the originator and the assets exist and are registered. Having a different set of laws governing a transaction can impose a significant threat to the *ṣukūk* and the *ṣukūk* holders. Difficulty of imposing foreign judgments and the

superseding nature of certain laws can jeopardize or even revoke the sale. Although the *shukūk* issuance is, in the most part, governed by English laws which are considered investor friendly, it is always doubtful, if not certain, that judgments awarded in an English court are not binding outside its jurisdiction.

Ownership laws, limitations and restrictions on foreign ownership in some countries represent an obstacle at the outset. Establishing a “true sale” in a country where foreigners are not allowed to own could be undermined at the start.

Selection of laws must be done in a way that in fact serves investors and would result in fair and enforceable judgments, instead of the seemingly safe choice of investor friendly laws that are out of jurisdiction on the originator or the underlying assets.

Selection of the type of contract is of great relevance to the transaction. Selecting a certain *shukūk* type in countries where existing laws do not support such arrangements should be revisited as it is not at all in the benefit of *shukūk* holders. Amended regulations can be introduced that ensure such arrangements are restricted and the transaction is properly regulated.

4.4 SPV status and powers

Although they are created as bankruptcy remote entities; SPV's are, at least in theory, created to become the representatives of *shukūk* holders and serve their interests. In reality, however, SPV's are more like virtual entities that have no employees or activities and are owned and managed by a trust that runs hundred other SPV's.

Most SPVs are not required, per the laws of the country of their establishment, to prepare financial statements or report on their performance. *Shukūk* holders do not enjoy any access to the results of operations of their investments or how the assets they own have performed. Exceptions to this are a number of *shukūk* which undertake the obligation, outlined in their prospectuses, to issue audited financial statements, even though not required by law.

The SPV also undertakes, as per the transaction documents, to refrain not only from engaging in activities that could impair their bankruptcy remote status, but also from having a free hand to the assets that it owns including the rights to sell, pledge, dispose, or encumber the assets. These rights are

explicitly required by the standards and the laws to be present in order to prove the existence of “true sale”.

SPV structures and powers need to be improved and activated. Real involvement in the SPV assets and management needs to take place. Limitations on SPV powers with regards to the assets need to be revoked if true sale is ever to be a requirement for the transaction.

- **Continued originator benefit**

The case studies indicate that while the originator has officially sold the assets to the SPV, they continue to benefit from the assets beyond the lease/investment management or other agreements the parties have entered into.

The stipulations to grant the originator in its different capacities as *muḍārib* or developer, the rights to retain excess profits clearly reflects the essence of the securitization transaction: the originator has sold the assets but continues to benefit from them as if the sale was not done; except for the periodic distributions it pays to the *shukūk* holders which are more or less predetermined. Allowing for incentives does not void a true sale. Lack of true sale is rather deduced from such arrangements!

Agreements to grant the *muḍārib* an incentive on top of their share of the profits should be formulated in a clear and measurable manner. Fixing the return for investors and granting any amounts in excess of that to the originator neither properly reflects ownership nor does it conform to the Sharī'ah requirements of the transaction. Ceilings and ratios of the excess profits that originators are allowed to retain could be utilized to better organize the transaction in order for *shukūk* to be differentiated from fixed income instruments.

5. Conclusion

Corporate *shukūk*, despite their rapid growth, are still in their infancy. Over the past decade they have been heavily introduced into the market, however, they are still in the process of developing their structures and shapes.

There is, however, a considerable lag between the standards and practice. Standard-setters and regulators are yet to catch up with what is present in the market. Although some regulators have succeeded in establishing their requirements for what “true sale” should be like; most are still far from where they should be.

Almost all *ṣukūk* issuances try to promote themselves as Sharī'ah compliant financial instruments where certificates sold represent an undivided ownership interest in real assets. An in-depth screening reveals different realities of what *ṣukūk* really are; what they represent and how the transaction is structured and would stand in a court of law.

The majority of the issued *ṣukūk* take the form of asset-based investments where investors provide financing to the originator in return for periodic distributions of income.

Investors do not, in fact, own the assets that were pooled for the transaction and are accordingly exposed to the originator's credit risk.

Originators' continued involvement and derived interest from the assets after they have been sold, and the control they continue to exercise long after the assets have been sold, all indicate that the assets are not "truly sold" to certificate holders.

Laws governing the different parts of the transaction and enforceability of judgments pose another threat to the investors' rights in the assets.

Confusing as they might be, transaction documents and offer circulars clearly address deviations from the standards in certain areas and explicitly describe the risks of departure from such standards that the *ṣukūk* entail. Disclaimers included therein serve to show how far from the standards the transaction is structured and yet each issuance is presented as a Sharī'ah compliant investment.

True sale is of paramount importance for any *ṣukūk* to be titled an ownership interest in assets. Although all issuances claim to be of ownership interest, only a minority in fact meet the requirements for achieving a true sale.

Increasing investor awareness of the real essence of the transaction and what investor rights and benefits result from such transactions, are essential.

A great room for improvement exists in the area of *ṣukūk* and significant efforts are required to bridge the gap between theory and practice. Also enhancing regulators' involvement is key in the improvement process.

Labeling instruments as Sharī'ah compliant needs to be taken with extra care.

For *ṣukūk* to be a real Sharī'ah compliant investment instrument, recourse has to be changed from the originator to the underlying assets. The excessive originator involvement and control over the assets needs to be restricted; the SPV has to be empowered to exercise its rights and properly discharge its duties.

The abnormal benefits that the originator continues to derive from the transaction through retention of excess profits, preferential prices and undertakings that strip the SPV of its powers or give illogically unbalanced rights to the originator to buy and sell the assets, have to be restricted and kept at fair market value with arms-length dealings.

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الشركة ذات الغرض الخاص في صكوك المؤسسات: هل البيع الحقيقي حقيقي؟

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*أستاذ - جامعة حمد بن خليفة - الدوحة - قطر

**مديرة التدقيق الداخلي في شركة النفط والغاز - قطر

المستخلص. تعتبر الصكوك موضوعاً حيوياً في مناقشات التمويل الإسلامي. ويعتمد البحث الحالي للنظر إلى الصكوك من زاوية مركزة بدقة هي مدى نجاح الصكوك، أو فشلها، في توافر الشروط الأساسية للبيع الحقيقي للأصول التي تُنقل إلى حملة الصكوك، الأمر الذي يحدد فعلاً مدى توافق أي إصدار للصكوك مع الشروط الشرعية. وقد اخترنا لهذا الاختبار عشرة صكوك صدرت بين عامي ٢٠٠٤م و ٢٠١٢م في سبعة بلدان. ولم نطبق في الاختيار المعايير الإحصائية للعشوائية وإنما اعتمدنا أساساً على توفر المعلومات اللازمة لإجراء الفحص. وقد طبقنا في اختبار حقيقة البيع معايير محددة قمنا بتطويرها من جملة المعايير القانونية والمحاسبية والشرعية.

وقد أظهرت نتيجة التقييم أن واحداً فقط من الصكوك العشرة التي قيّمناها تتوفر فيه شروط البيع الحقيقي عند نقل ملكية الأصول من الشركة المصدرة إلى حملة الصكوك، أما بقية الصكوك فتتضمن مخالفات عديدة لشروط البيع الحقيقي، الأمر الذي لا يجعل منها أدوات مالية متوافقة مع الشريعة الغراء.

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