

Sharia Issues in *Sukuk Ijarah Mawsufah Fi al-Zimmah*

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Abstract

This paper aims to identify the main Sharia issues regarding *sukuk Ijarah Mawsufah Fi al-Zimmah* from the academicians and the experts point of views. For the methodology part, the researchers utilized a qualitative method using online interview via zoom meeting application. Data was gathered from academicians of Universiti Utara Malaysia and experts on Sharia backgrounds from Malaysia. It was found that there is a positive growth of *sukuk Ijarah Mawsufah Fi al-Zimmah* in solving the shariah issues. In addition to this, the researchers also discovered that the Shariah advisers need to examine and review the structure of *sukuk* rigorously to eliminate all of the Sharia prohibitions that will make the *sukuk* void. For practical implications, this article shed light and fruitful discussion in the potential of *sukuk Ijarah Mawsufah Fi al-Zimmah* to the Sharia advisors, Sharia committees, regulating parties and Special Purpose Vehicles (SPVs). This paper adds to the literature on *sukuk Ijarah Mawsufah Fi al-Zimmah* from the Malaysian context. The paper validates the main Sharia questions regarding *sukuk Ijarah Mawsufah Fi al-Zimmah* by interviewing experts and academicians from various backgrounds.

Keywords: *Sukuk Ijarah, Mawsufah Fi al-Zimmah, Sukuk Issues*

Introduction

Today's sophisticated capital markets offer a broad variety of financial instruments for issuers and investors to choose from. *Sukuk* popularly known as Islamic certificates or securities-represent one of Islamic capital market's main instrument classes. Their innovation has drawn the ire of both Islamic and conventional issuers and investors; indeed, it has the potential to become an indispensable instrument relevant to humanity as a whole. One of the most widely used structures in both domestic and foreign issuance was the lease-based *sukuk* (*Ijarah sukuk*). This is primarily due to its ease of issuances, its versatility to be adapted to more complex systems and its preference by different parties such as the issuers, investors and Shariah's scholars. The *Ijarah sukuk* mechanism is useful in producing returns for creditors because it can be used in the funding process in a way that makes daily payments. *Sukuk Ijarah Mawsufah Fi al-Zimmah* is defined as the issuance by the owner or the SPV as a

party of the certificates of equal value representing the tangible asset, usufruct, or service owner which complies with certain requirements to sell the asset, usufruct or service then becomes the property of the *sukuk* holders.

Being an Islamic financial instrument, the issuance and trading of *sukuk* necessarily have to comply with Sharia principles, rulings and parameters. This ensures *sukuk* maintain their distinctive characteristics that differentiate them from other financial instruments that are not Sharia-compliant, such as conventional bonds and fixed-income securities. Adherence to the requirements of Sharia is essential for preserving the sanctity of *sukuk* that will in turn help sustain growth and expansion of the *sukuk* market as *sukuk* meet the demand of investors and issuers looking for Sharia-compliant investment and financing. Indeed, any breach in fulfilling Sharia requirements may affect the reputation and credibility of the issuer or originator and have a negative impact on the *sukuk* market. This article tries to analyse some of the possible Sharia issues that arise in *sukuk Ijarah Mawsufah Fi al- Zimmah* relate to the issuance of *sukuk* for ownership of physical assets and usufruct, *bay al-sarf*, asset backed vs asset based, mix of trading assets and possession (*qabd*) of underlying assets. Apart from that, other practical issues related to *sukuk Ijarah Mawsufah Fi al- Zimmah* are also discussed in this article.

Literature Review

What is *Sukuk*?

The definition of *sukuk* comes from the singular word which is *sakk*, but further, it can be defined in different perspectives such as linguistic, Islamic jurisprudence and in Islamic finance. From the linguistic perspective, the term *sakk* is said to be of Persian origin and its meaning has the concept of two things hitting one another with high impact. In the Arab literature *sakk* is "to strike a seal on a document." The term *sakk* applies generally to any written documents. A narration quoted by Imam Malik in Al-Muwatta refers to *Sukuk* as a document entitling its holders to some produce of the market (Sairally, B.S & et.al, 2017).

From Islamic jurisprudence perspective, scholars used the term *sakk* for a written document that confirms a transaction, stipulating the rights and conditions of the contracting parties. For example, a waqf, sale or lease. Whereas, from the perspective of Islamic finance, *sukuk* refers in its simplest form to 'investment certificates' that entitle the holder shall have a share of ownership proportionate of *sukuk*'s base assets or ownership transactions along with pro-rate profits or losses related to the property, business ventures or investment activity. Unlike conventional bonds, the structuring of *sukuk* requires Sharia-compliant underlying assets (Sairally, B.S & et.al, 2017). There are three organizations that have defined *sukuk* in their own perspective such as AAOIFI, IFSB and SC Malaysia. AAOIFI is one of a non-profit organization that founded to uphold and promote Sharia principles for the Islamic finance business, financial institutions and the members as a whole. AAOIFI stands for the Accounting and Auditing Organization for Islamic Financial Institutions describing *sukuk* as reflecting

Istithmar Sukuk (Investment Sukuk) to differentiate them from shares and bonds. In its Standard 17(2) (2015) of Shariah, AAOIFI describes *sukuk* as:

“Equal interest certificates containing undivided shares in the ownership of real assets, usufructs and services or resources (owned) of specific ventures or special investment activities.”

Definition of *Ijarah Sukuk*

Ijarah simply means that the usufruct of a specified property that will be transferred to another person from the owner (as the lessor) for the purposes of making a pre-negotiated rental payment within a defined lease period. Since the corpus of the leased property remains in the hands of the lessor, the lessor shall bear all the liabilities arising from the ownership of the property, while the lessee shall bear the liabilities relating to the use of the property. Thus, all the duties and rights resulting from the contract of *Ijarah* will extend to an *Ijarah Sukuk* as *Ijarah* is the main contract underlying this form of *sukuk*. The underlying asset in the *Ijarah Sukuk* system is used in a way that allows for regular payments during the funding scheme period, combined with the versatility of customizing the payment profile and the method of measuring a profit.

Ijarah Sukuk is basically a security reflecting the leased asset ownership, a service or a usufruct that entitles the bearer of such *sukuk* to the leased asset rental receivables, usufruct or services as well as the obligations arising from such asset, usufruct or services. In addition, these certificates can be transferred to other parties in the secondary market. The definition of *Ijarah Sukuk* from key organizations of the Islamic finance industry is elaborated as below:

Securities Commission Malaysia (SC)

According to SC Malaysia *Ijarah Sukuk* is certificates of equal interest indicating that the holder of a certificate of leased assets and/or usufruct and services, as well as access to the rental debts, has undivided ownership of the leased asset and/or services.

Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)

AAOIFI has been classified *Ijarah Sukuk* as very important for tangible assets, usufructs, and services. In its Shariah Standard No. 17 (3/1-3/2) it describes the different forms of *Ijarah Sukuk* as follows:

“Certificate of Ownership of Usufructs of Existing Property, Certificates of Ownership of Usufructs of Described Future Assets, Certificates of Ownership of Services of a Specified Party, Certificates of Ownership of Described Future Services.”

International Islamic Fiqh Academy of the Organization of Islamic Cooperation (IFA-OIC)

The IFA-OIC in its Resolution No. 137 (3/15) (2004) discusses *Ijarah Sukuk* as the principle of leasing bonds is based on the concept of 'securitization' relating to issuing negotiable financial papers backed by income-generating properties. The purpose of leasing bonds is to hand over the assets and usufructs relating to the lease contract to financial papers (bonds) that can be negotiated in secondary markets. Under AAOIFI (2015) definition, it is particularly noted that *Ijarah Sukuk* has been classified under three categories as follow:

1. *Sukuk* for the Ownership of Tangible Assets.
2. *Sukuk* for the Ownership of Usufructs.
3. *Sukuk* for the Ownership of Services.

The Differences between *Sukuk* and Bonds

The differences between *sukuk* and conventional bonds are mentioned as bellow:

Key Differences	Conventional Bonds	<i>Sukuk</i>
Nature	Represents an IOU or the issuer's interest-bearing debt duty	Represents a proportionate keeping in Sharia
Issuer	The issuance of conventional bonds is not constrained in its commercial activities	Any emitter engaged in business activities allowed under Sharia
Investors	Non-Islamic Investors	Islamic and non-Islamic investors
Relationship between Issuer and Investor	Lending arrangement that gives investors creditor status	Sharia-based relationship used to build <i>sukuk</i>
Underlying Assets	No assets required for unsecured bonds. For example, there is no need for collateral backing the bond issue.	Underlying properties must meet Sharia requirements.
Asset-Related Expenses	Bond investors are not affected	<i>Sukuk</i> holders may be affected
Status	Represent unsecured creditors, except where particular assets support bonds.	In case of default or if the issuer faces difficulties in paying, <i>sukuk</i> investors in asset-backed <i>sukuk</i> have access to the money.
Return to investors	Coupon payment in interest form that reflects a percentage of the money. They equate with fixed interest, which is connoted to <i>riba'</i> .	Periodic payments reflect a percentage of real income that generated from contracts of sale and partnership and also by rent that generated from contract of lease
Principal Repayment by Issuer	Return of principal on maturity is an irrevocable obligation, irrespective of whether the sponsored project was profitable	By practice, there is no fixed capital payment requirement for partnership-based <i>sukuk</i> structures but the return of principal is assured by sale-based and lease-based structures.
Utilization of Proceeds	No specific requirement.	Proceed must be used to finance <i>Sharia</i> -compliance activities.
Tradability in the	Selling bonds represent sale of debt.	Selling <i>sukuk</i> is essentially selling an

Secondary Market Pricing	Depends on the issuer's credit rating and terms and conditions.	asset's share, or in a project. Depends upon the <i>Sukuk</i> structure
Asset ownership	Bonds do not confer a share of ownership on the investor in the asset, project, business or joint venture they support.	<i>Sukuk</i> gives part-ownership to the investor in the properties on which the <i>Sukuk</i> is based.
Effects of costs	Holder not affected by costs related to the asset, project, business, or joint venture they support.	Costs attributable to the underlying asset impact holders.
Investment rewards and risks	Bond investors receive a regular scheduled interest charges for the bond's duration, and their principal is expected to be repaid at the maturity date of the bond.	<i>Sukuk</i> holders receive a share of profits from the underlying asset.
Issue price	Depending upon the credit worthiness of the issuer.	Depending upon the underlying asset's market value.
Issue unit	Each bond reflects a debt-share.	Each <i>sukuk</i> stands for a share of the underlying asset.
Investment criteria	Used to finance any asset, project, business or joint venture that meets local laws.	The commodity <i>sukuk</i> is focused on must be consistent with the Sharia.

Source: Sairally, B.S. et. al (2017); Shahar, W. S, Shahar & Jamlus, N. (2014); Advisory, S (n.d)

Practical Issues Relating to *Ijarah Sukuk*

It is vital to deliberate on some of the practical issues faced by financial institutions when issuing *sukuk*. These are briefly explained below:

Pricing of the *Sukuk*

Up till now, as mentioned previously, LIBOR, EURIBOR or any other interest rates are used as a form of benchmark, and this has become a norm in Islamic financial institutions. However, while it is acceptable both LIBOR and EURIBOR as a benchmark, the intrinsic value of returns arises from the rentals pertaining to the leasing arrangements with originator and SPV.

For example, in the case of *Ijarah Sukuk*, a Sharia-compliant structure is when the *sukuk* holders earn their returns on the rent of *sukuk* 's properties. However, the return may not represent the underlying asset but may be the single low prevailing interest rate. This is obvious in two entirely different real assets which are supposed to have different rental yields based on the realities of the industry. Nevertheless, a similar return rate was reported, as they are used for two separate *sukuk* issuances as the underlying asset. That is because the prevailing interest rate is used by both situations as a benchmark. For instance, the *sukuk* holder would receive low returns based on low-interest rates in an *Ijarah Sukuk*, where a certain form of real estate is used as the underlying assets and despite the fact that the rent of properties rises in the particular field in which their assets are located. The returns on

sukuk thus does not represent the quality of the underlying asset; instead, it is largely dependent on the prevalent interest rate.

Short Supply of Eligible Underlying Assets

In a Sharia-compatible *sukuk* structure, the underlying mechanism for the *sukuk* emission is crucially significant. Nevertheless, the position of the grouping of assets generating a Sharia-compliant income stream is one of the challenges at present. Often, a common *Ijarah Sukuk* asset class is property or other tangible assets. Certain eligible *sukuk* asset classes include commodities or goods and moving properties that are in compliance with Sharia. The leasing earnings from these properties would provide the *sukuk* owners with cash flow returns. In addition, the obligor or originator's duty to buy back those properties ensures key repayments in due time.

One of the key impediments is the very limited number of eligible Sharia-compliant properties, which is seen as a significant obstacle in *sukuk* industry development. This is one of the reasons why the industry has transferred *sukuk* blended assets, with *wakalah bi al-Istithmar* as the main contract behind them and allows for various combinations of assets on the basis of the principle of *khultah*. In addition, intangible assets are being gradually used to build *sukuk*. This thing gives issuers a broader range of assets and greater versatility in their choices.

Rate of Return Risk

Each *Ijarah Sukuk* at a fixed rate meets the rate of risk of return. Rate of return is an investment gain or loss for a given duration, which is the percentage of the investment cost. The returned risk rate has different implications both for the lender and the investor. Therefore, the magnitude of the return risk is directly proportional to the *sukuk*'s maturity and market risk adjustments. The longer the maturity period, for example, the greater the risk to investors. If the returns are tied to LIBOR, an increase of the benchmark rate would raise the payment obligations of the borrower in the case of the adjustable rate of *Ijarah Sukuk* it may be maintained or not and would become more popular if the payment ability of the obligor is strongly dependent on the earnings of a pool of fixed returned properties.

High Transaction Costs

One of the provisions of the contract with *Ijarah* is that the leased properties must be able to be used for the entire lease term. The leased properties must also be managed and operated at a high cost of maintenance. Additionally, in cases of loss, injury and degradation of the leased properties, the lessor must bear the associated costs. Therefore, there will be an extra expense to cover these risks in a reasonable way. In addition, if the leased assets incur partial or total losses, or the leased assets are inconsistent with the Shariah, then the issuer or the SPV must replace the leased assets (such as the *sukuk* trustee). That is also a secondary expense.

Ijarah Mawsufah Fi al-Zimmah

Ijarah al-Zimmah can be defined as the sale of future benefits for the purpose of obtaining divine cash or a court of law for the purpose of deriving whether the benefits are derived from the assets or services (Hammad, 1993). It is named *Ijarah al-Zimmah* because the benefit of the asset is closely related to the liability of the lender rather than the asset itself. It can also be defined as a benefit (*Ijarah*) that is guaranteed because the lender guarantees to provide the benefit under any circumstances (Nasar, A.M., 2009). This agreement is regarded as *salam* in which the subject is the benefit (Al-Manhaji, S. M., 1955). In fact, in some of the classical *fiqh* books, this agreement was dropped by the Islamic jurists in the chapter of *salam*.

The Differences between *Ijarah al-Zimmah* and *Ijarah*

1. The *Ijarah al-Zimmah* contract is not void if the rental property is damaged. If this happens, the lessor will have to replace the new asset in lieu of the damaged asset. Leasing of the benefit of the lease must be made by the lender according to the length of time the agreement has been made between the lessee. However, the *Ijarah* contract may be cancelled if the lease benefit is impaired either before or after the benefit is delivered to the lessee.
2. In *Ijarah al-Zimmah*, the benefit does not necessarily belong to the lender at the time of the contract provided that the lender can deliver the benefit at the agreed time. While in the *Ijarah* contract, *Ijarah* benefits must be owned by the lender at when the contract made (Ghuddah, D. A., 2007).
3. There is no *khiyar al-'Ayb* in *Ijarah al-Zimmah* contract, whereas this *khiyar* occurs in the *Ijarah* or *Ijarah wa iqtina'* contract.
4. In the *Ijarah al-Zimmah* contract, if it involves the delivery of an asset, then the cost of packaging the asset must be borne by the lessee. In contrast to the *Ijarah* contract, the cost of the packaging was borne by the lender (Ghuddah, D. A., 2007).
5. A detailed description is not required as the benefits that are the subject of the contract do not conflict with the specifications agreed until the deal is concluded. The Muslim scholars have illustrated this criterion by giving detailed examples of clothing when ordering clothes with tailors or buildings that need repair. In these examples, it is sufficient to provide details on the type of dress booking required for the tailor (Ghuddah, D. A., 2007).
6. The use of asset benefits does not occur after the *Ijarah Mawsufah fi al-Zimmah* contract is made, but it does happen in the future. On the other hand, the benefits of assets in the *Ijarah* contract could be deferred or determined at a later date. This refers

to views other than the Shafi'ie sect, in which they prohibit *Ijarah* to be backed up in the future (Al-Qasimi, B.H., 2009).

Sharia Issues Relating to *Sukuk Ijarah Mawsufah Fi al-Zimmah*

Below are some of the Sharia issues related to *sukuk Ijarah Mawsufah fi al-Zimmah*:

Issuance for Ownership of Physical Assets

Here, the subject of *Ijarah Mawsufah fi al-Zimmah* refers to the physical assets. *Sukuk* represents the ownership of the physical assets. However, in *sukuk Ijarah Mawsufah fi al-Zimmah*, it is difficult to determine the ownership of the physical assets involved. Because of the uncertainty in determining which item is represented by the *sukuk* issued by the lessor, it makes this type of *sukuk* possibly illegal in Sharia. Basically, *Ijarah Mawsufah fi al-Zimmah* is characterized by two distinguishing natures: the definitive nature of the benefit to be offered by the lessor, and the uncertain nature of the item containing the benefit. These two essential natures of *Ijarah Mawsufah fi al-Zimmah* allow the lessor to offer any item as long as it contains the benefit agreed upon in the *Ijarah* contract and serves the purposes of *Ijarah*.

These items which contain the *mawsufah fi al-Zimmah* benefit may carry different traits and qualities, but somehow all serve similar purposes. As long as they enable the lessee to benefit from them, there will be no issue of the lessor having to replace the item with a new one because the uncertainty in the item does not affect the contract if the benefit is clearly identified. This does not include the uncertainty of whether the item will be delivered on time and or will meet the actual description when delivered. Thus, as far as *sukuk* that represent the ownership of the item in *Ijarah Mawsufah fi al-Zimmah* is concerned, this uncertainty on behalf of the item which contains the benefit undoubtedly leads to the impossibility in determining which item is represented by the *sukuk* issued by the lessor, making this type of *sukuk* possibly illegal.

Some scholars prohibit the issuance and trading of *sukuk* for the ownership of assets that are the subject of usufruct meeting certain specifications (*mawsufah fi al-Zimmah*). This is based on the deliberation that the asset can offer by the lessor to the lessee for the aim to provide the usufruct is unknown—because the nature of the usufruct which is the subject of a *Ijarah Mawsufah fi al-Zimmah* contract is not associated with a particular tangible asset, opposite to the lease of a particular asset. Rather, it is an undertaking for which the lessor assumes liability, and he will fulfil his responsibility, in accordance with the Sharia, by supplying any tangible asset that provides usufruct meeting the specifications in the contract.

The majority contemporary scholars prohibit the secondary trading of these *sukuk* before the physical assets that provide the usufruct—which is what the *sukuk* holders have purchased are completed or more than half-completed. This is because the contracts that cover these assets usually include *istisna'* or *Ijarah Mawsufah fi al-Zimmah* contracts being combined, and when

the *sukuk* are sold they are denoted by cash until they have been converted to physical assets (or until most of their value is converted). Thus, they are covered by the Sharia rules relating to *al-Sarf* as their sale would be an exchange of cash for cash.

In addition, it has also been identified that a lease of usufruct in *Ijarah Mawsufah fi al-Zimmah* leads to sale of a debt for a debt as both the physical asset and the usufruct are, at the time of the Sukuk issuance, no more than just debts. AAOIFI Shariah Standard No. 17 (5/2/4) states the following on this issue:

“It is permissible, immediately upon issue and up to the date of maturity, but after the passing of ownership of the assets to the holders of the *sukuk*, to trade in *sukuk* that represent ownership of existing leased assets or assets to be leased on promise.”

Thus, it is clear that the standard allows for the trading of the *sukuk* this step will done only after the transferring of the possession of the assets to the *sukuk* holders. Although a majority of the Sharia scholars are agreeable to the supplying and commerce of the *Ijarah Sukuk* in the secondary market, some scholars disagree with this unless the buy-back value is based on the market price.

Issuance for Ownership of Usufruct

In this case, the *sukuk* subject is the usufruct of certain specifications which are assigned to the issuer's liability. Example of usufruct is the right to stay in a hotel which is still under construction for a specific period. Therefore, the details of the physical asset that provides the usufruct must be clearly and concisely described to avoid any upcoming disputes. Failure in providing the specifications that were assigned to the issuer's liability will lead to *gharar fahish*. For example, such details about the asset should be provided: the type or size of the hotel room, the amenities offered in the room, the services available in the hotel, the location plan of the hotel and the room, and other important information.

Bay al-Sarf

The issue of *bay al-Sarf* is relevant in the trading of *sukuk*. *Sukuk* represent ownership of the underlying assets; their trading is interpreted as direct exchange of their underlying assets. Thus, if currency or cash is the underlying asset of *sukuk* at any stage and the *sukuk* are traded for a cash price then their trading would fall under the scope of *bay al-Sarf* at that specific stage. In the case of secondary trading of *sukuk Ijarah Mawsufah fi al-Zimmah*, when the *sukuk* is sold they will be denoted in cash before they are converted to real assets (or until most of their value is converted). They are therefore triggered by the issue of *bay al-Sarf* that is related to Sharia laws. This is because their selling will be an exchange of cash for cash.

Mix of Trading Assets

Most of the *sukuk* nowadays do not merely consist of one type of underlying assets. Usually, the underlying assets of *sukuk* are formed by combining various types of assets such as (commodities, land and buildings) which stated under tangible assets and (usufructs, services and rights) which supposed to be intangible assets. From another aspect, they may state in the form of credit or assets (*ribawi* assets) and usufruct, products, rights and services (non-*ribawi* assets). Due to the fact that their underlying assets are neither completely non-*ribawi* nor completely *ribawi*, the Sharia ruling for their trading is quite complicated. This issue has become a debating point of difference among modern-day Sharia scholars.

Possession (*Qabd*) of Underlying Assets

As compared to physical possession (*qabd haqiqi* or *hissi*), constructive possession (*qabd hukmi* or *ma'nawi*) is more real in the context of *sukuk*. Constructive possession of an underlying asset of *sukuk* is achieved when the ownership titles, rights and liabilities of the underlying asset are transferred to the subscribers of *sukuk*. Similarly, constructive possession of proceeds of *sukuk* is considered to be achieved when the subscription amount of *sukuk* is collected by the issuer of *sukuk*.

However, there are various issues and aspects arising from how *sukuk* are structured that are strongly relevant to the discussion of constructive possession. For instance, the issue of possession becomes quite relevant is when the *sukuk* are built on cash, or backed by money. The *sukuk* investors have in asset backed *sukuk* unrestricted ownership of the underlying assets of *sukuk* which is established via true sale, therefore constructive possession seems to be valid in such of type *sukuk*. On the contrary, in the *sukuk* that are asset-based, the *sukuk* holders only enjoy restricted owning the underlying properties of *sukuk*. For instance, they do not have the authority to make use of the underlying properties in case of default.

Rental Payment Structure, Fixed Rate or Floating Rate

Initially, fixed rate *Ijarah* was seen to be the only Sharia-compliant rental payment structure. Unfortunately, fixed rate *sukuk* tend to face several market risks. To address this issue, the floating rate rental payment structure was introduced, with a precondition that it must be based on a certain formula and it has to be fixed for a certain period and agreed upfront. Finally, to match the market requirement of having a floating rate *sukuk* on the one hand the Sharia requirement of having fixed rate rentals on the other, a solution was found which was to base the *Ijarah Sukuk* on a master *Ijarah* agreement with several subordinate *Ijarah* agreements.

The rentals can be revised semi-annually in accordance with the market benchmark. This method ensures that the rent can be fixed for six months while it floats in accordance with

the market benchmark such as LIBOR or EURIBOR at the same time. However, it is noteworthy that while it is permissible to use LIBOR and EURIBOR as a benchmark, the returns to the *Ijarah Sukuk* holders are not reflective of the rental of the underlying asset; instead, it reflects the prevalent interest rates which are used as the benchmark.

The Issue of Expenditures Which Defy the *Maqasid al-Sharia*

In the case of *Ijarah Mawsufah fi al-Zimmah*, the lessee is the sole responsible for maintaining expenditures (ordinary maintenance and repairs) and it defies the *Maqasid al-Sharia*. The master lease agreement stipulates that the '*aqidain* (two contracting parties) agree to the point that "major maintenance" costs will be borne by the lessor but the true of the matter is, there is nothing in the account for "major maintenance" due to the amount of rental payment by the lessor into the transaction account. It is defined in the contract as the amount that is equal to the amount of periodic distribution to *sukuk* holders from the transaction account and it goes on saying that the first priority in distribution from transaction account is given to the *sukuk* holders. Ultimately, there is nothing in the transaction account that could cater "major maintenance". In short, the lessor is the prime party to bear all costs incurred and not the lessee.

Methodology

Development of Interview Questions

In this research the primary method of data collection is the semi-structured online interviews with the main informants. According to Creswell (2007), Merriam (2009) and Yin (2014), this method offers an opportunity for the researcher to discuss issues under review, explain claims, check for additional details and capture the perception of an opportunity or an event for an individual. The interviews conducted for the Sharia contexts with specific participants help the researcher to obtain dense and comprehensive knowledge about the issues and solutions. This also helps the researcher to collect the information in depth about the relevant skills and knowledge to perform the answers from the experts and academicians of Sharia backgrounds. The input from the Sharia academicians and experts is especially useful in determining the issues and solutions. A pre-test interview question was circulated to one academic at the University Utara Malaysia in conjunction with the analysis undertaken to gain academic opinion interview guide on the structure and quality of the research instruments. It is also to get feedback on which questions work well, and which questions sound incomplete or outside the study meaning, and if the questions work well. Following comments from the academician, the real interview questions were amended accordingly.

Profiles of Participants

Out of the seven scholars and experts who contacted via email and mobile, only three were able to participate. An academic delegate, University Utara Malaysia was also part of the interviewed respondents in order to get perspective from the academic's point of view.

Data Gathering and Analysis

The data was gathered through virtual interview meeting using WebEx and face to face meeting with the both academician and expert. The total of ten questions that related to the *sukuk* was given to the academician and expert to answer. Data was analysed based on the Sharia issues of *sukuk Ijarah Mawsufah fi al-Zimmah*. Comparative study of the academicians and the experts they serve. Certain related important concepts were established to help better clarify the criteria of *sukuk Ijarah Mawsufah fi al-Zimmah* to solve Sharia problems effectively.

Ensuring Quality and Rigor in Qualitative Study

This case study has using a data triangulation technique that basically seeks to use multiple evidence sources to enhance the precision of the results. Merriam's (2009) practice of data triangulation emphasized such triangulation is a well-known "internal validity improvement strategy." One of the strategies to boost the validity of the study findings can also be the use of multiple data sources (Denzin and Lincoln, 2008). Two approaches are used to answer research questions in accordance with the data triangulation technique, including semi-structured face-to - face interviews and interviews with virtual meetings. The respondents were usually staff involved directly in the field under review.

However, the multi-case study pattern that helps the researcher to collect the data from various sources and from two scholars and Sharia experts for this analysis. The data triangulation was also achieved in the current study through interviews with participants at the same organizational level as the lecturer at the University Utara Malaysia, who have the awareness of *sukuk Ijarah Mawsufah fi al-Zimmah* Sharia issues. In addition, the triangulation of data was further enhanced with various sources of proof, such as the authority's guidelines for administering such Both the organizations under review and the websites. Review of test paper substantiates the results of the interviews. This happens if what the respondent tells the investigator about an object in the interview that can be checked or confirmed with the information in the relevant phenomenon documents (Merriam, 2009). For example, in this study, findings from the interviews were checked later on. Validation of data was then achieved by respondents through the "member check" procedure. According to Silverman (2004) and Merriam (2009), member tests or the authentication of respondents is a reliability technique. According to Creswell (2007), his method includes data collection, interpretation, interpretation and conclusions from case informants in order to provide input on the analysis of the researcher. For this analysis, member tests are carried out as the participants through

the interviews participated in the semi-structured interviews were asked to comment on the solution to the problems proposed in the study.

Peer review is the other technique for exchanging ideas on the build validity qualitative data definition and interpretation of the study, processes, and study cycle. According to Merriam (2009), such practice it is when the researcher took part in the self-help community as a way of gaining consensus legitimacy among respected and competent colleagues. The informal discussions with colleagues who also do qualitative research analyses in various areas of study enabled the author gain emotional and intellectual support among peers addressed some of the stages of difficulties faced during the study period.

Findings and Discussion

The Sharia Analysis of Ijarah Mawsufah Fi Al-Zimmah

The following section will discuss briefly the Sharia issues related to *sukuk Ijarah Mawsufah fi al-Zimmah*:

The Ownership of Physical Assets

The subject of *Ijarah Mawsufah fi al-Zimmah* refers to the physical assets. *Sukuk* represents the ownership of the physical assets. However, in *Ijarah Mawsufah fi al-Zimmah*, it is difficult to determine the ownership of the physical assets involved because of the issue of *gharar* (uncertainty) in determining which item is represented by the *sukuk* issued by the lessor. It makes this type of *sukuk* possibly illegal and void in Sharia. *Gharar* literally means danger, uncertainty, fraud, deception or peril. Technically, it refers to the three main concepts, namely; uncertainty, ignorance and being unknown. *Gharar* due to the non-existence of the subject matter or not having control over the subject matter. This is known in the conventional modern term as settlement risk or counterparty risk where the seller, for example, is not in a position to hand over the subject matter to the buyer. Ibn 'Abbas reported the Prophet (PBUH) to have said:

“He who buys food grain should not sell it until he has taken possession of it” (Al-Bukhari, hadith no. 2136).

In the context of *sukuk*, the prohibition of *gharar* is founded on the rule of justice and fair dealings. This is because the occurrence of *gharar* in any transaction may result in oppression or injustice, and the loss of properties to one or even both of the parties. It can also violate the law of mutual consent if the consent of a party to the transaction is due to their insufficient knowledge or access to material information. Due to lack of knowledge, the result of the transaction is not transparent to the parties; thus, it exposes them to unnecessary risk in business transactions.

According to the above-mentioned hadith, the key reason for the prohibition of *gharar* is to prevent potential conflicts. If the parties concerned are not fully aware of any material contract information and are not clear, they may be engaged in unexpected financial responsibility and commitment. This might of course lead to disagreements between the parties as to the relevant and expected effects of the contracts concluded. Nevertheless, it should be noted that only major *gharar*, or *gharar fahish*, which relates to the contract's essential and material details, would make the agreement void. Minor *gharar* (*gharar yasir*) or inevitable *gharar*, due to the complexity of the subject matter and the unlikely possibility of doing serious harm to one of the parties, does not affect the validity of the contract.

Sukuk Ijarah Mawsufah fi al-Zimmah is the *sukuk* that is based on *Ijarah*, where the lessor will lease to the second party of the contract which is the lessee, and the second party will lease from the owner which is the lessor the asset for the *Ijarah* period of time at the related *Ijarah* payments for each *Ijarah* payment period. *Ijarah Mawsufah fi al-Zimmah* is a supporting contract in *sukuk Ijarah Mawsufah fi al-Zimmah* where it gives right to lessor to get advance rental payment. Generally, *Ijarah Mawsufah fi al-Zimmah* is characterized by two distinguishing natures: the definitive nature of the benefit to be offered by the lessor, and the uncertain nature of the item containing the benefit. These two essential natures of *Ijarah Mawsufah fi al-Zimmah* allow the lessor to offer any item as long as it contains the benefit agreed upon in the *ijarah* contract and serves the purposes of *ijarah*. These items which contain the *mawsufah fi al-Zimmah* benefit may carry different traits and qualities, but somehow all serve similar purposes. As long as they enable the lessee to benefit from them, there will be no issue of the lessor having to replace the item with a new one because the uncertainty in the item does not affect the contract if the benefit is clearly identified. This does not include the uncertainty of whether the item will be delivered on time and or will meet the actual description when delivered. Thus, as far as *sukuk* that represent the ownership of the item in *Ijarah Mawsufah fi al-Zimmah* is concerned, this uncertainty on behalf of the item which contains the benefit undoubtedly leads to the impossibility in determining which item is represented by the *Sukuk* issued by the lessor, making this type of *sukuk* possibly illegal.

Due to the non-existence of the asset for the usufruct, the elements of *gharar* would exist in the contract and automatically invalidate the contract according to Islamic perspective. Nazih Hammad is one of the staunch critics of *Ijarah Mawsufah fi al-Zimmah* due to the usufructs in this contract are not associated with a particular tangible asset and it is just a debt which the lessor is liable. Furthermore, he associated his opinion with the classical Muslim scholars such as al-Sarakshi and al-Shawkani to support his viewpoint (Hammad, D. N., 2010). However, the majority of contemporary jurists are in favour of *Ijarah Mawsufah fi al-Zimmah* and both International Fiqh Academy as well as AAOIFI have certified and validated it in their resolutions. Some scholars prohibit the issuance and trading of *sukuk* for the ownership of assets that are the subject of usufruct meeting certain specifications (*mawsufah fi al-Zimmah*). This is based on the deliberation that the asset the lessor can offer to the lessee to provide the usufruct is unknown—because the nature of the usufruct which is the subject of an *Ijarah Mawsufah fi al-Zimmah* contract is not associated with a particular tangible asset,

opposite to the lease of a particular asset. Rather, it is an undertaking for which the lessor assumes liability, and he will fulfil his responsibility, in accordance with the Shariah, by supplying any tangible asset that provides usufruct meeting the specifications in the contract.

Classical scholars have two different opinions with regards to the ownership of physical assets (the subject of *Ijarah Mawsufah fi al-Zimmah*). Hanafi school of thoughts prohibited the lease of an asset of certain specifications that the lessor undertakes to provide for leasing. This is because according to them, one of the conditions for the validity of a lease is that the usufruct must be attached to a particular asset. However, other scholars like Maliki, Shafi'ie and Hanbali schools of thought agreed that the leases are valid even though they differ about whether the entire rental fee needs to be paid upfront at the contract session in order to make the contract valid (Bouheraoua et. al, 2012). The majority contemporary scholars prohibit the secondary trading of these *sukuk* before the physical assets that provide the usufruct, which is what the *sukuk* holders have purchased are completed or more than half-completed. This is because the contracts that cover these assets usually include *istisna'* or *Ijarah Mawsufah fi al-Zimmah* contracts being combined, and when the *sukuk* are sold they are denoted by cash until they have been converted to physical assets (or until most of their value is converted). Thus, they are covered by the Sharia rules relating to *sarf* as their sale would be an exchange of cash for cash.

In addition, it has also been identified that a lease of usufruct in *Ijarah Mawsufah fi al-Zimmah* leads to sale of a debt for a debt as both the physical asset and the usufruct are, at the time of the *Sukuk* issuance, no more than just debts. AAOIFI Shariah Standard No. 17 (5/2/4) states the following on this issue:

“It is permissible, immediately upon issue and up to the date of maturity, but after the passing of ownership of the assets to the holders of the *sukuk*, to trade in *sukuk* that represent ownership of existing leased assets or assets to be leased on promise.”

Thus, it is clear that the standard allows for the commercialism of the *sukuk* only after the transferring of the possession of the goods to the *sukuk* holders. Although a majority of the Sharia scholars are conformable to the issuance and commerce of the *Ijarah Sukuk* in the alternate market, some scholars disagree with this unless the buy-back value is based on the market price.

The Ownership of Usufruct

The *sukuk* subject is the usufruct of certain specifications which are assigned to the issuer's liability. Example of usufruct is the right to stay in a hotel which is still under construction for a specific period. Therefore, the details of the physical asset that provides the usufruct must be clearly and concisely described to avoid any upcoming disputes. Failure in providing the specifications that were assigned to the issuer's liability will lead to major *gharar* (*gharar*

fahish). For example, such details about the asset should be provided: the type or size of the hotel room, the amenities offered in the room, the services available in the hotel, the location plan of the hotel and the room, and other important information.

The issue arises when *Ijarah* contract in *Ijarah Mawsufah fi al-Zimmah* particularly the usufruct must be attached to a tangible asset. It cannot simply be executed without the existence of the asset. It is null and void according to Hanafi school of thought. The majority of Muslim schools are in favour of this *Ijarah Mawsufah fi al-Zimmah* except in the case of payment, whether it should be upfront or delay. According to the Shafi'ie and Maliki school, the payment has to be upfront but according to Hanbali school, the payment can be delayed as long the *Ijarah Mawsufah fi al-Zimmah* is not using *salam* in the contract. If the *salam* contract is being used, then the payment has to be made upfront and cannot be made delayed as to avoid *riba'* (usury).

Some scholars like Sheikh Ali Qurrah Daghi and also the AAOIFI Shariah Standard have prohibited the trading of *sukuk* for ownership of usufruct that is the subject of *Ijarah Mawsufah fi al-Zimmah*. AAOIFI Shariah Standard No. 17 (5/2/8) on investment *sukuk* stated that; "It is not permissible to trade in certificates of ownership of usufructs of a described asset before the asset from which usufruct is to be made available is ascertained, except by observing the rules of disposal of receivables. When the asset is ascertained, trading in *sukuk* of usufructs of such asset may take place". Sheikh Ali Qurrah Daghi concluded that the strongest opinion regarding the sale and purchase of *sukuk* of this type is that they are only permissible after the issuer has converted the funds raised by the subscription (what was paid for the *sukuk*), or most of them, into a lease of particular assets. Before that happens, it is not permissible to trade them because they remain cash that has not been converted, completely or mostly, into particular leased assets or realised usufruct "(Al-Qurrah Daghi, 2004).

Other than that, other contemporary scholars like Nazih Hammad, Abdul Sattar Abu Ghuddah, Hussein Hamed Hassan and Kahf permitted to trade such *sukuk* (Hammad, 2010; Hassan, H. H., n.d.; Abu Ghuddah, A. S., n.d.; Kahf, 2011). The basis for the view is that the trading of *sukuk* for the ownership of the usufruct in forward leases is a form of *hawalah* (transfer) of responsibility for fulfilling the liability; it is not a sale of the same usufruct that is *mawsufah fi al-Zimmah*. Therefore, the usufruct that associated with a particular tangible asset must be meticulously described and narrated in full identification. To conclude, the contemporary jurists are in favoured of this *sukuk* but majority of them including AAOIFI are not happy with it and hold it as impermissible.

Bay al-Sarf

Sarf is an Arabic word that means change or exchange. The term *bay al-Sarf* means selling or exchanging currencies with one another, they can be either of the same genus or of different genus. Moreover, currencies of different countries should be treated as different species, so inequality in their exchange is allowed, but without any deferment. This is the view stated by the IEA-OIC (2000) in its Resolution No. 21 (9/3) dated October 1986; AAOIFI 2015 in its

Shariah Standard No. 1; and IFC-MWL (1982) in its 6th Resolution of the 5th session. The issue of *bay al-Sarf* is relevant in the trading of *sukuk*. *Sukuk* represent ownership of the underlying assets; their trading is interpreted as direct exchange of their underlying assets. Thus, if currency or cash is the underlying asset of *sukuk* at any stage and the *sukuk* are traded for a cash price then their trading would fall under the scope of *bay al-Sarf* at that specific stage. That is why the IFA-OIC, in its Resolution No. 30 (5/4) dated February 1988, resolved regarding *mudharabah sukuk* that if *mudharabah* capital is still in the form of cash after closing of subscription, the trading of such *sukuk* for cash would be considered exchange of money for money; thus, the conditions of currency exchange would be observed. The same ruling for other *sukuk* having cash as underlying assets is mentioned in Resolution No. 178 (4/19) dated April 2009.

Likewise, AAOIFI (2015) in Shariah Standard No. 17 (5/2/1) mentions that just after the closing of subscription and before starting business activity or an underlying project, if the assets of *sukuk* are in the form of cash, then the conditions of *bay al-Sarf* would be applied in the trading of such *sukuk*. Similarly, when liquidation of *sukuk* is completed and the assets of *sukuk* are in the form of cash, the same ruling of *bay al-Sarf* would be applied. In view of this, it can be construed that when the asset of *sukuk* is in the form of cash at any stage or point in time, their trading is subject to the rules of *bay al-Sarf*. For *sukuk Ijarah Mawsufah fi al-Zimmah* advised that it is vital to pay attention to the status of the *sukuk* involved. For example, if in *Ijarah* contract, the assets involved are like buildings, the issue that must be considered is what is the status of the *sukuk* when the investors invested for buildings to rent them? Is it debt or is it representing the assets? It is also worth mentioned, that the status can change from time to time. Let's say the delivery starts from 1 September 2020, it can be said that it is representing *Ijarah* now, but later, it is representing usufruct. Therefore, after the investors got the usufruct, they can change it in premium.

Possession (*Qabd*) of Underlying Assets

Basically, there are two types of possession (*qabd*) of underlying assets in *sukuk*; physical possession (*qabd haqiqi* or *hissi*) and constructive possession (*qabd hukmi* or *ma'nawi*). For asset-based *sukuk* like *Ijarah Mawsufah fi al-Zimmah*, the physical possession is more real in this context. The issue of possession becomes quite relevant as it is said that *sukuk* holders only enjoy restricted ownership of the underlying assets. Mutual delivery and possession of counter values by transferring ownership of those counter values to the counter parties is the ultimate objective of an exchange contract. Thus, taking possession of the underlying asset of *sukuk* another vital element in such type of transactions. The word *qabd* means "to take something". *Taqabud* is another term that adds a bilateral connotation of taking possession mutually by both sides of the exchange, The SAC of SC Malaysia (2006) considers possession as taking ownership and control over something through an exchange contract. AAOIFI (2015) in Shariah Standard No. 18 (2) defines possession as:

“Possession is the assembly of a thing or what takes its rule, based on the necessities of customary activity”

In the discipline of Islamic law of contracts, *qabd* is defined as an enablement, relinquishment and waiving any hindrance according to custom and genuine practice (Al-Kasani, 1986). From the preceding definitions given, it is evident that the notion of taking possession is fundamentally based on the quality of the physical object and on the customary activity of the people. This is also stated in the Resolution No. 53 (4/6) dated March 1990 by the IFA-OIC, AAOIFI (2015 in Shari ah Standard No. 18 and the SAC of SC Malaysia (2006). The issue of *bay al-Sarf* is relevant in the trading of *sukuk*. *Sukuk* represent the ownership of the underlying assets; their trading is interpreted as direct exchange of their underlying assets. Thus, if currency or cash is the underlying asset of *sukuk* at any stage and the *sukuk* are traded for a cash price then their trading would fall under the scope of *bay al-Sarf* at that specific stage. In the case of secondary trading of *sukuk Ijarah Mawsufah fi al-Zimmah*, when the *sukuk* is sold they will be denoted in cash before they are converted to real assets (or until most of their value is converted). They are therefore triggered by the issue of *bay al-Sarf* that is related to Sharia laws. This is because their selling will be an exchange of cash for cash.

With this regard, viewed that obviously *qabd haqiqi* belongs to lessor but *qabd ma'nawi* can be transferred to lessee. In the issue of incomplete projects, lessee should be responsible to the losses in the contract. *Ijarah Mawsufah fi al-Zimmah* is different with conventional bonds in the sense that in asset based like *Ijarah Mawsufah fi al-Zimmah*, the assets involved are the income from the building, from the businesses or from the obligor, where actually there are "real possession" in the assets. On the contrary, this is different when it comes to conventional bonds, because the income came from the interest were charged from the assets. Hence, the obligor paid the rental payment, therefore the obligor has the right of benefits over the assets (*huquq al-intifa'*). As compared to physical possession (*qabd haqiqi* or *hissi*), constructive possession (*qabd hukmi* or *ma'nawi*) is more real in the context of *sukuk*. Constructive possession of an underlying asset of *sukuk* is achieved when the ownership titles, rights and liabilities of the underlying asset are transferred to the subscribers of *sukuk*. Similarly, constructive possession of proceeds of *sukuk* is considered to be achieved when the subscription amount of *sukuk* is collected by the issuer of *sukuk*.

However, there are various issues and aspects arising from how *sukuk* are structured that are strongly relevant to the discussion of constructive possession. For instance, the issue of possession becomes quite relevant is when the *sukuk* are asset-based or asset-backed. In asset-backed *sukuk*, the *sukuk* holders have unrestricted ownership of the underlying assets of *sukuk* which is established via true sale, therefore constructive possession seems to be valid in such of type *sukuk*. On the contrary, in the *sukuk* that are asset-based, the *sukuk* holders only enjoy restricted ownership of the underlying assets of *sukuk*. For instance, they do when default case occurs, they will not have the right of access to the underlying properties.

Mix of Trading Assets

Most of the *sukuk* nowadays don't merely consist of one type of underlying assets. Usually, the underlying assets of *sukuk* are formed by combining various types of assets such as

touchable assets (like commodities, land and structures) and unidentifiable assets (like usufructs, services and rights). From another aspect, they may seem like currency or assets (*ribawi* assets) and products, usufruct, rights and services (non-*ribawi* assets). Due to the fact that their underlying assets are neither completely non-*ribawi* nor completely *ribawi*, the Sharia ruling for their trading is quite complicated. This issue has become a controversial point of difference among contemporary Sharia scholars.

AAOIFI (2015) in Shariah Standard No. 17 (5/2/1) only revealed the content of tradability of *sukuk* that have an individual type of asset. For example, it highlights that when the implicit assets belong to the touchable assets, usufructs or services, they can be listed at any price. One of the informant is on the opinion of the permissibility of mix trading assets. According to him, mix of trading asset is permissible with the condition that the assets should be clearly spell out in the contract to avoid *gharar*. If the lessee agrees on the asset offered by the lessor, then he can enter into *Ijarah* contract or *sukuk Ijarah Mawsufah fi al-Zimmah*. For the second informant, he viewed that normally for *sukuk ijarah*, the assets must be something that can be rented possibly as the underlying assets. As for beneficial ownership, the process involved to change into beneficial ownership is very costly. Normally, the Government will not sell the asset. However, the issue arises when the Government sell the asset, it will be in a form of fixed or real sale. From here it will trigger the issue of *qard*, that is not recognized in Islamic law. Hence, in order to ensure that the transfer of beneficial ownership really happened the government must obtain the permission from the Cabinet, and it isn't something easy to get an approval from the Cabinet.

Rental Payment Structure, Fixed Rate or Floating Rate

Initially, fixed rate *ijarah* was seen to be the only Sharia-compliant rental payment structure. Unfortunately, fixed rate *sukuk* tend to face several market risks. To address this issue, the floating rate rental payment structure was introduced, with a precondition that it must be based on a certain formula and it has to be fixed for a certain period and agreed upfront. Finally, to match the market requirement of having a floating rate *sukuk* on the one hand the Sharia requirement of having fixed rate rentals on the other, a solution was found which was to base the *Ijarah Sukuk* on a master *ijarah* agreement with several subordinate *ijarah* agreements in the subordinate *ijarah* contract. The rentals can be revised semi-annually in accordance with the market benchmark. This method ensures that the rent can be fixed for six months while it floats in accordance with the market benchmark such as LIBOR or EURIBOR at the same time. However, it is noteworthy that while it is permissible to use LIBOR and EURIBOR as a benchmark, the returns to the *Ijarah Sukuk* holders are no reflective of the rental of the underlying asset; instead, it reflects the prevalent interest rates which are used as the benchmark.

The main concept in *sukuk Ijarah Mawsufah fi al-Zimmah* is *Ijarah*; the lessor leases the underlying asset to lessee. Because of this, it should follow the basic elements of contract; '*aqad*, subject matter, contracting parties, price or rental. For *Ijarah Mawsufah fi al-Zimmah*, it is just a supporting contract to justify the rental return for project/asset under construction

in contract *Ijarah*. According to one of the informants, he opined that all of the elements of *Ijarah* must be fulfilled in the issue of rental payment. The two contracting parties upon agreeing the subject matter of the contract must follow the rules of thumb for *Ijarah*. For example, when is the time the lessee and lessor agreed to make payment, is it now or later? If the lessor permits the lessee to pay later, then it is permissible in Sharia. However, in the case of open delivery, the lessee has the right to reject the offer.

The Issue of Expenditures Which Defy the *Maqasid al-Sharia*

In the case of *Ijarah Mawsufah fi al-Zimmah* the lessee is the sole responsible for maintaining expenditures (ordinary maintenance and repairs) and it defies the *Maqasid al-Sharia*. The master lease agreement stipulates that the '*aqidain*' (contracting parties) agree to the point that "major maintenance" costs will be borne by the lessor but the true of the matter is, there is nothing in the account for "major maintenance" due to the amount of rental payment by the lessor into the transaction account is defined in the contract as the amount that is equal to the amount of periodic distribution to *sukuk* holders from the transaction account and it goes on saying that the first priority in distribution from transaction account is given to the *sukuk* holders. Ultimately, there is nothing in the transaction account that could cater 'major maintenance'. In short, the lessor is the prime party to bear all costs incurred and not the lessee.

***Sukuk* Default**

Capital Intelligence (2016) considers a default to have occurred in three major situations. Firstly, when an issuer fails to pay a material sum of principal and/or interest on a financial obligation in accordance with its terms. Secondly, when an issuer files for bankruptcy or similar protection from creditors-unless there is reason to believe that debt service payments will continue to be made in a timely manner. Lastly, when an issuer restructures (reorganises), reschedules, exchanges or in some other way renegotiates a debt instrument. For the third scenario, the following things apply:

1. There is an adverse change to the terms of the original debt agreement; and
2. The renegotiation or exchange is considered by Capital Intelligence to be distressed or coercive.

Adverse changes to the terms of the original debt agreement may include the following:

- A reduction in the principal amount or coupon/interest rate;
 - An extension of the maturity date or loan tenure;
 - A reduction in seniority or a substantial weakening of covenants;
 - A cash tender for less than par;
 - A decrease in the frequency of payments (e.g. from amortising to bullet payments);
- and
- Swapping debt for equity or hybrid instruments.

While the theoretical debate around the nature of as well as the Sharia justification for asset-based versus asset-backed *sukuk* is still ongoing, many examples of actual and near *sukuk* default highlight that the touchstone to distinguish between these two types is the scenario of default. The different treatment of these *sukuk* in the case of default is the result of the nature of asset ownership that *sukuk* holders have. Most of the *sukuk* issued so far are asset-based which only give the right of fixed payment to *sukuk* holders and the return does not depend on the performance of the assets. Since there is no direct link between the *sukuk* certificate and the underlying assets, the *sukuk* holders do not in case of default have recourse to the assets. One of the rationales behind issuing asset-based *sukuk* is to obtain a higher rating since these *sukuk* are linked to the creditworthiness of the originator and not to the physical asset on which *sukuk* are based.

The default scenario of an asset-backed *sukuk* is different. Since the ownership of asset has been, in most cases, legally transferred to *sukuk* holders in an asset-backed *sukuk*, they have the right of recourse against the asset itself upon default. So, the nature of asset sale is different in the two types of *sukuk* which leads to a different treatment of the *sukuk* holders when default occurs. Consequently, asset-backed *sukuk* may offer more security and proprietary rights to its owners-the underlying asset of such *sukuk* could ideally continue to perform regardless of the originator's financial distress, thus *sukuk* holders should be able to liquidate the asset if they wish. Conversely, if the *asset* underperforms (although the issuer may not be in financial distress) then the *sukuk* would pose higher risks to *sukuk* holders. In spite of these features, asset-backed *sukuk* are not common due to many reasons: the costs of legal transfer of ownership, tend to be very high; *sukuk* holders do not want to take on the actual risk of the asset and prefer to rely on the risk of the originator itself; and there are certain other legal challenges like negative covenants (which restrict specific activities by the issuer unless agreed to by the *sukuk* holders), and restrictions on foreign ownership that make asset-backed *sukuk* less preferable.

It can be summarized that *sukuk Ijarah Mawsufah fi al-Zimmah* falls under the category of asset-based *sukuk*. In an asset-based *sukuk* structure, the transaction in the asset results in a transferring income rights to *sukuk* investors whilst the legal title is retained by the obligor. In an asset-based *sukuk*, the presence of the asset is for the purpose of Shariah fulfilment rather than to serve as a source of profit and capital payments to *sukuk* holders. There's no "true sell" the underlying asset by the obligor to the SPV and thus no transfer of legal title as well as no establishment of legal owning the underlying asset to *sukuk* holders. *Sukuk* holders only have beneficial ownership in the asset, with limited risks and rewards of ownership being transferred to them. Through a number of credit enhancement features (e.g. purchase undertaking, liquidity facility), the recourse of *sukuk* holders is not to the asset but to the obligor (the entity having the obligation to redeem the *sukuk*). If the obligor defaults, the *sukuk* holders will only have a limited right of disposal because they will be required to sell the asset back to the obligor. Credit risk assessment will be directed towards the obligor and not on the asset. In the event of default, also told that since *sukuk* for *Ijarah Mawsufah fi al-Zimmah* contract involves forward or advance rental payment, if the project is incomplete or leave abandoned, the payment should be refund to lessee due to inexistence of *ijarah* asset.

In the context of Malaysia, it is not apparent to have problems of *sukuk* default. However, in other countries like Dubai, like in the case of Dana Gas, some of the scholars have declared that the contracts are not following the Sharia-compliance aspects for *mudharabah* and *musharakah*. Therefore, in this case, the parties don't necessarily need to pay for the profit.

Suggestions and Future Research

Suggestions

Sukuk Ijarah Mawsufah fi al-Zimmah were introduced successfully in several nations. There is a significant growth of this form of *sukuk* in solving the Sharia problems, having to go back to the basis or essence of the *Ijarah Mawsufah fi al-Zimmah* contract, the foundations etc, in order to prevent conflicts between contracting parties. Of course, when talking about Sharia, there's a diversity of views among the scholars. There is therefore a need to look for standardization to help in tackling the Sharia issues in *Ijarah Mawsufah fi al-Zimmah* which will contribute to the growth of this form of *sukuk* or even modern, specific *sukuk* structure involving *Ijarah Mawsufah fi al-Zimmah*. Additionally, the Sharia advisors need to rigorously analyse and study the *sukuk* 's framework in finding the best solution to avoid the contentious issues as it has to do with halal and haram. The secret to implement the standardization is moderation. The research found that removing all major prohibitions that would make the *sukuk* void is undeniably necessary. In addition, there are many government incentives for SRI *sukuk*, since one of the problems is restricted physical asset availability in *Ijarah*.

Future Research

To make the implementation of *sukuk Ijarah Mawsufah fi al-Zimmah* more compliant in terms of Sharia, more need to be done through the use of technology, as it helps to interact effectively among the parties. Innovation may also focus on intangible assets or usufructs such as service rights, airtime, travel rights, and others. Innovation affecting multiple industries can also require Intellectual Property (IP). In order to avoid default, further studies are required on the efficacy of risk management or risk reduction. In addition, *Ijarah Mawsufah fi al-Zimmah* can be built according to trends. Nowadays, perhaps the emerging trend of *sukuk* like the Sustainable and Responsible Investment (SRI) *sukuk* is on the bandwagon.

Conclusion

Sukuk Ijarah Mawsufah fi al-Zimmah is a leasing-based, creativity variant of *ijarah*. This is also known as forward leasing includes building a complete or incomplete asset, facilities either by construction or manufacturing as the leasing aspect exists. Thanks to *ijarah*, which has a solid and well-grounded Sharia perspective, it is graded as impressive *sukuk* structure. Subsequently, it has an additional benefit in terms of funding and investment instruments for

which it can be used not only in small scale but also in large ventures involving massive capital. While the application of *Ijarah Mawsufah fi al-Zimmah* in Malaysia is relatively small, there is potential for growth particularly in the setting up of outsized government projects, large corporations. However, due to the fact that the government is still engaged in infrastructure and project building, the sovereign *sukuk* is highly important in using this *sukuk*, which will support the *sukuk* holders at a later point. Nonetheless, this forward *sukuk* has its own distinct problems that need to be tackled in order to harmonize and systematize the potential development of *sukuk Ijarah Mawsufah fi al-Zimmah*.

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