

A Comparative Study of Conventional Bonds and Islamic Sukuk and their Use of the Trust Instrument

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Abstract

The English trust form has been an invaluable tool in the growth and development of capital markets, assisting in the smooth running of the bond markets in a way which is seemingly unattainable through contract law alone. During the course of the last few years, however, modern western finance has begun to experiment with, and embrace, a new legal instrument: the Islamic Sukuk.

Similar to bonds in their employment of the trust form, the sukuk is growing to be an essential tool in modern finance, providing western business with an opportunity to tap a previously restricted source of funding. Since the introduction of the instrument its' use has continued to grow, with many city law firms now having specialist Islamic Finance teams to tackle the unique questions and hurdles that the integration of sukuk into the western financial system inevitably creates.

This article examines the use of the trust form by both traditional bonds, and the Islamic sukuk, to ascertain why the trust is so valuable, and begins to assess what advantages and disadvantages may arise from the more common use of the sukuk in our western financial system.

Introduction

On 25th June 2014, the first sovereign sukuk¹ in the western world was issued by the UK government, marking out the United Kingdom as a key player in the future of Islamic finance. Unlike traditional bonds, in which the appointment of a trustee is optional, key differences in the fundamentals of sukuk mean that all sukuk arrangements involve the use of trusts and trustees. In this dissertation, I will look into how the trust form has been manipulated to assist in the operation of capital markets, specifically in the case of bonds, and how this use differs in a typical sukuk offering. The trust form has been described as an ‘immensely powerful and flexible instrument of modern finance’,² and therefore in this dissertation I intend to undertake a comparative analysis of the role of trusts in two scenarios: a bond issue, and a sukuk issue, in order to record an understanding of why they are employed and what the function of the trust actually is in these circumstances. I shall begin with an outline of how the bond markets, and sukuk, operate. Following from this I shall attempt to explain why the trust instrument is used (and sometimes required) in these markets. What are the benefits achieved by the trust which could not be granted through, for example, simple contract law? Why are trustees in bond issues often the preferred choice over a paying agent, and required by law in the USA? In answering these questions, my dissertation will also make comparisons with the Islamic sukuk to assess what advantages or disadvantages, if any, arise from using this alternative legal form.

The answer to these questions, I suggest, is threefold. The trust instruments’ asset partitioning function allows for bond monies to be held separate from the funds of the issuer or the trustee; the trust instrument allows for a level of organisation and

¹ Commonly translated as ‘Islamic Bonds’ though this is not a strictly accurate comparison, sukuks are in essence sharia-compliant bond certificates.

² Roy Goode, *Commercial Law* (3rd Edn, Penguin 2004).

accountability which could not be achieved through pure contract law, with benefits to both the issuer and the bondholders most notably with regards to acceleration of the bond; and finally the appointment of a trustee allows for a degree of efficiency which would be harder to attain through other means. In order to carry out such an analysis, it is first necessary to provide an understanding of how the conventional bond market operates, and the place of sukuk within the UK capital markets.

The Fundamental of the International Bond Market

A conventional bond is a debt instrument which promises to pay the bearer periodic interest³ in return for an immediate loan, until such time as the loan sum is repaid.⁴ Bonds have four categories of issuer (the borrower): Sovereign governments, local governments, supranational bodies such as the World Bank, and corporations.⁵ A bond will always include a 'term to maturity', typically between two and thirty years,⁶ at which time the principal sum is repaid. Included in a bond can be what are known as 'embedded options'. Examples of these include a call feature, through which the issuer can bring forward the date of maturity, a put feature, through which the bondholder can bring forward maturity, or a convertible bond agreement, through which the bondholder may exchange the bond for a specified amount of equity (shares) in the issuing company.⁷ For the purposes of this dissertation it is not necessary to explain further the rationale behind these embeddable options. Also of

³ The amount will either be set as the 'coupon rate' (traditionally the bond paper had coupons which could be torn off and exchanged for the interest), or alternatively in the case of a 'floating-rate note' (FRN) which are typically linked to six-month LIBOR and therefore the rates are reset every six months.

⁴ Philip Coggan, *The Money Machine: How the City Works*, (7th Edn, Penguin 2015).

⁵ M. Choudhry, *An Introduction to Bond Markets*, (4th Edn, Wiley 2010).

⁶ Op cit fn 4.

⁷ Op cit fn 5.

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note bonds are 'bearer certificates' and can be traded on secondary markets once issued.⁸

Participants in the bond markets can be grouped into four categories: Short-term institutional investors;⁹ long-term institutional investors;¹⁰ mixed-horizon institutional investors;¹¹ and market professionals.^{12; 13} Key players involved in a typical bond issuing, are the issuer/debtor, the bond-holder/investor, the managers and, when instructed, the trustee. Fig. 1, below, sets out the structure of a typical bond issue, and all of these places shall be filled at the 'pre-launch' stage of the issue i.e. before the bond issue has been publicly announced.¹⁴ The issuer shall directly instruct a trustee, and mandate a 'lead manager' who shall manage the bond issue and will often be a financial institution such as an investment bank. Both the issuer and lead manager shall then instruct their lawyers and the necessary documents shall be drawn up, usually by the lead manager's lawyers. These include the prospectus,¹⁵ subscription agreement¹⁶ and trust deed,¹⁷ among others. The lead manager may also approach further financial institutions to act as additional managers. These players together agree to form a syndicate which shall typically underwrite the bond issue, and buy any unsold bonds to subsequently sell on to

⁸ Ibid.

⁹ For example: banks, treasury desks, and central banks.

¹⁰ For example: pension funds.

¹¹ Most corporates will fall under this category, and as such this category is also very active in the primary market i.e. issuing bonds of their own to fund their business.

¹² This category includes investment banks and bond traders.

¹³ Op cit fn 5.

¹⁴ This is called the 'launch and roadshow' stage, at which point the bond issue is marketed to possible investors. Following from this is the 'issue' stage, where the subscription agreement and trust deed are signed, the bond instrument is created, and the investors receive the bonds in return for the purchase price.

¹⁵ A document which contains all of the information about the bond and the issuing corporation in order for investors to make a decision. The prospectus is governed by Part VI of the Financial Services and Markets Act 2000, and the Financial Conduct Authority Prospectus Rules, located in the FCA Handbook (<www.handbook.fca.org.uk/handbook/PR/> accessed 19 April 2016).

¹⁶ Signed by the issuer and the managers, in which the managers agree to purchase the bonds.

¹⁷ The trust deed gives legal form to the bonds and appoints the trustee to act for the bondholders and represent their interests.

investors. In the UK, a trustee is optional, however in the US jurisdiction a trustee has been mandatory since 1939,¹⁸ and in sukuk offerings they are a necessary participant.

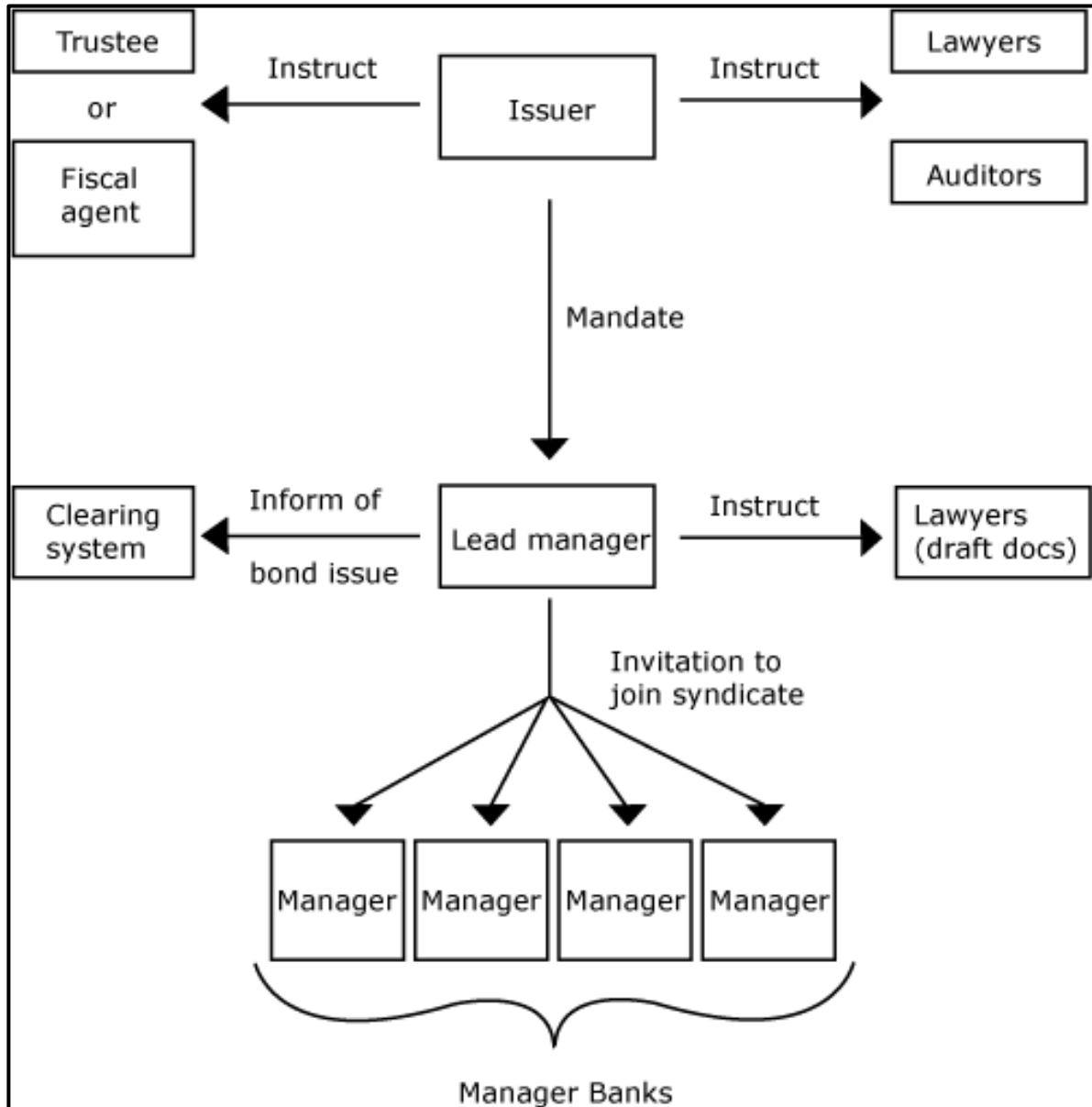


Figure 1: Structure of a Bond Issue

Source: Practical Law (Thompson Reuters)

¹⁸ Following the passing of the Trust Indenture Act 1939.

I shall be focusing in this dissertation on the international bond markets, which consists of bonds and Eurobonds, which are bonds produced in a different currency from that of the country in which they are issued.¹⁹ The role of the trustee in such bond issuings is to look after the interests of the bond-holder, typically by fulfilment of three functions: (i) the payment function i.e. passing on interest and principal payments to the bondholders; (ii) the monitoring function, which involves using their available resources and requesting the necessary disclosure of information and cooperation from the issuer to make sure that all of the issuer's obligations are being fulfilled; and (iii) the representative action function, which includes agreeing to modifications and waivers of bond provisions, and enforcement of the provisions, for example through acceleration (making the bonds immediately payable).

In recent years, however, the representative action function has become more and more difficult. The *Elektrim* litigation²⁰ of 2004-2005, for example, did not make clear when the courts may choose to intervene following the action of the trustee, arguably paving the way for overly cautious trusteeship, and the rise of investor activism in the case of junk bonds has muddied the waters somewhat. Further to this, it is interesting to see that in the case of Islamic sukuk offerings, the trustee is often the issuer themselves, which raises questions as to the obligations owed by the trustee in such situations, and how the role differs between the two structures. There is no reason why the sukuk trustee is essentially the issuer, and so this

¹⁹ The reason behind the name being that non-US borrowers still wanted to raise US capital (USD) following the imposition of the Interest Equalization Tax imposed by President Kennedy in 1963 to counter the US current-account deficit. As such, bankers – predominately in London – began to sell USD-denominated bonds in European countries. In short, a Eurobond is a bond sold outside of the denominating currency. See P. Coggan op cit fn 4.

²⁰ *Concord Trust v Law Debenture Trust Corporation Plc.* [2004] EWHC 1216 (Ch); [2004] EWCA Civ 1001; [2005] UKHL 27

dissertation intends to look at possible benefits and challenges faced by each form of trustee.

The Fundamentals of Sukuks

A sukuk, put simply, is a Shari'ah compliant alternative to a bond. The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) has recognised 14 types of sukuk²¹, however the most commonly used is the *al-ijara* structure due to its '...uncontested Shari'ah-compliance and investors' familiarity with the sale and leaseback structure.'²² As such, I shall be focusing on the *al-ijara* structure in this dissertation. The AAOIFI is a not-for-profit organisation founded in Bahrain in the 1990s and they produce sets of standards for the global Islamic finance industry. Compliance with AAOIFI's Shari'ah standards is mandatory in Bahrain, Oman, Pakistan, Sudan and Syria, and they were the basis for development of national guidelines in Indonesia and Malaysia. Further to this, the guidelines have been adopted voluntarily by law firms and institutions in the U.K., U.A.E, France and others. This clearly illustrates the high regard in which the standards set by the organisation are held and their contribution to a harmonization of Shari'ah law and interpretation across jurisdictions.

Islamic law does not allow for certain things which are common features of the conventional bond structure, and indeed Western banking in general, and as such the use of these structures is strictly prohibited.²³ These fundamental principles are

²¹ The Accounting and Auditing Organisation for Islamic Financial Institutions, 'Shari'ah Standards for Islamic Financial Institutions (2015) <<http://aaoifi.com/books/shariah-standards-2/?lang=en>> accessed 30th April 2016.

²² Latham and Watkins, 'The Sukuk Handbook: A Guide To Structuring Sukuk' (*Latham and Watkins*, 2015) <<https://www.lw.com/thoughtLeadership/guide-to-structurings-sukuk-2015>> accessed 30th April 2016.

²³ The Accounting and Auditing Organisation for Islamic Financial Institutions, 'Shari'ah Standards for Islamic Financial Institutions (2015) Shari'ah Standard 21 <<http://aaoifi.com/books/shariah-standards-2/?lang=en>> accessed 30th April 2016.

the prohibition of interest (*Riba*); the prohibition of excess uncertainty (*Gharar*); and the prohibition of support for immoral/unethical activities (*Haram*).

Riba

The charging of interest is known as *riba* and is prohibited by Islam. This rule has been the subject of much discussion in fairly recent history²⁴ with some scholars presenting the view that the strict interpretation of the rule is now outdated and not relevant in modern society. They argue that the concept of *riba* is not simply 'stipulated excess', but rather that it is linked to taking advantage of the poor and vulnerable. In the old days debtors were the most economically disadvantaged in society, with a lack of certainty surrounding their ability to secure their most basic needs, and with no protection from the lenders upon whom they relied. Failure to pay interest eventually lead to enslavement and slave labour if payments were not kept up. The charging of interest in this society was considered unethical, and inhumane.²⁵ In today's society, however, debtors tend to be relatively affluent, have secure jobs, and access to financial advice. There are laws protecting against exploitation, and the existence of bankruptcy proceedings (also a part of Islamic law). People and companies can lose their assets, but nothing more and so it is argued that *riba* in today's circumstances is not automatically immoral.²⁶ Whilst the accepted stance at present is the prohibition of 'excess in any form',²⁷ the debate still

²⁴ Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation* (2nd Edn, Brill 1999); Abu Umar Faruq Ahmad; M. Kabir Hassan, 'Riba and Islamic Banking' (2007) 3(1) J.I.E.B.F. 1; Barbara L. Seniawski, 'Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law' (2000) 39 Colum.J.Transnat'l.L. 701; Mohammad Omar Farooq, 'Stipulation of Excess in Understanding and Misunderstanding *Riba*: The Al-Jassas Link' (2007) 21 A.L.Q. 285.

²⁵ Abdullah Saeed; 'The Moral Context of the Prohibition of *Riba* in Islam Revisited' (1995) 12(4) A.J.I.S.S. 496.

²⁶ *Ibid.*

²⁷ *Op cit* fn 21.

seems to remain open, and interesting questions are raised concerning the future development of sukuk should this position change at any time (however unlikely).

Gharar

Gharar is a broad concept which has been described as 'deceit, risk, fraud, uncertainty or hazard that might lead to destruction or loss.'²⁸ *Gharar* is split into two types: *fahish* and *yasir*. The former is 'light' *gharar*, or risk, which is present in any transaction and is permissible. The latter is 'excess' *gharar* which is prohibited, and would include the use of a floating interest rate to determine payments, as there is no way to know which way and to what extent said interest rates will fluctuate.²⁹ As with many other elements of Shari'ah finance law there can be difference of opinion among Islamic scholars as to where to draw the line with respect to uncertainty. It seems that as with the development of sukuk itself, there is a will amongst all parties to facilitate a successful transplanting of Islamic finance into Western jurisdictions.

Difference of opinion in respect of Islamic financial law more generally has been a significant barrier to the emergence and wide use of an Islamic legal system in the UK, demonstrated by the cases of *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV and ors*³⁰ and *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd (No.1)*³¹ in which English law was ruled above Shari'ah as the law of enforcement of contracts. In the latter case, Potter LJ recognised that Shari'ah law contains 'areas of considerable controversy and difficulty'³² due to the presence of multiple schools of thought, and so it was found

²⁸ Md Akther Uddin, 'Principles of Islamic Finance: Prohibition of Riba, Gharar, and Maysir' (2015) MPRA Paper No. 67711 <https://mpa.ub.uni-muenchen.de/67711/1/MPRA_paper_67711.pdf> accessed 30th April 2016.

²⁹ Muhammad al-Bashir Muhammad al-Amine, *Global Sukuk and Islamic Securitization Market: Financial Engineering and Product Innovation* (Brill 2011).

³⁰ [2002] All ER (D) 171 (Feb).

³¹ [2004] EWCA Civ 19.

³² *Ibid.* [55].

that Shari'ah cannot be the host law, in addition to other reasons not relevant to this dissertation.

It can be said, however, that Shari'ah is undergoing a process of standardisation in the area of financial law, and that it is beginning to take the shape of a coherent legal system. This is thanks in part to institutions such as the AAOIFI Shari'ah Standards, and also to organic convergence as Islamic instruments become more widely used.³³

Haram

Haram simply means an activity prohibited by Islamic law. A strict interpretation is that immoral and unethical business cannot be supported, for example businesses concerned with alcohol, pork, armaments, and gambling,³⁴ but also any other business which is not wholly Shari'ah compliant in all of its operations.³⁵ This, however, would put extreme limitations on companies with which Islamic investment banks could do business, and so a group of prominent Islamic scholars have relaxed the interpretation somewhat, subject to conditions. For example, if the primary business aim is Shari'ah compliant, then this would satisfy the requirement that the business as a whole be compliant,³⁶ which would therefore allow investment in a hotel which happens to have a bar serving alcohol.

³³ Nicholas H. D. Foster, 'Islamic Finance Law as an Emergent Legal System' (2007) 21 A.L.Q. 170.

³⁴ Omar Salah, 'Islamic Finance: The Impact of the AAOIFI Resolution on Equity-Based Sukuk Structures' (2010) 4(5) Law & Fin.Mkt.Rev. 507.

³⁵ *Ibid.*

³⁶ Atif Hanif, 'Islamic Finance – An Overview' (2008) 1 Int'l.E.L.Rev. 9.

Asset-Backed vs Asset-Based

In addition to there being many different types of sukuk, they can also be categorised as either 'asset-based' or 'asset-backed', though only a very small percentage fall into the latter group.³⁷ The difference between the two stems from the nature of the sale of the trust assets, and the nature of the sale raises questions about the permissibility of the structure. According to Islam, lawful profit-making must involve effort, or at the very least the taking of risk – one cannot profit from an investment that they help to finance if they bear no responsibility for its outcome.³⁸

In an *asset-backed* sukuk scenario, there is a true sale of assets from the obligor to the issuer SPV. There is a full transfer of legal and equitable title and the property no longer belongs in any way to the obligor, and therefore there is no debt structure. Following the sale, the obligor then acts as servicing agent i.e. they perform all tasks in relation to managing and operating the asset(s). In this model, return for the investors comes directly from the cash-flow of the securitised asset,³⁹ and if the asset does not make any money (for example, if the asset was a hotel and that hotel suddenly had no guests) then there is no return on the investment. The asset-backed model is recognised as truly Shari'ah compliant as there is the presence of profit and loss sharing, or risk. There is no guaranteed income stream – if the securitised assets are utilised and perform well, then there is profit for the investors and the obligor; if it performs badly then the losses are shared. This principle is reiterated in the purchase and sale undertakings signed by the parties –

³⁷ Habib Ahmed, 'Islamic finance at a crossroads: the dominance of the asset-based sukuk' (2010) 6 J.I.B.F.L 366.

³⁸ Abdul Karim Abdullah, 'Asset-Based vs Asset-Backed Sukuk' (2012) 3(4) I.C.R. 751.

³⁹ Razi Pahlavi Abdul Aziz; Anne-Sophie Gintzburger, 'Equity-Based, Asset-Based and Asset-Backed Transactional Structures in *Shari'a*-Compliant Financing: Reflections on the Current Financial Crisis' (2009) 28(3) Economic Papers 270.

in an *asset-backed* model, the sale/purchase of the asset(s) upon maturity will be for the *net* value of the asset.

Asset-based sukuk, on the other hand, do not involve a true sale, that is to say that there is no transfer of legal title, only the grant of an equitable beneficial interest, and the property will remain on the obligors' books. The fact that there is *technically* the sale of an asset within the structure gives the asset-based model the form of a Shari'ah-compliant instrument, but not the substance,⁴⁰ and it has been said that this model maintains 'the fiction that interest (collected as price mark-up or rent, respectively) is in fact a return based on risk associated with the ownership of a physical asset.'⁴¹ The asset-based sukuk very much tries to replicate the circumstances of a traditional bond. The risk is removed as returns are not tied to the venture or asset(s) themselves, but to the obligations of the obligor. The purchase/sale undertakings are drawn up to be for the face value of the sukuk, and so any loss following depreciation in value of the asset(s) is to be borne by the obligor, and not the investors. The fact that rental amounts are often tied to interest rates also raises questions as to the Shari'ah compliance of such structures.⁴²

Compliance aside, the asset-based sukuk remains to be the far more often utilised structure between the two, which raises questions as to the purpose of sukuk. Is the instrument being developed to provide a true Shari'ah compliant financial tool, or is it simply smoke and mirrors to allow Islamic institutions access to prohibited funds? Bill Maurer and Mahmoud A. El-Gamal (fn 38-39) seem to suggest the latter, putting forth the position that there is a market of potential buyers who are

⁴⁰ Bill Maurer, 'Form versus substance: AAOIFI projects and Islamic fundamentals in the case of sukuk' (2010) 1(1) J.I.A.B.R. 32.

⁴¹ Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics and Practice* (Cambridge University Press 2006).

⁴² Muhammad Taqi Usmani, 'Sukuk and their Contemporary Applications' Chairman of the AAOIFI Shari'ah Committee <www.iefpedia.com/english/wp-content/uploads/2009/11/Sukuk-and-their-Contemporary-Applications.pdf> accessed 05 May 2016.

interested in the 'Islamic brand'⁴³ regardless of compliance with AAOIFI Standards because they are 'limited to this type of investment.'⁴⁴ As such, both scholars suggest that the AAOIFI has had to soften some of its principles and potentially conflict with its understanding of Shari'ah in order to accommodate this new market.⁴⁵ Given all of the above, this dissertation shall proceed with the more common al-ijara asset-based structure in mind.

Sukuk Al-Ijara

All sukuk offerings of this nature are based on a prior *ijara* transaction, which grounds the sukuk in assets through a sale and leaseback structure, thus circumventing *riba*. In this scenario the certificate holders are taking pre-determined rental payments, not interest. As the rent is a fixed and certain amount, there is also no presence of *gharar*. Due to the fact that sukuk al-ijara are tied to tangible assets⁴⁶ it is necessary to include a trustee in the structure to hold those assets. The reason for this is that whilst a bond is a contractual debt obligation with duties and powers held by the trustee, a sukuk *is* a trust certificate⁴⁷ – the issuing Special Purpose Vehicle holds the trust assets purchased from the obligor on trust for the benefit of the certificate holders. The trust must be used in this structure as the sukuk certificate holders are not purchasing legal title to the trust assets, but rather an equitable, undivided beneficial interest. 'Where a conventional bond is a debt obligation that returns interest to bondholders, a sukuk is – at least in

⁴³ Op cit fn 40.

⁴⁴ Op cit fn 41.

⁴⁵ Op cit fn 40.

⁴⁶ There are alternative structures e.g. *Murabaha*, though these sukuk structures are not securitised and as such have been ruled inadmissible under Shari'ah law by more conservative Islamic scholars.

⁴⁷ S. R. Vishwanath; Sabahuddin Azmi, 'An Overview of Islamic Sukuk Bonds' (2009) (Win) J.S.F. 58.

theory – an ownership stake in an underlying asset that provides returns based on profit and/or rent.⁴⁸

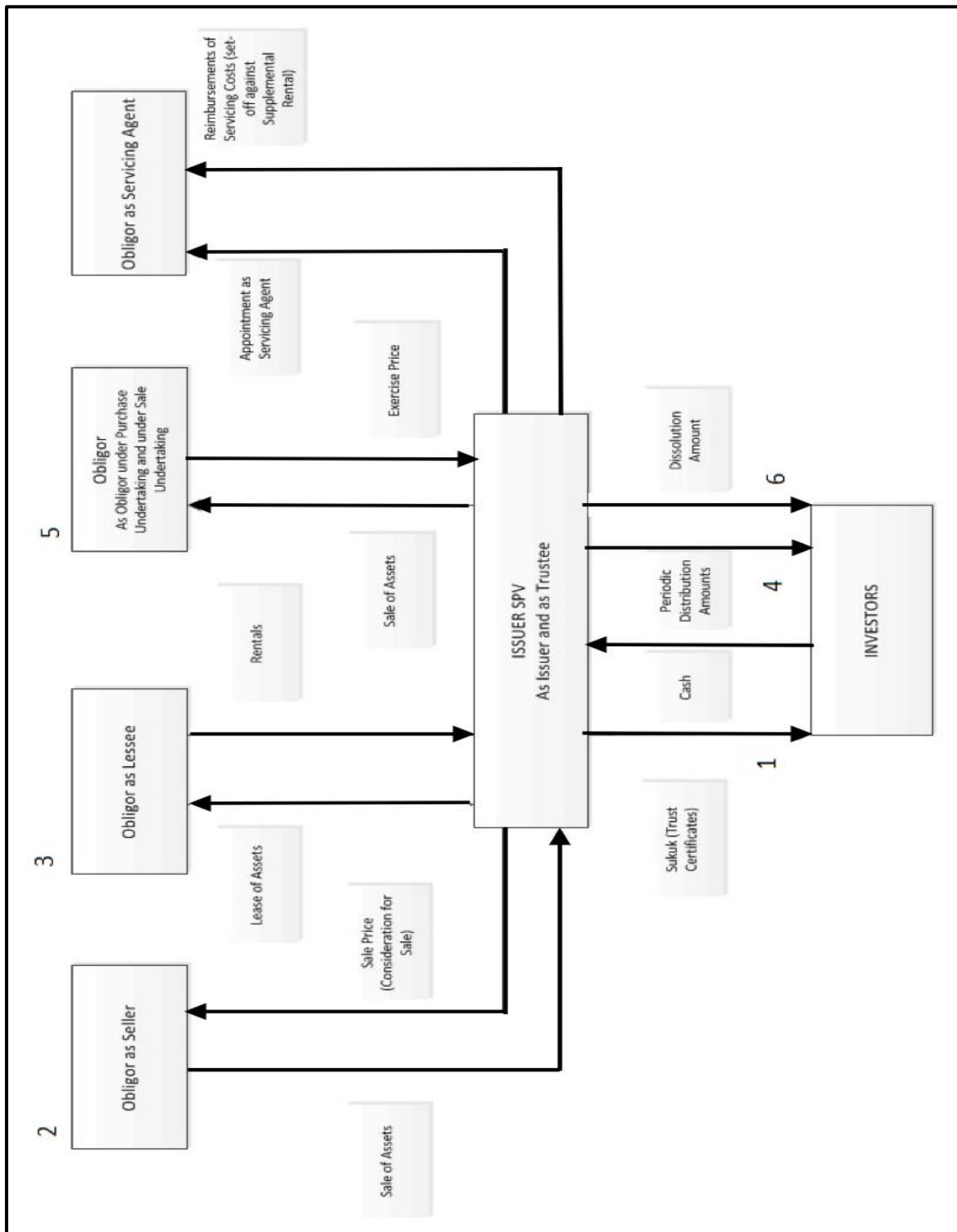


Figure 2: Sukuk al-Ijara Structure

Source: LexisPSL

⁴⁸ Op cit fn 40.

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As the figure above illustrates, in an asset-based sukuk al ijara structure, the SPV is set up by the company seeking funding as a separate, bankruptcy-remote company used purely to facilitate the financial arrangement [special purpose] that it has been created for, in this case to issue sukuk. The SPV then issues sukuk certificates to investors in return for cash (see point 1 of figure 2, above). Following from this, on the issue date, the SPV purchases assets from the obligor costing the total amount raised from sukuk, and places the assets into trust (point 2, fig.2). The obligor signs a purchase undertaking, and the SPV a sale undertaking, to the effect that upon maturity or following an early dissolution event such as a default, the obligor will re-purchase the assets for a pre-agreed *exercise price* (the principal amount plus any accrued but unpaid profits). The SPV then leases the assets back to the obligor for the period until the sukuk reaches maturity (point 3, fig.2), and the rental stream acts in the same way as interest payments on traditional bonds – they go to the trustee SPV who then passes them to the investors as *periodic distribution amounts* (point 4, fig.2). Upon maturity of the sukuk, the undertakings are enforced and the assets sold back to the obligor for the exercise price (point 5, fig.2), and the dissolution amount i.e. the principal is paid to the investors (point 6, fig.2). During the lifetime of the sukuk, the obligor will be appointed as servicing agent, which means that they manage and operate the trust assets.

In the case of sukuk al-ijara, the SPV acts as both issuer and trustee for the sukuk certificate. This raises questions as to whose interests the trustee would be acting in the case of a default, when conventionally it is supposed to be *against* the issuer and in favour of the investors. One way of getting around this, which appears to be general practice, is for the trustee SPV to delegate its' powers to an

independent trust management company, at least in the event of an early dissolution. Essentially, however, a sukuk and bond offering are very similar. Just as an investor in bonds isn't so interested in what the bond issuer does, the sukuk investor is not interested in the assets grounding the sukuk. What interests the investors is how creditworthy the issuer is, and when they will see a return on their investment.

Bond Trusts, Sukuk Trusts and the Asset Partitioning Function

Organisational law involves the arrangement and active structuring of the rights of various creditors in such a way that certain groups have recourse to certain assets,⁴⁹ achieved through the partitioning of those assets as mentioned above. It also allows for the shielding of certain assets from certain other groups in the event of insolvency which makes lending and financing much more attractive. In their article on the functions of trust law⁵⁰ Henry Hansmann and Ugo Mattei advance the suggestion that perhaps the primary function of trust law which makes it such a useful tool in comparison with, for example, contract law, is the asset partitioning ability of the trust instrument. By this, Hansmann and Mattei mean that trusts allow for assets to be placed '... into bundles that can conveniently be pledged separately to different classes of creditors.'⁵¹ Furthermore, they speak of the ability to shield the trust assets from the personal creditors of the trustee, a vital function for trusts in general and of specific use in the bond and sukuk scenario.

⁴⁹ Henry Hansmann; Reinier Kraakman, 'Organizational Law as Asset Partitioning' (2000) 44 *European Economic Review* 807.

⁵⁰ Henry Hansmann; Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 *N.Y.U.L. Rev.* 434.

⁵¹ *Ibid.*

Asset Partitioning in Bond Trusts

When a bond is issued, and a trustee appointed, there are two things that are held on trust for the bondholders: any moneys received by the trustee in respect of the bonds, and the benefit of the company's covenant to pay interest and the principal amount. If, however, the bond is a secured bond then the assets offered up as security will also be held on trust.

Considering that the vast majority of international bonds are unsecured,⁵² with conventional unsecured bonds, all that is being held is an authority to exercise powers on behalf of the bondholders,⁵³ and so the asset partitioning function is not in use so much initially. However, in the event of a default, the trustee has the authority to accelerate payment in which case the bonds become immediately payable either directly to the bondholders, or to the trustee, in which case those funds are then no longer in the hands of the company, and so partitioned and organised in such a way that they have been 'reserved' to pay the creditor bondholders.

Asset Partitioning in Sukuk Trusts

Similarly to conventional bonds, when sukuk is issued, monies received by the issuer/trustee in the form of rentals are held on trust for the certificate holders. The difference is that instead of just the benefit of a covenant being held, the issuer of sukuk also holds the trust assets (bought from and then leased back to the obligor) for the benefit of the certificate holders. The trust in sukuk scenarios is therefore

⁵² Michael Z. Brooke, *Handbook of International Financial Management* (Springer 1990); Suk H. Kim; Seung H. Kim, *Global Corporate Finance: Text and Cases* (6th Edn, John Wiley & Sons 2009).

⁵³ Op cit fn 2.

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essential in order to create an 'undivided, pro rata interest'⁵⁴ in the assets represented by the sukuk.

The reason for this is that the certificate holders are not purchasing the trust property per se, but rather an interest in that property i.e. the rental proceeds for a specified time until maturity. Just like with a traditional bond, they have bought a right to receive payment from the issuing company/SPV. The organisational aspect of the trust is arguably more relevant in the sukuk scenario, as in these cases there is tangible property being held on trust by the bankruptcy-remote SPV and is therefore placed out of the hands of the company's other creditors. Due to the novelty of sukuk in Western jurisdictions, it remains to be seen how the addition of tangible partitioned property would impact on insolvency and default scenarios. In asset-based sukuk, for example, al ijara structures, there is no 'true sale' of the security assets as explained above. They remain on the books of the obligor and the investors merely have an equitable interest in the property, and so it is commonly accepted that there is no option for recourse to the trust property in the event of default.⁵⁵ Regarding asset-backed sukuk, however, there is a true sale and passing of legal title of the trust property, and so in theory the investors could seek recourse to the trust property in the event of default, although there is uncertainty surrounding this possibility.⁵⁶

⁵⁴ Rahail Ali, 'An Overview of the Sukuk Market' in Rahail Ali (ed), *Sukuk and Islamic Capital Markets: A Practical Guide* (Globe Business Publishing Ltd. 2011).

⁵⁵ Sutan Emir Hidayat, 'A Comparative Analysis between Asset Based and Asset Backed Sukuk: Which One is More Shariah Compliant?' (2013) 1(2) I.S.J.F.A. 24.

⁵⁶ Silke N. Kumpf, 'A New Frontier' (2014) 164 N.L.J. 15.

The Trust, Governance and Accountability

In the United Kingdom jurisdiction, whilst they are commonly employed there is no mandatory requirement for the appointment of a trustee in a bond issue. Conversely, the United States Securities and Exchange Commission (SEC) decided in 1939 that the interests of the public and investors are adversely affected without the presence of a fully informed trustee, with adequate powers, responsibilities and resources.⁵⁷

Following the Wall Street Crash of 1929 and subsequent Great Depression, the United States government was keen to intervene in and regulate the markets to put an end to the near total freedom of market actors.⁵⁸ Prior to the crash, companies had been exaggerating the value of the securities that they were issuing, and brokers were selling these to investors with promises of huge returns – promises based on little to no information about the companies, or which were ‘wholly fraudulent’.⁵⁹ To do this, two pieces of legislation were enacted: The Securities Act of 1933 which regulated primary security issues, and the Securities Exchange Act of 1934 which regulated brokers and exchanges i.e. the secondary market. The latter also created the SEC⁶⁰ - an independent, cross-party regulatory authority which was to report each year on matters determined the year prior. Areas included changes in Commission regulations which would benefit investors,⁶¹ problems which investors had with financial service providers and investment products,⁶² and the impact on investors of proposed rules and regulations.⁶³ The SEC’s annual reports led to the passing of a number of statutes including Public Utilities Holding Company Act of

⁵⁷ Trust Indenture Act of 1939, sec. 302.

⁵⁸ Elisabeth Keller, ‘Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934’ (1988) 49 Ohio.St.L.J. 329.

⁵⁹ Legal Information Institute, Cornell Law School, ‘Securities Law History’ <www.law.cornell.edu/wex/securities_law_history> accessed 30th April 2016.

⁶⁰ Securities Exchange Act of 1934, sec. 4.

⁶¹ *Ibid.* sec. 4 (4)(B).

⁶² *Ibid.* (4)(C).

⁶³ *Ibid.* (4)(D)(i)-(ii).

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1935; the Trust Indenture Act of 1939; the Investment Company Act of 1940; and the Investment Advisors Act of 1940, which together gave minimum protections to investors to prevent a repeat of 1929.⁶⁴ It is therefore no surprise that the SEC and the Trust Indenture Act (TIA), both borne from a financial crisis, should come under scrutiny following the 2008 market crash.⁶⁵

The Commission decided to include the indenture trustee into their study of reorganisation and protective committees as the ‘... broad discretionary powers’ of the indenture trustee are utilised more frequently when a reorganisation is taking place, and also because they have a direct bearing on the need to form protective committees.^{66; 67} They outlined in their report major concerns surrounding indenture trusts, documenting misappropriation of profits, insufficient income streams and gross misinterpretations.⁶⁸ The Commission also found that although the trustees had these broad powers they weren’t offering protection to the security holders. Decisions were made with no consultation, and there was apparent ‘... injury to thousands of investors’⁶⁹ who held securities with no real way of monitoring, controlling or enforcing the performance of the issuer. Additionally, there were concerns surrounding insider control of bond issuances.⁷⁰ As such, the federal TIA

⁶⁴ Op cit fn 58.

⁶⁵ Victor Valdivia, ‘Is the SEC a Tough Enough Watchdog?’ (2007) 77(12) *The CPA Journal* 24; Steven L. Schwartz; Gregory M. Sergi, ‘Bond Defaults and the Dilemma of the Indenture Trustee’ (2008) 59(4) *Ala.L.Rev.* 1037; Committee on Trust Indentures and Indenture Trustees, ‘Annotated Trust Indenture Act’ (2012) 67(4) *Bus.Law.* 977; Ingrid M. Bagby; Michele C. Maman; Daniel P. Gwen, ‘Trust Indenture Act of 1939: A Sleeping Statute Comes Back to Life’ (2015) 27 *Bureau of National Affairs’ Bankruptcy Law Reporter* 706.

⁶⁶ A protective committee is a collective group who together would possess enough securities to force the trustee to act in cases where a quorum is required.

⁶⁷ Securities and Exchange Commission, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective Reorganization Committees, Part VI, Trustees Under Indentures* (1937).

⁶⁸ Securities and Exchange Commission, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective Reorganization Committees, Part I, Strategy and Techniques of Protective and Reorganization Committees* (1937) pg 5-6.

⁶⁹ *Ibid.*

⁷⁰ Op cit fn 65 (Bagby; Maman; Gwen).

was passed which makes appointment of a trustee mandatory, and stipulates certain duties and powers which they possess.⁷¹

The benefits of having a trustee operating in either of these situations are clear on the part of the bondholders. The trustee has been described as a ‘... representative of the [bond]holders, [who] owes its duties to them’.⁷² The trustee in theory has the time, resources and power to monitor the issuer and their compliance with all of the covenants in the trust deed, to flag up and look into any causes for concern, and to take action if need be.⁷³ This resonates with the thinking behind the SEC’s recommendations to transform the indenture trustees ‘... into active trustees with the obligation to exercise that degree of care and diligence which the law attaches to such high fiduciary position.’⁷⁴ However, much has been written about the true nature of the indenture trustee and to what extent they really serve the interests of bondholders.

The Pre-Default Role of the Trust

It is a well-known principle in English law that one aspect of the fiduciary relationship between a trustee and the beneficiary is that there can be no conflict of interest present.⁷⁵ This rule is upheld in the law of English bond trusts; however, the U.S. takes a different stance which speaks volumes about the perception of the role of the trustee pre-default. The Trust Indenture Reform Act of 1990 states that part of sec. 310(b) of the former legislation (which regards disqualification of a trustee by reason of conflicting interest) is to be amended to read:

⁷¹ Op cit fn 57 Sec 313 – 317.

⁷² Financial Markets Law Committee, *Issue 62 – Trustee Exemption Clauses* (2004).

⁷³ Philip Rawlings, ‘The Changing Role of the Trustee in International Bond Issues’ (2007) (Jan) J.B.L. 43.

⁷⁴ Op cit fn 67.

⁷⁵ *Aberdeen Railway v Blaikie Brothers* [1854] UKHL 1; *Boardman v Phipps* [1966] UKHL 2.

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“For the purposes of this subsection, an indenture trustee shall be deemed to have a conflicting interest *if the indenture securities are in default* (as such term is defined in such indenture, but exclusive of any period of grace or requirement of notice) and...”⁷⁶

This passage from the legislation clearly shows that there is a view that the trustee’s role is not really engaged prior to a default scenario, however this is not a universally adopted point of view with arguments existing to the effect that there is actually a substantial pre-default role to be carried out.

To give an example, one often overlooked area is the negotiation stage of the indenture. The reason for the oversight could be down to the fact that at this stage the bonds have yet to be issued and the issuer has appointed the trustee, and therefore the trustee acts with a feeling of ‘indifference’ prior to the investors becoming actual individuals.⁷⁷ This raises concerns with the governance of the bond as it could mean that only very minimal protections for bondholders are incorporated into the bond at the negotiation stage which could lead to problems later down the line. Another problem in this area is that the issuer will usually appoint the trustee rather close to the closing date for the bond which leaves them with little time to negotiate aspects of the relevant documents.

Take, for example, the case of *Citibank NA v MBIA Assurance SA and Ors*⁷⁸ in which Citibank was the trustee for a series of noteholders of varying classes issued by a company (FLF). Some of the notes were guaranteed by a third party,

⁷⁶ Trust Indenture Reform Act of 1990, sec. 408 (emphasis added).

⁷⁷ Efrat Lev, ‘The Indenture Trustee: Does It Really Protect Bondholders?’ (2000) 8(1) U.Miami.Bus.Law.Rev. 47.

⁷⁸ [2007] 1 All Er (Comm) 475.

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MBIA Assurance, and it was written into the trust deed that MBIA could give directions to Citibank, and that they could exercise a large degree of control over many trustee duties and discretions. Upon restructuring, the noteholders for a certain class of debt were given the option to either redeem their notes as shares in a Eurotunnel company plus cash, or the option for just cash. MBIA directed Citibank to accept the cash option, but QVT, the holder of notes not guaranteed by MBIA, asked Citibank not to accept this direction. It was affirmed in court that, given the wording of the trust deed, Citibank had to comply with MBIA.⁷⁹ If the role of the trustee is to always act in the best interests of the bondholders, should Citibank have drawn attention to the provisions relevant to this case in the negotiation stage? Whilst there was no liability in this case on the part of Citibank, who acted in good faith and in accordance with the trust deed, this case does raise questions regarding the duties of trustees in these early stages.

In a sukuk scenario, I would suggest that such a case would never have arisen in the first place. The sukuk form requires that all sukuk holders have an undivided interest in the trust, in other words, there cannot be 'classes' of certificate holders as is a possibility with conventional bonds. This structure goes some way to preventing one class of holder pressuring, or overriding through provisions in the deed, the trustee to force action which would be beneficial to that class at the expense of the others. On the other hand, in a sukuk scenario the issuing company is the trustee, though the market practice is to delegate this power out as explained in the section above.

Whilst this delegation solves any problems faced following the issue date, the same concerns with regards to bondholder protection during the negotiation stage

⁷⁹ Look Chan Ho, 'On security trustees' powers and their control: Citibank v MBIA Assurance' (2007) 22(5) J.I.B.F.L. 265.

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come into play as with conventional bonds. Furthermore, specifically regarding protection in the United States, it is unlikely that the courts would find the TIA to apply to sukuk. According to the Act:

(7) The term “indenture” means any mortgage, deed of trust, trust or other indenture, or similar instrument or agreement (including any supplement or amendment to any of the foregoing), *under which securities are outstanding or are to be issued*, whether or not any property, real or personal, is, or is to be, pledged, mortgaged, assigned, or conveyed thereunder.⁸⁰

Due to the fact that a sukuk certificate technically represents an interest in an asset rather than a right to receive interest, regardless of the practical uses of the structure, it is questionable as to whether sukuk would come under the Act. If not, then not even the bondholder protections protected by the statute are guaranteed. Though unable to say with certainty until such a case involving sukuk reaches the courts of either the United Kingdom or United States of America, one possible consequence of the issues above could be sweeping and all-encompassing exclusion clauses to limit the liability of the trustee of the sukuk. As before, there is current U.K. legislation to mitigate the effects of trustee exemption clauses for conventional bonds,⁸¹ however whether this would stretch to include sukuk remains to be seen, potentially leaving open the ability to weaken the position of sukuk-holders.

⁸⁰ Trust Indenture Act of 1939, sec. 303 (emphasis added).

⁸¹ Companies Act 2006, s. 750.

The Post-Default Role of the Trustee

Whilst I have highlighted in the previous section that the trustee still has to perform a more than trivial role before the circumstances of a default, it goes without question that the post-default duties of the trustee are far more substantial and require a lot more care and skill in both bond and sukuk scenarios. In the case of sukuk, the change in who carries out the trustee duties in a default scenario is testament to this shift in the nature of the role. Efficient governance, the mechanisms of which allow for efficient decision-making,⁸² is the key to an effective trusteeship.

Seeking No Direction from Bondholders

In this regard, one of the benefits of the presence of a trust and a trustee, for both the issuer and the bondholders, is that it can prevent the problem described as the 'mad bond-holder'⁸³ The mad bondholder is the single noteholder who could, in circumstances of a technical default, accelerate the bond regardless of whether or not it made commercial sense to do so. On the flip side of the coin, the trustee now faces a dilemma – on the one hand they have a duty to the investors to maximise their returns in the event of a default,⁸⁴ which may mean not acting on some technical defaults. On the other hand, they are a representative of the bondholders, and while under no obligation to seek their advice before acting the trustee will be aware of possibly incursions of liability due to the risk involved in either taking or refraining from action should the move fail to bring about the intended effect on return.

⁸² Stephen M. Bainbridge, *Corporation Law and Economics* (Foundation Press 2002).

⁸³ Anthony Herbert, 'Why Have a Trustee for a Eurobond Issue' (1987) 2(1) J.I.B.L. 48.

⁸⁴ Steven L. Schwartz; Gregory M. Sergi, 'Bond Defaults and the Dilemma of the Indenture Trustee' (2008) 59(4) Ala.L.Rev. 1037.

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Writing from a U.S. perspective, Schwartz and Sergi⁸⁵ list a number of potential decisions to be taken by trustees in the event of a default other than that of non-payment.⁸⁶ They include determining whether or not to involve the bondholders in the first place; obtaining collateral to secure unsecured bonds; enforcement of remedies such as acceleration; suing for overdue payments; and the best course of action if the issuer begins insolvency proceedings. These decisions are not specific to the U.S., or to bonds – they also apply to the U.K. and to sukuk. The difference is in the standard of care which must be adhered to in the making of such decisions.

In the United States, the TIA states that:

(c) The indenture trustee shall exercise in case of default (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.⁸⁷

Whereas in the U.K., the wording is such that:

(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(a) to any special knowledge or experience that he has or holds himself out as having, and

⁸⁵ Ibid.

⁸⁶ Upon which in the U.S. the trustee is obliged by law to inform the bondholders.

⁸⁷ Trustee Indenture Act of 1939, sec. 315(c).

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(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.⁸⁸

There is clearly a difference in the way in which these two provisions have been worded, and there is a degree of consensus among scholars that the U.S. construction of the duty of care makes for cautious and ineffective trustee⁸⁹ who will always seek the direction of bondholders 'for any unilateral action by the indenture trustee that entails a degree of risk.'⁹⁰ As with the section above, the American legislation is aimed specifically at indenture trusts and so it is not certain whether or not the provisions are transferable to sukuk. However, the U.K. legislation applies to trustees in general when performing their duties, and so would apply to a sukuk trustee, thus making the position in the U.K. clearer in terms of integrating the Islamic instrument into a western financial and legal system.

In order to solve the issues that arise regarding efficiency of bond governance, Schwartz and Sergi propose the adoption of a 'business judgement rule' into trust provisions which would allow for a greater degree of risk to be taken by the trustee without a fear of liability, as there would be a general presumption against such liability.⁹¹ Under such a rule (which already applies to corporate directors in the U.S.), the trustee's actions would only be examined to the level required to determine the existence of an independent business decision, made in

⁸⁸ Trustee Act 2000, s1.

⁸⁹ Mayo Adams Shattuck, 'The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century' (1951) 12(4) Ohio St.L.J. 491; Henry F. Johnson, 'The 'Forgotten' Securities Statute: Problems in the Trust Indenture Act' (1981) 13 U.Tol.L.Rev 92; Jeffrey N. Gordon, 'The Puzzling Persistence of the Constrained Prudent Man Rule' (1987) 67 N.Y.U.L.Rev 52.

⁹⁰ Op cit fn 84.

⁹¹ Ibid.

good faith and without any abuse of discretion.⁹² The rule makes sense in a business context where the role of the trustee is not simply to preserve the value of the trust for the beneficiaries, as with traditional trusts, but to maximise it. A balance needs to be struck between acting with care and skill, and maintaining good governance of the bond. The suggestion of a business judgement rule seems to go some way to striking that balance.

Seeking Direction from Bondholders

In addition to the problems surrounding acting without the direction of the bondholders, there are also issues which arise having followed bondholder guidance. To an extent this issue has been dealt with through the *Elektrim* litigation⁹³ of 2004-2005 which concerned liability of trustees acting on the directions of bondholders.

In the series of cases, there was a default on the bonds by the issuer (Elektrim) and some 70% of the bondholders voted to accelerate payment, the claimant being among them. The guarantor of the bonds was of the opinion that no default had occurred and made it clear that they would challenge the validity of any notice of acceleration issued by the Trustee (Law Debenture Trust Corp.). In other words, the trustee was faced with the dilemma of not acting and being in breach of the terms of the trust deed which said they must accelerate if required by 30% in value of the bondholders; and of acting on the wishes of the bondholders, thus being liable for a breach of terms should there turn out to be no event of default.

The case went through to the House of Lords in which it was ruled that the trustee is obliged to act on the wishes of the bondholders in cases of acceleration,

⁹² Ibid.

⁹³ Op cit fn 20.

but also that the trustee should not be held liable if the acceleration is invalid. The court at first instance in this series also cleared up the question as to what should be classed as a default in a bond issue. A common phrase in the market is that a default occurs upon an event which is 'materially prejudicial' to the bondholders, and in his judgement Justice Smith reasoned that this does not simply concern the economic interests of the bonds i.e. payment of interest, but also rights ancillary to the economic interest.⁹⁴ In this case, ancillary rights included the right to have a bondholder-appointed representative on the Elektrim board of directors. The rulings are said to be welcome news to bond trustees, bringing clarity to the situation surrounding acceleration, and arguably leaving trustees in a position to be erring slightly less on the side of caution when it comes to declaration of default.⁹⁵

The Integration of Sukuk

In much of my evaluation so far, when it comes to applying existing stances and principles of bond issues to the sukuk, there has been an air of uncertainty. Despite the position of the U.K. as a global leader of sukuk outside of the Middle East and Asia, the structure is still in its infancy throughout the Western world, and so there is very little information to draw on when considering how they would fit in to our current system.

Legislation has been passed to aid the development of a U.K. sukuk market,⁹⁶ and Islamic finance has the perception by some as being a more ethical form of borrowing,⁹⁷ though at this stage there are a number of barriers to complete

⁹⁴ Ibid. [2004] EWHC 1216 [53]

⁹⁵ Daniel Whitehead, 'Why Elektrim May Be Welcome News for Trustees' (2005) 24 Int'l Fin.L.Rev. 13; Daniel Whitehead, 'Lessons from Elektrim on Trustee Responsibilities' (2005) 24 Int'l Fin.L.Rev. 59

⁹⁶ Notably the Finance Act 2007 s. 53-54; Finance Act 2008 s. 154-157

⁹⁷ Mohamed Ariff, Munawar Iqbal, Shamsheer Mohamad, *The Islamic Debt Market for Sukuk Securities: The Theory and Practice of Profit Sharing Investment* (Edward Elgar Publishing 2012); Mansoor Khan,

integration. Much is being done to appease these problems,⁹⁸ which include standardisation of Islamic principles, regulation, and tax. One potential issue could be the role of exemption clauses in bonds and sukuk. It strikes me as a possible concern that in sukuk scenarios, even if the trustee responsibilities are delegated, the issuer *is* the trustee according to the trust deed. If the trustee has excluded liability, and the issuer is the trustee, then who can the certificate holders turn to in order to bring a claim in the case of a negligent trustee?

Further to the above concerns, it is notable that it could be that the USP of Islamic finance is its greatest barrier to permeating the Western market. English and Welsh law is the governing law of choice for much of the business world. It is the global law of contract, and the leading choice for international business and dispute resolution.⁹⁹ One of the reasons for the popularity of English law is that it is clear, flexible, and certain;¹⁰⁰ these adjectives cannot so easily be used to describe an instrument or framework with morality and ethics at its core.

Conclusion

In summary, the al-ijara sukuk structure is in practice very similar to a conventional bond structure in its' aims and how it goes about achieving them. Following from this, it is little surprise that the role of the trust and trustee in each structure is very similar. The trust form has been described as an 'immensely powerful and flexible instrument

'Islamic Banking and Finance: On Its Way to Globalisation' (2008) 34(10) *Managerial Finance* 708; Neil D. Miller, John Challoner, Aziza Atta, 'UK Welcomes the Sukuk - How the UK Finance Bill Should Stimulate Islamic Finance in London, Much to the Delight of the City's Banks' (2007) 26 *Int'l Fin.L.Rev.* 24

⁹⁸ Michael Ainley et al, Financial Services Authority, 'Islamic Finance in the UK: Regulation and Challenges' (2007) <www.fsa.gov.uk/pubs/other/islamic_finance.pdf> accessed 07 May 2016

⁹⁹ TheCityUK, *UK Legal Services 2016: Legal Excellence, Internationally Renowned* (July 2016) <<https://www.thecityuk.com/assets/2016/Reports-PDF/UK-Legal-services-2016.pdf>> accessed 30 June 2017

¹⁰⁰ The Law Society of England and Wales, 'England and Wales: Global Legal Centre' <<http://www.lawsociety.org.uk/policy-campaigns/documents/global-legal-centre-leaflet/>> accessed 30 June 2017

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of modern finance'¹⁰¹ and this is displayed in how the tool has been fitted into both conventional bonds and a form of Islamic finance.

This dissertation has shown that despite their similarities, there are still hindrances to complete integration of sukuk into the western financial legal system which arguably leaves the conventional bond as the more attractive option at present. However, the last half a decade has seen changes to legislation, unifying standards, and an example by government in the first U.K. sovereign sukuk, among other things, paving the way for full exploitation of this newly accessible pool of potential finance in the long term, and there are no signs that this process is slowing. In the next ten years, we can expect the large commercial law firms to hit headlines in this area with numerous innovations in order to match supply to demand for Islamic finance mechanisms. With capital markets growing increasingly globalised, the value and advantages of being able to tap this large reservoir of new finance will be fully realised.

¹⁰¹ Op cit fn 2