

The Legal Aspects of Sukuk Investment: Moroccan Experience as a Model

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ABSTRACT

Sukuk investment has been the most important financial instrument compatible to prescribe of Shariah, and this instrument has been growing tremendously. Hence, it is considered the fastest growing sectors in Islamic finance industry.

From a theoretical point of view, Sukuk investment is defined as certificates of equal value that represent an ownership over underlying asset, or represent an usufruct on buildings, services, and so on. These financial assets must abide by the Shariah. Sukuk certificates and the organisms that manage them are subject to regulations from the Moroccan legislator and need to comply with Shariah principles.

Keywords: *Sukuk, SPV, originator, sovereign Sukuk, asset-based, asset-Backed.*

INTRODUCTION

In the recent years, the Islamic finance market has grown enormously, it becomes the fastest growing sectors in Islamic finance industry¹.

The Moroccan legal system has adopted some Islamic product since 2007 through a circular published by BANK AL MAGHRIB, which regulate some new products such as ijarah, Murabahah, Musharakah, Salam, and istisna'a. These circular is entitled by "alternative products", this general guidance notes allow to conventional bank promote all the different alternative products without certification of authenticity with shariah prescription.

After thirteen years, the legislator enact a law about Islamic bank or participative bank which mean that type of banks have an Islamic

department who said this product respect the prescription of shariah or not. All the products promoted by participative bank are controlled by superior council of scholars².

In 2018, the Moroccan legislator enact another law about sukuk investment through authorize to government and firm a possibility to issue these new instrument for subscribers who look for an Islamic area where they can invest their money.

Further, sukuk is an investment certificate of equal value representing after closing subscription, receipt of the value of the certificates, and putting it to use as planned; thus, it represents common shares and rights in the underlined assets or their usufructs and services.

As a rule, Quran and sunnah do not recognize transaction that have a proven illegitimate factor and object, shariah has identified some elements which are to be avoided in all type of Islamic transactions. In this regard, the prohibition of Riba, Gharar and gambling is the most strategic factor that defines invalid and voidable contracts and demarcates the overall limits which should not be crossed.

This article proceeds as follows: No 2 provides a brief definition of sukuk, No: 3 describes all

¹- see :

* Ahcen Lahsasna, M.Kabir HASSAN, and Rubi Ahmad, Forward lease sukuk in Islamic capital markets, structures and governing rules, Palgrave Macmillan, 2018.

*Hans Visser, Islamic finance, Principales and practice, Edward Elgar publishing, 2009, p 1 and following

*Muhamed Ayub, Understanding Islamic finance, John Wiley and sons, Ltd, 2007, p 15

* Mahmoud A. EL Gamal, Islamic finance, Law, economics and practice, Cambridge university press, 2006, p 2

²- Superior council of scholars means with Arabic المجلس الأعلى العلمي

types of sukuk, and No 4 discusses the first Moroccan issuance.

DEFINITION OF SUKUK

The word sukuk or صك (with Arabic language) is not found in the Quran, it emerged as a development from the real human act of debt funding³.

Sukuk investment is defined as a financial instrument of equal value who represent a share of ownership or usufruct over an underlying asset. The sukuk has developed in conformity with Islamic legal principles based on Quran and sunnah⁴.

Some doctrines have defined sukuk as debt funding arrangement agreed to between the party (investor) who provide fund or the counterparty (a government or a firm) who borrows the funds to engage in permissible economic activities and so on⁵.

In addition, the AAOIFI has also defined sukuk as a certificate of equal value representing undivided shares in ownership of tangible assets, usufructs and services (in the ownership of) the assets of particular projects or special investment activity, however, this is true after receipt of the value of the Sukuk, the closing of subscription and the employment of funds received for the purpose for which the Sukuk were issued⁶.

In this regard, the Moroccan legislator does not forget to define sukuk, which mean that is a certificate represents an equal value in some eligible assets or investment owned by body of

securitization called in french "fond commun de titrisation"⁷.

To summarise, sukuk can be defined as a certificate or debt contract is a new way for financing firm and government which represent an equal value based on eligible assets.

TYOLOGY OF SUKUK

There is different significantly structures of sukuk, and, therefore, they must be studied case by case, The underlying structure of each sukuk is determined by one of the Islamic finance contracts such as al Murabahah, al ijarah, al salam, al Mudarabah, and so on.

Sukuk Al Murabahah

The *Murabahah* contract is one of the most frequently used contract within Islamic finance, that represent more than 80% of all Islamic finance industry⁸.

Sukuk al Murabahah is defined as certificates of equal value issued for the purpose of financing the purchase of goods through Murabahah so that the financing the purchase of goods through Murabahah so that the certificate holders become the owners of the Murabahah commodity⁹.

The sukuk al Murabahah starts with an originator looking for funding for the purchase of an identified tangible property from a third-party who is called a seller, the originator incorporates an SPV that will issue sukuk to fund the purchase of the tangible property. The SPV uses the sukuk proceeds to pay the purchase price of the tangible property to the third-party seller. The third-party seller transfers the right of ownership of the tangible property to the SPV. At this level, the underlying property in the sukuk transaction owned by the SPV is a tangible property and, consequently, the sukuk are tradable in secondary markets¹⁰.

Sukuk Al Ijarah

Sukuk al ijarah is one of most popular sukuk because these certificates can offer to the holder

³-Mohd Azmi Omar, Muhamed abduh and Raditiya Sukamana, Fundamentals of Islamic Money and capital markets, John wiley & sons, pte, LTd,2013p 78

⁴-the term islamic bond may, however, be misleading because sukuk differ from conventional bond.

⁵-« les Sukuk comme des titres de copropriété représentatifs d'un actif tangible. Ils renvoient à des titres de créances ou de capitaux dont les rendements sont subordonnés à la performance d'un actif sous-jacent. Cet instrument financier au regard des principes éthiques représente un droit de copropriété dans un actif tangible ou dans l'usufruit d'un actif tangible.

*Mballo Thiam, de la religion à la banque, thèse pour l'obtention du doctorat, université de Toulon, 2013, p 403

⁶-Sharias standards No 17 for islamic financial institutions, the Accounting and Auditing Organization for Islamic financial institutions, 2015, p 468

⁷-Article 1-7 from the law No 69.17 relating to the securitization of assets, Official journal No 6667, 23 april 2018

⁸-حسن السوسي، معيقات التعامل بسائر الصيغ التمويلية التشاركية، دراسة إحصائية، المجلة الإلكترونية للأبحاث القانونية، ع 4، 2019، ص326

⁹- AAOIFI, p 470

¹⁰- Omar Salah, Sukuk structures : Legal engineering under dutch law, published by eleven international publishing, 2014, p65

a fixed return. Omar Salah said that “these features also make lease-back sukuk a compatible alternative to conventional bond¹¹”. These type of sukuk is the most attractive instrument to the investors who want or look for fixed income.

These sukuk can be defined as a certificate of equal value issued either by the owner of a leased asset or a tangible asset to be leased by promise, or they a leased asset or a tangible asset to be leased by promise, or they are issued by a financial intermediary acting on behalf of the owner are issued by a financial intermediary acting on behalf of the owner with the aim of selling the asset and recovering its value through with the aim of selling the asset and recovering its value through subscription so that the holders of the certificates become owners of subscription so that the holders of the certificates become owners of the assets¹².

The Moroccan legislator has defined sukuk al ijarah as a certificate of equal value represents an ownership or an usufruct in a leased tangible assets which can be a house, car, invention patent and so on¹³.

Sukuk Al Musharakah

These are certificates of equal value issued with the aim of using the mobilised funds for establishing a new project, developing an existing project or financing a business activity on the basis of any of partnership contracts so that the certificate holders become the owners of the project or the assets of the activity as per their respective shares, with the Musharakah certificates being managed on the basis of participation or Mudarabah or an investment agency¹⁴.

Sukuk Al Mudarabah

Mudarabah sukuk is another example of variable payoff sukuk. There could be no reward for funding (such as in a sustenance loan), in which case the proceeds of sale of the SPC assets are used to pay the initial funded amount and the balance, if any is given back to the borrower. More commonly, a payoff is given, in

which case the fund provider gets a payoff equal to the principal plus the profit share of the project as agreed.

Sukuk Al Salam

In this type of sukuk, the item purchased will materialize in a future period but a payment is made now to secure ownership of that item. An example is paying a sum of money now for fruit still on trees that will be delivered as a ripe commodity in six months. This contract is widely used in agricultural and extracting industries. With another way, the issuer of sukuk al salam is a seller of the salam's good, and the subscribers are buyers of these goods. The holders of Salam certificates are the owners of the Salam goods and are entitled to the sale price of the Salam goods and are entitled to the sale price of the certificates or the sale price of the Salam goods sold certificates or the sale price of the Salam goods sold through a Parallel Salam, if any.

In conclusion, all different types of sukuk investment cannot get out only of sukuk asset based which mean the underlying assets offer fairly predictable returns to the sukuk holders¹⁵, and in other side there is sukuk asset backed that mean the risk profile is dependent on the underlying asset whereas for asset based sukuk, because sukuk holders have no recourse to the underlying asset but are dependent on the purchase undertaking, the risk profile is dependent on the financial ability of the originator¹⁶.

THE FIRST MOROCCAN ISSUANCE

The sukuk market was originally the best domain of sovereign issuers as the government. Sovereign sukuk in Islamic finance is expected to serve as a replica to government bonds in the conventional system¹⁷.

The Moroccan minister of finance has been issued an ijarah sovereign sukuk which equal 1.100.000.000dh, the originator called the “FT

¹¹- Omar Salah, p 68

¹²-AAOIFI, p 468

¹³-عرف المشرع المغربي صكوك الإجارة بموجب المادة 2-7 من القانون رقم 69.17 القاضي بتغيير وتنظيم القانون رقم 33.06 المتعلق بتسديد الأصول بقوله: "شهادات صكوك الإجارة، والتي يتم بواسطتها ملكية أصول أو ملكية منافع أصول مؤجرة أو قابلة للتأجير، سواء تعلق الأمر بإجارة عقارات أو منقولات أو خدمات. ويمكن أن تكون هذه الأصول موجودة أو موصوفة في الذمة".

¹⁴- AAOIFI, P 470

¹⁵-Michael Riney and Omar Salah, Why does categorisation of sukuk structures matter? ISRA international journal Islamic finance, vol 3, issue 2, 2011, p 123

¹⁶-OBIYATHULLA Ismath Bacha and ABBAS Mirakhor, Islamic capital markets, a comparative approach, Wiley, 2013, p 175

¹⁷-Muhammad al bashir and muhammad al-Amine, Global sukuk and islamic securitization market, financial engineering and product innovation, Brill, 2012, p88-89

IMPERMIUM SUKUK CI", and the Moroccan government guarantee the price of issuance¹⁸.

CONCLUSION

A whole new way of funding firm and government is now the emerging sukuk market. the design and operating principles of this new instrument is targeted to different economic activities and tailored for safety for both parties.

Furthermore, the Moroccan experience is still in the beginning and there is only one issuance of sovereign sukuk which mentioned above. The Moroccan experience should be fed with comparative experience such as Malaysia experiences, in order to strength our experience and raise the financial Casablanca city.

In addition, the legal rules relative to sukuk need to be reformed because there is no legal institution relates all the party of the correlation as trust in Britain and Malaysian legal system.

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¹⁸ 2.18.735 صادر بتاريخ 18 محرم 1440 الموافق ل 28 شتنبر 2018 بمنح ضمان الدولة لسداد المبالغ المستحقة لفائدة القسم في حدود FT IMPERMIUM SUKUK CI مرسوم رقم مليار و مائة مليون درهم 1.100.000.000 درهم في إطار عملية إصدار شهادات صكوك إجارة منبينة على المنافع والتي تعتبر الدولة المؤسسة المبادرة فيها، الجريدة الرسمية عدد 6713 Decree No. 2.18.735 فاتح أكتوبر 2018، ص8436

issued on 18 Muharram 1440 corresponding to September 28, 2018 granting the state guarantee for the payment of amounts due to the benefit of the department FT IMPERMIUM SUKUK CI within the limits of one billion and one hundred million dirhams 1.100,000,000 dirhams in the framework of the process of issuing sukuk al ijarah based on benefits which are considered The founding country initiating it, Official journal, No. 6713, October 1, 2018, p. 8436