

TISCO

TISCO Working Paper Series on Banking,
Finance and Services
No. 01/2013

LEGAL INFRASTRUCTURE OF *SUKUK* STRUCTURES – PART 2

Omar Salah LLM



FACULTY OF LAW
TILBURG UNIVERSITY

January 2013

Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO). This paper can be downloaded without charge at TISCO Working Paper Series on Banking, Finance and Services, available at the Social Science Research Network <http://www.ssrn.com/link/Tilburg-TISCO-Banking-Financing.html>

LEGAL INFRASTRUCTURE OF *SUKUK* STRUCTURES – PART 2

Omar Salah

o.salah@tilburguniversity.edu

Abstract

This article is the second part of a two-part analysis of *sukuk*. This second part now discusses the three most important *sukuk* structures (*sukuk al-musharaka*, *sukuk al-ijarah*, and *sukuk al-murabaha*) clarifying the legal infrastructure of each structure. This article shows that there are many *sukuk* structures, each having its own characteristic features and that the underlying Islamic finance contract determines the structure of each *sukuk*.

LEGAL INFRASTRUCTURE OF *SUKUK* STRUCTURES – PART 2¹

Omar Salah²

This article is the second part of a two-part analysis of *sukuk*. The first part considered the addresses the development of Islamic finance law, the position of the English courts towards it, and the importance of Islamic law for *sukuk* structures, as well as providing an Islamic legal framework that should be respected in legal practice when structuring *sukuk*. This second part now discusses the three most important *sukuk* structures (*sukuk al-musharaka*, *sukuk al-ijarah*, and *sukuk al-murabaha*) clarifying the legal infrastructure of each structure.

1. *Sukuk* structures

Sukuk are often compared to conventional bonds and shares, but as will be discussed below the underlying Islamic finance contract determines the structure of the *sukuk* and that is decisive for a possible qualification of *sukuk* as a bond or share. Based on the prohibition of *riba* and *gharar*, several Islamic finance contracts such as *musharaka* & *mudarabah* (partnership contracts), *ijarah* & *ijarah-wa-iqtina* (leasing contracts), and *murabaha* (sale and resale with profit mark-up)³ are structured.⁴ These Islamic finance contracts form the foundation of Islamic finance products, such as *sukuk*. As a result, there are different *sukuk* structures: the *sukuk al-musharaka*, the *sukuk al-mudarabah*, the *sukuk al-ijarah* structure, the *sukuk al-murabaha*, the *sukuk al-salam*, etc. As mentioned, fourteen different structures have been acknowledged and these fourteen structures can be divided in three basic categories: equity-based, lease-based, and sale-based. Below the prototype of each category will be discussed in further detail. For the equity-based *sukuk* this is the *sukuk al-musharaka*, for the lease-based *sukuk* it is the *sukuk al-ijarah*, and for the sale-based *sukuk* it is the *sukuk al-murabaha*. English law plays a decisive role in the legal structure of these financial instruments. This comes as no surprise, since English law – or the law of the state

¹ This article has been published with the *Companies & Securities Law Journal*, see O. Salah, ‘Legal Infrastructure of *Sukuk* Structures: Part II’, *Companies & Securities Law Journal*, Volume 30, 2012, Number 61, pp. 61-69.

² Omar Salah LL.M., is an attorney at law (*advocaat*) with De Brauw Blackstone Westbroek, in Amsterdam, The Netherlands. He is also PhD Researcher and Lecturer at Tilburg Law School (TISCO), The Netherlands. Salah is also Junior Fellow of the European Banking Center at Tilburg University. This paper was written during his time as Visiting Researcher at the National Centre of Excellence for Islamic Studies Australia at the University of Melbourne. The research visit was financially supported by the Australia-Netherlands Research Collaboration (ANRC), which granted him the ‘ANRC Overseas PhD Travel Fellowship’.

³ The list of Islamic finance contracts is not exhaustive. Islamic finance acknowledges the freedom of contracts and the freedom of parties to structure new contracts, so long these contracts are not violating the *Shari’ah*.

⁴ A closer discussion of the different Islamic finance contracts falls outside the scope of this article. For more on the different Islamic finance contracts and their structures, see Usmani MT, *An Introduction to Islamic Finance* (Kluwer Law International, The Hague, 2002).

of New York – is often the governing law of international finance contracts and they dominate the world of finance.⁵

1.1 Sukuk al-musharaka structure

According to article 3/6 AAOIFI SS 17 *sukuk al-musharaka* certificates should represent the ownership of the *sukuk* holders in a business or project. The *sukuk al-musharaka* is structured by a party who requires financing. This party is referred to as the ‘originator’.⁶ The originator in a *sukuk* transactions is often a government, a multinational or a(n Islamic) financial institution.⁷ The originator establishes a ‘Special Purpose Vehicle’ (SPV). The SPV is a separate legal entity which is incorporated to serve one single purpose: facilitating the transaction. The SPV is also the party that issues the *sukuk* certificates.

An important aspect of the *sukuk al-musharaka* structure – and also of other *sukuk* structures – is the bankruptcy remoteness of the SPV. The possibility of the bankruptcy of the SPV should be mitigated as much as possible.⁸ Bankruptcy considerations weigh heavily, because in most jurisdictions the bankruptcy of the SPV would mean that the assets will be distributed according to statutory provisions or a court order instead of the contractual arrangements made between the parties.⁹ In addition, there might be a mandatory stay period.¹⁰ This means that the creditors of the bankrupt entity should wait for a period and cannot take any action towards the bankruptcy estate during this period. Such mandatory stay can affect the timely payments of the *sukuk*. Finally, the liquidation of the bankruptcy of the SPV might lead to additional costs, such as the salary of the bankruptcy trustee. Therefore, it is important that the transaction is structured such that the insolvency risk of the SPV is mitigated as much as possible.

The bankruptcy-remoteness of the SPV requires the following steps. The constitutional documents of the SPV, e.g. its objects clause, should determine that the SPV can only serve one single purpose: facilitating the transaction. The articles of association of the SPV should restrict the activities of the SPV and should not permit the SPV to engage in any other transactions, acquire any other assets, or create any other debts than those which are necessary to facilitate

⁵ Wood P, *Law and Practice of International Finance* (Sweet & Maxwell, London 2008) pp 15-28.

⁶ The term ‘originator’ is often used in the context of securitisation structures. In this article, the term is used in the context of *sukuk* structures without implying any other links with securitisation structures.

⁷ Ayub M, *Understanding Islamic Finance* (John Wiley and Sons, Hoboken, 2008), p 393.

⁸ McMillen MJT, “Contractual Enforceability Issues: Sukuk and Capital Market Development” (2006) 7 CJIL 427 at 452-453; McMillen MJT and DeLorenzo YT, “Law and Finance: An Interactive Analysis” in Archer S and Karim RAA (eds), *Islamic Finance: Innovation and Growth* (Euromoney Books and AAOIFI, London, 2002), pp 176-178.

⁹ McMillen, n 7, at 452-453; McMillen and DeLorenzo, n 7, pp 176-178.

¹⁰ Abdel-Khaleq AH and Richardson CF, “New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings” (2006) 7 CJIL 418, at 418-419; McMillen, n 7, at 452-453; McMillen and DeLorenzo, n 7, pp 176-178.

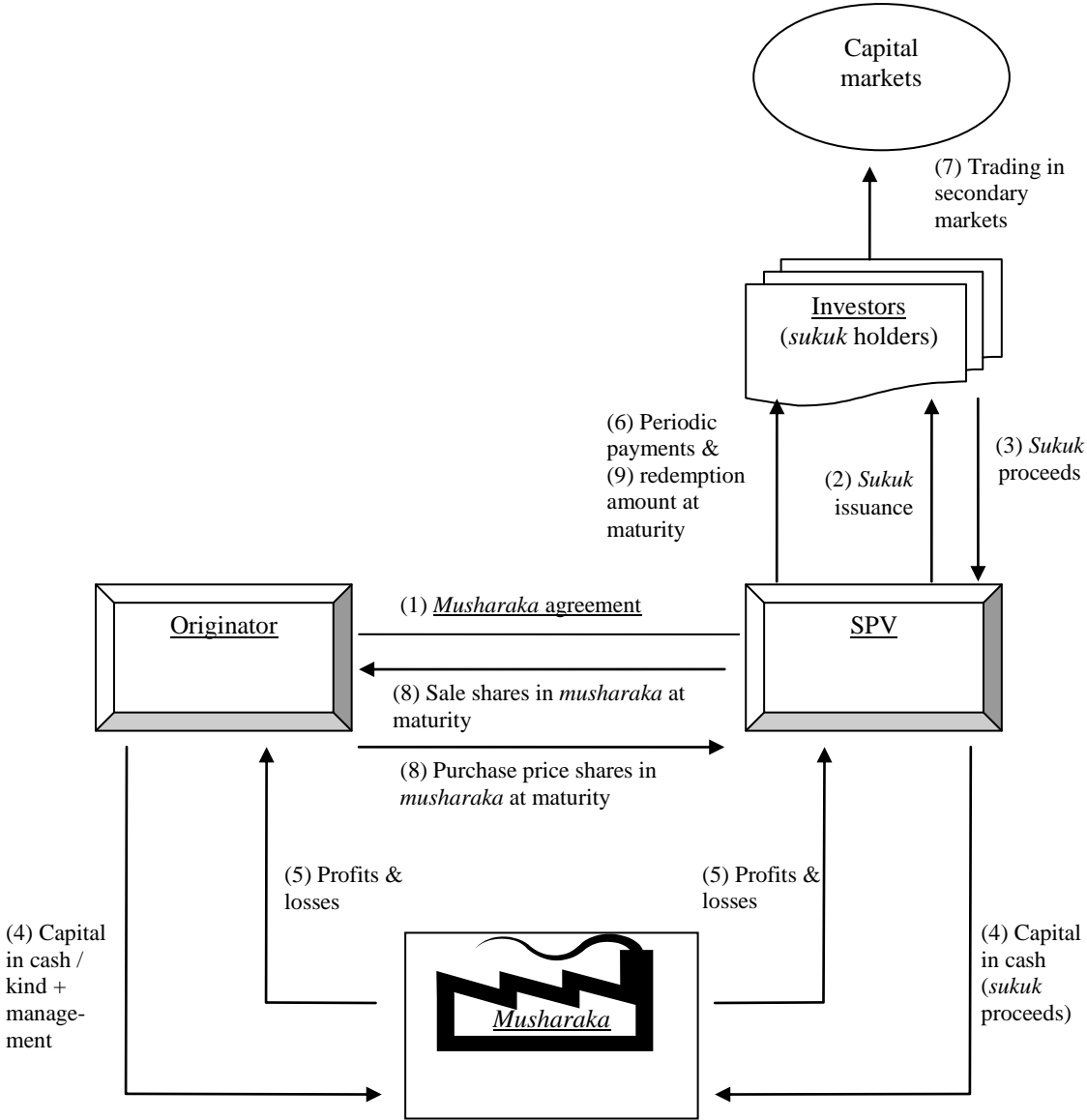
the *sukuk* issuance. The SPV can also stipulate this in agreements with the originator respectively the *sukuk* holders. Such clauses in transaction documents are referred to as negative pledges. The result is that the SPV is strongly restricted in its actions. This mitigates the risks of a possible insolvency of the SPV and turns the SPV into a bankruptcy remote vehicle.

Next, the originator and the SPV enter into a *musharaka* contract. This is a partnership agreement, often compared to a joint venture. Article 5/1/5 AAOIFI SS 17 states that this agreement determines the relation between the originator and the SPV. The 'financier' and the 'borrower' both contribute capital into the *musharaka* and receive units in the *musharaka* that corresponds to their investments.¹¹ The originator often contributes in kind. The SPV contributes in cash and funds its contribution through the issuance of *sukuk* certificates in capital markets. The amount that is raised through the issuance of *sukuk* is invested by the SPV in the *musharaka* venture. A partnership is created between the originator and the SPV due to article 5/1/5/6 AAOIFI SS 17. Figure 1 provides an overview of the *sukuk al-musharaka* structure.

¹¹ Usmani, n 3, pp 8-10; Vogel FE and Hayes SL, *Islamic Law and Finance, Religion, Risk, and Return* (Kluwer Law International, The Hague, 1998), pp 195-196.

Figure 1¹²

Structure of sukuk al-musharaka



As mentioned above, the *sukuk* holders should gain some form of ownership in the underlying tangible assets. From an Islamic law perspective, the partners in a *musharaka* agreement are regarded as the owner of all the assets of the *musharaka*. This means that the originator and the SPV are regarded as the owners of all the assets – both tangible and intangible – of the *musharaka* venture. The *sukuk* certificates of the *sukuk* holders should, in turn, evidence their ownership claims to the shares of the SPV in the *musharaka* venture. The question arises how to transfer this ‘ownership’ to the *sukuk* holders.

¹² Author’s own.

Practice has found its solution in English law trusts.¹³ *Sukuk* transactions are often governed by English law. Under English law, the SPV creates a trust over all its assets and, thus, also over the units that it is holding in the *musharaka* on behalf of the *sukuk* holders. The SPV creates the trust through a declaration of trust.¹⁴ The trust is a common law concept, whereby one party – the trustee – acquires the legal ownership of an asset, while another party – the beneficiary – acquires the beneficial ownership of the same asset.¹⁵ When a trust is created under English law, the *sukuk* holders acquire the beneficial ownership of the underlying assets. This approach has been accepted by the *Shari'ah* scholars and has become market practice. Since the *sukuk* holders gain some degree of ownership, the *sukuk* are tradable in capital markets. Although the SPV is a bankruptcy-remote vehicle, there still remains a – rather small and theoretical – risk that the SPV goes bankrupt. The trust also has the advantage that it provides security to the *sukuk* holders in case this hypothetical situation occurs: when a trust is created under English law, the creditors of the bankrupt trustee (SPV) do not have any recourse to the trust assets, because these assets belong to the beneficiaries (*sukuk* holders).¹⁶ The *sukuk* holders have the ownership of the underlying assets and the *sukuk* are tradable in capital markets according to article 5/2/16 AAOIFI SS 17.

From an Islamic law perspective, in a *musharaka* agreement both partners share the profits and losses according to the amount of their investment in the *musharaka* partnership; but the profits can also be shared according to an agreed percentage of the realised profit.¹⁷ The latter is often the case in the *sukuk al-musharaka* structure. For example, the originator and the SPV can agree that 20% of the realised profits of the *musharaka* are paid to the originator, while 80% of the profits of the *musharaka* are paid to the SPV. The SPV pays this amount through to the *sukuk* holders in the form of the periodical payments over the *sukuk* certificates. This makes the *sukuk* certificates somehow comparable to the shares of a company: the periodical payments of the *sukuk* are dependent on whether profit is made in the *musharaka* or not, just as the payments of

¹³ It should be noted that the use of the English law trust provides a workable solution, but it does not clarify: (i) whether a trust is sufficient for *Shari'ah*-compliance purposes; and, if so, (ii) whether the use of a trust is perhaps even necessarily required from a *Shari'ah* perspective. In relation to the first point, some *Shari'ah* scholars have argued that Islamic law does not acknowledge the concept of (a split between legal and) beneficial ownership. For that reason, it remains uncertain whether the use of a trust is sufficient for *Shari'ah*-compliance purposes. In order to be able to answer the question whether it sufficient or not, one needs to study the underlying concepts of proprietary rights under Islamic law; that requires more study and falls outside the scope of this article. For the purpose of this article it is sufficient to note that *Shari'ah* Supervisory Boards have broadly accepted the use of trusts in several structures. Thus, the use of a trust to transfer the ownership of an asset from the SPV to the *sukuk* holders does not seem to be violating the *Shari'ah*. The second point is in particular important for (civil law) jurisdictions that do not acknowledge the concept of trust. The point addressed falls outside the scope of this article as well, but for the purposes of this article it is important to note that it would be too easy to reach the conclusion that the trust is required in *sukuk* transactions from a *Shari'ah* perspective.

¹⁴ Hayton DJ, *Hayton & Marshall Commentary Cases on: The Law of Trusts and Equitable Remedies* (Sweet & Maxwell, London, 2001) p 238.

¹⁵ In some civil law jurisdictions, the legal concept of trust is not acknowledged.

¹⁶ Abdel-Khaleq and Richardson, n 9, at 418-419.

¹⁷ Qadri SQ, "Islamic Banking – An Introduction" (2008) 6 BLT 59, at 59-6; Usmani, n 3, p 8.

dividend over shares are dependent on whether the company has made profit or not.¹⁸ That explains why the *sukuk al-musharaka* is referred to as an equity-based structure. Besides the *sukuk al-musharaka*, there are five other equity-based *sukuk* structures.¹⁹ These structures strongly reflect the concept of profit-and-loss-sharing.

Under Islamic law, both partners have a right to management in the *musharaka* arrangement. However, they are also allowed to agree that one partner manages the *musharaka*.²⁰ This usually happens in a *sukuk al-musharaka* structure. The originator will be the managing partner, since the SPV has the sole purpose of facilitating the transaction. During the period for which the *sukuk* has been issued, the SPV pays the profits through to the *sukuk* holders. At maturity date, the originator purchases the units of the SPV in the *musharaka*.²¹ The SPV pays the purchase price of the units through to the *sukuk* holders and the *sukuk* will be redeemed.

1.2 Sukuk al-ijarah structure

The *sukuk al-ijarah* structure is based on the *ijarah* agreement.²² The *ijarah* agreement is comparable to an operational leasing contract. According to the contract of *ijarah* the lessor grants the lessee the right of use of an asset for a determined period against payment of a determined rental price.²³ The ownership of the asset remains with the lessor and the lessee only

¹⁸ In the period prior to 2008, most of the equity-based structures in the *sukuk* market used several financial and legal mechanisms (such as the payment of interest free loans by the originator to the SPV in case of shortfalls in profits and the payment of excess profit to the originator as an incentive fee) to fix the period payments to the *sukuk* holders. As a result, most of the structures did not have a profit-and-loss-sharing feature. As a reaction to the developments in the *sukuk* market, the AAOIFI issued a Resolution in 2008 (AAOIFI Resolution) in which it declared that the use of some of those mechanisms was not *Shari'ah*-compliant, see AAOIFI Resolution, *AAOIFI Shariah Board Resolution on Sukuk* (AAOIFI 2008), http://www.aaofi.com/aaofi_sb_sukuk_Feb2008_Eng.pdf viewed 18 July 2011. The Islamic finance industry has been trying to avoid the use of such mechanisms since 2008. For a discussion of some of several *sukuk* structures before and after the AAOIFI Resolution, see Salah O, "Islamic finance: The impact of the AAOIFI Resolution on equity-based *sukuk* structures," (2010) 5 LFM 507-517.

¹⁹ The other five equity-based *sukuk* structures are: *sukuk al-mudarabah*, *sukuk al-wakala*, *sukuk al-muzra'a*, *sukuk al-musaqa*, and *sukuk al-muqarasa*.

²⁰ Usmani, n 3, p 10.

²¹ Prior to 2008, purchase undertakings were used in most of the equity-based *sukuk* structures pursuant to which the originator bought the units of the SPV for their nominal value (which was equal to the face value of the *sukuk*). As a result, the principal of the *sukuk* holders was guaranteed. As a result, the profit-and-loss-sharing feature of the structure was undermined. Therefore, the AAOIFI prohibited the use of purchase undertaking pursuant to which the units are bought back at nominal value. However, the use of purchase undertakings pursuant to which the units are bought back at market value or for a price to be determined at maturity is permissible. See AAOIFI Resolution, n 64. For a discussion of this ruling, see Salah, n 17, at 507-517.

²² Iqbal Z and Mirakhor A, *An Introduction to Islamic Finance: Theory and Practice* (John Wiley & Sons, Singapore, 2007) p 182.

²³ Ayub, n 6, p 280.

acquires the right of use of the asset.²⁴ There are five lease-based *sukuk* structures; the *sukuk al-ijarah* is the textbook model.²⁵

Article 3/1 AAOIFI SS 17 defines *sukuk al-ijarah* as certificates that represent the ownership of the *sukuk* holders in the leased assets. The *sukuk al-ijarah* commences with an originator requiring financing. The originator identifies and selects tangible assets which can be used for a *sukuk* transaction; one can think of real estate, such as office buildings. The presence of tangible assets is in line with the prohibition of the *bai al-dayn*. Intangible assets cannot be the underlying assets in a *sukuk* transaction. Only tangible assets qualify as tradable assets in Islamic finance transactions according to Islamic law. In addition, it is important that these assets are *halal*, as described above.

The originator incorporates an SPV. The SPV, once again, should be a bankruptcy remote vehicle. The next step in the transaction is the sale of the buildings by the originator to the SPV. The originator transfers the buildings to the SPV and the SPV should become the legal owner of the buildings. For the transfer of these tangible assets, it is important that there is a true sale from the originator to the SPV.²⁶ The term 'true sale' has an accounting background and also a legal connotation under English law. True sale refers to a transfer that is legally valid, binding, and enforceable. It touches upon the question whether the SPV has become the legal owner of the assets.²⁷ Hence, there must be a valid transfer of those assets. The creditors of a bankrupt originator should not be able to challenge the transfer and claim the assets; the bankruptcy of the originator should not affect the transfer of the assets from the originator to the SPV.²⁸

Next, the sale price of the buildings will be funded through the issuance of *sukuk* certificates. From an Islamic law perspective, the buildings should belong to the *sukuk* holders due to article 5/1/5/1 AAOIFI SS 17. The *sukuk* certificates should represent the ownership of the *sukuk* holders in the underlying tangible assets. From a practical perspective, it is almost impossible to transfer the buildings to all *sukuk* holders, since several property law requirements, such as registration formalities in public registers, must be fulfilled for all hundreds or thousands of *sukuk* holders. As described above, this is realised through a declaration of trust under English law. Pursuant to the declaration of trust, the SPV shall hold the assets on trust for the *sukuk* holders. As a result, the principle of *bai al-dayn* is not violated, since the *sukuk* holders acquire some degree of ownership in the assets: the beneficial ownership of the buildings. The *sukuk* proceeds

²⁴ Usmani, n 3, p 70-71.

²⁵ The other four lease-based *sukuk* structures are: *sukuk ijarah-mowsufa-bithima*, *sukuk manfaa-ijarah*, *sukuk manfaa-ijarah-mowsufa-bithima*, and *sukuk milkiyat-al-khadamt*.

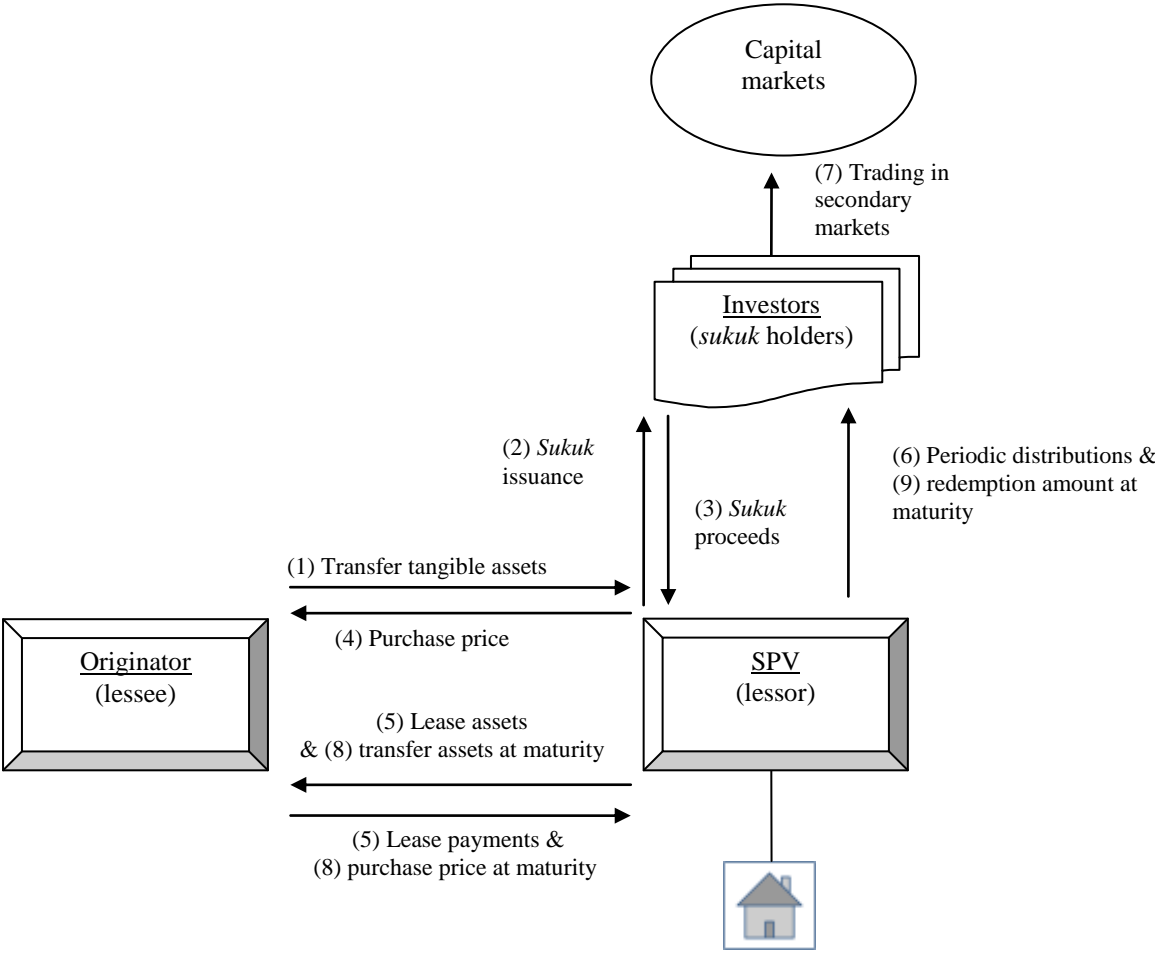
²⁶ Abdel-Khaleq and Richardson, n 9, at 418-419.

²⁷ McMillen, n 7, at 452-453; McMillen and DeLorenzo, n 7, pp 176-178.

²⁸ McMillen, n 7, at 452-453.

will be paid by the SPV to the originator to purchase the buildings. An overview of the *sukuk al-ijarah* structure is given in figure 2.

Figure 2²⁹
 Structure of *sukuk al-ijarah*



The SPV leases the assets back to the originator. The originator makes periodic lease payments to the SPV. The SPV pays these lease payments through to the *sukuk* holders. As the beneficial owners of the buildings, the *sukuk* holders are entitled to these lease payments. In this structure, the interest payments being an essential feature of conventional bonds are replaced with lease payments. As a result, the transaction is not violating the prohibition of *riba*. The lease payments from the originator (through the SPV) to the *sukuk* holders continue until maturity date. During this

²⁹ Author's own.

period the *sukuk* holders can trade their certificates in the international capital markets according to article 5/2/4 AAOIFI SS 17. The *sukuk* holders do not merely trade in debts, but also transfer their beneficial ownership in tangible assets. Consequently, the trade in these *sukuk* is not in violation with the prohibition of *riba* or the *bai al-dayn*.

At maturity date, the buildings are sold back to the originator pursuant to a purchase undertaking provided by the originator. The originator pays a pre-determined price. This amount is paid through by the SPV to the *sukuk* holders. The amount will be equal to the principal amount of the *sukuk* holders.³⁰ Thus, the principal amount of the *sukuk* holders is paid back and the *sukuk* are redeemed. From all *sukuk* structures, the *sukuk al-ijarah* structure is most comparable to a conventional bond, because it can be structured as a fixed-income security. However, it must be noted that no interest is paid in the *sukuk al-ijarah* structure and there is a direct link with the underlying tangible assets (i.e., the *sukuk* holders are the beneficial owners of the underlying tangible assets). The structure of the *sukuk al-ijarah* shows many similarities to a conventional securitisation structure.

1.3 Sukuk al-murabaha structure

The third category of *sukuk* concerns the sale-based *sukuk* structures. There are three forms of sale-based *sukuk* structures.³¹ A feature of these types of *sukuk* is that they are not tradable in capital markets. Therefore, these *sukuk* are often issued for a short term, they are so called 'Shari'ah-compliant short term bills'. The sale-based *sukuk* are not tradable, because the *sukuk* holders do not acquire the ownership – not even the beneficial ownership – of the underlying tangible assets. As will appear below, the *sukuk* holders merely acquire the beneficial ownership of a debt claim (intangible asset), i.e., the sale price. Consequently, there is no direct link with tangible assets.

The underlying Islamic finance contract of the *sukuk al-murabaha* structure is the contract of *murabaha*. This contract is a form of asset finance, meant to be used to fund the purchase of assets.³² The financier purchases an asset and becomes the legal owner of the asset. The financier then sells the asset to his client. The sale price from the resale between the financier and his client contains the initial sale price (of the first sale between the third party seller and the financier) plus a profit-margin. The client is allowed to pay in instalments.

³⁰ In the *sukuk al-ijarah* it is permissible to use a purchase undertaking pursuant to which the originator purchases the assets back at a predetermined value equal to the face value of the *sukuk*, because the *sukuk al-ijarah* is not an equity-based structure (thus, the focus is not on profit-and-loss-sharing, but rather on asset-backing). See AAOIFI Resolution, n 64.

³¹ Besides the *sukuk al-murabaha*, there are two other types of sale-based *sukuk* structures: *sukuk al-salam* and *sukuk al-istisna'*.

³² Iqbal and Mirakhor, n 21, p 89; Visser H, *Islamic Finance: Principles and Practice* (Edward Elgar Publishing, Cheltenham, 2009) pp 57-58; Usmani, n 3, p 42.

The *sukuk al-murabaha* also commences with an originator who sets up the entire structure. The originator will purchase an asset and will fund the purchase through capital markets. The originator incorporates an SPV that will facilitate the transaction. The originator and the SPV enter into a *murabaha* arrangement, pursuant to which the SPV is acting as the 'financier' and the originator the 'borrower'. The originator identifies an asset that must be bought from a third party seller.

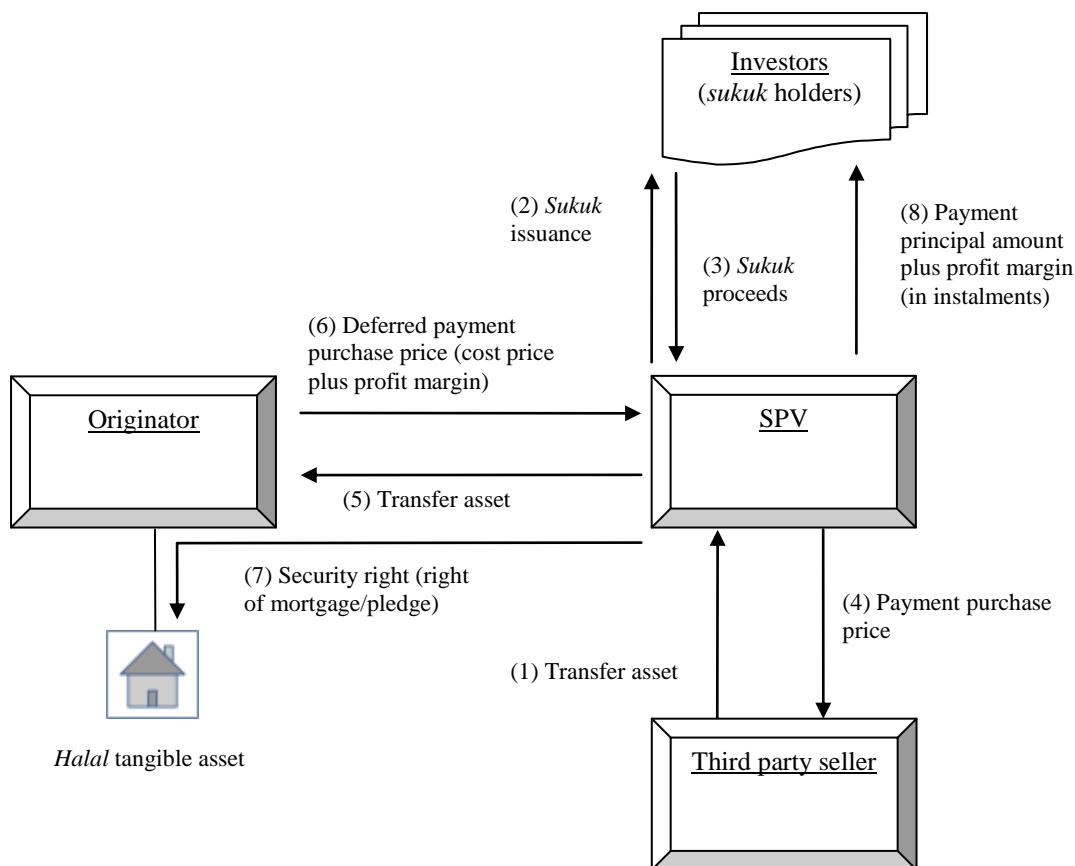
The SPV purchases the asset from the third party seller. The third party seller transfers the asset to the SPV and it is important that there is a true sale here. This means that there must be a transfer that is legally valid, binding, and enforceable resulting in the SPV becoming the legal owner of the tangible asset. The SPV pays the entire purchase price to the third party seller. The SPV funds the purchase price through the issuance of *sukuk* certificates to the *sukuk* holders in capital markets. Once again, the SPV creates a trust over all its assets. This makes the *sukuk* holders the beneficial owners of the underlying tangible asset at this moment. Article 5/2/15 AAOIFI SS 17 states that this the only moment during which the *sukuk* are tradable in secondary markets.

This moment, however, does not last long, because the SPV resells the asset simultaneously through to the originator. According to the rules for a *murabaha*, the ownership is transferred immediately from the SPV to the originator.³³ This means that there must be a true sale: there must be a valid transfer, resulting in the originator becoming the legal owner of the tangible asset. The SPV is entitled to the payment of the sale price (including both the initial price and the profit margin). The originator is permitted to pay this amount in instalments. The SPV may ask security for this in the form of security interests. The instalments are paid through to the *sukuk* holders and form the periodic payment of the *sukuk*. Hence, the SPV only has a claim towards the originator. The *sukuk* holders, as a result, merely have the beneficial ownership of a claim to the payment of the sale price. Therefore, the *sukuk* certificates are not tradable in capital markets due to article 5/2/15 AAOIFI SS 17. Figure 3 gives an overview of the *sukuk al-murabaha* structure.

³³ Usmani, n 3, pp 42-44.

Figure 3³⁴

Structure of sukuk al-murabaha



The *sukuk* certificates can be redeemable: the payment of each periodic amount partially redeems the *sukuk*, until the payment of the final amount resulting in the complete redemption of the *sukuk*. It is also possible that the part of the sale price that consists of the profit margin is paid through to the *sukuk* holders as a periodic payment, while the part of the sale price which is the initial price is put into a reserve account. After payment of the final instalment by the originator to the SPV, the SPV can pay the entire principal amount (existing of the initial purchase price paid for the assets) to the *sukuk* holders to redeem the *sukuk*. Since the SPV as trustee holds this amount on trust for the *sukuk* holders and that amount is not part of the insolvency estate of the trustee in case of insolvency of the trustee under English law, the *sukuk* holders do not take an insolvency risk on the SPV.

³⁴ Author's own.

2. Conclusion

This two-part article clarified that there are many *sukuk* structures, each having its own characteristic features. The underlying Islamic finance contract determines the structure of each *sukuk*. The *sukuk al-musharaka* shows more similarities to shares. The transaction contains a partnership arrangement between the originator and the SPV; and the issuance of *sukuk* in capital markets which links the profit-generating transaction in society to the international capital markets. The periodic payments of the *sukuk* are strongly depending on whether real profit is generated. This differs from the *sukuk al-ijarah* structure, which is more comparable to a fixed-income security. The *sukuk al-ijarah* structure consists of a sale-and-lease-back arrangement between the originator and the SPV followed by the issuance of *sukuk*. The lease payments from the originator to the SPV are paid through to the *sukuk* holders. Finally, the *sukuk al-murabaha* structure has been addressed: a short term note which can be used for asset finance purposes. The different transaction structures show the flexibility of *sukuk* as financial instruments and the flexibility of the *Shari'ah* framework within which *sukuk* can be structured.