

Application of Third Party Guarantee in Sukuk Al-Ijarah

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Abstract

Sukuk al-Ijarah is the most popular Sukukto fund projects. It plays a vital role in the development of economics in both Muslim and non-Muslim countries, because of its flexibility to finance various projects which need a huge amount of funds. This paper examines the nature of Sukuk al-Ijarah, types of Sukuk al-Ijarah, structure, and process of issuance of Sukuk al-Ijarah. The paper analyses the issue of third party guarantee in Sukuk al-Ijarah and the surrounding scholarly discourse. The methodology adopted in the paper is qualitative which is based on Islamic jurisprudential methodology to analyse classical and modern scholars' viewpoints on the issues that arise in the study. It was found that application of third party guarantee is permissible in the process of Sukuk al-Ijarah provided that it is voluntary without charging a fee.

Keywords: Sukuk al-Ijarah, nature of Sukuk al-Ijarah, structure of Sukuk al-Ijarah, Islamic jurisprudence, Third party guarantee.

1. Introduction

Sukuk al-Ijarah is a new method of investment in Islamic commercial transactions, particularly in the Islamic capital market. Sukuk al-Ijarah is classified as one of the prominent products of the Islamic capital market. For example, the first, and largest Sukuk al-Ijarah issued in the history of the Islamic capital market to date, was a US\$ 3.52 Billion Nakheel Sukuk al-Ijarah. This shows that Sukuk al-Ijarah is the epitome of the Sukuk for financing big projects that need a huge amount of capital. In addition, it is a flexible financial instrument that can provide capital for the financing of various projects through several different methods of investment because it can be issued as a certificate that represents ownership for an underlying asset or as a certificate that represents ownership for the usufruct of an underlying asset or as a certificate that represents ownership for carrying out services. It can be used not only to provide capital for commercial projects, but also to provide initial capital for charitable projects and for financing them.

2. Nature of Sukuk Al-Ijarah

Sukuk al-Ijarah is considered as certificates that represent undivided ownership of the leased asset, or usufructs, or services in a specified asset or whatever is described in one's obligation. These certificates have equal value at issuance; they are tradable in the secondary market (stock) after the subscription has been closed in the primary market. From the above statement of Sukuk al-Ijarah, it is obvious that there are three types of Sukuk al-Ijarah, which are: (i) Sukuk al-Ijarah representing ownership over the underlying leased asset, (ii) Sukuk al-Ijarah representing ownership over usufructs and (iii) Sukuk al-Ijarah that represents ownership over services. These three types are explained in detail as follows:

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(i) Sukuk al-Ijarah represents ownership over underlying leased assets (Sukuk Milkiyyat al- Usul al-Mu'ajarah): In this type of Sukuk al-Ijarah, the Sukuk holders have the right of ownership over the leased assets, such as real estate, or equipment that is leased to a company. The Sukuk holders of these assets can sell their assets to anyone they want to after deducting the cost of maintenance from the rental fees. This Sukuk can be traded in the stock market.

(ii) Sukuk al-Ijarah represents ownership over usufructs of the leased asset (Sukuk Milkiyyat al-Manafi'i): This type of Sukuk can be seen in a situation whereby the owner of real estate issues Sukuk on the usufruct of the real estate, and the holders of Sukuk are entitled only to receive the derived benefit from the rented real estate during a specific period of time stated in the agreement. The Sukuk holders of this usufruct can sell it at their convenience. In other words, these Sukuk holders can sell their Sukuk in the stock market at their own discretion.

(iii) Sukuk al-Ijarah represents ownership over services (Sukuk Milkiyyat al-Khidmat): This Sukuk represents ownership over services, which are in one's liability. For instance, education at university or air transportation. This form of Sukuk operates thus; the owners of the assets will issue Sukuk on the services that are offered. The holders of this Sukuk have the right to own those services, and at the same time, they can sell them in the stock market without any hindrance.

From the aforementioned explanation, in the Sukuk al-Ijarah contract the underlying asset is entirely owned by the Sukuk holders. The issuer of the Sukuk is only an agent who judiciously manages the project. The rental fees that are derived from the asset exclusively belong to the Sukuk holders. Therefore, it is significant to say that the Sukuk al-Ijarah transaction in the contemporary world is not different to the classical Ijarah transaction. In both classical Ijarah and modern Sukuk al-Ijarah, the leased asset still belongs to the lessor. Based on this, in order for Sukuk al-Ijarah's operations to be in line with the principles of Islamic law, they must not differ from the operations and rules, as well as conditions and terms, of classical Ijarah. In addition, in Sukuk Ijarah transactions, there is no argument about the legality of Sukuk al-Ijarah representing ownership over underlying assets. Similarly, it is permissible to issue Sukuk al-Ijarah on the asset that represents ownership over usufructs or services which are in the lessor's liability, if the usufructs or services are specified and known to the contracting parties. This is because usufructs or services that are specified and known can be sold and leased to third parties. Therefore, it is permissible to issue Sukuk al-Ijarah on those usufructs or services that are specified and known to the contracting parties. Muslim jurists have two views on leasing the usufructs that are not specified and known to the contracting parties. The first view is that of the majority of Muslim jurists. They are of view that it is permissible to lease a usufruct that is in the lessor's obligation absolutely. The second view is that of Hanafi jurists. Their view is that it is impermissible in Islamic law to conclude a contract of leasing on a usufruct which is not specified and known to the contracting parties. This is because one of conditions for a leasing contract to be considered as a valid contract is that the leased asset must be specified and known to the contracting parties. Based on that, it is impermissible to conclude a contract on a usufruct which is in the lessor's obligation without being specified. From the aforesaid, the preferable view is that of Hanafi jurists. This is as a result of the fact that the transaction will amount to uncertainty and ignorance of the contractual instruments (subject matter of the contract) and it is impermissible in Islamic law to conclude a contract on such instruments. Therefore, it is impermissible to issue Sukuk al-Ijarah on usufructs and services that are not specified and known to the contracting parties because the issuer is not liable for the guarantee of this kind of Sukuk al-Ijarah investment. In Islamic law, investors deserve the profit derived from the investment when they bear any loss that may occur to the investment, (al-Ghurm bi al-Ghunm, al-Kharaj bi al-Daman). These principles are the main principles of investment in Islamic law in order to establish justice among the investors and the issuers. In Islamic law, the guarantee of the principal amount of the capital, in other words, the guarantee of the issuer or manager for investment, leads to injustice between the parties. This is because loss may affect the investment without any carelessness on the part of the party who manages the investment due to causes, which are beyond his desire and capability. In this case, there is no justice among the contracting parties if the manager is responsible for any damage or loss of the investment. For this reason, the OIC Fiqh Academic resolution held that it is impermissible for the issuer of Sukuk al-Ijarah or the manager to guarantee the principal amount or profit of the Sukuk if the leased asset is destroyed wholly or partially. Only the Sukuk holders are liable for any damage to the leased asset. Based on this, guarantee of issuer for the principal amount or profit of Sukuk al-Ijarah is disallowed in Islamic law.

3. Essential Features of Sukuk Al-Ijarah in Islamic Law

From the perspective of Islamic law, essential features of Sukuk al-Ijarah are explained extensively and various submissions by jurists regarding Sukuk al-Ijarah are elaborated.

In Sukuk al-Ijarah, that represents ownership over leased assets, the contract must include the conditions of sale between the issuer of the Sukuk and the subscriber (Sukuk holder). For example, the subject matter of the contract or the sold item must be known, and the price of the sold item must also be pronounced to the contracting parties. In this regard, the subject matter of the contract is the leased asset, which is owned by the Sukuk holders. This means that Sukuk holders will share the revenues of the leased asset, or the project, among themselves according to each person's portion in the project and at the time of the liquidation of the project. This means that the Sukuk holders will share in both profit and loss among themselves based on their portions. The profit and loss of the project should be calculated and announced in order to be at the disposal of the Sukuk holders. However, in Sukuk al-Ijarah that represents ownership over usufructs of a particular corporeal asset, the contract must be concluded on the condition of leasing between the issuer and the subscriber. For example, the leased asset must be openly declared. It must be existed and able to be delivered at the time the contract is concluded. It has been argued that the price must also be determined, and the contracting parties must know the method of payment. The proceeds that are realized at the end of every period of investment are distributed to the Sukuk holders, as long as the project is not liquidated. Nevertheless, in case of last liquidation, Sukuk holders should share in what is realized from the last period of investment according to each person's portion. The Sukuk holders must share both the profit and the loss. In a Sukuk al-Ijarah contract that represents ownership over usufructs of an asset, which is in one's obligation, the contract of issuing Sukuk must include the conditions of Islamic law that are stipulated for leasing the asset which is in one's obligation. For instance, the asset must be described accurately in order to avoid any ambiguity and uncertainty in the contract. The asset must be one that can be described specifically. The parties must know the usufructs of the leased asset, its period, and date of delivery, the price must be determined, as well as the method of payment. In Sukuk al-Ijarah contract that represents ownership over services, the contract of issuance must include conditions, terms and rules of leasing the services. The service, that is the subject matter of the contract, must be known and determined clearly in order to avoid any uncertainty in the contract. The conditions of the contracting parties and the determination of rental fees, as well as the method of payment, must also be stated to the contracting parties. Similarly, in the case of Sukuk al-Ijarah that represents ownership over services, which are in one's obligation, there must be a sufficient description of the type of services that is the subject matter of the contract. The same terms, conditions and rules that applied to the former (Sukuk al-Ijarah that represents ownership over usufructs of an asset) should also apply to the latter. In addition, Sukuk al-Ijarah should represent an undivided portion in the specified project or in the usufructs or services. It is impermissible to include in the contracts of Sukuk al-Ijarah that the capital or specific profit is guaranteed by the issuer. Likewise, it is impermissible to include in the contracts of Sukuk al-Ijarah that it is obligatory to sell back the Sukuk, even if this condition is pending or it is taken as a future condition. However, it has contrarily been argued that it is allowed to include in the contract a promise to sell back the Sukuk. In this case, the sale contract would be concluded on the price that will be assessed by the experts or by mutual consent among the parties. The prospectus of issuance should include all statements that are related to the asset, usufructs or services and the issuer, as well as the rights and obligations of the contracting parties. The issuer of Sukuk al-Ijarah must include in the contracts sufficient information in describing the contracting parties and the participants in the issuance; such as the agent of issuance, the manager, the guarantor for payment and the secretary of investment. The obligations and rights of everyone must be stated clearly in the contract in order to avoid any conflict and uncertainty. It should also include how the Sukuk should operate and how it will be terminated.

In addition, the issuer can mention in the Sukuk al-Ijarah contract that there is a promise from a third party who is separate from the investment, to make a guarantee voluntarily, with a specific amount, in order to recover the loss that may happen to the project. This guarantee should not be an obligation or stipulation in the contract. In other words, the third party guarantee should not be a condition, term or rule among the contracting parties to execute the contract in a situation whereby, if the third party is not able to fulfil his promise, the contract thereby will not be concluded. From the foregoing essential features of Sukuk al-Ijarah, it could be inferred that transaction of Sukuk al-Ijarah is different from other Sukuk transactions. An Sukuk al-Ijarah transaction, in order to be in line with the principles of Islamic law, must be in accordance with the aforementioned features. In addition to that, it is observed that the essential features for issuing Sukuk al-Ijarah contract, in whatever circumstances, are similar to the essential features of a classical Ijarah contract that the classical Muslim scholars have described and agreed upon.

Therefore, the contracting parties in Sukuk al-Ijarah must observe those features in their contracts, contractual instruments and transactions in order to avoid any ambiguity and uncertainty that may lead to dispute among them.

3. Process of Sukuk al-Ijarah

Sukuk al-Ijarah has various processes covering structure, circulation in the market, redemption from the investors and termination of the Sukuk transaction. Notwithstanding this, the processes should be considered in accordance with the principles of Islamic law.

3.1 Structure of Sukuk Al-Ijarah

In general, the structure of Sukuk al-Ijarah is that the originator sells the leased asset to the issuer to create a special purpose vehicle (SPV), which acts as a trustee to manage the project for the investors who are the Sukuk holders. The asset will be leased back to the originator for a specific period. At the same time, the SPV issues certificates (Sukuk) to investors, which represent the undivided ownership in the underlying leased asset during the period of the Ijarah contract. The rental fees will be paid to the SPV. After that, the SPV will distribute the same rental fees to the Sukuk holders, according to their portion of ownership in the undivided underlying leased asset. At the expiration of the leasing contract, the Sukuk holders are no longer entitled to possess the leased asset. The principal amount and profit will be paid to them, and ownership of the leased asset will be transferred to the originator. By this, it means that the originator will buy the asset at the end of the Ijarah period at nominal price. Therefore, the originator guarantees the principal amount of the Sukuk holders. From the aforementioned explanation on the structure, wherein the asset is leased back to the originator, Muslim jurists have two views. The first view is that of Hanafi jurists, who have declared that it is impermissible to lease back the leased asset to the lessor. Based on the proof that the leased asset already belongs to the lessor, in such a situation it is not allowed for a person to lease his asset to himself, as this would amount to the contradiction of various rules of Islamic law. The second view is that of Maliki, Shafi' and Hanbali jurists. The jurists in these schools collectively agree that it is permissible for the lessor to lease back the leased asset from the lessee. Their argument is that any worthy contract, which is permissible to be concluded with another party, should be also allowed to be concluded with the lessor. In addition, it was reiterated that the origin in the commercial transaction is permissibility and there is no principle in Islamic law that prohibits leasing back the leased asset to the lessor. Besides, the usufruct of a leased asset exclusively belongs to the lessee, therefore, it is permissible for him to lease it to anyone he wants to, either the lessor, or another party.

From the foregoing differences of opinions among the Muslim jurists regarding the permissibility of leasing back the leased asset to the lessor, it may be suggested that the preferable view is that of Maliki, Shafi' and Hanbali. The justification for such a stance is that there is no provision in Islamic law that prohibits leasing back the leased asset to the lessor, provided that it is a transaction which is free from any element of *riba*. Based on this, it may be argued that the structure of Sukuk al-Ijarah wherein the SPV will lease back the asset to the originator on behalf of the Sukuk holders is permissible in Islamic law if it does not lead to a *riba* transaction. However, in the above-mentioned structure of Sukuk al-Ijarah, it seems that the leased asset does not belong to the Sukuk holders, because at the end of the leasing contract their principal amount that they paid for the asset will be returned to them. If the asset belongs to them, there is no need to return the principal amount of their asset to them. Therefore, this structure needs to be reformed in order to be in conformity with the principles of Islamic law because, if the principal amount of the Sukuk holders is returned to them, then the structure seems to be a loan contract and this is impermissible under Islamic law. This is for the reason that the principal amount of the Sukuk al-Ijarah transaction is guaranteed, and when the principal amount of any transaction is guaranteed in Islamic law, then the transaction is effectively a loan transaction in which it is impermissible to take any benefit thereof. As a result, the current structure of Sukuk al-Ijarah is not in accordance with the principles of Islamic law and needs to be reformed. The vitality of reformation is due to the fact that the structure of Sukuk al-Ijarah is akin to an organised loan contract, which is not allowed in Islamic law.

3.1.1 Application of Third Party Guarantee in the Structure of Sukuk al-Ijarah

It is useful to examine whether guarantee is permissible in classical Ijarah or not. In this regard, there is no dissenting opinion among Muslim jurists that the leased asset is a trust in the hands of the lessee. He does not guarantee it unless it is due to his negligence or transgression. Therefore, the guarantee of leased asset is on the lessor. However, there is a dispute on guarantee of leased asset, in the case that the lessor stipulates in the contract of Ijarah that the guarantee of the leased asset is on the lessee, whether due to his negligence or not.

In this respect, there are two views on the issue of the guarantee, namely: the view of Hanafi jurists and the view of Maliki, Shafi', and Hanbali jurists. The first view is that of the Hanafi jurists in which, it was asserted that the stipulation of guarantee on the lessee is permissible and it is a valid stipulation. This is because there is no provision in the Qur'an or Sunnah that prohibits stipulation of guarantee of leased asset on the lessee. Based on this, since the objective of Islamic law in a contract is that the contracting parties must fulfil their contractual rights, obligations and conditions, and it is impermissible for them to be breached. Therefore, if the lessor and lessee have concluded the contract on condition that guarantee of the leased asset is on the lessee, this condition is valid, and the lessee must fulfil the contractual obligations that he has undertaken. In addition, it was said that the origin in the contracts is mutual consent among the contracting parties. This means that any condition that they have included in the contract by mutual consent is obligated upon them to fulfil, as long as it does not contradict the principles of Islamic law. This is in line with Allah's assertion in the Qur'an: "O you believe do not devour the property of each other unjustly unless it is trade by mutual consent among you". In another verse, He says: "If they agree to give it to you with their consent, so you can eat it freely". As a result of this divine evidence, they submitted that since mutual consent is the element that makes the property of one party lawful for the other one and there is no provision in Islamic law that prohibits it. If the lessee agrees to undertake the guarantee of the leased asset with his own consent, this guarantee is permissible.

The second view is that of the Maliki, Hanbali and Shafi'. They argued that the stipulation of guarantee of leased asset on the lessee is disallowed. In other words, stipulation of guarantee of the leased asset on the lessee contradicts the principles of the contract of Ijarah, in which it is said that the leased asset is to be trusted into the hands of the lessee. In an actual sense, the lessee cannot guarantee any damage or loss that may occur to the leased asset unless it is due to his negligence or other transgression. Even if the lessee agrees to guarantee the leased asset by his own consent, this guarantee is not binding. This is because, this guarantee is in conflict with the principles of Islamic law, and mutual consent of the contracting parties cannot make what is unlawful in Islamic law lawful. In addition, the Prophet (S.A.W) is reported to have said that any condition which is not in the Qur'an is void even though it is hundreds of conditions. In another Hadith, the Prophet (S.A.W) has forbidden the conclusion of a contract with sale and condition in one contract. Based on this, it is unlawful to stipulate a guarantee of the leased asset on the lessee in a leasing contract, because this contract is a contract of sale of usufructs to the lessee. As such, it is not prohibited to combine it with a stipulation of guarantee of the leased asset on the lessee. Based on the differences of opinions among Muslim jurists on the guarantee of leased asset on the lessee, the preferable view is the second view which provides a sound justification. This is for the reason that the lessee leased the asset to get benefit from it, and it is obliged on the lessor to provide this benefit for him. The lessee is entitled to benefit from the leased asset, only not to own the asset due to the fact that the asset exclusively belongs to the lessor. Therefore, it is mandatory on the lessor to maintain the leased asset in the manner that the lessee will benefit from it. If the lessee guarantees the leased asset, then it will amount to a loan contract, which will also lead to procurement of the property of each other unjustly which accordingly is also detestable in Islamic law. This is reasonably justified by the fact that it is impermissible that the lessee guarantees the leased asset and pays the rental fee to the lessor. This means that the lessor benefits from the leased asset without taking any risk on the asset. In Islamic law, the principle that governs the commercial transaction is that it is impermissible to take any benefit from such a transaction without taking the risk of the transaction. As a result, in a Sukuk al-Ijarah transaction, it is impermissible for the originator or the SPV to stipulate guarantee of the leased asset on the lessee. Thus, in classical Ijarah itself, in which Sukuk al-Ijarah has taken its initial path. It was lamented that it is impermissible for the lessor to stipulate guarantee of leased asset on the lessee, and contemporary Sukuk al-Ijarah transaction should not be differentiated from classical Ijarah transaction in term of guarantee of the leased asset and implementation of the principles of Islamic law. However, it is permissible for a third party to voluntarily guarantee the leased asset during the period of the leasing contract. Based on this, the application of a third party guarantee that is not involved in the structure of Sukuk al-Ijarah is permissible on a voluntary basis without charging a fee.

3.2 Circulation of Sukuk al-Ijarah in Islamic Law

Circulation is a method commonly recognized among stockbrokers as a transfer of ownership of Sukuk from the owner to the other party by a contract that is acknowledged by Islamic law, such as a sale contract.

A gift or inheritance, or through any means that the traders are familiar with. Therefore, circulation of Sukuk al-Ijarah is a transfer of ownership over the corporeal asset or usufructs or services from the Sukuk holder to the other party by any contractual means which is not in conflict with the principles of Islamic law. In other words, the circulation of Sukuk al-Ijarah refers to the compatibility for sale and purchase without observing the principle of sale of currency and sale of debt. This, in an actual sense, cannot be realized unless most of the properties of the project are converted into assets or usufructs and services. However, if the assets that represent Sukuk are money or debts the parties are obliged to apply the principles of sale of currency or sale of debt to the circulation of the Sukuk al-Ijarah. For this reason, it is obliged on the contracting parties to observe the following principles in circulation of Sukuk al-Ijarah in order to be in conformity with the principles of Islamic law: Sukuk al-Ijarah that represents ownership over the leased asset or a promised to lease can be circulated after the Sukuk holders possess the underlying assets from the time of the issuance until maturity. Similarly, Sukuk al-Ijarah that represents ownership over the usufructs of particular assets can be circulated before releasing the assets. If the assets are released, then the Sukuk represents the rental fees of the Ijarah; and therefore it is a form of debt that is in one's obligation (the lessee who released the Sukuk before possessing the asset). In this case, circulation of this kind of Sukuk should go under the rules and principles of the debt transaction.

However, Sukuk al-Ijarah that represents ownership over usufructs of the assets that are in one's liability cannot be circulated before specifying the asset that usufructs will be derived from. On the other hand, if the asset is specified, then it is allowed for the Sukuk to be circulated or negotiated. Likewise, it is acceptable to circulate Sukuk al-Ijarah that represents ownership over services that are offered by a specified party before releasing those services. If it is released, then the Sukuk represents the fees that are derived from the leased assets (services). It is therefore regarded as debts that are in the obligation of the lessor. As a result of this fact, the circulation of this type of Sukuk should be classified under the rules and principles of debt transaction. Sukuk al-Ijarah that represents ownership over the services that are in the obligation of the other party cannot be circulated before specifying the party that will offer the services. If the party is specified, then the circulation of the Sukuk is permitted. The second buyer of these particular services of the underlying asset can sell the services and issue Sukuk on them before possessing the Sukuk. This is because the party who will offer the Sukuk is already known to the contracting parties. Furthermore, the issuer of the Sukuk al-Ijarah can mention in the prospectus of the issuance of the Sukuk that there is a promise to buy the Sukuk that is exposed to him for sale at the market price after the operation of the issuance has been concluded. However, it is not acceptable to promise to buy the Sukuk with the face value (original price). It is acceptable for Sukuk al-Ijarah to be circulated by whatever method is customary in the community, such as record keeping, electronic means and hand-to-hand when the Sukuk is expected to be in the holder's possession. From the abovementioned principles, the circulation of Sukuk al-Ijarah is subject to certain conditions and rules, which the contracting parties should observe at the time of circulation in order to avoid any illegal transaction. If the abovementioned principles and rules are not observed in the circulation of Sukuk al-Ijarah, then the circulation will not be in accordance with the principles of Islamic law. In addition, in a situation where the leased asset is sold to a third party who is not involved in the contract of Ijarah. Muslim jurists have two views on the legality of selling (circulation) the leased asset to another party who is not a lessor. The first view is that of the Hanafi jurists who submit that selling the leased asset to other parties is permissible on condition of the approval of the lessee. This means that if the lessee approved the sale of the leased asset, the sale contract is valid, while if the lessee did not approve the sale contract, then the contract is invalid. This is because, in this situation, the lessor will not be able to deliver the asset to the buyer, thus the leased asset is in the possession of the lessee to use it and it is obliged to maintain his right in a manner that he would be able to use the asset during the leasing period without any impediment. The second view is that selling the leased asset to another party is permissible, but the buyer has the right to cancel or continue the contract if he does not know that the asset is leased by a lessee. This is for the reason that a leasing contract is on the usufructs of the leased asset, while the sale contract is on the asset itself, therefore, they are different contracts. This view is attributed to Maliki, Hanbali and Shafi'.

From the earlier two views, it can be inferred that they are akin to or interrelated with each other. The former is that the sale contract is permissible with the exception of lessee's consent while the latter is that the sale contract is permissible with the exception of the buyer's consent. Both parties agree that the sale contract is permissible if the lessee or the buyer agrees to conclude the contract on the leased asset.

Based on this, selling the leased asset to another party who is not the lessee is permissible with the condition of the agreement by lessee or buyer on the sale contract. As a result of this fact, circulation of Sukuk al-Ijarah is permissible in Islamic law based on the principles and conditions as previously described.

3.2.1 Application of Third Party Guarantee in Circulation of the Sukuk al-Ijarah

This part is an integral part of Sukuk al-Ijarah as it focuses on its circulation in relation to the application of third party guarantee. From the classical scholars' points of view, the concept of classical Ijarah is sale of usufructs to another party, and circulation of Sukuk al-Ijarah is also sale of Sukuk to another party. In both contracts it can be observed that they are based on a sale contract. Based on this, in Islamic law, it is lawful for the third party to guarantee the price of the sold item for the seller and guarantee the sold item for the buyer. This is because classical and contemporary Muslim jurists agree that future liability is allowed in Islamic law for a third party to undertake it. Therefore, it is permissible for a third party to guarantee the price of the Sukuk al-Ijarah for the seller and guarantee delivery of the Sukuk to the buyer, in the event that the contracting parties are not able to fulfil their contractual liabilities to each other. As a result of this fact, the application of third party guarantee is permissible in circulation of Sukuk al-Ijarah, provided it is done voluntarily without any charging of fees. However, if there is a fee on the contracting parties, then the circulation of the Sukuk would amount to a loan contract in which it is unlawful to take any benefit.

3.3 Redemption of Sukuk al-Ijarah in Islamic Law

Islamic law presents a unique way of redemption of Sukuk al-Ijarah in accordance with the principles of Islamic values and teachings. Redemption is the purchasing of the portion of the investor that participates in the investment fund, and returning it into the same investment fund, in order for the investor to no longer participate in the investment. In other words, redemption of Sukuk is the sale of the Sukuk to the issuer by the holder, either with the market price, or with any price agreed upon after the subscription is closed, and the Sukuk is offered for negotiating. Similarly, the redemption of Sukuk al-Ijarah is an action from the obligor to buy the portion of the investor either partially or wholly. This redemption can be done either by concluding a contract immediately between the manager and the investor or by a promise from the manager to redeem any portion that is offered for sale. This promise can be stated in the prospectus of the issuance of the Sukuk al-Ijarah. It must be expressly declared that there will be a promise from the issuer to repurchase any Sukuk that is exposed for sale, either at market value or with any mutual agreed price between the parties. However, this promise will be considered as an offer to purchase the Sukuk whether it is temporary or not. The retrieval will be a new contract between the Sukuk holders and the issuer. The redemption of Sukuk al-Ijarah may be incomplete without cognizance of its essential principles. Thereby the following should be considered as the principles to follow in the retrieval of Sukuk al-Ijarah under Islamic law: Sukuk al-Ijarah that represents ownership over the underlying asset can be retrieved by any agreed price between the issuer and Sukuk holders, because it is a repurchase of the Sukuk from the owners. It is also allowed for the issuer to retrieve the Sukuk before the maturity period at the market price or with a mutually agreed price between him and the Sukuk holders at the time of the retrieval. It is encouraged to retrieve Sukuk al-Ijarah that represents ownership over the usufructs of a particular underlying asset from the Sukuk holders after the price of the subscription has been paid. Thereby the retrieval of this kind of Sukuk can be done at the market price or with any agreed price between the issuer and Sukuk holders provided that the amount of subscription or retrieval is not on deferred payment. Likewise, the issuer of Sukuk al-Ijarah that represents ownership over the services can retrieve this Sukuk with any agreed price among the contracting parties, if this retrieval does not lead to any element of a ribĒ transaction, such as a sale and buy-back contract (Bay al-Ōnah) which is prohibited in Islamic law. In order to avoid a ribĒ transaction in this retrieval, it is obliged to mention in the retrieval that the leased asset will be released to the lessor, whether the lessor is the owner of the asset or the owner of the services only. Based on this, if the retrieval of the Sukuk is done at the market price, or at any mutually agreed price, then it is far from being akin to a sale and buy-back contract (Bay al-Ōnah). Furthermore, Sukuk al-Ijarah can be retrieved by a promise from another party, who is not a manager of the investment, or by someone who is not one of the participants in the investment. In this case, the retrieval of the Sukuk will be done at the market price or any agreed price between the issuer and Sukuk holders. This promise is a kind of third party guarantee, for which the International Fiqh Academic issued a resolution to emphasize that it is allowed in Islamic law.

However, it is disallowed for the manager of the investment of Sukuk al-Ijarah to take commission on the retrieval of the Sukuk. Notwithstanding this, it is permissible for him to take the real cost of the retrieval and its services, such as for registration fee and service charge. From the above-mentioned principles of retrieval of Sukuk al-Ijarah, it can be observed that in order for the retrieval of Sukuk al-Ijarah to be in compliance with the principles of Islamic law, it must follow particular rules and principles. By following these rules and principles, the retrieval of Sukuk al-Ijarah would be differentiated from the conventional one (bonds), particularly the Sukuk that represents usufructs and services that are in one's obligation. At this juncture, it is noteworthy to mention that Muslim jurists from the four Fiqh Schools unanimously agree that selling a leased asset to the lessee is permissible in Islamic law. The reason for this is that the leased asset is already in the hands of the lessee so it is encouraged to sell the asset to him. This sale contract is similar to selling the usurped asset which is in the hand of usurper to the usurper or selling the pawned asset to the pawnbroker. In addition, the leasing contract is on the usufructs of the asset and sale contract is on the asset itself. The lessee owns the usufructs by the contract of leasing and owns the leased asset by the contract of sale. These are two completely separate types of contract. As a result of this fact, it is permissible for the lessor to sell the leased asset to the lessee. In view of the foregoing, it can be deduced that it is allowed in Islamic law for the issuer or manager of Sukuk al-Ijarah to retrieve the Sukuk from the Sukuk holders at the market price. This is because it is permissible to conclude a sale contract between lessor and lessee. Therefore, since retrieval of Sukuk al-Ijarah is essentially a selling back of the Sukuk to the issuer, this retrieval is allowed in Islamic law.

3.3.1 Application of Third Party Guarantee in the Redemption of Sukuk al-Ijarah

Muslim jurists agree that in a sale contract, it is permissible for the third party to guarantee the sold item for the buyer and the price of sold item for the seller, in case they (seller and buyer) did not fulfil their contractual rights and obligations to each other. Since the retrieval of Sukuk al-Ijarah is based on selling the Sukuk to the issuer, and it is allowed for a third party who is not involved in the sale contract to guarantee any contractual rights or liabilities for the contracting parties in the event they are not able to fulfil their contractual rights and liabilities. Based on this, in the retrieval of Sukuk al-Ijarah, it is encouraged for a third party who is not involved in the Sukuk transaction to voluntarily guarantee on behalf of the issuer and Sukuk holders any contractual right or obligation. This is a result of the fact that retrieval of Sukuk al-Ijarah is akin to a sale contract. For this reason, it can be concluded that the application of third party guarantee in the retrieval of Sukuk al-Ijarah is lawful in Islamic law by taking into consideration the principles and rules of retrieval that should be observed in the retrieval. However, this third party guarantee should be done voluntarily without taking any consideration in relation to the guarantee.

3.4 Termination ('Itfa') of Sukuk Al-Ijarah

Neglecting the termination of Sukuk al-Ijarah renders the concepts and principles of Sukuk al-Ijarah incomplete. As a result of this, it is worthwhile highlighting the termination of classical Ijarah in Islamic law before embarking on the discussion of termination of Sukuk al-Ijarah. In this regard, Muslim jurists unanimously agree that an Ijarah contract can come to an end by the termination of the period of Ijarah or by resignation of one of the parties from the contract or by destruction of the leased asset. Sukuk al-Ijarah can be terminated by several methods, which can be considered as customary amongst the traders in the stock market. Thereby, as far as the termination of Sukuk al-Ijarah is concerned, there are three approaches that can be used. Firstly, transactions that can be considered as termination of Sukuk al-Ijarah are, for instance, Sukuk al-Ijarah that represents ownership over the asset. This Sukuk is terminated if the leased asset is damaged and no longer exists. Secondly, Sukuk al-Ijarah that represents ownership over usufructs of the asset can be terminated if the usufructs have been transferred to the lessee at the maturity of the leasing contract. Thirdly, for Sukuk al-Ijarah that represents ownership for services in one's obligation, this Sukuk also can be terminated if the services have been carried out. Therefore, if one of the above mentioned methods that are considered as termination for Sukuk al-Ijarah has occurred, then, the period of Sukuk al-Ijarah is terminated. Hence, a Sukuk al-Ijarah contract can be terminated by resignation of one of the contracting parties.

3.4.1 Application of Third Party Guarantee in Termination of Sukuk al-Ijarah

In Islamic law, the guarantee of future liability (Daman al-Dark) is permissible by the unanimous agreement of the Muslim jurists. Therefore, since Ijarah is a kind of sale contract, guarantee of future liability is also permissible in Ijarah if the contracting parties are not able to fulfil their contractual rights and obligations. As a result of this, it is allowed in Islamic law for a third party to guarantee the rental fees or usufructs or services of Sukuk al-Ijarah.

For example, in cases whereby the leased asset is destroyed before the end of the period of a lease contract or in cases whereby the Sukuk holders are not able to use the usufructs of leased assets or in cases whereby the issuer is not able to perform the services for Sukuk holders. It may be submitted that the application of third party guarantee in termination of Sukuk al-Ijarah is permissible by charging a fee (“compensation”), if the third party has performed any liability on behalf of the issuer of Sukuk al-Ijarah. For instance, if the leased asset is destroyed before the contract of leasing expired, the third party can guarantee replacement of the asset or reimbursement of rental fees for the Sukuk holders, and return to the issuer of the Sukuk to refund what he has paid on behalf of the issuer. The third party can also guarantee the use of usufructs for the Sukuk holders in case they are not able to use the usufructs, and return to the issuer for refunding. In addition, the third party guarantee can guarantee the performance of services for the Sukuk holders if the issuer of the Sukuk is unable to carry out the services, and return to the issuer for reimbursement. This is due to the fact that the issuer of the Sukuk has taken the rental fees for using the usufructs or price of services for carrying out the services from the Sukuk holders. Therefore, the third party has rights to return to the issuer for refunding if he did not guarantee the Sukuk voluntarily. In other words, this guarantee is as a reimbursement of what the issuer of the Sukuk has taken from the Sukuk holders in case he is not able to fulfil his contractual rights and obligations.

4. Conclusion

There is no doubting the importance of Sukuk al-Ijarah transactions, as it is appropriate for financing various projects that need a huge amount of funding. This is because it can be used to provide capital for those projects without contradicting the parameters of the principles of Islamic law. This cannot be done without setting rules, terms, conditions and principles that Sukuk al-Ijarah transactions and structures should follow in order to be in line with the principles of Islamic law. In this regard, various views relating to Sukuk al-Ijarah with specific focus on the application of third party guarantee in structure, circulation, redemption and termination of Sukuk al-Ijarah and other concepts have been explored. The application of a third party guarantee in Sukuk al-Ijarah is permissible in Islamic law provided it is conducted voluntarily without any fees. In this case, the guarantor should not be involved in the investment or the management of the Sukuk, and should not have any relation with the investors or the manager of the investment or any party that is involved in the investment of the Sukuk. However, the stipulation of a guarantee on a lessee or a manager in Sukuk al-Ijarah contract is impermissible, as it contradicts the principles of Islamic law in Sukuk al-Ijarah transactions.

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