

ISRA

International Journal of Islamic Finance

Volume 7 • Issue 2 • December 2015

An International Refereed Journal Published by
International Shari'ah Research Academy for Islamic Finance (ISRA)

ISRA الأبحاث العالمية للبحوث الشرعية
International Shari'ah Research Academy for Islamic Finance

First Published by:

International Shari'ah Research Academy for Islamic Finance (ISRA)
Lorong Universiti A,
59100 Kuala Lumpur, Malaysia.
Tel: +603 7651 4200
Fax: +603 7651 4242
www.isra.my

© International Shari'ah Research Academy for Islamic Finance (ISRA)
2015

All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without prior permission of the publisher.

Perpustakaan Negara Malaysia
Cataloguing-in Publication Data

ISRA

ISRA International Journal of Islamic Finance/ ISRA. Kuala Lumpur:
International Shari'ah Research Academy for Islamic Finance, 2015.

185 p. (Volume 7, Issue 2)

ISSN 0128-1976

1. Islamic Microfinance
2. Central Asia
3. Islamic Mutual Funds
4. Shari'ah Governance
5. Personal Cooperatives Model
6. Beneficial Ownership
7. *Shukūk*

Disclaimer:

The views expressed in this book do not necessarily reflect those of International Shari'ah Research Academy for Islamic Finance (ISRA). References and citations are allowed but must be properly acknowledged.

ISRA International Journal of Islamic Finance is indexed in:

Index Islamicus

EconLit

EBSCO Products

ProQuest

Scientific Indexing Services

EconBiz

ISRA International Journal of Islamic Finance

Volume 7, Issue 2, December 2015

Contents

EDITORIAL	1
.....	
ACADEMIC ARTICLES	
Supply of Islamic Microfinance in Central Asia: The Case Study of Tajikistan and Kyrgyzstan <i>Manijeh Sabi</i>	9
The Relationship Between Islamic Mutual Funds and Oil Prices: Which Leads The Other? <i>Manzoor Ahmed and Faleh Alrashidi</i>	29
Legal Issues in Sharī'ah Governance in the Islamic Finance Industry in Malaysia <i>Sherin Kunhibava</i>	55
Personal Cooperatives Model: Basic Concepts and Evidence from Jordan <i>Ahmed Taha M. Al Ajlouni</i>	81
.....	
PRACTITIONER'S ARTICLE	
Application of the Concept of Beneficial Ownership in <i>Shukūk</i> Structures: An Islamic Legal Analysis <i>Engku Rabiah Adawiah, Nermin Kloplic, Muhammad Ramadhan Fitri Ellias and Muhamad Nasir Haron</i>	105
.....	
RESEARCH NOTES	
Towards a Corporate Model of Islamic Law of Insolvency: A Note on "Voluntary Insolvency" <i>Najeeb Zada, Ahcene Lahsasna and Muhammad Yusuf Saleem</i>	137
Integrating Environmental, Social and Governance (ESG) Factors in Islamic Finance: Towards the Realisation of <i>Maqāṣid al-Sharī'ah</i> <i>Beebee Salma Sairally</i>	145
The Concept of Actual Financial Loss (<i>Darar Mālī Fi'li</i>) in the Context of Islamic Banking Operations <i>Mohamed Fairouz Abdul Khir</i>	155
Structuring Innovative Tier 2 (T2) Capital Instruments Under Basel III: A Sharī'ah Perspective <i>Beebee Salma Sairally, Marjan Muhammad and Madaa Munjid Mustafa</i>	163
Criteria for Determining the Sharī'ah Compliance of Shares: A <i>Fiqhī</i> Analysis <i>Shamsiah Mohamad, Marjan Muhammad, Farrukh Habib and Kinan Salim</i>	171
.....	
NOTES ON CONTRIBUTORS	179
.....	
GUIDELINES TO CONTRIBUTORS	183

APPLICATION OF THE CONCEPT OF BENEFICIAL OWNERSHIP IN *ŞUKŪK* STRUCTURES: AN ISLAMIC LEGAL ANALYSIS*

*Engku Rabiah Adawiah**, *Nermin Kloplic***,
*Muhammad Ramadhan Fitri Ellias****
and *Muhamad Nasir Haron*****

Abstract

Asset ownership is an important aspect of şukūk structuring and issuance. However, a recurring and contentious issue regarding the underlying şukūk asset is the actual nature of its ownership and the corresponding legal implications for şukūk holders and other parties in the şukūk transaction. Many şukūk are based solely on beneficial ownership of the assets whilst legal title is retained by the originator or trustee. This paper attempts to ascertain the status of beneficial ownership vis-à-vis registered legal title from the Islamic legal perspective. The paper begins with an examination of the meaning, origin and status of beneficial ownership under English law. This is followed by a brief discussion on ownership (milkiyyah) from the Sharī'ah (Islamic law) perspective and a deliberation on the status of

* This paper originates from a paper presented at the 2nd Roundtable on Challenges in *Şukūk* Issuance, 31 March 2014, Abu Dhabi, United Arab Emirates. Views expressed in this paper do not necessarily represent the views of the respective organisations of the authors.

* Engku Rabiah Adawiah, PhD, is Professor at International Islamic University Malaysia (IIUM). She can be contacted at eradawiah@yahoo.com.

** Nermin Kloplic is the Acting Head of Shariah, HSBC Amanah Malaysia, and a PhD candidate at IIUM Institute of Islamic Banking and Finance (IiBF), International Islamic University Malaysia. He can be contacted at nerminkloplic@hsbc.com.my.

*** Muhammad Ramadhan Fitri Ellias is Head of Shariah Management at Maybank Islamic Berhad, Malaysia. He can be contacted at ramadhan@maybank.com.my.

**** Muhamad Nasir Haron is Researcher of Shariah Management at Maybank Islamic Berhad, Malaysia. He can be contacted at mnasir.h@maybank.com.my.

beneficial ownership under the Sharī'ah. Finally, the paper analyses the use of beneficial ownership in ṣukūk structures and its implication on ṣukūk holders and other parties in the ṣukūk transaction.

Keywords: Beneficial Ownership, Legal Title, *Ṣukūk*, Islamic Legal Analysis.

I. INTRODUCTION

An underlying asset is a prerequisite feature in *ṣukūk* structures to the extent that *ṣukūk* are often described as—or are, by definition, required to be—“asset-based”. This is especially true for *ṣukūk al-ijārah*, which was the most preferred *ṣukūk* structure in the early days of global *ṣukūk* expansion between the years 2001 and 2006. However, later (2004 onwards) *ṣukūk* structures such as *ṣukūk al-mushārah*, *ṣukūk al-muḍārah* and *ṣukūk al-wakālah* may be considered more “asset-light” in nature because there may not be a revenue-generating asset at the outset of the *ṣukūk*’s issuance, though the asset is intended to be built or acquired later in order to generate returns or cash flow to the *ṣukūk* holders.

The critical position of the asset can be seen in the various definitions of *ṣukūk*. For example, the Islamic Financial Services Board (IFSB) defines *ṣukūk* as:

Certificates with each *sakk* representing a proportional undivided ownership right in tangible assets, or a pool of predominantly tangible assets, or a business venture (such as a *muḍārah*). These assets may be in a specific project or investment activity in accordance with Sharī'ah rules and principles (IFSB, 2009: 3).

The Sharī'ah Standard No. 17 (2) of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (2010) in turn defines investment *ṣukūk* as:

هي وثائق متساوية القيمة تمثل حصصاً شائعة في ملكية أعيان أو منافع أو خدمات أو في موجودات مشروع معين أو نشاط استثماري خاص، وذلك

بعد تحصيل قيمة الصكوك وقفل باب الاكتتاب وبدء استخدامها فيما
أصدرت من أجله.

Investment *ṣukūk* are certificates of equal value representing undivided shares in ownership of tangible assets, usufruct and services or of the assets of a particular project or specific investment activity; however, this is true after receipt of the value of the *ṣukūk*, the closing of subscription and the employment of funds received for the purpose for which the *ṣukūk* were issued.

Based on the above definitions, it is clear that the asset is a critical element in *ṣukūk* structuring and issuance. In fact, the asset underlies the *ṣukūk*, and the *ṣukūk* represents undivided ownership in the asset. Yet, a recurring and contentious issue regarding the underlying *ṣukūk* asset is the actual nature of its ownership and the legal implications this has for *ṣukūk* holders and other parties in the *ṣukūk* transaction. In most *ṣukūk* structures, the transaction in the asset results in a transfer of beneficial ownership only whilst the legal title is retained by the originator or trustee. As such, the question that is posed is: when the ownership is categorised as beneficial only, without legal title, is the *ṣukūk* holders' ownership of the underlying asset sufficient (such as the right to use and dispose of the asset) for the basis of the *ṣukūk* under Islamic law? This paper attempts to examine this issue.

Section II of the paper compares beneficial ownership with ownership of the legal title (commonly termed as legal ownership). Section III then examines the meaning, origin and status of beneficial ownership under English law in particular. This is followed by a brief discussion on ownership (*milkiyyah*) from the Sharī'ah perspective and a deliberation on the status of beneficial ownership under the Sharī'ah in Section IV. Section V examines the use of beneficial ownership in some *ṣukūk* structures and its implication on the *ṣukūk* holders and other parties in the *ṣukūk* transaction. This section also determines whether the beneficial ownership structured in the *ṣukūk* examined is sufficient to qualify as ownership from the perspective of the Sharī'ah. Section VI summarises and concludes the discussion.

II. BENEFICIAL OWNERSHIP VIS-À-VIS LEGAL OWNERSHIP

The term “beneficial ownership” has been used interchangeably with a number of other terminologies, such as: “beneficial interest”, “beneficial title”, “equitable ownership” and “equitable interest”. In the business or commercial context, the term “beneficial owner” has been defined by Chaiban and Kanh (2004: 116) as follows:

الشخص أو المنشأة الذي يتمتع بحق الانتفاع بورقة مالية أو عقار أو ممتلكات
أخرى سواء كان أو لم يكن هو المالك الذي يظهر اسمه في سجل أو صك
الملكية

The person or institution that enjoys the beneficial right in a security, real estate or other assets, whether or not he is the owner whose name appears in the register or certificate of ownership.

Likewise, Investopedia (n.d.: para. 1) defines a beneficial owner as a person who enjoys the benefits of ownership even though the title is in another person’s name.

In the legal context, the term beneficial ownership or its other synonyms and related terms has been defined in contemporary legal literature either in a general manner or in a more specific context of trust arrangements and/or investment in securities. Black’s Law Dictionary (n.d.: para. 1) for example defines “beneficial interest” generally as “*profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.*” The same dictionary further defines a beneficial owner in the context of investment in securities as “*the actual owner of securities and the rightful recipient of the benefits accorded; the beneficial owner is often different from the title holder (generally a financial institution holding the securities on behalf of clients).*”

In another definition by Cornell University (n.d.: para. 1) beneficial ownership is said to be “*a trust arrangement whereby the beneficial owner of a security has the power to vote on and influence decisions regarding that security, and receives the benefit afforded by the security, even though in street name the security may be held by someone other than the true owner, such as a broker, for safety or convenience reasons.*”

It follows that a beneficial owner is “*someone recognized in equity as the owner of property even though legal title may belong to someone else. The use and enjoyment of the property belong to the beneficial owner. In securities law, the term refers to someone who is a shareholder even though a broker may hold legal title to the shares.*” (Cornell University, n.d.: para. 1)

Based on the definitions above, it is clear that in law, a beneficial owner is regarded effectively as the real or actual owner who is entitled to enjoy the benefits of the asset, although he/she does not have the legal title to the asset.

In addition to beneficial ownership is the ownership of the legal title (legal ownership). Some assets, including property, air/sea/land vehicles, bank accounts and financial securities, are generally required to have a legal title owner. In general, the legal title owner is someone legally recognised as the title owner of the asset evidenced by registration or record. The term legal title owner is sometimes used to describe a person who holds legal title to a property for someone else's benefit. This is true when the beneficial interest in the property belongs to person other than the legal title owner. Examples of legal title owners are trustees and record owners.¹ Table 1 summarises the differences between beneficial ownership and ownership of the legal title.

Table 1: Beneficial Ownership vs. Ownership of Legal Title

No.	Beneficial Ownership	Ownership of Legal Title
1.	Beneficial owner is the person who enjoys the benefits of ownership even though the title is in another person's name.	The legal title owner is someone who is legally registered as the title owner of the asset whose ownership is evidenced by registration or record.
2.	Interchangeably used with other terminologies, such as: “beneficial interest”, “beneficial title”, “equitable ownership” and “equitable interest”.	It can also be referred to as registered or record owner.
3.	Beneficial owner enjoys the benefits from the asset.	Poorest can be included by integrating <i>zakāh</i> with microfinancing

1 A record owner is “*a property owner whose name appears on the title. The term commonly refers to brokers who hold legal title to shares but pass the voting rights, profits, and losses on to the beneficial owners.*” (Cornell University, n.d.: para. 1)

III. ORIGIN AND STATUS OF BENEFICIAL OWNERSHIP FROM LEGAL PERSPECTIVE

The concept of beneficial ownership was developed in modern times in English common law. In fact, the segregation between legal title and beneficial title under English law is said to go back to as early as the seventh and eighth centuries in England (Watt, 2003: 8-9). The segregation was evident in a system known as the “use”. The “use” would arise when legal ownership was transferred to one party for the use of another (Hepburn, 1997: 217). For example, if A had received an asset for the benefit (use) of B, under common law, A was obliged to hold the asset on B’s behalf. The system was limited to chattels and money until in the thirteenth century when the Chancellor recognised the execution of “uses” in land (Watt, 2003: 8).

According to Watt (2003: 8-9) the “use” was brought to an end with the Statute of Uses that was enacted by Henry VIII in the fifteenth century. Pettit (2012: 12) observes that the Statute was largely passed because the King was losing feudal dues through practice of the “uses”. However, the Statute of Uses was circumvented by execution of “the use upon a use” and it was finally repealed in 1925 (Thompson, 1995: 19).

Later, the application of beneficial ownership in England was extended further through the development of the law of trust. Hepburn (1997: 217) notes that trust is one of the most important creations of the Law of Equity² and that the modern form of trust evolved from the early device of “use” that we have discussed earlier.

The use of the concept of beneficial ownership is also extended into the application of proprietary rights in commercial transactions. For example, Worthington’s (1996) study shows that it is possible

2 English law developed two different jurisprudential streams: common law and equity. English common law was characterized with rigidity due to the “*inflexible procedures surrounding the common law writs.*” Some frustrated litigants started to petition the King seeking for justice. To deal with these petitions, the Chancellor was authorized to issue royal writs in the fourteenth century. Initially, the Chancellor’s decisions were unpredictable because they are often based on an appeal to matters of conscience. However, over time, the Court of Chancery started to adopt a more objective approach, whereby rules and principles began to be developed. This development represents the root for the foundation of English law of equity (Evans, 2009: 4; and Thompson, 1995: 16).

for a seller of goods to retain legal ownership, although the buyer will get all the rights granted by the agreement. These rights include authority that entitles him/her to use and sell the goods. The author argues that the concept of “*legal ownership is sufficiently flexible to allow both buyer and seller to agree on right which meets their commercial objectives*” (Worthington, 1996: 16-20). This flexibility is considered to be a device which safeguards the seller’s interest.

Honore’s work provides a list of standard ingredients in the notion of ownership in terms of its most general concept, which is full ownership. The study reveals that ownership comprises the following rights: “(i) *the right to possess; (ii) the right to use; (iii) the right to manage; (iv) the right to the income of the thing; (v) the right to the capital; (vi) the right to security; (vii) the right or incidents of transmissibility and absence of term; (viii) the prohibition of harmful use; (ix) the liability to execution; and, (x) the incident of residuary*” (Honore, 1992: 130-131). The author then elaborated on each right and incident from this list.

Based on the explanations above, it is evident that the concept of ownership in English law has passed through several evolutionary stages throughout history. It is also clear that English law distinguishes between the two types of ownership, i.e., legal title and beneficial ownership rights. In fact, beneficial ownership is legally considered a real ownership right as it carries features of both personal and proprietary rights, where the beneficial owner has a direct interest in the asset which is the subject matter of the ownership. The establishment of trusts law was certainly one of the important milestones in the evolution of the ownership concept in English law. The invention of trust was a direct outcome of equity to prevent the perceived injustice and rigidity that occurred under common law. Trusts provide a flexible device to govern the transfer of ownership rights from one to the other. Trust arrangements address people’s needs in transferring ownership rights among themselves, using the segregation between legal title and beneficial ownership, according to the intention of the contracting parties. Thus, trusts aptly illustrate the dichotomy between legal title and beneficial ownership, such that beneficial ownership can be said to be one of the most significant outcomes of trust law.

It should be noted that the doctrine of ownership in English law differs substantially from jurisdictions that derive their laws from the Roman law. Civil law accepts the concept of absolute ownership over both chattels and land. By contrast, English law recognises absolute ownership in chattels only, while the only absolute owner of land is the King. The owner of a piece of land is not considered to be the holder of absolute ownership but the holder of an “*estate*”, a word closely related to the status of a tenant (Butt, 1988: 64-65). In this respect, Tyler & Palmer (1973: 40) cited: “*Land cannot be the subject-matter of ownership, though the person in whom its ‘seisin’ is vested is entitled to exercise proprietary rights in respect of it.*” In other words, one cannot own land but only the title to an estate in land. According to Todd and Wilson (2003: 4), “*an estate in land can be regarded as a right to possess land for a period of time.*”

Based on the General Report of the European University Institute (EUI) (2005), in the civil law jurisdiction, there is only one type of ownership which comprehends all ownership rights. Civil law allows joint ownership, yet the ownership cannot be split between two different entities in terms of ownership rights. The existence and use of trust is another significant distinction between civil law and common law (Shmid et al., 2005: 12). The concept of a trust, which is recognized in English law, is not part of the civil law system in most continental European countries (Van Mens, 1992: 45)

Buckland (2002: 15) wrote, “*So too, we shall not find the trust, as a general institution, in Roman law: of this conception it is common knowledge that the Roman law and the systems derived from it possess no parallel.*” However, there are a number of jurisdictions not based on the English legal model which have introduced legislation related to the taxation of trusts. Also, there are instances in some civil law jurisdictions where certain devices give outcome similar to the outcome of trust law.

Sonneveldt’s (1992: 1-17) research shows that the common perception is that there are several factors in civil law that represent the main obstacles for introducing the trust into civil law jurisdiction. Those factors are: (i) inconsistency with duplication of ownership rights; (ii) public registration of rights *in rem* involves tax codification of such rights; (iii) existence of adequate devices serving the same purpose to a certain degree.

According to Van Mens (1992: 45-49), Switzerland for instance, has established a detailed trusts law, which originates from 1926. Van Mens' (1992) work shows that Switzerland's encouraging attitude towards foreign wealth contributed to a positive attitude towards trusts. Furthermore, the study reveals that for tax purposes Swiss law considers the trustee to be a nominee owner. "*This nominee is not subject to Swiss income tax, nor to Swiss net wealth tax, leaving the tax burden to the beneficiary or settlor.*"

In addition, Rehahn and Grimm's (2012: 97-105) work shows that though Germany does not recognize the concept of trust under English law, there are various branches in German law that provide outcomes similar to the trust law, i.e. the fiduciary relationship. One example is the law of succession that spells out the concept of *Vorerbe* and *Nacherbe*. Although *Vorerbe* is the legal owner, its legal powers are restricted to the benefit of *Nacherbe*. Another example is the *Testamentvollstrecker*, who holds strong legal powers though the legal title is held by somebody else. Furthermore, there are instances in German law where a departure from indivisibility of property ownership is clearly demonstrated in the refinancing register, which gives "certain creditors the power to act like a legal owner in order to protect the refinancing company".

Based on the foregoing discussion, it may be concluded that the civil law tradition does not formally, in principle, recognise the dichotomy between beneficial ownership and legal ownership; it recognises only one absolute indivisible ownership. There may, however, exist some practices in a few civil law jurisdictions that give an outcome similar to that of a trust. In contrast, the concepts of beneficial ownership and legal title are clearly recognised by Common law.

IV. OWNERSHIP (*MILKIYYAH*) AND BENEFICIAL OWNERSHIP FROM THE SHARĪ'AH PERSPECTIVE

The crucial issue is: what is the Sharī'ah perspective on ownership, and how does this reconcile with beneficial ownership and legal title? More specifically, is the practice of using beneficial ownership in many of the transactions in Islamic finance, *shukūk* in particular,

acceptable in the Sharī‘ah? In an attempt to answer these questions, this section will first discuss the concept of ownership in Islamic law. This is followed by an examination of the status of legal and beneficial ownership under the Sharī‘ah.

a. The Concept of Ownership in Islamic Law

From the Sharī‘ah perspective, ownership (*milk/milkiyyah*) can be defined as:

اتصال شرعي بين الشخص وبين شيء، يكون مطلقا لتصرفه فيه، وحاجزا
عن تصرف غيره فيه

A legal connection (*ittiṣāl shar‘ī*) between a person and an asset, such that he is free to transact with it and exclude others from dealing with it (the asset) (Ḥammād, 2008: 441).

Al-‘Abbādī (1974: 271) notes that the expression “absolute *taṣarruf*”, as mentioned by the jurists, refers to any type of dealing, regardless of whether it is physical dealing in something with the purpose to extract personal benefits from the asset or to benefit from its revenue, or legal dealings with the aim to transfer its ownership.

In Muhammad Baltāji’s view, *milkiyyah* refers to “*what the law has established regarding a person’s exclusive right concerning a thing in terms of using it, exploiting it, and dealing with it within the limits of the law*” (Baltāji, 2007: 59). Baltāji clearly specifies the different types of dealings, i.e. the right to use, exploit and deal with the asset, whereas Al-‘Abbādī (1974) mentions dealings in general to be sufficient to constitute *taṣarruf*.

The definitions provided by the jurists imply that *milkiyyah* governs the relationship between a person and a property. It is a bundle of exclusive rights which entitles the owner to benefit from a property, to be compensated in case of transgression and to dispose of it, except in cases where legal hindrance exists. Ownership dealings are subject to the provisions of the law and the legal capacity of the owner.

These constituents can be divided into five groups concerning the various aspects of *milkiyyah* that the definitions address, namely, (i) authority, (ii) scope, (iii) subject matter, (iv) restrictions, and

(v) consequences of ownership. Table 2 depicts the five aspects mentioned in the definitions of *milkiyyah* by the jurists.

Table 2: Aspects of Ownership According to the Jurists

No.	Aspects of Ownership	Explanation
1	Authority	Establishment of authority based on the law. This implies that ownership enjoys legal authority accorded to it by the law.
2	Scope	Scope of ownership covers the relationship between a person and property. Person in this case refers to human beings and legal entities such as the entity of an endowment, investment or, in contemporary times, a company. Ownership does not entail a relationship between a property and a delegated person.
3	Subject Matter	The subject matter of ownership is property. This includes ownership of physical assets and of rights.
4	Restrictions	A number of legal restrictions may be imposed by the law on one's ownership with the aim to preserve the property and ownership rights. Examples of restrictions are limitations imposed on dealings of children and bankrupt persons.
5	Consequences	Ownership results in a number of consequences, such as rights to deal with, dispose of, consume, extract benefits and be compensated, in relation to the subject matter. These consequences are subject to the law. Therefore any illegitimate dealing or consumption is not a consequence of <i>milkiyyah</i> .

Concerning the last item in Table 2, i.e. the consequences of *milkiyyah*, the fundamental evidence in the Sharī'ah sources that addresses this issue can be found in the statement of the Prophet (SAW): "*The mortgaged item remains the property of the owner who mortgaged it. He (the mortgagor) is entitled to its benefits, and he is liable for its expenses (or loss)*" (Ibn Hajar, 2003: 317). The highlighted words imply that the two consequences of ownership are: (i) the entitlement to benefit from the asset; and (ii) the liability for the asset.

The *hadīth* (prophetic tradition) confirms that *milkiyyah* provides the owner with the entitlement to benefit from the subject matter of ownership, which is consistent with the definitions above. It also adds another dimension to the ownership, which is the owner's liability over the subject matter. This includes maintenance of the subject matter in a proper state and its preservation against decay, including all necessary outlays such as feeding, clothing, safekeeping, and

others (AAOIFI Sharī‘ah Standards, 2010: 709). The owner of an asset also bears liability for any damages caused or triggered by such asset.

A clarification regarding the relationship between the entitlement to the benefits and the liability for the asset has been provided in another *hadīth*, where it is reported that the Prophet (SAW) said, “*Al-kharāj bi al-ḍamān*”, which literally means “[The right to] gain comes with liability.” The *hadīth* is deemed authentic by the classical scholars of the prophetic tradition (Ibn Hajar, 2003: 301). It also represents one of the well-established maxims in Islamic commercial law.

Baghawī (1983: 8/164) remarks that the above tradition means that if a person buys a house or animal and receives revenue from renting it or leasing it, and subsequently discovers a defect in the house or the animal, he is entitled to return it to the seller and be given a refund, while retaining the revenue (if any) that was generated from the house or the animal by virtue of being liable for the house/animal during the period. Therefore, ownership of the revenue arising from a property belongs to the person who is liable for it.

Having elaborated on the meaning of the liability of a person for an asset that he owns, we will now turn our attention to the analysis of the right to deal with an asset. The scholars agree that the right to deal with the subject of ownership is one of the ownership rights originally derived from the law. However, the scholars have further discussion as to whether or not this right is an essential component of *milkiyyah*.

In this context, Ibn Hummām (1995: 230) and Ibn Nujaym (1998: 382) define ownership as a legal (*shar‘ī*) right that is vested in an individual to deal with an asset. This definition implies that the right to deal with and dispose of an asset is an essential component of the concept of ownership. In contrast, Al-Qarāfī (2010: 1009-1010) opines that the right to deal with or dispose of the asset does not represent a fundamental constituent of ownership. He argues that, from the perspective of legal rights, ownership over an asset differs from the right to deal with it. For instance, an interdicted individual does not have the right to dispose of assets which he owns. Furthermore, a purchase or sale may be executed by somebody who does not own the subject matter, such as, an agent or by way of a

court order. Holding possession also does not necessarily entitle the holder to dispose of or otherwise manage what he holds, for example, in the case of a custodian.

In relation to the issue of right to asset disposal and management by the owner, Ibn Nujaym (1998: 382) observes that this refers to specific eligibility originally granted by the Lawgiver (Allah SWT). In contrast, an agent does not derive his right to asset disposal and management originally from the Lawgiver, but merely through a valid authorization by the owner. Therefore, any disposal done without the consent of the original owner is deemed invalid. In relation to an interdicted individual, Ibn Nujaym (1998: 382) limits the restriction on the owner's right to disposal and management to certain "*legal obstacles*", one of which is unsound financial behaviour that triggers the imposition of interdiction by relevant authorities.

Based on the above arguments of Ibn Nujaym (1998: 382), it can be said that enjoyment of wealth is the main objective of ownership while the right to asset disposal and its management is one of the manifestations of wealth enjoyment. In other words, the benefit of the utility of an asset is fundamental to ownership, but its enjoyment is reasonably associated with the right to asset disposal and management, without which, the enjoyment would not be complete or would entirely be missed. Nonetheless, as pointed out by Al-Qarāfi (2010: 1009-1010), Islamic law sometimes imposes some restrictions on the owner's right to asset disposal and management, in which case the owner may be unable to exercise full ownership rights. This is to address special situations such as in the case of an interdicted individual, a minor or an incapacitated person. In addition, Islamic law imposes specific regulations to protect the wealth of people, such as, in the case of individuals who fail to fulfill their financial obligations or debts towards others. For this purpose, the Sharī'ah permits certain parties such as the courts to exercise their judicial powers, in specific situations and subject to certain legal maxims and parameters, to dispose of assets owned by someone else. In all these situations, the restrictions do not totally deny the existence of ownership. In fact, ownership can still exist despite the restriction, but its enjoyment is temporarily and/or circumstantially incomplete.

Perhaps in recognition of this dichotomy between the general definition of ownership and possible restrictions on its actual

enjoyment in specific circumstances, scholars tend to classify ownership into two categories: complete ownership (*milk tamm*) and incomplete ownership (*milk nāqis*). For instance, Al-‘Abbādī (1974: 274), Abū Zahrah (1996: 67-68), and Nazh Hammād (2008: 441) classify ownership in Islamic law, from the perspective of the extent of ownership rights, into complete and incomplete. Complete ownership is “*the ownership that covers both the corpus of the property as well as its usufructs*” (Abū Zahrah, 1996: 67). Alternatively, according to Al-Naysāburī (1982: 261), complete ownership can also be defined as, “*full control over an asset in terms of any kind of (legal) dealings or disposals*”. This type of ownership gives the owner all possible legal rights associated with the owned property, and it is unconditional and has no time limit as long as the property continues to exist (Abū Zahrah, 1996: 67; Hammād, 2008: 441).

On the other hand, incomplete ownership can be defined as the ownership of either the property but not of its usufruct, or vice versa (Abū Zahrah, 1996: 68). Thus, the main reason behind the creation of incomplete ownership lies in the separation of ownership rights in two different things—the corpus of the asset and the usufruct of the asset (Madkūr, 1996: 498). Alternatively, incomplete ownership can also be defined as one in which the owner does not have a complete right to transact (Hammād, 2008: 443). The incomplete ownership of a property may result from any one of these three scenarios: (i) a person only owns the corpus of an asset but not its usufruct (e.g. a legal heir’s right to the corpus of the inherited estate in the existence of a bequest (*wasiyyah*) of its usufruct to another for a specified period of time); (ii) a person owns the usufruct but not the asset itself (e.g. a lessee’s ownership of the usufruct in a lease contract); or, (iii) a person who owns both the corpus and usufruct of an asset but is interdicted from transacting with the asset (e.g. a debtor who is under interdiction to protect the creditor’s rights to recover the debt) (Hammād, 2008: 443).

Badrān (1986: 310) is of the view that incomplete ownership may occur in one of three scenarios: first, *raqabah*³ without usufructs; or second, usufructs without *raqabah* and without right of disposal

3 *Raqabah* refers to the tangible part of an asset. Although *raqabah* generates usufructs, the usufructs may be owned by an entity other than the owner of the *raqabah*.

(*ḥaqq al-intifā' al-shakḥī*);⁴ or third, usufructs without *raqabah* and with right of disposal (*ḥaqq al-intifā' al-'aynī*). The difference between the last two scenarios is that, in the former, the right of the usufruct owner over the asset is limited to personal use by the usufruct owner. Hence, it is impermissible for him to dispose of the underlying asset or its usufruct. In contrast, the right of the usufruct owner over the asset in the latter (i.e. *ḥaqq al-intifā' al-'aynī*) is attached to the corpus of the asset of the usufruct and this permits the usufruct owner to deal or transact in the usufruct (Al-Zarqā, 1998: 373).

In conclusion, the definitions and explanations about incomplete ownership above imply that the holder of incomplete or partial ownership has only partial control over the asset in terms of enjoyment, dealings and disposals. The discussion on incomplete ownership also indicates the existence of a dichotomy between ownership of the corpus of the asset and ownership of its usufructs; as well as between the ownership of the asset and full enjoyment of the ownership rights due to some restrictions imposed by law or contract.

Islamic law thus allows for a segregation of ownership in certain circumstances as a means to meet the needs of people. In this regard, we can see at least two instances from classical *fiqh* where one asset may be owned by two different owners, each with a specific set of ownership rights. The first instance is the recognition of duality in ownership in the discussion of the jurists on complete and incomplete ownership that we have alluded to in some details above. The second instance is in the concept and application of *waqf*.

Waqf clearly illustrates that an ownership right can be split. Although the jurists have differences of view on the issue of whether the settlor (*wāqif*) in *waqf* loses his ownership of the *waqf* assets or not, their views imply that the rights of ownership over the *waqf* asset are split between two different entities. On the one hand, *raqabah* is owned by God (as per the view of Ḥanbalī and Shāfi'ī scholars), or by the settlor (according to Ḥanafī and Mālikī Schools). On the other hand, the right to enjoyment (*ḥaqq al-intifā'*) belongs to the *waqf* beneficiaries (Kahf, 2000: 119).

4 This is applicable in the contract of *i'ārah*. *I'ārah* grants the usufructs of household goods, equipment, animals, etc., for personal use of the taker without any consideration. The relationship will be turned into a leasing (*ijārah*) contract if the taker is obliged to pay for the usufruct

***b. Status of Legal and Beneficial Ownership
under the Sharī'ah***

In contemporary times, the issue of separation between legal title and beneficial ownership has been further examined either directly or indirectly by a number of Sharī'ah scholars or bodies. One example of an indirect observation of the issue is a verdict (*fatwa*) issued by the Sharī'ah Committee of Rajhi Bank in the Kingdom of Saudi Arabia (KSA). The verdict addresses a case where a property is purchased from a person (the first seller). The property is subsequently sold to a third party while the legal title is kept with the first seller for tax benefits. The first transaction will be documented in the name of Rajhi Bank and will be certified by the relevant authorities in the United States. Upon deliberation, the Committee approved the transaction subject to the following conditions: (i) such dealing is not regarded as fraud in the country; (ii) the method is deemed a legal solution (*makhraj*) that gives benefits to the parties involved (Sharī'ah Committee of Rajhi Bank, 2010: 68).

Another example of indirect elaboration on beneficial ownership is found in the AAOIFI Sharī'ah Standards on financing facilities based on the concept of *murābahah* for a purchaser's order. According to the Standard (8/5/4), it is permissible for the bank to defer registration of the title in the client's name as a security for payment of the deferred price. The bank must however provide a document that establishes the ownership of the client over the goods. In the reasoning for this Standard, it was stated that this arrangement does not preclude the transfer of ownership (*milkiyyah*) to the client (AAOIFI, 2010: 97 & 107).

In both verdicts, jurists have approved that the title be held by a person/entity who is not the ultimate or actual purchaser. In both cases, documentary evidence recognised by the relevant legal system was required, and the evidence must prove the ownership interest of the actual owner in the property. These two examples indicate that the Sharī'ah Committee of Rajhi Bank and the Sharī'ah Board of AAOIFI have recognised separation between legal title and actual ownership. This implies that the segregation between legal title and beneficial ownership is acceptable and permissible according to this Islamic legal opinion.

In addition, the topic of beneficial ownership has been specifically discussed by a number of Sharī'ah scholars and bodies such as the Sharī'ah Advisory Council of Bank Negara Malaysia, AAOIFI's Sharī'ah Board, Ḥussain Ḥāmid Ḥassān and Bashir al-Amine.

The Sharī'ah Advisory Council of Bank Negara Malaysia (SAC of BNM, 2010: 6) and AAOIFI's Sharī'ah Board (AAOIFI, 2010: Addendum One) have implied in their resolutions that both legal and beneficial ownership are recognised from the Sharī'ah perspective. More specifically, the SAC of BNM discussed beneficial ownership in the context of *ijārah* since in current practice the lessor does not hold the legal title of the *ijārah* assets. The SAC, in its 29th meeting dated 25 September 2002, resolved that the lessor is the owner of the leased asset although his name is not registered in the asset's title (SAC of BNM, 2010: 6). The resolution was based on the Sharī'ah recognition of both legal title and beneficial ownership. The SAC recognised that in products based on *ijārah* the lessor has the beneficial ownership although the asset is not registered under his name. Such beneficial ownership may be proved through the documentation of the *ijārah* agreement concluded between the lessor and the lessee and presumably the purchase agreement between the seller and lessor/purchaser (SAC of BNM, 2010: 6).

In contrast, Ḥussain Ḥāmid Ḥassān (n.d.) deemed beneficial ownership to be impermissible because an owner must have complete ownership of an asset in order to have the right of disposal and to justify his/her earnings from it. Similarly, Al-Amine (2011: 119-120) is of the view that beneficial ownership violates the concept of ownership in Islamic law because "*ownership in Islamic law is beneficial as well as legal and there is no way of separating the two.*"

The summary of the jurists' views on this issue is presented in Table 3.

Table 3: Jurists' Views on Beneficial Ownership

	Topic	Status	Authority
1	Legitimacy of registration of title of one's asset in the name of a person/entity who does not actually own it	Permissible	1. Sharī'ah Committee of Rajhi Bank, Kingdom of Saudi Arabia 2. AAOIFI Sharī'ah Standards 2010

2	Legitimacy of applying beneficial ownership in transactions in Islamic Finance	<p>a. Permissible</p> <p>b. Impermissible</p>	<p>Sharī'ah Advisory Council of Bank Negara Malaysia</p> <ol style="list-style-type: none"> 1. Ḥussain Ḥāmid Ḥassān 2. Bashir Al-Amine
---	--	---	--

It should be noted that the resolutions that recognise beneficial ownership come with a clear condition that the beneficial ownership must result in all rights and liabilities attached to the purchased asset being attributed to the buyers, albeit short of legal title. In addition, the Islamic Financial Services Board (IFSB), in elucidating the parameter of ownership in one of its standards, states that the structure must transfer all ownership rights in the assets from the originator via the issuer to the investors. Depending on the applicable legal system, these ownership rights do not necessarily include registered title. The transfer could be a simple collection of ownership attributes that allow the investor (a) to step into the shoes of the originator and (b) to perform (perhaps via a servicer) duties related to ownership and (c) ownership liabilities (e.g. duty of care). The transfer could also include rights granting access to the assets, subject to notice, and in case of default, the right to take possession of the assets (IFSB, 2009: 9).

In practice, the condition set by various Sharī'ah bodies which allow the use of beneficial ownership as elaborated above has been achieved legally through the application of the English law of trust. When a person holds an asset in trust for another, the beneficiary can be construed to be the beneficial owner of the asset held by the trustee. The relationship between the trustee and the beneficiary is evidenced by a trust deed executed by the settlor. Alternatively, the trust deed can also be documented to allow the relationship between the trustee and the beneficiaries to be created through the issuance of a trust instrument by the trustee to the beneficiary or class of beneficiaries (Haneef, n.d.: 5). For instance, a settlor can create a trust over, say, a house pursuant to a trust deed and appoint a trustee to issue trust instruments to a class of beneficiaries. The class of beneficiaries will be limited to the investors who purchase the trust instruments offered by the trustee for a certain consideration. The investors who purchase the trust instruments will automatically become the beneficiaries of

the trust and be construed as pro-rata owners of the house held on trust by the trustee. The trust deed can also be structured to allow the holders of the trust instrument to transfer the trust instruments to others on a willing-buyer and willing-seller basis. If the trustee leases the house to a tenant for a fixed or variable rental term, the holders of the trust instrument will be entitled to a pro-rata share of the rental income derived from the house held on trust (Pettit, 1997: 14-17).

These characteristics of the trust instrument and its subsequent legal effects squarely meet the requirements of *milkiyyah* from the Sharī'ah perspective, either as complete ownership (*milk tāmm*) or at least incomplete ownership (*milk nāqis*), depending on the extent of liberty and control enjoyed by the beneficial owner/s as prescribed by the trust deed.

V. APPLICATION OF BENEFICIAL OWNERSHIP IN ŞUKŪK AND ITS SHARĪ'AH STATUS

In the context of *şukūk*, many of the transactions underlying the issuance involve the sale of assets by an originator to a Special Purpose Vehicle (SPV) or Trustee, but the originator only transfers beneficial interests of the asset to the latter, and not the legal title, in order to avoid contravening certain legal restrictions or for convenience or cost efficiency purposes. This gives rise to a Sharī'ah concern on whether the sale of an asset resulting in a transfer of beneficial interests without the legal title is recognised under the Sharī'ah or not. Based on the discussion about beneficial ownership under English law as well as the Sharī'ah resolutions by the AAOIFI Sharī'ah Standard and the SAC of BNM, it is clear that the sale of assets where only the beneficial ownership is transferred is recognised under the Sharī'ah.

Thus, when an SPV which has acquired beneficial ownership over the asset later issues the *şukūk*, the *şukūk* certificates represent real ownership of the asset, albeit being described as beneficial interest. The holders of the *şukūk* will be construed under the Sharī'ah as owners of the asset, although it is being held on trust by the seller who acts as a bare trustee. Based on this arrangement, it can be argued that the *şukūk* holders have complete ownership (*milk tāmm*) over the asset though they are not the registered owners as far as the legal title

is concerned, provided that no substantial restrictions are imposed on the liberty of the *ṣukūk* holders to deal with the asset. If the *ṣukūk* documents contain substantial restrictions on the liberty of the *ṣukūk* holders to deal with the asset, the *ṣukūk* holders still have ownership over the asset, albeit incomplete (*milk nāqış*).⁵

Through this fresh interpretation, the contemporary Sharī'ah scholars are able to extend the scope of ownership in Sharī'ah to include the concept of beneficial ownership when, as illustrated in some of the *ṣukūk* structures from Malaysia, the true owner in the eyes of the law is the beneficial owner and the seller remains only as a bare trustee. This, however, might not be a generic conclusion as legal frameworks vary from one country to another.

Ṣukūk have often been categorised into two main categories: asset-based and asset-backed *ṣukūk*. This classification has practical and legal implications on the parties to the *ṣukūk* transactions. The following sub-sections attempt to examine the concept of beneficial ownership and its status in the context of asset-based *ṣukūk* and asset-backed *ṣukūk*, and the issue of recourse to the *ṣukūk* assets.

a. Asset-Based Ṣukūk

There is no technical or widely accepted academic definition for “asset-based” *ṣukūk*. The phrase is loosely coined to describe the majority of *ṣukūk* structures that have been issued in the market. Generally, the use of the terms asset-based connotes those *ṣukūk* structures where the asset plays a limited but important role in the creation of a legal relationship, including rights and obligations between the parties. The existence of the asset also confirms the notion that *ṣukūk*, like Islamic finance in general, should be linked to the real economy via transactions on assets. In comparing asset-based *ṣukūk* with asset-backed *ṣukūk*, Hidayat (2013: 26) points out that the underlying asset used to structure the issuance of asset-based *ṣukūk* remains on the balance sheet of the originator after the issuance of the *ṣukūk*; only partial beneficial ownership passes to the *ṣukūk*

5 Further discussion will be made in subsequent sub-topics on the restrictions put on the *ṣukūk* holders in dealing with the underlying *ṣukūk* asset and their effects on the nature of *ṣukūk* holders' ownership of and recourse to the asset.

holders while the originator keeps the full legal title and ownership. In other words, from the legal perspective, there is no “true sale” or securitisation transaction in an asset-based *ṣukūk* structure since the underlying asset is not sufficiently legally isolated from the originator. As a consequence, the *ṣukūk* holders have very restricted ownership; they cannot, for example, sell the asset to a third party and only have recourse to the originator/obligor (Hidayat, 2013: 26).

In an asset-based *ṣukūk* such as *ṣukūk al-ijārah* there is normally a sale and lease-back arrangement between the owner of an asset (known as the originator) and a Special Purpose Vehicle (SPV), which is normally the issuer that will later act on behalf of the investors. In this arrangement, the originator typically transfers only partial beneficial ownership or equitable interest in the assets to the SPV. The legal title is almost always retained by the originator.⁶ The originator either executes an explicit bare trust,⁷ or at least is deemed to be a bare trustee, to declare that the legal title of the asset is held in trust for the benefit of the SPV or ultimately the *ṣukūk* holders.⁸ Also, in this type of *ṣukūk*, the originator or the issuer will normally undertake to purchase the asset back from the *ṣukūk* holders upon the occurrence of an event of default or maturity of the *ṣukūk*. Furthermore, typically, the *ṣukūk* holders’ options are limited in the case of a default such that their trustee is required to sell the assets to the obligor/lessee and the *ṣukūk* holders thus become unsecured creditors for the sale price, with no security over the asset they have sold.

This practice has been subject to scrutiny, in particular, on whether or not there has been a real and valid sale between the originator and the SPV. Admittedly, the absence of legal title and the existence of a purchase undertaking and requirement to sell may give the impression that there is no real sale of the asset by the originator to the SPV issuer. However, in the light of the previous discussions on the status of beneficial ownership under the English law and the Sharī’ah opinions on the issue, it can be argued that this impression is not completely accurate. There is a real sale between the originator

6 This is based on the observation by the authors of many *ṣukūk al-ijārah* documents.

7 As in the case of the first sovereign *ṣukūk al-ijārah* by the Malaysian government; this information is based on verbal explanation made by some related parties involved in the transaction.

8 Offering Memorandum of 1Malaysia Sukuk Global Berhad, p. 61.

and the SPV, although only part of the beneficial ownership is transferred to the buyer, and the seller retains the legal title and a part of the ownership rights [the right to dispose of the asset to third-parties and purchase in case of default]. As we have seen earlier, the legal title is retained by the seller-originator in trust for the benefit of the buyer, i.e., the beneficial owner. Hence, the buyer can be said to be the real partial owner of the asset. The existence of the purchase undertaking is also not an issue in *ṣukūk al-ijārah* because in our view, this is an independent and unilateral undertaking (*wa'd*), which is not contractually related to the initial sale contract between the originator and the SPV. The lessee-originator, based on his free will, can separately make a unilateral undertaking (*wa'd*) to buy the leased asset from the lessor-owner due to the occurrence of specified events or at a certain date in the future, similar to any arrangement of *ijārah muntahiyah bi al-tamlīk*. Nonetheless, it is acknowledged that, in practical terms, it is very unlikely that the sale from the originator would have occurred if a *wa'd* to repurchase the asset was missing.

However, as noted, although the *ṣukūk* holders in asset-based *ṣukūk* can be said to have ownership rights over the underlying asset represented by the *ṣukūk* that they hold, the enjoyment of the ownership depends very much on the actual terms and conditions of the issuance. For example, this type of *ṣukūk* usually restricts the right of the *ṣukūk* holders to cause the sale or other disposition of the *ṣukūk* asset to a third party upon default of the obligor. Typically, they can cause the trustee to call a meeting of the *ṣukūk* holders and exercise their rights under the transaction documents, which may include the issuance of notice to the originator/obligor pursuant to its undertaking to purchase the assets upon maturity or default of the *ṣukūk*. Here, we can see that the enjoyment of the ownership right by the *ṣukūk* holders is restricted by specific terms on the right to disposal of the asset that have been agreed upon by both parties.

As a result, some legal opinions suggest that the holders of asset-based *ṣukūk* will have no real recourse to the assets, but rather, their main recourse is actually to the obligor-originator (Elmaki and Ryan, 2010). This leads to the crux of the debate among Sharī'ah scholars who question the use of beneficial ownership in *ṣukūk* structures. The main contention stems from the fact that in some structures (i.e. asset-based *ṣukūk*), the *ṣukūk* holders do not have an outright right to dispose

of the asset, especially upon the occurrence of the event of default. This seems to be against the basic principle that the *ṣukūk* holders, as full owners of the *ṣukūk* asset, should be able to deal with it freely. This triggers a debate on whether or not full ownership is actually transferred to the *ṣukūk* holders. If full ownership is not transferred, the relationship between the *ṣukūk* holders and originator-obligor may be construed as merely that of lender-borrower and this can lead to a serious Sharī'ah issue.

It is acknowledged that such restrictions on the right to asset disposal do render the enjoyment of *ṣukūk* holders of their ownership over the asset incomplete. Nonetheless, this does not mean that ownership is denied altogether. There is still ownership by virtue of the sale and purchase contract between the *ṣukūk* holders (purchaser) and the originator (seller) of the asset. However, the ownership is incomplete (*milk nāqis*) not by virtue of strict provisions of the law but by way of contractual terms that had been mutually agreed to between the *ṣukūk* holders and their obligor. In short, it is argued that although beneficial ownership originally is as good as complete ownership (*milk tāmm*), in asset-based *ṣukūk* the beneficial ownership is incomplete ownership (*milk nāqis*) or restricted ownership for financial structuring reasons, which include the contractual restriction on *ṣukūk* holders (being the beneficial owner) from disposing of the asset during the *ṣukūk* tenure and upon the occurrence of an event of default (Dusuki & Mokhtar, 2010: 11).

b. Asset-Backed Ṣukūk

Asset-backed *ṣukūk* are the Sharī'ah-compliant alternative to conventional asset-backed securities (ABS) which comprise a legally recognised asset class with its own technical meaning and legal structure. In asset-backed *ṣukūk*, similar to conventional ABS, there must be a "true sale" of an asset⁹ between an originator and a SPV

9 This asset should be income generating with a stable stream of cash flow. The main difference between Sharī'ah-compliant asset-backed *ṣukūk* and conventional ABS is the nature of the asset backing the securities. The asset in conventional ABS are essentially interest-based debts whilst the asset in asset-based *ṣukūk* must be Sharī'ah-compliant assets, either tangible or a combination of tangible, intangible and financial assets.

where the legal ownership will be transferred from the originator to the SPV. It should be noted that the term “*true sale*” in ABS has a specific technical meaning. A “*true sale*” in an ABS structure indicates a “*securitisation transaction*” that entails a legal isolation of the asset from the originator to the SPV in order to achieve bankruptcy remoteness and full asset-backing and step-in rights with potentially “no-recourse” by the ABS holders to the originator. After the “*true sale*” or “*securitisation transaction*”, the SPV then issues the ABS. The investors who subscribe to the ABS gets undivided proportionate ownership of the underlying cash flows of the assets backing the ABS, although the legal title of the asset is retained by the SPV. In this situation, the SPV acts as a trustee in holding the legal title of the asset for the ABS holders, who are the beneficial owners.

In terms of ownership, we can see that the asset-backed *ṣukūk* holders only have beneficial ownership of the underlying asset. The legal title is held by the SPV, which is acting as agent and trustee for the *ṣukūk* holders. Does this mean that the *ṣukūk* holders do not have ownership over the asset? As we have seen earlier, beneficial ownership is generally treated in law to be as good as real ownership. In asset-backed *ṣukūk*, we conclude that the *ṣukūk* holders enjoy complete ownership (*milk tāmm*) over the asset backing the *ṣukūk* subscribed from the SPV, although technically, they only have beneficial ownership and legal title is retained by the SPV. This is because there is no restriction on the *ṣukūk* holders’ enjoyment of their ownership rights. Although the *ṣukūk* holders are supposed to act through the SPV and a trustee, the *ṣukūk* holders can make their own decisions as outlined in the trust in terms of disposal and management of the underlying asset. Moreover, the SPV has to act based on the instructions of the trust.

This conclusion is further supported by the fact that asset-backed *ṣukūk* enjoy the feature of bankruptcy remoteness. This means that the asset backing the *ṣukūk* is legally isolated from the originator such that, even in the case of bankruptcy or receivership of the originator, the *ṣukūk* holders’ payment will not be interrupted as long as the asset continues to generate returns. On the other hand, if the underlying asset is not performing, the *ṣukūk* holders’ income will be impacted because they are the owners of the asset, unless the originator does not provide additional support (Dusuki & Mokhtar, 2010: 11). Thus,

in asset-backed *ṣukūk*, the *ṣukūk* holders have full ownership rights over the assets, regardless of any default of the originator, and the actual performance of the underlying asset determines the return to the *ṣukūk* holders as well as any support the originator provides.

c. Right to Recourse to the Underlying Ṣukūk Asset

“Recourse” means a legal right to claim. Its antonym, the phrase “without recourse” means one party has no legal claim against another.

We have seen in the preceding discussion that the recourse available to the *ṣukūk* holders in asset-based *ṣukūk* can be very different from the recourse available in asset-backed *ṣukūk*, although the basic contract underlying both types of *ṣukūk* may be similar, i.e. the sale of assets by the originator to the SPV. In asset-based *ṣukūk*, the originator transfers partial beneficial ownership only to the SPV.

In asset-backed *ṣukūk*, the originator transfers both legal title as well as full beneficial ownership of the asset to the SPV, such that the asset is legally isolated from the originator. Predominant legal ownership in the asset-based *ṣukūk* is retained by the originator whilst full legal ownership in the asset-backed *ṣukūk* is held by the SPV; both purportedly hold the asset in trust for the beneficial owners, i.e., the *ṣukūk* holders. However, in asset-based *ṣukūk*, the *ṣukūk* holders typically do not have direct recourse to the asset but have recourse to the originator-obligor, principally due to the existence of the purchase undertaking and other guarantees or pledges in the *ṣukūk* structure. In asset-backed *ṣukūk*, the *ṣukūk* holders also have recourse to the asset backing the *ṣukūk* mainly due to the absence of purchase undertaking and sale provisions in the trust deed. The difference in the recourse available to these two types of *ṣukūk* can be clearly seen, especially upon occurrence of default by the obligor. This, for example, has been clearly illustrated in the two Tamweel *Ṣukūk* issuances: (i) an asset-backed *ṣukūk* (the USD210 million *ṣukūk* in 2007 that was not affected by the insolvency and financial problems of the originator, Tamweel PJSC, because the *ṣukūk* holders had recourse to the underlying *ṣukūk* asset); and (ii) an asset-based *ṣukūk* (the USD300 million convertible *ṣukūk* in 2008 that was directly affected by the insolvency and financial problems of the originator-obligor, Tamweel

PJSC, because the *ṣukūk* holders ultimately had recourse to Tamweel not the underlying *ṣukūk* asset due to the existence of the purchase undertaking) (Yean, n.d: 4-5; Howladar, 2009: 32).

Based on the elaboration above, it can be concluded that the ability to have recourse to the *ṣukūk* asset is not necessarily influenced by the issue of *ṣukūk* holders' ownership of legal title of the *ṣukūk* asset. Rather, the determining factor is whether or not there is any restriction on the *ṣukūk* holders' enjoyment of their beneficial ownership right in the *ṣukūk* asset. In asset-backed *ṣukūk*, there is no or very minimal restriction, so they can have full recourse to the *ṣukūk* asset. In asset-based *ṣukūk*, there are substantial restrictions in terms of the *ṣukūk* holders' right to disposal and management of the *ṣukūk* asset due to the existence of a purchase undertaking and/or other restrictions. Instead, they have to exercise the purchase undertaking given by the obligor at the time of the *ṣukūk* issuance, i.e., they will have to sell the *ṣukūk* asset to the obligor at the exercise price agreed between them.

VI. CONCLUSION

The lengthy discourse in this paper points to a number of conclusions:

First: From the legal perspective, the dichotomy between beneficial ownership and ownership of the legal title is clearly recognised by English law and those following the common law legal tradition (e.g. Malaysia). In this legal tradition, beneficial ownership is generally treated as good as real ownership.

Second: From the Sharī'ah perspective, the dichotomy between beneficial ownership and ownership of the legal title can be traced to at least two situations: in the discussion regarding incomplete or partial ownership (*milk nāqis*) and in *waqf* arrangements. However, the acceptability of the use of beneficial ownership in contemporary Islamic finance practices is subject to differences of views among scholars, some of whom allow it while others do not.

Third: This paper finds that the use of beneficial ownership in *ṣukūk* structures is acceptable in principle because the valid sale transaction that occurs between the originator and SPV effectively transfers ownership to the latter, although it is described as beneficial

ownership. Moreover, by *'urf* (customary practice) or law, beneficial ownership is considered effectively real ownership; thus, in principle, we view that it can be categorised as complete ownership (*milk tamm*). However, beneficial ownership may be structured to be tantamount to incomplete ownership (*milk nāqis*) when substantial restrictions are imposed on the *shukūk* holders' enjoyment of their ownership right, such as restriction of the right to disposal and management of the *shukūk* asset due to a purchase undertaking and the like.

Fourth: In asset-based *shukūk*, restrictions are normally placed on the *shukūk* holders in terms of right of disposal of the asset due to the existence of a purchase undertaking and selling restrictions in the trust deed, although they enjoy other ownership rights. Thus, we view that their ownership in this arrangement is tantamount to incomplete ownership (*milk nāqis*).

Fifth: The *shukūk* holders in asset-backed *shukūk* have beneficial ownership that allows them to enjoy all ownership rights, including the right to asset disposal without any substantial restriction, even though they may not be the registered legal title owners. Thus, we view that in this arrangement, the *shukūk* holders enjoy complete ownership (*milk tamm*) of the *shukūk* asset.

Sixth: The ability to have recourse to the *shukūk* asset is not necessarily influenced by the *shukūk* holders' ownership of the registered legal title of the *shukūk* asset, as the *shukūk* holders in both asset-based and asset-backed *shukūk* have only beneficial ownership. The determining factor is whether or not there is any restriction on the *shukūk* holders' enjoyment of their beneficial ownership right in the *shukūk* asset. In asset-backed *shukūk*, there is ability to have recourse to the *shukūk* asset because there is no or very minimal restriction in place. In asset-based *shukūk*, there is very limited recourse to the *shukūk* asset due to substantial restrictions on *shukūk* holders' right to disposal and management of the *shukūk* asset.

Finally, we conclude that ownership does transfer in the sale contracts validly made in *shukūk* transactions, be they asset-based or asset-backed.

References

- AAOIFI. (2010). *Addendum One*, AAOIFI Shari'ah Standards No. 17. (English Edition).
- AAOIFI. (2010). *Shari'ah Standards*. Bahrain: Accounting and Auditing Organization for Islamic Financial Institutions.
- Abū Zahrah, Muḥammad. (1996). *Milkiyyah wa Naẓariyyah al-'Aqd fi al-Shari'ah al-Islāmiyyah*. Cairo: Dār al-Fikr al-'Arabī.
- Al-'Abbādī, 'Abd al-Salām. (1974). *Al-Milkiyyah fī al-Shari'ah al-Islāmiyyah*. Vol. 1. Lebanon: Mu'assasat al-Risālah.
- Al-Amine, Muhammad Al-Bashīr. (2011). *Global Sukuk Market and Securitisation Market*. Brill.
- Al-Baghawī. (1983). *Sharḥ al-Sunnah*. Damascus: Maktab al-Islamiy.
- Al-Naysāburī, As'ad ibn Muḥammad ibn Ḥusayn. (1982). *Al-Furūq Li al-Karābiṣ*. Kuwait: Ministry of Awqāf.
- Al-Qarāfī, Shihāb al-Dīn Aḥmad ibn Idrīs. (2010). *Kitāb al-Furūq* (3rd Ed.). Vol. 3. Cairo: Dār al-Salam.
- Al-Zarqā', Muṣṭafā. (1998). *Al-Madkhal al-Fiqhī al-'Āmm*. Damascus: Dār al-Qalam.
- Al-Zuhaylī, Muḥammad. (n.d.). *Milkiyyat A'yān al-Waqf bayna Maqāṣid al-Tashrī' wa mathālib al-Saytarah*.
- Badrān, Abū al-'Aynayn. (1986). *Al-Shari'ah al-Islāmiyyah Tarīkhuhā wa Nazariyyat al-Milkiyyah wa al-'Uqūd*. Cairo: Mu'assasat Shabāb al-Jāmi'ah.
- Baltāji (2007) *Al-Milkiyyah al-Fardiyyah fī al-Nizām al-Iqdiṣādī al-Islāmiy*, Egypt: Dar al-Salām.
- Bank Negara Malaysia. (2010). *Shariah Resolutions in Islamic Finance* (2nd Ed.). Kuala Lumpur: Bank Negara Malaysia.
- Black's Law Dictionary. (n.d.). *Free Online Legal Dictionary*. 2nd Ed. Retrieved March 7, 2015 from <http://thelawdictionary.org/letter/b/page/36/>.
- Buckland, W. W. (2002). *Equity in Roman Law*. Buffalo, New York: William S. Hein & Co., Inc
- Butt, P. (1988). *Land Law*. 2nd Ed. Sydney: The Law Book Company Limited.
- Chaiban, N. A. and Kanh, D. H. (2004). *Chaiban Business Dictionary*.
- Cornell University Law School (n.d.). Retrieved March 6, 2015 from http://www.law.cornell.edu/wex/without_recourse.
- Dusuki, A. W. & Mokhtar, S. (2010). *Critical Appraisal of Shari'ah Issues on Ownership in Asset-based Shukūk as Implemented in the Islamic Debt Market*. Research Paper No. 8/2010. Kuala Lumpur: International Shari'ah Research Academy for Islamic Finance.
- Elmaki, F. & Ryan, D. (2010). *Sukuk an Evolution*. Retrieved from <http://www.conyersdill.com/publicationfiles>.
- Evans, M. (2009). *Equity and Trusts*. 2nd Ed. Australia: LexisNexis Butterworths.
- Ḥammād, Nazīh. (2008). *Mu'jam al-Muṣṭalaḥāt al-Māliyyah wa al-Iqtisādiyyah fī Lughat al-Fuqahā'*. Damascus: Dār al-Qalam.
- Haneef, R. (n.d.). *Recent Trends and Innovations in Islamic Debt Securities: Prospects for Islamic Profit and Loss Sharing Securities*.
- Hepburn, S. (1997). *Principles of Equity and Trusts*. Cavendish Publishing (Australia) Pty Limited.
- Hidayat, S. E. (2013). A Comparative Analysis between Asset-Based and Asset-Backed Sukuk: Which One is More Shariah Compliant? *International SAMANM Journal of Finance and Accounting*, 1 (2).

- Honore, A. M. (1992). *Ownership*. Oxford Essays in Jurisprudence. (R. G. Hammond, Personal Property, Commentary and Materials. New Zealand: Oxford University Press).
- Howladar, K. (2009). *The Rating Difference between Secured and Unsecured Sukuk*. Zawya Sukuk Report.
- Hussain Hāmid Hassān. (n.d.). *Dirāsah Hawl Mawdū‘ ba‘ḍ al-Ṣukūk al-Mu‘āṣirah*. Retrieved from <http://www.hussein-hamed.com/pagedetails.aspx?id=112>.
- Ibn Hajar Al-‘Asqalāniy (2003). *Bulūghu al-Marām* – English Translation by Dr. Nancy Eweiss, Egypt: Dar Al-Manarah.
- Ibn Hummām, Kamāl al-Dīn. (1995). *Sharḥ Faḥ al-Qadīr ‘alā al-Hidāyah*. Lebanon: Dār al-Kutub al-‘Ilmiyyah.
- Ibn Nujaym, Zayn al-‘Ā‘bidīn. (1998). *Al-Ashbāh wa al-Nazā‘ir ‘alā Madhhab Abī Ḥanīfah al-Nu‘mān*. Lebanon: Al-Maktabah al-‘Aṣriyyah.
- Investopedia. (n.d.) Retrieved March 7, 2015, from <http://www.investopedia.com/terms/b/beneficialowner.asp>.
- Islamic Financial Services Board. (2009). *Capital Adequacy Requirements for Sukuk, Securitisations and Real Estate Investment*. Kuala Lumpur: Islamic Financial Services Board.
- Kahf, M. (2000). *Al-Waqf al-Islāmī: Taṭawwuruh, Idāratuh wa Tanmiyatuh*. Lebanon: Dār al-Fikr al-Mu‘āṣir.
- Madkūr, M. S. (1996). *Al-Madkhal li al-Fiqh al-Islāmī: Tārīkhuh wa Maṣādiruh wa Nazariyyatuh al-‘Āmmah*. Kuwait: Dār al-Kutub al-Ḥadīthah.
- Pettit, P. H. (1997). *Equity and the Law of Trusts*, 7th Ed. Butterworths.
- Rehahn, J. & Grimm, A. (2012). Country Report: Germany. *The Columbia Journal of European Law Online*.
- Sharī‘ah Committee of Rajhi Bank. (2010). Kingdom of Saudi Arabia: Dār Kunuz al-Ishbīliyyah.
- Shmid, C. U. et al. (2005). *Real Property Law and Procedure in the European Union – General Report*. European University Institute (EUI) Florence/European Private Law Forum Deutsches Notarinstitut (DNofI), Würzburg. Retrieved from <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf>
- Sonneveldt, F. (1992). *The Trust: An Introduction*. In *The Trust: Bridge or Abyss between Common and Civil Law Jurisdictions?* Boston: Kluwer Law and Taxation Publishers.
- Thompson, M. (1995). *Land Law*. 1st Ed. London: Sweet & Maxwell.
- Todd, P. & Wilson, S. (2003). *Textbook on Trusts*. New York: Oxford University Press.
- Tyler, E. L. G. & Palmer, N. E. (1973). *Crossley Vaines on Personal Property*. 5th Ed. London: Butterworths.
- Van Mens, H. L. (1992). *The Trust and Swiss Tax Law*. In *The Trust: Bridge or Abyss between Common and Civil Law Jurisdictions?* Deventer, Boston: Kluwer Law and Taxation Publishers.
- Watt, G. (2003). *Trusts and Equity*. New York: Oxford University Press.
- Worthington, S. (1996). *Proprietary Interest in Commercial Transactions*. Oxford, New York: Clarendon Press.
- Yean, T. W. (2009). Sukuk: Issues and the Way Forward. *International Legal News*, 6(2). Retrieved from <http://www.assaif.org/content/download/5319/31080/file/Sukuk%20Issues%20and%20the%20Way%20Forward.pdf>