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**Shifting Foundations of Sukuk in
Uncertain Times***By Richard Susalka*

Recent developments in Dubai have brought considerable attention to Islamic bonds, or sukuk. In particular, a \$4.1 billion sukuk default by Dubai developer Nakheel was narrowly averted, thanks to a \$10 billion bailout from Abu Dhabi. The episode sent waves through global markets, and is causing many to take a more discerning look at sukuk as an instrument of investment.

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But what exactly is sukuk? Generally speaking, it is a sharia-compliant method of raising debt capital that is similar to, but importantly different than, a conventional bond financing. As discussed below, the requisite differences between a conventional bond financing and a sharia-compliant sukuk financing have been the subject of recent controversy.

A fundamental basis of sharia, as pertains to financing matters, is the view that money itself does not have (and should not be treated as having) inherent value. A conventional bond financing, and other types of interest-based loans, run afoul of this fundamental tenet

inasmuch as the financier achieves a return on its investment (i.e., interest) solely on the basis of having provided capital to the issuer for a specified term. According to sharia experts, in order to achieve a return on investment in a strictly sharia-compliant manner, the financier must share in the risk of the project.

The challenge of the sharia-compliant financier is to find a way to satisfy sharia requirements (including risk sharing) while providing, to the extent permissible, the benefits of conventional financing.

In the context of sukuk, the most common solution is a form of leasing, known as ijara. In an ijara financing, an asset (typically, the asset for which financing is sought) is purchased by the financier and leased to the borrower. During the lease term, the financier maintains the rights and obligations of a financier (including major maintenance, insurance and the like), although these obligations may be contractually transferred to the borrower, with consideration paid. The financier also maintains the risk of total loss of the project. The borrower, as lessor, pays the financier lease payments at fixed intervals, which approximate interest on the financier's capital outlay (i.e., the purchase price of the asset). The transaction may also include an undertaking by the purchaser to purchase the leased asset at the end of the specified term (or, if earlier, upon an event of

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default). In the context of sukuk, the purchase price may equal the nominal face value of the sukuk, thus constituting a return of the financier's principal.

Ijara is just one of the forms commonly used in sukuk transactions. Other popular forms include musharaka and mudaraba. A musharaka is a joint venture whereby the financier and borrower each contribute capital to a project and co-own and co-manage the project in a pre-agreed manner. Profits are

rights were oftentimes limited to a right of returns from the project, rather than true ownership. Second, the financier's income was fixed at a specified rate (typically a fixed percentage based on LIBOR) and amounts in excess of such amount were distributed to the borrower as an incentive for effective management. Third, the financier's income was guaranteed, even during periods of loss, by virtue of an undertaking by the borrower to provide a sharia-compliant (i.e., interest-free) loan to the financier in the amount of the financier's expected income. Future "effective management" incentive fees paid by

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shared between the financier and the customer in a pre-agreed ratio, whereas losses are shared strictly in proportion to the parties' respective capital contributions, typically resulting in the financier bearing the majority of the losses. In a mudaraba structure, the financier retains ownership of the capital and engages the developer to manage the venture. Profit is shared according to a pre-agreed ratio whereas losses are entirely absorbed by the financier.

The prototypical musharaka and mudaraba structures described above differ from conventional bond financing in a number of respects. First, the financier owns at least a portion of the project in each scenario. Second, the financier's income during the term of the loan is based on pre-agreed profit ratios rather than a fixed or variable interest rate. Third, the financier is not entitled to income in the event the project operates at a loss. Fourth, these structures provide no clear mechanism for the repayment of principal and the financier's exit from the deal.

The sukuk market developed a manner of structuring these deals to more closely approximate a conventional bond financing; as discussed below, these mechanisms have since been the subject of controversy. First, the financier's ownership

the financier (or, more accurately, retained by the borrower) would be applied towards satisfaction of this loan. Fourth, the borrower would undertake to purchase the project at the end of the term (or upon an event of default) at a price equal to the face value of the sukuk.

Although these alterations were successful in more closely approximating conventional bond financing, they did so at the expense of sharia-compliance, according to the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). AAOIFI regulations have been adopted by the Dubai IFC and a number of countries in the MENA Region (including Bahrain, Sudan, Lebanon, Qatar, Sudan and Syria), and their influence extends beyond these jurisdictions. In November of 2007, Sheikh Taqi Usmani, Chairman of AAOIFI's Sharia Board, shook up the global sukuk market by reportedly announcing his view that 85% of existing Gulf sukuk issuances were not sharia-compliant. A paper circulated by Sheikh Usmani, and a subsequent statement by AAOIFI, declared that each of the above-mentioned alterations violated sharia.

It is not yet clear what long-term impact the ruling will have on the selection of sukuk structures moving forward, although reported statistics suggest that the market has taken note of

the AAOIFI ruling. While 2008 saw a greater than 50% decline in the number of sukuk issuances, musharaka and mudaraba issuances decreased by 83% and 66%, respectively, though ijara issuances (which were not condemned by the AAOIFI ruling) decreased by just 6%.

The episode demonstrates the important and perhaps unsteady role sharia-compliance requirements can play in the sukuk market. The episode also raises some interesting issues regarding the future of Islamic finance generally. In a segment of his paper entitled “The Higher Purposes of Islamic Economics,” Sheikh Usmani noted that the Islamic finance industry “has given permission to Islamic banks to carry out certain operations that more closely resemble stratagems than actual transactions . . . in order to facilitate, under difficult circumstances, the figurative turning of the wheels for those institutions when they were few in number [and short of capital and human resources]. . . . It is time for Sharia supervisory boards to review their policies and to moderate the license [they have granted] until now to benefit Islamic financial institutions.” Reflecting this sentiment, the subsequent AAOIFI ruling concluded with the Sharia Board “advis[ing] Islamic Financial Institutions to decrease their involvement in debt-related operations and to increase true partnerships based on profit and loss sharing in order to achieve the objectives of the Sharia.”

Indeed, an often-heard criticism of sharia-compliant finance is the flexibility of scholars in approving financing structures that are indistinguishable, as a practical matter, from conventional structures. As the industry gains a foothold in the global financial market, it will be interesting to follow whether renewed diligence on the part of sharia scholars results in a financing market that is more readily distinguishable from conventional models. It will also be interesting to see what role these questions will play in the fallout if the next high-profile sukuk default is not averted. ☉

Underwater and Out of the Money — the IMO Car Wash Decision

By Alper Deniz and Adrian Harris

Background

In 2006, the IMO Group, operators of a global car wash business, was acquired in a leveraged buy-out by private equity firm Carlyle Group. As a result, the IMO Group had two secured debt facilities: (i) a senior loan of £313 million and (ii) a mezzanine loan of £119 million. Pursuant to an intercreditor agreement, the mezzanine loan was subordinate to the senior loan. Both the senior loan and the mezzanine loan had the benefit of substantially the same security and guarantee package and the security agent was authorised to release the mezzanine security and guarantee once enforcement action had been taken. The IMO Group was balance sheet insolvent and had breached its financial covenants and defaulted on its interest payments. It was also facing difficulties with its insurers. The IMO Group decided, therefore, to carry out a restructuring of its debt to secure its future.

Proposed restructuring

The IMO Group’s proposed restructuring involved the creation of new holding companies (Newcos) into which the business and assets of the existing IMO Group would be sold through a pre-packaged administration sale. The consideration for the sale was the release of the IMO Group from liabilities under the existing senior loan. In addition, approximately £185 million of the existing senior loan was novated to the Newcos and the senior lenders were allotted shares in the top Newco. Using its authority in the intercreditor agreement, the security agent also released the security and guarantees held by the mezzanine lenders.

Approximately 15% of the senior lenders were not in favour of the proposals and schemes of arrangement were therefore implemented to effect the release of the senior loan in the absence of all senior lender consent. The schemes were not actually necessary to transfer the assets to the Newcos — the assets would be transferred in a pre-packaged administration. The mezzanine lenders were not included in the schemes and were to be left behind in the old group. / continued page 4

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The justification given was that, on the senior lenders' calculations, the value of the IMO Group was less than the value of the outstanding senior loan and, therefore, there was no hope for a return for the mezzanine lenders.

The Challenge

The mezzanine lenders challenged the senior lenders' calculations and claimed that the schemes unfairly prejudiced them.

tion outcomes. This resulted in a significant majority of outcomes exceeding a valuation for the IMO Group of £320 million and therefore breaking in the mezzanine loan. The mezzanine lenders claimed that they did have an economic interest in the IMO Group and should therefore have been involved in the schemes.

The High Court was very critical of the LEK valuation and said that valuations required "real world judgments as to what is likely to happen" and not a series of random calculations which create a range of possibilities rather than a range of pro-

Economic conditions will continue to exert pressure on stretched leveraged deals over the next few years and the rising number of defaults will lead to restructurings of those deals.

The mezzanine lenders claimed that their own valuation exercise indicated that value broke within the mezzanine loan. They further argued that the directors of the IMO Group were in breach of their duties to obtain a benefit for all creditors rather than just the senior lenders.

Valuations

The IMO Group obtained three valuations. PricewaterhouseCoopers valued the business using an income approach (based on discounted cash flows), a market approach (comparable publicly traded companies), and an LBO approach (the level that a private equity investor would pay based on a typical required equity rate of return). Rothschild conducted a "market testing" sales process to see if a buyer could be found. In addition, King Sturge valued the IMO Group's properties. The maximum valuation from these exercises was £265 million, i.e. significantly short of the £313 million of senior loans outstanding.

The mezzanine lenders instructed LEK Consulting, who used a "Monte Carlo simulation" to assess the most likely discounted cash flow valuation outcomes using a random sampling of input and assumptions, and then aggregating the result into a distribution of the probabilities of different valua-

tionally assessed values. There is no statutory method of valuation in restructurings, but this case indicates that valuations should be done on a going concern basis (i.e. how much would a purchaser pay today), particularly where the likely alternative to the scheme and pre-packaged administration would be a sale of the business. In previous cases, valuation has been determined on a liquidation basis and, although this was not argued in this case, this may still be a valid basis for valuing a company depending on the facts of the particular situation. What is clear, however, is that to successfully challenge the fairness of a scheme on the grounds of valuation, the mezzanine lenders had to show real economic interest in the IMO Group and not just a theoretical or fanciful interest.

Duties of directors

The mezzanine lenders also alleged that the board of directors breached their duties by not getting a better deal for all the creditors. In this case, the IMO Group was technically insolvent and it was unrealistic to believe that they could bargain for a better deal from the senior lenders in such circumstances, particularly as they could incur personal liability for wrongful trading. The mezzanine lenders were also negotiating their

own position at all times and were coordinating with the senior lenders directly. The board had started to negotiate with the mezzanine lenders but, based on the valuations for the business, continued negotiations solely with the senior lenders as the only party with a real economic interest in the business. The court also noted that the board had independent professional advisers at all times.

Decision

The High Court sanctioned the schemes. Mr. Justice Mann confirmed that a company is free to enter into an arrangement with such of its creditors as it chooses and is not required to include those creditors whose rights are not affected by the scheme and, in particular, a company does not need to consult with such creditors either because their rights are not affected or they have no economic interest in the company. However, it was also confirmed that the mezzanine lenders were entitled to object as creditors on grounds of unfairness if the schemes unfairly affected them in ways other than affecting their strict legal rights.

The High Court sanctioned the schemes on the basis that the mezzanine lenders were not affected or bound by the schemes and he found that the overall restructuring was not unfair to the mezzanine lenders on the basis that they had no economic interest in the IMO Group and that the valuation as a going concern was much less than the level of the senior loan. Furthermore, in the absence of the proposed restructuring, enforcement would be the most likely outcome.

The High Court also noted that the intercreditor agreement enabled the mezzanine lenders to buy out the senior lenders, particularly if they felt that the assets were being sold at below their real valuation, and that the senior lenders were taking a genuine risk in accepting shares in the Newco for part of their loan.

Comment

Economic conditions will continue to exert pressure on stretched leveraged deals over the next few years and the rising number of defaults will lead to restructurings of those deals. This case, although not making new law, does provide useful guidance where that restructuring will result in a continuing business. The valuation exercise carried out by a debtor or senior lenders will come under very close scrutiny and where the court is satisfied with that exercise, whether it is done on a going concern basis as in this case or on a liquidation basis, creditors who lack an economic interest can be

legitimately excluded. Adrian Harris, a partner and head of our restructuring practice in London, comments: "This should not be seen as a barrier to junior creditor claims but it does highlight the need for such claims to be prepared carefully and based on reasonable and realistic valuations". Alper Deniz, also a partner in the London restructuring practice, notes: "The case demonstrates the need for a clear understanding of the various rights in the intercreditor agreement, whatever type of deal is being restructured. Crucially, the rights of senior creditors to release security and other claims of junior creditors needs to be carefully analysed." ☺

In re Gold & Honey, Ltd.: Bankruptcy Court Denies Recognition to Israeli Receivership Proceedings

By Francisco Vazquez

Introduction

Under Chapter 15 of the United States Bankruptcy Code, a court may grant recognition to and may assist in the administration of a "foreign proceeding." A prerequisite to granting any relief under Chapter 15 is a finding that the foreign insolvency, liquidation, bankruptcy, reorganization, debt adjustment proceeding or the like is a foreign proceeding as defined under the Bankruptcy Code. United States courts have recognized a variety of different types of proceedings under Chapter 15 of the Bankruptcy Code. Recently, however, the United States Bankruptcy Court for the Eastern District of New York (the "*Bankruptcy Court*") refused to grant recognition to Israeli receivership proceedings in *In re Gold & Honey, Ltd.*, because (i) the Israeli proceedings did not satisfy all of the elements of a foreign proceeding and (ii) recognition would have been manifestly contrary to United States public policy in that the actions taken in the Israeli proceeding violated the automatic stay in effect by virtue of the debtors' Chapter 11 filing.

Background

Gold & Honey Ltd. ("*GH Ltd.*") is an Israeli / continued page 6

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corporation and a general partner and 49.5 % equity holder of Gold & Honey (1995) L.P. (“GH LP,” together with GH Ltd., the “Debtors”), a New York limited partnership. GH LP’s business generally consists of designing, manufacturing, and marketing and selling moderately priced jewelry. Although GH LP’s design and marketing efforts were done in New York, it did have operations in Israel.

In or about 1996, the State of Israel agreed to guaranty a

On September 23, 2008, each of the Debtors filed a voluntary petition under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court. Despite the automatic stay arising upon the Debtors’ bankruptcy filing, FIBI continued to pursue its request for the appointment of a temporary receiver by the Israeli Court. On October 2, 2008, the Israeli Court appointed Aliza Sharon as the supervisor of the Debtors’ businesses. Immediately thereafter, the Debtors sought an order from the Bankruptcy Court determining that the automatic stay applied to the Debtors’ property, wherever located and by

Recognition should not be granted if it would be manifestly contrary to public policy.

working capital line of credit (the “Working Capital Facility”) in the principal amount of \$12 million to the Debtors. The Working Capital Facility was intended to provide GH Ltd. with funds to purchase gold and other precious metals. Ultimately, First International Bank of Israel (“FIBI”), an Israeli banking corporation, agreed to finance the Working Capital Facility with GH Ltd., as borrower, in the amount of \$9 million. GH LP guaranteed payment of such funds.

In 2003, FIBI agreed to increase the Working Capital Facility to \$12 million and GH LP agreed to pledge certain accounts receivables (the “Existing Contracts”) as additional collateral for the repayment of the increased Working Capital Facility. FIBI purportedly recorded the pledge agreement as a lien on the Existing Contracts in Israel. In March 2008, the Working Capital Facility was increased to \$16 million and FIBI requested additional collateral from the Debtors. In response, GH LP pledged certain machinery and equipment to FIBI. Shortly thereafter, FIBI commenced litigation against the Debtors in Israel. In July 2008, FIBI (i) seized substantially all of the Debtors’ assets and accounts, and (ii) commenced receivership proceedings (the “Israeli Receivership Proceedings”) with respect to each of the Debtors in the Tel-Aviv-Jaffa District Court for the State of Israel (the “Israeli Court”).

whomever held, and enjoined the Israeli Receivership Proceedings. Ultimately, the Bankruptcy Court held that the automatic stay applied to all of the Debtors’ property, wherever located and by whomever held. The Bankruptcy Court, however, refused to address whether (i) the automatic stay applied to the Israeli Receivership Proceedings, or (ii) it had personal jurisdiction over FIBI. Nevertheless, the Bankruptcy Court informed FIBI that it proceeded against the Debtors in the Israeli Court at its own peril.

Subsequently, the Israeli Court refused to give effect to the automatic stay or the Bankruptcy Court’s order confirming that the automatic stay applied to all of the Debtors’ assets in Israel on the basis of (i) the “presumed illegitimacy” of the Debtors’ Chapter 11 cases, (ii) the failure by the Debtors to properly register the Bankruptcy Court’s order in the Israeli Receivership Proceedings, and (iii) principles of comity. On November 30, 2008, the Israeli Court issued a judgment appointing Amir Bartov and Aliza Sharon as permanent receivers for the Debtors (collectively, the “Receivers”). In the interim, the Debtors commenced an adversary proceeding and sought a temporary restraining order against FIBI. Ultimately, the Bankruptcy Court denied the request for a temporary restraining order.

On January 7, 2009, FIBI filed a motion for an order lifting the automatic stay with respect to the Israeli Receivership Proceedings or, in the alternative, an order abstaining from exercising jurisdiction over *and* dismissing the Debtors' Chapter 11 cases. In addition, on January 28, 2009, the Receivers filed chapter 15 petitions for recognition of the Israeli Receivership Proceedings as "foreign main proceedings" under the Bankruptcy Code.

The Bankruptcy Court's Analysis

Requirements of Chapter 15

A foreign proceeding will be recognized, if (i) the foreign proceeding is a foreign main proceeding or foreign nonmain proceeding, (ii) the foreign representative petitioning for recognition is a person or body, and (iii) the petition for recognition satisfies the requirements of section 1515 of the Bankruptcy Code. Chapter 15 is "designed to make recognition as simple and expedient as possible." Nevertheless recognition is not intended to be a "rubber stamp exercise" and the foreign representative bears the ultimate burden of proving the elements.

Here, the Bankruptcy Court concluded that the Receivers had satisfied the requirements of section 1515, which the court described as "purely procedural in nature." In particular, the petitions for recognition were accompanied by the appropriate orders from the Israeli Court and the requisite statements from the Receivers. Moreover, the Receivers had satisfied the second requirement for recognition in that the Receivers were persons. The Bankruptcy Court, however, was not convinced that the Israeli Receivership Proceedings were foreign proceedings, much less foreign main (i.e., pending where the debtor has the center of its main interests) or foreign nonmain proceedings (i.e., pending where the debtor carries out nontransitory economic activity).

The Israeli Receivership Proceedings Are Not Foreign Proceedings

For purposes of Chapter 15, a foreign proceeding is defined as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." Therefore, the Bankruptcy Court concluded that recognition could be granted only if the Receivers could demonstrate that the Israeli Receivership Proceedings was:

- (i) a proceeding;
- (ii) that is either judicial or administrative;
- (iii) that is collective in nature;
- (iv) that is in a foreign country;
- (v) that is authorized or conducted under a law related to insolvency of the adjustment of debts;
- (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and
- (vii) which proceeding is for the purpose of reorganization or liquidation.

The Bankruptcy Court concluded that the Receivers demonstrated five of the seven requirements with respect to both Israeli Receivership Proceedings. While the Receivers were able to show that the Israeli Court had jurisdiction over the assets of GH LP and GH Ltd., there was no evidence that the Israeli Court had any authority over GH LP's business affairs. Thus, the Receivers failed to satisfy the sixth element with respect to the Israel Receivership Proceeding pending with respect to GH LP. Moreover, the Receivers failed to convince the Bankruptcy Court that the Israeli Receivership Proceedings were collective in nature.

A collective proceeding "considers the rights and obligations of all creditors." A receivership proceeding, however, is typically designed to benefit a single creditor. In this instance, the Israeli Receivership Proceedings were "more akin to a individual creditor's replevin or repossession action than it is to a reorganization or liquidation by an independent trustee." Indeed, the proceedings were designed to permit FIBI to collect its debts and did not provide a mechanism to ensure payment to all creditors or "evenhandedness." As such, the Israeli Receivership Proceedings were not collective in nature and therefore were not foreign proceedings eligible for recognition.

Recognition would be Manifestly Contrary to U.S. Public Policy

Section 1506 of the Bankruptcy Code provides, in pertinent part, that a court may refuse "to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." Accordingly, recognition should not be granted if it would be manifestly contrary to public policy.

Here, FIBI pursued its request for the appointment of the Receivers after the Debtors filed for bankruptcy in the United States. FIBI's efforts violated the automatic stay and the Bankruptcy Court's order confirming that the automatic stay applied to all of the Debtors' assets in */ continued page 8*

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Israel. The Bankruptcy Court was therefore reluctant to condone FIBI's actions by granting recognition to the Israeli Receivership Proceedings out of concern that it would encourage other creditors in similar situations to pursue their remedies against a debtor's foreign assets that were subject to the bankruptcy court's jurisdiction in violation of the automatic stay. "Because of the serious ramifications that would ensue in derogation of fundamental United States policies, this Court should not recognize the Israeli Receivership Proceeding as a foreign proceeding."

FIBI's Lift Stay Motion

While the Bankruptcy Court did not grant recognition to the Israeli Receivership Proceedings, it acknowledged that the Israeli Court was better suited to address the disputes between the Debtors and FIBI under principles of comity and practicality. In particular, the Israeli Court was the more appropriate forum given that (i) the parties' agreements provided that they were governed by Israeli law, and (ii) most of the relevant assets were located in Israel. Accordingly, the Bankruptcy Court

granted FIBI's motion to lift the automatic stay and permitted FIBI to pursue its remedies in the Israeli Court.

Conclusion

In the spirit of comity, Chapter 15 is designed to ensure that United States courts cooperate with foreign courts by assisting them in the administration of cross-border cases. If appropriate, a United States court may abstain from considering issues that it would normally handle or defer to litigation pending in foreign countries. Recognition, however, is not a rubber stamp exercise and United States courts will refrain from granting recognition if the proceeding to be recognized does not satisfy all of the elements of a foreign proceeding or if recognition would be manifestly contrary to United States public policy. Assuming that the proceeding to be recognized is indeed a foreign proceeding and one that would fall within the definition of a foreign main proceeding or a foreign nonmain proceeding, recognition should be, as Chapter 15 intends, "simple and expedient." ©

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