

FATAWA AWQAF 2008-2012

Subject: Types of Waqf Compared to Trusts.

From: Asad

Location: USA

Sent: Monday, January 07, 2008

Question: Waqf compared to trust

Assalamu Alaykum

I came across your website while doing research on how a WAQF concept can be applied in the US. I was found your site to be very informative and useful. Here in Minnesota, our donors want to protect our school through a WAQF, but want that to be a local arrangement and clearly do not want to deal with any national organization. I am trying to make sense of how to make these competing needs work. Can I ask for your advice?

What is the difference between a waqf in the Islamic setting & a trust in the modern western setting? Am I correct in thinking that in the old days, the masjid or the school was not a waqf; rather agricultural land that produced revenue was placed in a waqf to help support the masjid or school? If that is correct, why do people nowadays still want to put the masjid or school in a waqf?

As the foremost expert in this field, your advice would be appreciated.

Sincerely, Asad

My Answer:

Bismillah al Rahman al Rahim

Al Hamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Asad,

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Waqf is of two major kinds and each kind has also branches. We have Waqf whereby the property itself is used to achieve its objectives. This I call service Waqf such as a mosque building, a hospital building, or a Schools building. Similar to these are copies of the Qur'an in a mosque, mosque carpets, hospital beds and equipment's or school desks and chairs. All these can be Waqf. This kind of Waqf is branched according to the nature of the service, generally as religious (a mosque or also a church) charitable (a school, orphanage or hospital) or family such as a building kept for family and descendants for future generations to use for celebrations and other gathering or could be as a residence but with no right to sell.

The second kind I call investmental. These are properties that are meant for investment whereby the net revenues, after replenishment of the property itself, are used for the poor and needy, scientific research, a mosque, a school an orphanage or a hospital or the like. This can also take three branches depending on the objective for which these revenues are spent: religious, philanthropic or family. Of course of the above can also be sub-branched on the basis of the nature of the property. For instance, shares and common stocks, investment deposits in Islamic banks, agricultural land, commercial buildings, etc. Waqf, as defined in Shari'ah is a bit stronger than trusts.

Trusts, depending on the conditions of the founder, can be sold, disposed of, etc. Waqf cannot. And if there is a pressing need for sale, its proceeds must be kept in escrow until another property can be bought and devoted for the same objectives. Waqf founder's conditions cannot be altered by any authority after the founder's death (only by the founder during his live time according to a minority among Shari'ah scholars while the majority does not give the founder any right to alter or modify).

Waqf is protected against creditors, cannot be used as collateral and no lien, charge or mortgage can be placed on it. That is why I always preach that our Islamic organizations in America do not provide sufficient protection to these public Islamic community buildings the way the Awqaf concept requires because by certain majority rules these buildings can be disposed of, they can be collateralized and sued by creditors. . . If you need any help in devising a Waqf agreement for a Muslim community property, I will be glad to review any proposal or even give certain ideas to your lawyer to formulate an appropriate formula for such properties. (Of course I do that for Muslim communities without any charge, but since I am not a lawyer I cannot offer a legal advice nor provide a legal document, I can only study it from Shari'ah point of view).

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Subject: Decline of Waqf

From: Khalid

Sent: Thursday, October 18, 2012

Location: USA

Question: Decline of new Waqf in Muslim countries

Assaalaamu Alaykum Dr. Monzer,

I hope you are doing well by the mercy of Allah (swt). I am taking a course at Duke titled "Economic History of Islamic Middle East". I am having hard reconciling the notion that one of the chief causes for Waqf's decline is the "static perpetuity". So far I've come across works from Dr. Kuran and Jeffrey A. Schoenblum that discuss the decline in Waqf. My professor advised me to focus on last 200 years of Middle East.

Masha Allah, I'm inspired by your works on Islam and Economics and came across your site that lists excellent papers. I would very much appreciate if you can help me identify the right resources available in English that would help me address the issue of static perpetuity, intellectual stagnation and other factors that have contributed to the decline of this great institution which has no parallel in the West.

Looking forward to hearing from you soon.

JazakAllahuKhairan,

Your brother in Islam

Khalid

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Khalid

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

I don't have other than what you find on the internet, just keep searching.

But I want to mention one thing. Your Teacher, Kuran, only sees the negative thing in anything that is Middle Eastern or Islamic and he invent terms for them. Perpetuity is one of the major beautiful aspects of Waqf so he wants to call it static. Is it not true that over the last 500 years all our Muslim societies were static, is it a sin of Waqf or a sin of the whole society? How about the achievement of Waqf in financing the struggle against colonialism in North Africa during the last 200 years? He does not want to see that. The whole Ummah was asleep, is it not a great job that instead of what he sees, we work on awakening it by using its own institutions which did great things throughout history. Let me give you an example: there is a beautiful old invention, a water clock on the wall in front of Al Qarawieen Mosque in Fes, Morocco. This great thing does not work, and it is been out of functions for a few hundred years. There are several orchards in Fes as Waqf for its maintenance, God knows what happened to these orchards, must have been stolen by the Trustees themselves and became private properties long time ago. Where is the problem? Is it in society and government, I.e., in backwardness and static society or is it in the principle of perpetuity of Waqf? A hospital in Damascus, half of it is taken to a private house and the other half is just semi ruined. Is the problem in the perpetuity or in the static society? Why we were colonized? Is it because we have perpetual Awqaf? How about the perpetuity of Rockefeller foundation? Honestly, I am tiered of this mentality!

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Subject: Using of Will and Trusts for Inheritance

From: Habib

Sent: Tuesday, February 15, 2011

Location: United Kingdom

Question: Using trust for inheritance in Muslim communities

Dear Dr. Monzer,

Assalamu Alaykum.

I hope you are well. I am writing to ask a question regarding using of will and trusts for inheritance purposes. I am aware that you propose use of these instruments in non-Muslim countries. The question I have is can similar instruments be used in other circumstances. I am writing a paper on Islamic Finance and Offshore Financial Centers (OFCs). One key product of OFCs is estate planning where wills and trusts are used for inheritance purposes. My question is two-fold:

1. Can Muslims living in Islamic countries use these centers for estate planning (if done according to Fara'id).
2. By putting the assets/property in a trust appears to prevent actual ownership of these assets by the heirs as they only have beneficial ownership (e.g., cannot sell the assets if they want to). Does this violate the laws of Fara'id?

I will be grateful if you can kindly provide some insight on these issues. We are planning to organize a Roundtable of Islamic economists and Shari'ah Scholars here in Durham with the ISRA and IRTI in April. Once the program is finalized, we will send you invitation, InShaAllah.

Best regards,
Habib

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Dr. Habib

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Muslim in any country, Muslim majority or Muslim minority countries can use the last will and the living trust forms. This is of course if laws in their countries allow it and I don't know any Muslim country that does not allow creating a trust.

I believe however that any Muslim must put appropriate clauses/articles in these documents to assure that the Islamic inheritance system is implemented correctly and in full. Accordingly from Shari'ah point of view, a trust can only take the form of Wakalah of Waqf. When it is a Waqf ownership is transferred to the Trust permanently and the heirs, family or any other beneficiary will have only the right of deriving benefits/revenues as dictated in the document. Ownership of assets does not go to heirs at any time unless the founder dictates it been liquidated and distributed (see my reservation later)

If the intention of the trust is long term investment and preservation, then distribution to heirs, the basis of the trust becomes Wakalah. Wakalah comes to an end by death of the principal. This means that it must be either distributed at that moment or continue with CONSENT of new owners. This distribution must be in accordance with Fara'id, keeping in mind that some children of the founder may die during the life of founder, I take the position taken by most Arab laws of inheritance that the children of a deceased child take his/her share (as it is only website)

My reservation is: any attempt to use the Waqf basis of a trust in order to modify the share of inheritance is Haram and is void. This means that creating a waqf with liquidation and distribution to children at any different rates is not permissible, While creating a waqf with distribution to living descendants after a long period say 100 years is permissible because it is most likely that own children would not be then there and distribution can be at any rate, e.g., equating males and females. In other words, I argue that since Abu Hanifa does not allow creating Waqf because he considers it a violation of inheritance likewise Waqf creation should not be a vehicle to avoid the Shari'ah distribution.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Habib

Sent: Thursday, February 17, 2011

Dear Br. Dr. Monzer,

Walaikum assalam warahmatullahi wa Barakatuh.

Thank you for your detail response--it is very helpful.

1-What I understand from your response is that while under waqf property is transferred to trust permanently and cannot go to the heirs at any time, under Wakalah of waqf, the trust is temporary and dissolves with the death of the Waqif or trustor. In the former case, how is the violation of inheritance law (as the heirs do not have legal ownership of their inheritance which lies with the trustee, which probably is the point of Abu Hanifa) resolved?

This highlighted statement is inaccurate. The trust is either Waqf or Wakalah (meaning Amanah). Western laws makes the Trust under all cases owns the property and have the trustee acts according to instructions. In Wakalah trust owner remains the trustor/founder and end by his death. So if you make a trust with no reference to being waqf or Wakalah it needs to be interpreted on either way. It shows that the intention is to distribute to heirs then it is Wakalah. In other words, when a man comes to me I first tell him all the above and the difference between them and ask him about his desires which route he wants to take. Then make the trust with distribution or without it so that we set it the right way. Notice where does the problem lie?! It is in the fact that trust actually owns the property in Western laws and yet it allows distribution to heirs. The underlying philosophy is that in Shari'ah ownership right is given from Allah for lifetime only and at death it goes back to Allah who distributes it as He likes (as He gave it in the Qur'an). In Western laws ownership is absolute therefore you can do anything you want with it even after death.

2- When it is a Waqf ownership is transferred to the Trust permanently and the heirs, family or any other beneficiary will have only the right of deriving benefits/revenues as dictated in the document. Ownership of assets does not go to heirs at any time unless the founder dictates it been liquidated and distributed

In the above case, I was saying that heirs do not get full ownership of the property, but only beneficial rights.

While searching for sources for this paper, I found an interesting related issue that may interest. In Labuan offshore financial center one can also establish a foundation for asset protection and management. Foundation is a European concept which appears to be a mixture of a trust and company. By creating a foundation, the ownership of property moves to the foundation itself and there is a council (like a board of directors) that governs it. Like a trust the revenues of the assets of the foundation can be distributed to specified beneficiaries. Unlike a trust, the founder can have control (as a founder or through the council) on how the foundation is managed and run. The law in Labuan says that Islamic foundations can be established.

I was wondering what would be the Shari'ah perspective on this type to entity.

Thanking you again and best regards,

Habib

My Answer:

Dear Br. Dr. Habib

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

You see a waqf can be permanent or temporary. There are many laws that do not allow permanent trust (in America family waqf cannot exceed 3 generations) or permanent family Waqf (in Lebanon family Waqf must not exceed 120 years). This liquidation is permissible to be not according to inheritance because the heirs are distant when it happens. Shari'ah does not put such a limit on family Waqf but some form of restrictions or liquidation is in my opinion necessary to avoid fragmentation and meaningless share. In my personal Waqf I suggested elimination of any share that becomes be low US\$100 and transforming the whole Waqf to charity after 5 generations. But otherwise heirs have only right to share of revenue in investment Waqf and beneficiary ownership in case of direct Waqf. Labuan matter is meant to be Waqf. But the word (and institution of) Waqf should take it to the authority of state religious board according to their laws. This is why they avoid the word Waqf and use instead the word foundation. Even Islamic university has established a foundation not a Waqf for this reason. Foundation in America can be private but must be charitable to enjoy privileges of foundations.

Best Regards,

Wassalam

Monzer Kahf

Subject: Legality of Waqf

From: Khalfan

Sent: Friday, October 29, 2010

Location: Zanzibar

Question: Is Waqf legally recognized in America

Aslam Alaykum.

Dear Dr. Monzer,

I am doing research on Islamic waqf on the East African Island of Zanzibar.

Zanzibar was ruled by Arabs and later become a British Protectorate in 1890. Consequently, the British transformed the traditional waqf practice in the Island. According to the correspondence of British Waqf Commission, investing waqf funds in stock exchange is accepted by Islamic laws.

Kindly, as I am not familiar with the law, I would like to ask your favor to clarify this matter. I will appreciate if you could varnish some Qur'anic and or Hadith evidence.

Many thanks.

Salaam,

Khalfan Amour

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Khalfan

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

There is nothing about Awqaf in the Qur'an except the issue of Sadaqah Jariah. The only Hadith is the famous one of Omar when the Prophet, pbuh, advised him: make it Waqf and make its

fruits for charity. The full text is in Bukhari. Awqaf is assignment of private property for a cause of righteousness. Therefore the general rules apply to it. This is why the major rule is respecting the conditions of Waqif because it is his property and he decides on it. The rule is "conditions of Waqif should be treated as if it is a text of Qur'an or Sunnah." Permissibility of investment in stock is there provided it does not violate Shari'ah or conditions of Waqif and it is to the best interest of beneficiaries/ objective of the Waqf. Therefore it cannot be in shares of banks, if the Waqif left agricultural land and now it became metropolitan, most likely the Waqif did not mean to plant it under these conditions. If he did not prevent replacing it in his document (the Hujjah) or his document is lost and not known, it can be sold and invested in Shari'ah compliant share if this is better to the beneficiaries. This is a matter that should be decided by the Nazir under supervision of appropriate supervisory authority.

If you have any other question please do not hesitate to contact me.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Subject: Selection of a Mutawalli

From: Khalfan

Sent: Thursday, January 27, 2011

Location: Zanzibar

Question: Can the Waqif be the Nazir?

Dear Prof. Monzer,

I would like to ask your favor to clarify what Shari'ah (or different schools of Islamic laws) says about the nomination of a Mutawalli and what is your stand on the issue. I saw some of the waqf deeds in Zanzibar that Waqif have dedicated themselves as Mutawalli during their life time and thereafter death others in lineage take over. Is it allowed to nominate yourself as Waqif to be Mutawalli? What is the motivation behind such a scenario?

Thank you.

Best regards,

Khalfan

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Khalfan

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Of course the best Mutawalli of a waqf is the Waqif. Isn't she/he the once who created the Waqf from own money? Waqf is absolutely a private action for the sake of Allah and the founder is the one who cares more about it. This is the position of Shari'ah. It is based on the principle of respect of private ownership, freedom and integrity of human beings. The founder creates the Waqf seeking pleasure from Allah and it is he who decides how to do that. He has

full right to appoint himself or any other person as Nazir and government must not interfere in Waqf except in protecting it and giving it privileges given to similar charities. This is why a basic rule of waqf is: the condition of founder should be treated as a text of the Law Giver. Of course any condition that clearly contradicts the basic objective of the Waqf is not valid such as a mosque with a condition to be closed at times of prayers. But if a Waqif makes a condition that persons not wearing socks should not be allowed in the mosque such a condition is to be honored, no doubt about that.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Subject: Trust (Waqf) Contractual Arrangement

From: Faheem

Sent: Thursday, January 13, 2011

Location: United States

Question: is the Waqf a contract?

Assalaamu Alaikum Dr Kahf;

It is with great interest I read your website and the advices you offer. Thank you. I wonder if you can assist me with the following issue.

I have a home I purchased long ago that I paid off for. A relative of mine is interested in purchasing it but is unable to qualify for financing at any of the Islamic Institutions here in the US due to his credit not being good. I would like to help him out but I'd like to protect myself and property as best as I could.

He wants me to rent to him for 3 years with an option to buy until he fixes his credit (could take a couple of years) at which point he will obtain financing from an Islamic institution and purchase the property. I was speaking to a few investor friends of mine and they offer the following solution. Please comment.

Thank you.

1. I create a beneficiary directed living trust and transfer the property to it (I am the trustor, my lawyer as trustee, I am the 100% beneficiary).
2. I assign 90% beneficial interest to buyer and retain 10% beneficial interest myself (co-beneficiaries).
3. The trust leases the property to buyer for market rent for a lease period of 3 years with an option to purchase my 10% beneficial interest during or at the end of the lease period for a pre-agreed price.
4. Buyer would pay the trust a non-refundable option fee for the right to purchase my 10% beneficial interest.
5. Buyer agrees to be obligated for ALL maintenance of the property (as he is a beneficiary occupying the property).
6. The trust will pay the property taxes and insurance of the property.

7. During or at the end of the lease period, buyer has the right to exercise his option to purchase my 10% beneficial interest.
8. If buyer defaults on his lease payments, the trust will revert his 90% beneficial interest to me (as other beneficiary) and he will be evicted (with adequate warning). The option fee is non-refundable and all monthly payments are regarded as lease payments for usage of the property.
9. At the end of the lease period, if buyer chooses not to exercise his option there is no penalty on him. Another lease can be renegotiated or I can choose to sell to someone else.
10. If buyer exercises his option to purchase, I am obligated to sell to him my 10% beneficial interest for the pre-agreed price.
11. I will credit the option fee towards the purchase price.

According to Shari'ah, can I structure the above transaction?

Thank you so much (I apologize for the length, but I wanted to cover as much detail as possible)
faheem

PS: I realize that I can accomplish the above without the involvement of a trust, but (without getting into details), my state laws puts a heavy burden on option to purchase Real Property. However, as you know, this is a case of an option to purchase beneficial interest which is Personal Property and the statutes are different.

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Faheem

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

There are certain principles that guide any such structure in Shari'ah. Here are those that relates to this case

1. Although many laws in America and in other countries give a trust a different legal personality (and this is recognized in Shari'ah) ownership of the trust remains in the hand of the Trustor except in Waqf where the property goes out of the ownership of founder with no return at all. In other words we still deal with you and him from Shari'ah point of view and the existence of the trust does not eliminates a basic fact that the Trustee acts on behalf of owner on Amanah basis.
2. Shari'ah does not accept any differentiation between beneficiary interest and ownership. If he owns 90% beneficiary interest he may only rent the remaining 10%. I question why transfer 90% beneficiary interest? If you do so as a grant, then he owns 90% of the property and is required to pay 10% of the fair rental value.
3. If the monthly payment he makes is actually more than the fair market value (i.e., inflated to include partial payments for the property itself) then this additional payment MUST be credited towards ownership and can't be considered simply rent.
4. A financial penalty for default or delinquency must not exceed the actual financial damaged cause by them. It cannot be by a condition in the contract. By condition in a contract is Riba not compensation of damage. Of course actual financial damage is essentially the out of pocket expenses and any difference between the contracted price

and the sale price if you were forced to sell to another person. The condition of penalty is not recognized in Shari'ah in matters of payments at certain maturities except within the compensation of actual damage.

5. Payments and division of ownership must always reflect the actual reality not any assumed or presumed virtual image of it. This means that payments must always be credited for what they really are: rent (consensual within the boundaries of fair market rent) or payment toward ownership. It also means that if you own you are responsible for major maintenance, minor maintenance can be charged to lessee, a known insurance payment and any definite known expenses can be charged to lessee as a part of the rent.
6. Suspension of a sale on a future date is not permissible. Rather making an undertaking, subject to make a contract in the future is permissible.

I see in the proposed structure many variations from these principles, many changes need to be done.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Subject: Waqf Business Models

From: Yusuf

Sent: Friday, April 09, 2010

Location: South Africa

Question: Waqf for making regular business

As-salam 'alaykum

Dear Shaykh

My name is Yusuf. I met you when you visited us in South Africa a few years ago. I am now involved with a private company. We are interested in establishing a business for waqf purposes. We intend to have the entire business and all resultant profits made waqf li-Allah.

We need your assistance in that this type of venture does not exist in South Africa; we were wondering if you know of the existence of such types of business Waqfs in any part of the world. Also do you have business models for this kind of venture on hand that can assist us in establishing our Waqf. Also any kind of advice and assistance you can offer will be most welcome.

Thanking you in advance and in anticipation of your cooperation.

Yours

Yusuf

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Yusuf

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

I don't have any business model for a Waqf business. There are several Awqaf in many countries in which the principal of the Waqf is a share in a private partnership, especially these Awqaf that are based on Wassiyah of the one third. Awqaf of shares in common stock companies is also common. What I suggest is: register the business as a waqf with its balance sheet on the day of creating the Waqf, authorize the Nazir to take all action of buy and sell, put some form of a limit to the Nazir authority in order to preserve a minimum principal in case of loss (e.g., do not borrow on behalf of the Waqf), and proceed from there.

If I can be of any further help please do not spare me.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

From: Zeinoul

Sent: Friday, November 16, 2012

Question: Sukuk for partnership with \Awqaf projects

Location: Africa

SLM. What If we have the shares held by a Trustee on behalf of Sukuk holders rather than the underlying asset? So that the shareholders cannot vote on getting more loans or endangering the underlying asset, if it is that we want to maximize the protection of Sukuk holders.

Btw: where are you based now? Pls send me also your contact details mobile/tel no land no.

Wslm.

Zeinoul

My Answer

Dear Br. Zeinoul

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Sukuk, like shares from this angle, must represent real absolute unrestricted full ownership of the assets. Sukuk keep the owners at distance because they are always represented by the Trustee.

In the model you are suggesting, Sukuk are not the best solution. One of the most important Sukuk features is their tradability in the market and you intend to block it. Also usually Sukuk represent a property which has already a lined-up lessee so that return is pre-fixed and you are making the return variable.

Alternatively, why don't you create a shareholding closed company and assign its management to the xyz company. You may decide to restrict the authority of shareholders by creating a trustee who will act on their behalf.

May be a better alternative is a limited liability company with xyz as a general partner and the five entities as limited partners. In LLCs no partner can sell to outsiders without other partner's approvals and authorities of partners can be limited to a large extent as almost all action is made exclusively in the hand of the general partner.

I've been in Qatar for over four years, the surface mail address is P O Box 34110 Doha Qatar. Presently I am on a personal Eid visit to Dubai and will be back in Qatar on Wednesday InShaAllah.

Best Regards,
Wassalam
Prof. Dr. Monzer Kahf

Aa
Shukran

Dear Br Prof Dr Monzer

The one you are suggesting is fine. That's the original way I was thinking of structuring.

1. We will issue "linked Shares" to variable rate debentures. The reason why its variable is because we know that there will be fluctuations, mainly escalations. When the leases expire, the buildings may remain vacant for a while. Our plan is to perhaps sell the buildings halfway through the lease.

2. So each shareholder will get 20 shares linked to R200000 debentures.

3. For tax purposes we will pay a debenture benefit (which is deemed "interest" and this tax deductible. In the hands of tax exempt NGO's like AWQAF SA, no tax will be payable on its debenture benefit income.

4. This is a simple way. The LLC does cover issues of preferential treatment etc. and we could have a separate shareholders agreement.

5. The company will be managed by Awqaf Sa or its appointed agent (by agreement with all parties).

6. We don't want to make the decision making cumbersome so we will have only two directors in the XYZ P L who will carry out the mandate of the shareholders. In this case AWQAF SA is the prime mover/ lead investor. The others will follow unless there is a major disagreement. But these issues will be sorted out beforehand, e.g., Sale of shares; sale of property.

If the above is Shari'ah compliant then we don't have to go the Sukuk route. I was exploring the possibility of an innovative Sukuk although a mini one.

Will keep u posted InShaAllah.

Jazakallhukhairan and enjoy your holiday.

Wslm

Zeinoul

My Answer

Dear Br. Zeinoul

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

I am not comfortable with the idea of linked shares to variable debentures.

Rather let us issue Sukuk and call them variable rate debentures. The will be issued by A trustee who will declare that it is using the funds on behalf of debenture holder to buy the assets. The trustee enters into a management agreement with xyz which will include appropriate clauses on maintenance, taxes and insurance as well as clauses on distribution of net profits to debentures/Sukuk holders. Sukuk holders will not interfere in the work of the trustee, which is actually one thing only (to enter into an agreement with the) and of course not with the work of the XYZ. Notice that in this arrangement Sukuk holders own the assets through the trustee but do not have rights to take action on them. Calling the Sukuk debenture does not really matter if the law of SA can swallow this structure. Awqaf SA can be the incorporator in

declaring the trust and its functions (to issue Sukuk, own assets and enter in agreement with XYZ).

Best Regards,
Wassalam
Prof. Dr. Monzer Kahf

AA

1. The Company is WAREES SA (PTY) LTD (WSA)
2. A wholly owned subsidiary of Awqaf SA
3. 100 ord shares of R1 each issued to Awqaf SA.

WSA purchased the property for around R21million

The funding is coming from about 5 NGOS

1. AWQAF SA (Trust) 49%
2. Islamic Propagation Centre International (Trust) 49%
3. Jamiatul Ulama Mpumalanga (Trust) 1%
4. Voice of Medina (Trust) 1%

The funds will be paid into WSA which will make the payment to the seller.

“Variable rate debentures” certificates will be issued by WSA to all the debenture holders (Sukuk holders?)

The following terms and conditions will apply:

1. The property will be bonded in favour of a TRUSTEE on behalf of all the Sukuk holders.
2. The TRUSTEE will enter into a management agreement on behalf of all the Sukuk holders with WSA.
3. Maintenance, taxes, insurance, administration will be borne by WSA from the rentals received.
4. WSA will pay to Sukuk holders on a quarterly, half yearly or annual basis, the net rental received (gross rental less expenses) as Sukuk holders benefit.
5. WSA will disclose the lease agreements entered into between WSA and the tenants.
6. Sukuk holders will not interfere in the work of the TRUSTEE.
7. The title of the property will be registered in the name of WSA in terms of the law of the Republic of South Africa. They will “Own” the asset through the Bond registered in favour of the Trustee.
8. AWQAF SA will effectively manage WSA or appoint a manager to manage WSA on its behalf.
9. Should any Sukuk holder wish to sell, they may do so by first offering to the existing Sukuk holders at fair market value within a specific time frame to exercise their right.

So in this structure:

- a) Shares are not linked to debentures. This
- b) Sukuk holders are secure with their asset through a TRUSTEE.
- c) Sukuk holders will receive a distribution of the net rentals
- d) Sukuk holders will be fully aware of the underlying asset and the income generated through the transparent lease agreements with tenants.
- e) Allows the Trustee to continue with his work without hindrance from the Sukuk holders.
- f) Sukuk holders will be able to exit (perhaps after a fixed period by agreement) at fair market value.

Optional clauses:

1. Awqaf SA can by agreement guarantee the purchase of any members Sukuk should they wish to sell, thus making the Sukuk tradable easily (within a time frame)

I think this can work in the South African sense and can comply with Shari'ah requirements.

Pls advise further.

Wslm.

Zeinoul

My Answer

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Zeinoul

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

We don't want to go back to the idea of debenture. It is not ownership. We need the trust to own the property, issue the Sukuk and delegate management. Debentures without these pre-requisites are mere debts and do not deserve return as interest is prohibited whether variable or fixed.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Slm.

It seems that the one critical element is missing: OWNERSHIP.

Should ownership vest in a trustee on behalf of the Sukuk holders?

At this stage we can only have WAREES SA as the registered title holder. But can overcome this with a bond in favour of trustees which has the same effect at least for the time being until we do another transaction of this nature.

Basically I was following your email below.

Wslm.

Zeinoul

My Answer

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Zeinoul

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

Yes Brother, ownership is the crucial point. No ownership of real assets and it should be with a trustee on behalf of Sukuk holders.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Slm. Ok. In substance then, best case scenario for now is to pass a bond over the property in favour of the TRUSTEE. Nobody will have authority to transact on the property without the consent of the "OWNERS" who are the Sukuk holders.

By passing a 1st bond in favour of TRUSTEE obo Sukuk holders, you are effectively removing control of the asset from the directors of WAREES. The asset is in control of the TRUSTEE.

Wslm.

Zeinoul

My Answer

That does not qualify the Sukuk holders to earn because this is exactly what any lender on interest does. It is well known and clear enough that a person under debt with lien cannot take action on the property without first satisfying the lender. A 1st bond represents a loan not ownership. The title must be in the hand of the trustee as a rep of Sukuk holders.

MK

AA

Dear Br Prof Monzer

Trust you are well with the Grace and Mercy of Allah. Trust that you had a joyous Eid. May Allah accept all your prayers and sacrifices.

We have a very simple proposition regarding the acquisition of fixed property for a consortium of Muslim NGO's including AWQAF SA. And require your advice.

1. Awqaf SA owns a company XYZ (PTY) LTD: 100 shares of R1 each. (100% Owned by Awqaf SA)
2. Awqaf SA facilitates the acquisition of a property through XYZ (PTY) LTD for R1million
3. AWQAF SA arranges 5 consortium members to fund the R1million @R200K each. (a, b, c, d & e) (Awqaf SA is one of them, sa)
4. The consortium members (CM) are not issued any shares in the company.
5. The CMs are issued with Secured Variable rate debenture certificates (Sukuk?)
6. The Sukuk is subject to the following terms and conditions:
 - a. XYZ will pay a dividend yield at end of each year equivalent to +- 87.5% of rental income. (The other +- 12.5% being expenses) (10 year leases are in place, with options to renew.)
 - b. The dividend yield this may equate to 10% pa, 11% pa, 12%pa, 13%pa, 14%pa, 15% pa, 16% pa etc. ...over the 10 year period. (There are built in escalations in the lease agreements)
 - c. Sukuk holders will have to stay fixed and not sell to any third party ... Awqaf SA shall have the right of first refusal.
 - d. Should Awqaf SA purchase the Sukuk of one or more members, it may at its sole discretion onward sell the Sukuk to another person/s, (may offer to existing members of the consortium). Similarly if Awqaf SA would want to exit, it may provide right of first refusal to the other members on a pro rata basis.
 - e. The asset is registered in the name of XYZ Pty Ltd. XYZ (Pty) Ltd is the registered title holder.
 - f. The Sukuk holders (except for Awqaf SA) do not own any shares in the company. Awqaf SA will manage the property and the company at a fee payable by XYZ (PTY) LTD. (out of the +- 12.5% allowed for expenditure)

g. For the security of Sukuk holders, a 1st bond can be passed over the property to give the Sukuk holders the protection against any third party.

Kindly provide your advice on the above.

What are the critical requirements for a Sukuk?

We may want to extend this as a public offering as well for future projects.

Wslm.

Zeinoul

Slm and Shukran.

Jazaakallahukhairan Dear Br Prof Monzer. Thank you for always being at our service and always keen to offer your advice. It is really very highly appreciated and May Allah swta reward you well.

I think most of the conditions you are referring to can be met.

1. Regarding ownership of the underlying asset: registering a 1st bond on the property in favour of Sukuk holders giving them equity in the assets rather than the company.

This is not equity; this is a right on equity which is a lien or charge. It does not do it. The title has to be in the name of the trustee who must be the representative of the Sukuk holders

2. The rate will be a floating rate.

3. The selling price will be fair market value of the underlying asset.

4. The appointment of a trustee. This should not be a problem.

5. The title of the property is held in the Company

It rather should be in the name of the trustee, a charge is not sufficient

6. The Directors of the Company may be appointed as its Trustees? Or do we want a third party trustee?

This may make the Sukuk fake not real. You cannot have a potential conflict of interest and call it ok

7. The property/ies will be rented out to third parties and not the issuer.

Then the Sukuk are Wakalah basis. The Wakil takes 12.5% or the gross rent. How about maintenance, taxes and insurance which are the liability of lessor (Sukuk holders) how are they going to be paid.

8. Awqaf SA wants first option to purchase at fair market value if any sukuk holder wishes to sell.

It is permissible and every partner has this right

9. If Awqaf Sa wishes to sell, it will give the other members first option to buy.

Every partner has this right, No partner can be deprived of this right.

Do you have a draft of a Sukuk Mudarabah contract?

I don't have forms. But draft them according to SA laws and I can review them

What type of Sukuk will this be? If not Sukuk Mudarabah..

As mentioned above, there seems to be no concept of net profit to be shared between a Mudarib and Rabb al Mal.

Are we getting closer?

Wslm.

Zeinoul

My Answer:

Please see my answers in red

Monzer

The 1st Bond is a way of protecting Sukuk holders. They are the bondholders, not any other bank or financial institution. Their earnings are directly based on the earnings of the underlying properties less management/ taxes/ etc. costs.

Then the best option would be to make them shareholders in the Company linked to the Sukuk. But you said you are not in favour of this linked arrangement.

Slm

Zeinoul

My Answer

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Zeinoul

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

We don't want to go back to the idea of debenture. It is not ownership. We need the trust to own the property, issue the Sukuk and delegate management. Debentures without these pre-requisites are mere debts and do not deserve return as interest is prohibited whether variable or fixed.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf

Subject: Waqf Business issues

From: Fawzi

Sent: Saturday, March 13, 2010

Location: Ghana

Question: can a Waqf go in partnership with other persons?

AS-SALAAMU ALAIKUM WARAH'MATUL-LAAHI WABARAKAATUHUU

Dr. Kahf,

May ALLAH bless you, your family, and loved ones abundantly. I have recently been informed of the release of a certain piece of land to be used to generate wealth that would help the community.

The concept of waqf came to mind as my recent visit to Jeddah educated me on the readiness of the Islamic Development Bank to support waqf based projects in non-Member countries.

Here are my questions:

1. Can a waqf project be done using a partnership structure with other interested parties?
I.e. the waqf would own a percentage of the project?
2. Can a management company manage the waqf for a fee?

The reason for my first question is that I intend to look into maximizing the value of the land in question, and thus the amount needed for the project may be more than would be given to establish the waqf project. In this case we may need other investors to pitch in to complete the project.

Your clarification of these issues would be much appreciated.

Ma'a Salaam

Fawzi

My Answer:

Bismillah al Rahman al Rahim

Alhamdu Lillahi Rab al Alamin, wa al Salatu wa al Salamu ala Sayyidina Muhammad, wa ala Aalihi wa Sahbihi Ajma'in

Dear Br. Fawzi

Assalamu Alaykum wa Rahmatu Allahi wa Barakatuh

A waqf land can only remain in the ownership of Waqf for its purpose forever. It cannot be shared with a new comer partner. This means: you cannot make any other person a partner in owning the Waqf land. Of course you can take investors (who always like to have an exit from the deal in the future) as owners of the construction on the land (either partner in owning the construction with the Waqf or full owner of construction). You can arrange a declining partnership in which part of the Waqf share of the rent or revenue can be used to buy the partner out so that the Waqf will have full ownership of the construction too. (In principle, construction follows land in ownership but they are separable by agreement for a number of years not permanently).

Awqaf property can be managed for fees by a management company.

Wa Allahu A'alam

Wa Alhamdu Lillahi Rab al Alamin

Wassalam

Prof. Dr. Monzer Kahf
