# GreenSaif Sukuk issuance based on shares

**The use of privately held shares as a Wakalah asset in a Wakalah–Murabahah Sukuk structure has been demonstrated for the first time as a viable and commercially successful structure by the recent US$1.5 billion amortizing Sukuk issuance by TMS Issuer Sàrl in February 2023 (the GreenSaif Sukuk). MUNIB HUSSAIN, JOHN DEWAR and BADER THABTI explore.**



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**The GreenSaif Sukuk facility establishes the start of a new chapter in Islamic finance, particularly in the Sukuk sector, with the use of an AAOIFI-compliant share-based Sukuk structure which was nearly 16 times oversubscribed by Islamic investors. This new structure, as demonstrated by the successful GreenSaif Sukuk issuance, highlights the considerable investor appetite for high-quality Sukuk issuances with reliable underlying cash flows. The GreenSaif Sukuk issuance represents a new financing solution for energy and infrastructure developers seeking to raise a combination of Islamic and conventional facilities.**

The GreenSaif Sukuk structure utilized a Wakalah–Murabahah structure with the Wakalah assets being circa 25% of the obligor's shareholding in the underlying project company (AssetCo) acquired by the issuer representing 70% of the Sukuk issuance and a conventional commodity Murabahah with a deferred sale price representing 30% of the Sukuk issuance.

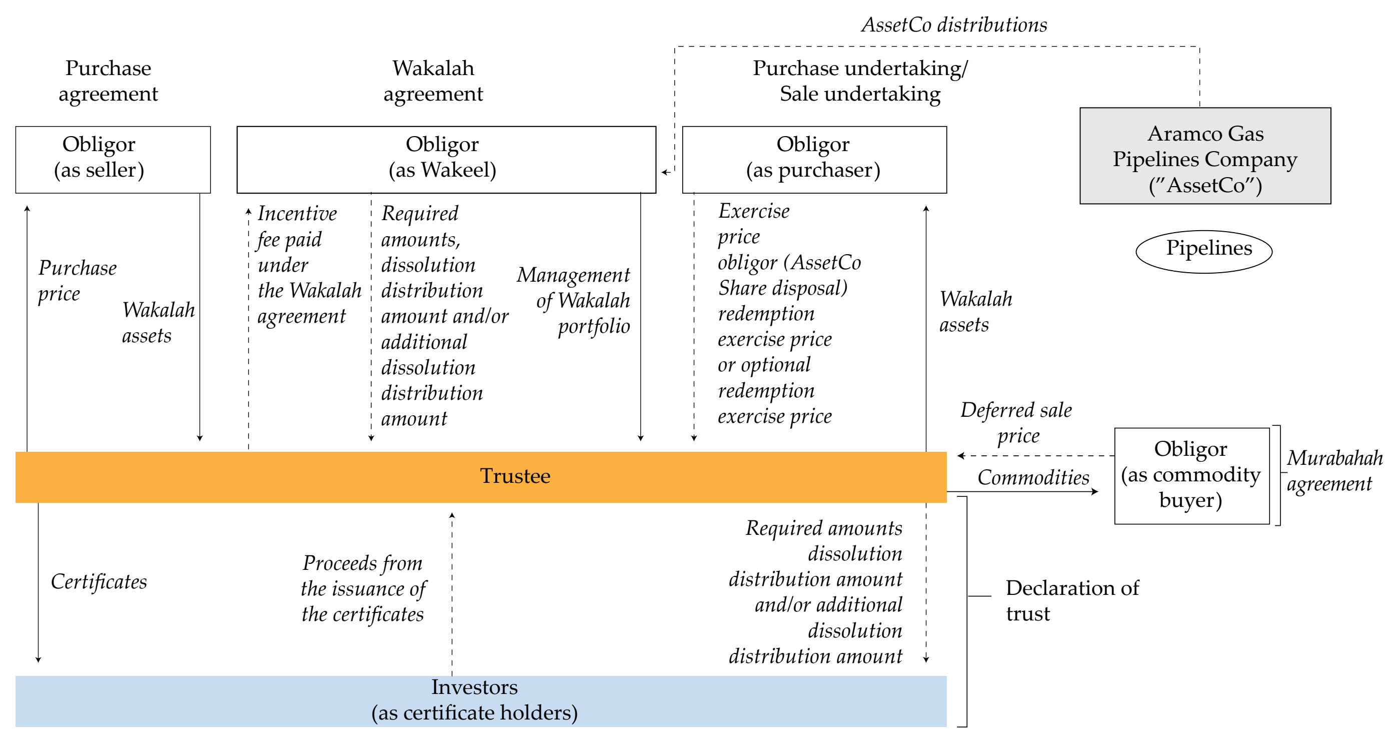
As the Sukuk issuer was purchasing a shareholding in a pre-existing structure, retrospectively introducing a Sukuk structure into:

(i) the underlying AssetCo shareholding arrangements, which required that the title in the shares remain with the obligor at all times and that the shareholder arrangements not be disrupted in any way as a result of the proposed GreenSaif Sukuk issuance, and

(ii) the existing bridge facility procured by the obligor to purchase the initial 49% shareholding in AssetCo (which is subject to an intercreditor agreement governing the arrangements between the existing bridge lenders and any future bank facility, bonds or notes issued by the obligor to refinance the bridge facility and the existing common security being held for the benefit of the secured creditors),

this required considerable structuring of the Sukuk and interfacing with the shareholder(s) and the secured creditors in seeking waivers and amendments —

Figure 1: GreenSaif Sukuk structure




*Source: TMS Issuer Sàrl Offering Circular dated the 10th February 2023* including with respect to the transfer of shares to the Sukuk issuer which are and will continue to be the subject of security in favor of both Islamic and conventional creditors — to enable the issuance of the GreenSaif Sukuk successfully.

When contemplating a Sukuk issuance based on privately held shares, there are certain issues to consider:

***Contracted revenues***

The GreenSaif Sukuk structure worked well because of the nature of AssetCo, an entity with limited operational history/risk which owned key infrastructure assets capable of generating future cash flows attributable to the Wakalah assets arising from underlying long-term contracts. This is a key structuring component as pursuant to AAOIFI standards, the exercise price payable by an obligor under a purchase or sale undertaking (as applicable) must be based on the fair market value of such shares.

This hurdle means that the exercise price cannot be structured as the sum of (i) the face amount of the certificates then outstanding; and (ii) any due and unpaid distributions, but rather needs to be based on a fair market valuation.

In the context of publicly traded/listed shares, this would be a relatively straightforward exercise; however, in the GreenSaif Sukuk issuance context using privately held shares, it is more complicated and requires a detailed analysis of the underlying contracted cash flows to ensure that AssetCo is capable of generating dividends/distributions that would be capable of delivering an exercise price sufficient to meet the Sukuk issuer's obligation to pay the dissolution distribution amount and, if applicable, any make-whole equivalent.

***AAOIFI criteria compliance***

The Wakalah assets (ie the shares) need to comply with the financial screening requirements under Rule 3/4 of Shariah Standard No 21 of AAOIFI in order to be considered Shariah compliant (the AAOIFI Criteria).

In order to comply with AAOIFI Criteria and ensure the certificate holders have adequate recourse in the event that the Wakalah assets are no longer AAOIFI-compliant, the Sukuk issuer will need to have a right under the purchase undertaking to allow it to put the Wakalah assets to the obligor in the event


that, following the lapse of any remedy periods agreed with the Shariah advisor, the shares continue to fail to comply with AAOIFI Criteria. It is likely that the obligor (in structured financings) will not have the necessary free cash on hand to allow it to redeem the certificates in full.

There are a number of ways to effectively manage this risk, including but not limited to the following:

(i) specifying that the exercise price shall be payable on a deferred payment basis in installments equal to the periodic distribution amount and amortizing face amount of the certificates on each periodic distribution date falling after the occurrence of the AAOIFI Criteria event, and
(ii) the certificates shall, as determined in consultation with the Shariah advisor, following the Sukuk issuer exercising the purchase undertaking, only be tradeable in accordance with the Shariah principles of debt trading, and will be delisted from any securities exchange on which the certificates have been admitted to trading.

***Tangibility ratio***

In accordance with Shariah and to ensure compliance with AAOIFI requirements, the Wakalah portfolio is required to meet a tangibility ratio such that at least 33% of the assets in the Wakalah portfolio are of a tangible nature. The consequences of not complying with the tangibility ratio could lead to the delisting of the Sukuk.

While traditionally the occurrence of a tangibility ratio breach would allow the certificate holders to exercise their put option to put the Wakalah assets to the obligor prior to any delisting, however, given the structured nature of the underlying AssetCo contracted cash flows, it is unlikely (as per the occurrence of an AAOIFI Criteria breach) for the obligor to be able to redeem the certificates in full.

As such, through effective structuring of the Wakalah assets, the likelihood of the occurrence of a tangibility event is low given that the Wakalah assets would represent at least 70% of the Wakalah portfolio and that the book value of the AssetCo shares need to fall significantly before a tangibility ratio may be triggered.

***Existing security arrangements and sharing between Islamic and conventional financiers***

In any multisourced financing utilizing a combination of Islamic and conventional financiers/sources, there are certain issues that must be addressed at the onset of the intercreditor arrangements, where possible. Where it is not possible to do so, certain amendment consents will need to be sought to ensure that upon the incurrence of the Sukuk, the Sukuk issuer will accede to the intercreditor arrangements as a secured creditor (for and on behalf of the certificate holders) to ensure that, as between the different classes and categories of secured creditors, the Sukuk certificate holders benefit from the common security shared between all secured creditors and held by the offshore/onshore security agent.

There are a number of hurdles, both from a structural and Shariah perspective, that must be overcome:

(i) **Shares in AssetCo being unencumbered**: Where the underlying shares in AssetCo are encumbered in favor of the existing secured creditors, the Wakalah assets would not be sold free of encumbrances to the Sukuk issuer, which is a typical Shariah requirement.

(ii) **Sharing of enforcement proceeds**: As the certificate holders become secured creditors upon the Sukuk issuer's accession to the intercreditor agreement, it is likely that upon the occurrence of any event of default/dissolution event, the proceeds of any enforcement action taken by the security agents would be co-mingled and applied in repayment of the secured creditors from Shariah compliant sources (ie the sale of the shares in AssetCo) and non-Shariah sources (the positive mark-to-market of the hedging arrangements).