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Role of Sukuk al-Istisna' in the economic development of Islamic capital

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Abstract

This paper examines the legality of Istisna' contract, similarities and dissimilarities between Istisna' contract and Salam as well as Ijarah via a qualitative method which is based on the view of prominent Muslim scholars. As a result, Istisna contract, in general, is a vital contract which can contribute a significant role in the economic development of a country. In conclusion, Sukuk al-Istisna is the crucial element of financing a project which will be carried out in the future as the issuer of Sukuk al-Istisna' can conclude a parallel Istisna' contract on an asset which will be manufactured in the future.

Keywords: Istisna' contract, Sukuk al-Istisna', Islamic capital.

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El papel de Sukuk al-Istisna' en el desarrollo económico de la capital islámica

Resumen

Este artículo examina la legalidad del contrato de Istisna, las similitudes y diferencias entre el contrato de Istisna y Salam, así como Ijarah, a través de un método cualitativo que se basa en la opinión de destacados estudiosos musulmanes. Como resultado, el contrato de Istisna, en general, es un contrato vital que puede contribuir un papel importante en el desarrollo económico de un país. En conclusión, Sukuk al-Istisna es el elemento crucial para financiar un proyecto que se llevará a cabo en el futuro, ya que el emisor de Sukuk al-Istisna puede concluir un contrato paralelo de Istisna sobre un activo que se fabricará en el futuro.

Palabras clave: contrato de Istisna, Sukuk al-Istisna ', capital islámica.

1. INTRODUCTION

Ṣukūk al-Istiṣnā‘plays a crucial role in developing commercial transactions, particularly as one of the instruments of the Islamic capital market. This is because most commercial assets are manufactured assets due to the flexibility of the legal nature of Ṣukūk al-Istiṣnā‘. For example, it gives stability in the investment to provide funds for projects or commercial assets. These characteristics can give Ṣukūk al-Istiṣnā‘the prospect of being an important element of investment in the contemporary era wherein the development of any country is based on its various manufacturing assets that can be

imported and exported. This can be done by concluding contracts on the manufacturing instruments among the countries (Alamine, 2001; Ramli et al., 2018). For instance, a country can issue Ṣukūk al-Istiṣnā'on an aeroplane to be manufactured in another country's favour. Based on this, Ṣukūk al-Istiṣnā'is axiomatic financial instruments, which can be structured in accordance with the principles of Islamic law. Thus, Ṣukūk al-Istiṣnā'can assists in the development of Muslim and non-Muslim countries in terms of Istiṣnā'. This is because by issuing Ṣukūk al-Istiṣnā'to finance a project, a country can advance by concluding a contract of Istiṣnā'on new developed products that will be manufactured in the future. Ṣukūk al-Istiṣnā'can be considered as a milestone in the development of the economy of a country as it can be issued on the asset that will be manufactured in the future. This can provide investment opportunities for investors to invest their capital, and job opportunities for non-investors (Althubayti, 1992).

1.1. Role of ṣukūk al-istiṣnā'in Islamic capital market

Sukuk al-Istisna' plays a crucial role in Islamic capital market in order to develop the economy of a country and provide funds for projects. Thus it defined as certificates that have an equal value which is issued to provide funds for a manufactured asset that is required to be made in the future and owned by the Ṣukūk holders. The issuer of the Ṣukūk is called a manufacturer who is the seller of the

manufactured asset. The Ṣukūk holders are called commissioners to manufacture, who are the buyers of the manufactured asset. The Ṣukūk holders have all the rights and obligations on the manufactured asset when the asset is delivered to them. The issuer can enter into a parallel Istiṣnā‘contract based on the sale of a similar manufactured asset so that he will be commissioned to manufacture (buyer) the parallel manufactured asset (Nisar, 2018). For example, the issuer can sell the manufactured asset to Ṣukūk holders, after that, he will enter into another contract with a third party to manufacture an asset which is similar to the same asset that was sold to Ṣukūk holders. Therefore, in the case of parallel Istiṣnā‘ contracts, the issuer can be considered as a manufacturer and commissioner to manufacture at the same time.

This kind of parallel Istiṣnā‘can attracts saving funds holders to invest their funds in a project that a country can benefit from. This is because by issuing parallel Ṣukūk al-Istiṣnā‘on an asset that will be manufactured in the future wherein the proceeds derived from the subscription are used to finance the project (Hassan, 2018). This can encourage the issuer to issue Ṣukūk on a project to attract saving funds to be invested in such kind of projects. This method of Istiṣnā‘can play a crucial role in financing for the manufacturer and anchor a good price in the future for the commissioner to manufacture. This is because, in an Istiṣnā‘contract, it is permissible for the commissioner to manufacture to pay a part of the price of the manufactured asset at the session of the contract and pay another part at the delivery of the manufactured asset. Once the commissioner to manufacture paid this part at the time the contract is concluded, it can be considered as a

form of financing for the manufacturer and anchor a good price movement in the future for the commissioner to manufacture. This is because, in case the contracting parties choose to pay the price partially or fully at the session of the contract, the price of the manufactured asset is fixed and there is no room for a discount. At the same time, the manufactured asset is exposed to the future good price movements at the pace of the market. The reason is that the commissioner to manufacture can sell the manufactured asset based on the pace of the market price. As such, the Istiṣnā'contract can be considered as a mode of financing a project (Eldin, 2004).

1.2. Legality of istisna contract in Islamic law

Muslim jurists have two views on legality of Istiṣnā'contract which is disputed between the majority of Muslim jurists and Ḥanafī jurists. According to the majority of Muslim jurists, an Istiṣnā'contract is not an independent contract, but a contract that emanates from a sales or Salam contract. Based on this, it is impermissible in Islamic law to conclude a contract on Istiṣnā'. The reason is that an Istiṣnā'contract is sale of debt by debt (bay al-dayn bi al-dayn), which it is impermissible in Islamic law (Algazali, 1996), as Allāh says in the Qur'ān, O you who believe! When you deal with each other in transactions involving future obligations in a fixed period of time reduce them to writing. Let a scribe write down faithfully as among the parties. Istiṣnā' is sale of debt by debt which is not allowed in Islamic law. In the Sunnah, it was narrated by Ibn 'Umar

(R.A) that the Prophet (S.A.W) has forbidden the sale of debt by debt (nahā ʻan bay al-kālī bi al-kālī). The majority of Muslim jurists argued that in the above verse and Ḥadīth, it was explicitly mentioned that the sale of debt by debt is impermissible in Islamic law. The Istiṣnāʻcontract includes the sale of debt by debt; therefore, it is impermissible in Islamic law to conclude a contract on it. In another Ḥadīth, which is narrated by Ḥakīm bin Ḥizām (R.A), the Prophet (S.A.W) is reported to have said to him, do not sell what is not in your possession (lā tabiʻ mā laysaʻindaka) (Altabrani, 1983). An Istiṣnāʻ contract involves a contract in which the subject matter is not in possession of the contracting parties, and it is impermissible in Islamic law to conclude a contract on a subject matter which is not in the possession of the contracting parties. Therefore, it is impermissible in Islamic law to conclude a contract on Istiṣnāʻ(Alhindi, 2007). This is because; it is a contract that is concluded on a subject matter, which is not in the seller's possession as the time the contract is concluded.

However, Ḥanafī jurists are of the view that an Istiṣnāʻcontract is an independent contract, which has its own rules, terms and conditions. Based on this, an Istiṣnāʻcontract is permissible in Islamic law (Alsarakhsi, 2000). As in the Qur'ān, Allāh says, O you believe fulfil your contractual obligations and rights to each other (Al-Ma'idaah:1). Fulfilment of contractual obligations and rights is included in any valid obligation and right of a contract such as a debt contract, a sales contract and an Istiṣnāʻcontract. The Ḥanafī jurists argued that the expression of the above verse is a common expression, which can include any contract that is not prohibited, and there is no

provision in Islamic law that denotes the Istiṣnā‘contract as a prohibited contract. Therefore, Istiṣnā‘is included in this common expression since there is no clear evidence that forbids it (Alkasani, 2005). More to the point, in the Sunnah, it was narrated by ‘Abdullah bin ‘Umar (R.A) that the Prophet (S.A.W) had ordered a ring of silver (al-Wariq) to be made for him, when he (S.A.W) wore it on his finger, he (S.A.W) put the lobe of the ring (faṣahu) under the palm of his hand (ja‘ala faṣahu fī bātini kafaihi idhā labisahu). The companions of the Prophet (S.A.W) also had manufactured rings of silver and wore them on their fingers. When the Prophet (S.A.W) saw what they had done, he (S.A.W) got on the pulpit (al-Minbar) and gratified Allāh , and praised Him, and said, I have ordered it to be made for me, but I have not worn it. Then, he (S.A.W) threw it (ring) away and the companions also threw away their rings (Al-Asfara'ini, nd). In another Ḥadīth, the Prophet (S.A.W) had sent to a woman to order her servant, who is a carpenter, to make a chair of wood (pulpit) on which he (S.A.W) would sit-down (Aldarimi, 1986). They say that all these Ahādīth have obviously proven and shown that the Istiṣnā‘contract is permissible in Islamic law as it was ordered by the Prophet (S.A.W) himself and his companions. It is obvious that the Prophet (S.A.W) and his companions could not order something which is impermissible in Islamic law to be made in their favour (Alkasani, 1982).

Ḥanafī jurists further argued their case through juristic preference (al-Istiḥsān) which is based on the needs of people. This juristic preference is supported by the practice of Muslims for Istiṣnā‘from the era of the Prophet (S.A.W) until the contemporary era.

This can be considered as evidence that it is permissible to deal with Istiṣnā‘in Islamic law (Albadran, 1980). They support this juristic preference by the Ḥadīth which was narrated by ‘Abd Allah bin Mas‘ūd that the Prophet (S.A.W) is reported to have said, Whatever Muslims have seen that is good, it is also good in the sight of Allāh, and whatever they have seen that is bad, it is also bad in the sight of Allāh (Alasbahi, 1991). By considering divergent opinions between the majority of Muslim jurists and Ḥanafī jurists on the Istiṣnā‘contract, the preferable view can be that of the Ḥanafī jurists. This is because the origin of commercial transactions in Islamic law is permissibility, and there is no any provision from the Qur’ān or the Sunnah that says explicitly or implicitly an Istiṣnā‘contract is impermissible in Islamic law. Besides, the objective of Islamic law behind commercial transactions is to facilitate dealings between traders and non-traders as well as between manufacturers and non-manufacturers. The main purpose of Istiṣnā‘is to remove hardship from the Muslim traders in their commercial transactions and to make Muslim market instruments to be more flexible in terms of dealing with traders and non-traders. Allāh says, And He has not imposed difficulty on you in the religion.

In another verse Allāh says, He likes to bring the facility to you and does not like to impose difficulty on you. In addition to this, in Fiqh Academic Resolution No. 67/3/7, it was determined that an Istiṣnā‘contract is permissible and binding on the contracting parties if its terms and conditions are met (Fiqh, 1992). As a result of the abovementioned analysis, an Istiṣnā‘contract is permissible in Islamic

law as long as the contract has fulfilled the terms and conditions of a valid contract, and the manufactured asset is valuable property. Currently, the development of the world and growth of the economies in Muslim countries necessitates this kind of contract to facilitate transactions between Muslim traders and non-Muslim traders as well as manufacturers and non-manufacturers in their commercial transactions.

1.3. Comparison of istisna' with salam

Some Muslim jurists argued that, Istiṣnāʿis a contract that came from Salam contract,. This means that the contract of Istiṣnāʿis not an independent contract; it is a part of this type of contract. Therefore, it is noteworthy to discuss this element with Istiṣnāʿcontract to clarify its concept to the reader, so that he/she can distinguish an Istiṣnāʿcontract from the Salam contract. This is because in our contemporary era, this type of contract is prevailing in Islamic commercial transactions, and it is difficult to differentiate Istiṣnāʿfrom Salam because of the contracting parties sometimes hybrid Istiṣnāʿcontract with Salam contract. For the reason that there is a similarity among them. In this regards, one can say that, Istiṣnāʿand Salam are similar in the following points: First, the subject matter of the contract in both Istiṣnāʿand Salam must be known to the contracting parties, such as its specie, type, size and attribute. Second, in both Istiṣnāʿand Salam, the sold item does not exist while the contracting parties are concluding the contract. Third, the ribawi items are impermissible to be the price

of Istisna' and Salam contracts. For instance, the price of the contract cannot be exchanged barley for barley or wheat for wheat unequally. Fourth, the contracting parties must know the price of the sold item in both Istiṣnā'and Salam. For example, in which currency it should be paid, such as Ringgit Malaysia or U.S.A Dollars, and how much is it? (Alzuhaili, 1997; Alnashawi, 2007).

However, the contract of Istiṣnā'and Salam are dissimilar in the following points:

First, in an Istiṣnā' contract, it is stipulated that the subject matter must be a manufactured item, which will be made by the seller (manufacturer) in the future, while in a Salam contract, there is no such stipulation in the contract that the subject matter must be manufactured by the seller. Second, the Istiṣnā'contract can be concluded on homogenous and non-homogenous items, while the Salam contract can be concluded only on homogeneous items. Third, an Istiṣnā'contract is not a binding contract on the contracting parties; it is permissible for any of them to terminate the contract before starting to manufacture the asset and deliver it to the commissioner to manufacture. On the other hand, a Salam contract is a binding contract on the contracting parties; it cannot be terminated except by mutual consent of both parties. In addition to this, in the contract of Istiṣnā', the right of option of the manufacturer is waived if he has delivered the manufactured item to its commissioner to manufacture (al-Mustisni'u) with the terms and conditions that are stipulated in the contract, while the commissioner to manufacture has right of the

option to accept or reject the manufactured item. This is because Istisna'contract is not binding on the contracting parties. Fourth, Istiṣnā'contract is permissible only in what is customary or is common to deal with it among people in the society. However, Salam is permissible in anything, whether it is customary to deal with in the society or not. For the reason that, Salam contract must be concluded on the item which its similarity can be easily found a market. Fifth, the sold item in the contract of Istiṣnā'is a corporeal item that is in obligation of the manufacturer, but the sold item in the Salam contract is a debt which is an obligation of the seller. Sixth, according to the majority of Muslim jurists, it is an obliged in an Istiṣnā'contract to determine the date of delivery of the manufactured item, while according to Abu Hanifah, if there is a stipulation of a specific period of date to deliver the manufactured item in an Istiṣnā'contract, the Istiṣnā'contract would be converted to a Salam contract. Seventh, in an Istiṣnā' contract there is no stipulation to pay the price in advance, it is at the discretion of the contracting parties to decide either to pay a deposit or ¼ or 1/3 from the principal amount, and whether the rest will be paid at the delivery of the manufactured item or not. In contrast, it is obliged in a Salam contract to pay all principal amount at the session of the contract before the delivery of the subject matter of the contract (Alkasani, 1996).

From the foregoing discussion, it can be observed that an Istiṣnā'contract is not derived from the Salam contract, and it is not a form of Salam. It is an independent contractor that has its own rules and regulations, terms and conditions that differentiate it from a Salam

contract. If the contract is concluded based on the terms and conditions of an Istiṣnā‘, it cannot be converted to a Salam contract in any circumstances. This is because of the Istiṣnā‘is an independent contract and different from the Salam contract, as described in the abovementioned discussion.

1.4. Comparison of istisna’ with ijarah’

Some Ḥanafī jurists say that Istiṣnā‘contract is like an Ijarah contract because, there is a direct connection between Istiṣnā‘and the work of a dyer (Sabagh). This is because the duty of a dyer is to do the dye on his own property. This is similar to Istiṣnā‘, and the work of a dyer is an Ijarah, therefore, Istiṣnā‘also is Ijarah. Other jurists refute this view, and say that there is a difference between Ijarah on the dye and Istisna’. The work of the dyer is on the asset that will be dyed, while Istiṣnā‘is on both the work and the manufactured asset. As a result of this, one cannot correspond the Istiṣnā‘to the Ijarah of the dyer to make dye on a cloth. The reason for this is that Ijarah is on the asset that is owned by the lessor. The lessee is only entitled to benefit from the leased asset. While Istiṣnā‘is on the asset that is owned by the manufacturer, and the commissioner to manufacture is only entitled to pay the price when the manufactured asset is delivered to him. After that, the manufactured asset will belong to him (commissioner to manufacture). In addition, the option of sight is permissible in the Istiṣnā‘contract, while this is impermissible in the Ijarah. From the foregoing, it could be observed that Istiṣnā‘is different from an Ijarah

contract. An Istiṣnā‘ contract is an independent contractor which has its own rules, terms and conditions which must be included in the contract while concluding it in order to be in conformity with the principles of Islamic law. Therefore, Istiṣnā‘is not Ijarah, there is much difference between an Istiṣnā‘contract and an Ijarah.

1.5. Essential features of ṣukūk al-istiṣnā‘

In order to be in accordance with the principles of Islamic law, the contracting parties in Ṣukūk al-Istiṣnā‘transactions should observe the following essential features of the Ṣukūk. First, Ṣukūk al-Istiṣnā‘assets will be owned by the Ṣukūk holders. The issuer of Ṣukūk should record the ownership of the assets in his book in the name of Ṣukūk holders while the asset is being manufactured. This is because the manufactured asset on which Ṣukūk is issued belongs to them. All rights and responsibilities should be borne by the Ṣukūk holders when the manufactured assets are delivered to them according to the terms and conditions that are stipulated in the contract. Second, the Ṣukūk holders have the right to reject the manufactured asset in case of its non-compliance with the terms and conditions that are described and mentioned in the prospectus of issuance of the Ṣukūk. This is because Ṣukūk al-Istiṣnā‘ contract is not binding on the Ṣukūk holders unless the manufactured asset is made in accordance with the attributes, terms and conditions that are mentioned in the contract. Third, for Ṣukūk al-Istiṣnā‘to be traded in the secondary market, it must not represent a debt instrument. If Ṣukūk represents debt the

transaction will amount to the transaction of debt by debt, and this is impermissible in Islamic law. This can be done in the case where Ṣukūk holders sell their Ṣukūk in the secondary market during the manufacturing period without paying the price of the asset to the issuer (manufacturer). Fourth, it is impermissible for the issuer of Ṣukūk al-Istiṣnā‘to promise to offer a loan to the Ṣukūk holders in case of any shortfall from the expected profit. In such a circumstance the investment seems to be guaranteed by the issuer. This is not in accordance with the principles of Islamic law concerning investment. In Islamic law, the investment is not allowed to be guaranteed by any of the contracting parties. However, it is permissible for the issuer to mention in the prospectus of issuance of the Ṣukūk al-Istiṣnā‘that there is a voluntary reserve fund to recover any shortfall from the actual earnings. This is because there is no legal impediment on the voluntary action to be performed when it comes from an eligible person.

Fifth, the issuer of Ṣukūk al-Istiṣnā‘ cannot make a promise to buy the Ṣukūk at face value when the Ṣukūk transaction is terminated, because when the Ṣukūk is bought at the face value by the issuer, this may be tantamount to a loan transaction which is not allowed in Islamic law to take a benefit from . Nevertheless, the issuer can promise to buy the Ṣukūk at the market value. Sixth, it is obliged on the issuer to mention in the prospectus of issuance the description of the manufactured asset such as the specifications of the manufactured asset, its type, size and attributes which the manufactured asset is required to be made in accordance with in order to avoid an issue that

may lead to conflict between the issuer and Ṣukūk holders. The issuer and the Ṣukūk holders must determine the fixed period of delivery of the manufactured asset in the prospectus. In case the issuer fails to fulfil his contractual obligation in terms of delivery of the manufactured asset without any reasonable or rational cause, it is permissible for the Ṣukūk holders to impose compensation on him in relation to the damage that may happen to them due to the delay of delivery of the manufactured asset. This compensation is on the delay to deliver the manufactured asset on the due date, not on the delayed payment of the cost of the manufactured asset. This is because of Ṣukūk al-Istiṣnā'is a contract on the manufactured asset and work that should be done by the manufacturer in a specific period of time. The Ṣukūk holders can pay on the spot the principal amount of the manufactured asset fully or partially for the reason that it is allowed in Istiṣnā'contract to pay the price of the manufactured asset in advance at the session of the contractor at the delivery of the manufactured asset (Abughuddah, 2018).

From the foregoing, Ṣukūk al-Istiṣnā'transaction can be considered a distinguished transaction that is different from the other Ṣukūk transactions. The reason is that in Ṣukūk al-Istisna' transaction it is permissible to impose compensation on the issuer in case he delays the delivery of the manufactured asset at the specific period that was determined by the contracting parties at the session of the contract. Payment of the price of a manufactured asset is at the discretion of the contracting parties. This is another evidence that shows Ṣukūk al-Istiṣnā'transaction is more flexible and distinguished.

1.6. Process of ṣukūk al-istiṣnā‘

Ṣukūk al-Istiṣnā‘has several processes like structure, circulation in the secondary market, retrieval from the Ṣukūk holders and termination of the Ṣukūk transaction.

1.7. Structure of Ṣukūk al-Istiṣnā‘

The structure of Ṣukūk al-Istiṣnā‘is realized by going through the following stages. First, the originator creates SPV on the project, then, the SPV issues Ṣukūk to provide capital for the project. Second, the amount that is collected from the Ṣukūk holders is used to pay the manufacturer under the contract of Istiṣnā‘in which the manufactured asset will be delivered in a specific period of time in the future. Third, the titled ownership of the manufactured asset will transfer to the SPV in order to have the authority to manage the project. Fourth, upon completion of the manufactured asset, the asset will sell to the end buyer (second buyer). The end buyer pays the price of the sold asset on deferred instalments to the SPV on a monthly basis. Fifth, the proceeds that are collected from the end buyer are used to pay the Ṣukūk holders their principal amount of the Ṣukūk that they provided to bankroll the project. From the above-mentioned structure, it can be observed that the Ṣukūk al-Istiṣnā‘structure needs to be enhanced in order to be in accordance with the principles of Islamic law. When the manufactured asset is sold or leased to anyone, the proceeds that are derived from the sale or lease of the manufactured asset exclusively

belong to the Ṣukūk holders. In a situation wherein the proceeds are used to pay the Ṣukūk holders their principal amount, then the transaction is tantamount to a loan transaction in which it is impermissible to take any profit in relation to the loan whether physical or financial.

1.8. Circulation of Ṣukūk al-Istiṣnā'in Islamic law

Circulation of Ṣukūk al-Istiṣnā'refers to its trade in the secondary market. In other words, the circulation of Ṣukūk is the transfer of ownership from one party to another (seller to buyer). However, the nature of Ṣukūk al-Istiṣnā'is different from the nature of Ṣukūk al-Muḍārabah and al-Ijārah in which the asset that Ṣukūk is issued on is a corporeal asset that existed while the subscription of Ṣukūk is taking place. Ṣukūk al-Istiṣnā'is issued on a particular asset that is described in the obligation of the manufacturer to be manufactured in the future. Based on this, it is advised to observe some terms and conditions while Ṣukūk al-Istiṣnā'is circulating. First, Ṣukūk al-Istiṣnā'can be circulated if the proceeds of subscription are transferred into corporeal assets that are owned by the Ṣukūk holders. This is because when the proceeds are converted into corporeal asset, the Ṣukūk represents the corporeal assets that exist, and then it is permissible in Islamic law to sell and buy the Ṣukūk in the secondary market. In this case, Ṣukūk al-Istiṣnā'can be circulated directly from the Ṣukūk holders.

This is because the Ṣukūk represents the corporeal assets of the manufactured asset that exist in their possession, which costs more than the initial price of the manufactured assets that are described in the manufacturer's obligation while concluding the contract. This view is also supported by Wan Abdul Rahim Kamil consultant of Islamic capital market at the Securities Commission of Malaysia in an interview conducted with him on 30th November, 2012 in which he said Ṣukūk can be circulated (sold) directly from the Ṣukūk holders. Second, it is not allowed to circulate Ṣukūk al-Istiṣnā'if the proceeds of the subscription are still in the form of currency, and not transferred to corporeal assets. In this case, if Ṣukūk is circulated it is obliged to observe in the circulation of the Ṣukūk, circulation of currency, wherein the transaction should be done immediately or on the spot hand-to-hand. Third, it is not allowed to circulate Ṣukūk al-Istiṣnā'during the manufacturing period because the corporeal asset that is manufactured has not been transferred or delivered to the Ṣukūk holders. If the Ṣukūk circulated during that period, the contract on the circulation of the Ṣukūk is void because it is a contract on something that is not in the possession of the Ṣukūk holders. In other words, it is a contract that is concluded on a non-existent asset, which is impermissible in Islamic law (Hasan, 2018). The Prophet (S.A.W) is reported to have said to one of his companions, who is a trader, do not sell what is not in your possession. Four, in case of a parallel Istiṣnā', the contracting parties should observe in the circulation of the Ṣukūk terms and conditions of debt transaction in order to avoid a transaction that is tantamount to a ribā transaction such as sale of debt by debt. This is because parallel Ṣukūk al-Istiṣnā'can only be circulated during

the manufacturing period, if the manufactured asset is completed and the price is paid to the manufacturer, and commissioner to manufacture has received the manufactured asset, then circulation of parallel Ṣukūk al-Istiṣnā'should be under debt transaction, because the contract is terminated and parallel Istiṣnā'can no longer take place.

From the aforementioned, circulation of Ṣukūk al-Istiṣnā'is permissible based on some terms and conditions that must be observed at the conclusion of the contract so that the circulation will be conducted in accordance with the principles of Islamic law. This is due to the fact that Ṣukūk al-Istiṣnā'is not allowed to be circulated unless the manufactured assets are delivered to Ṣukūk holders and are ready for sale with the exception of parallel Ṣukūk al-Istiṣnā' which can be circulated only during the manufacturing period.

1.9. Redemption of Ṣukūk al-Istiṣnā'in Islamic Law

Redemption of Ṣukūk al-Istiṣnā'is to repurchase the Ṣukūk from the Ṣukūk holders and return it into the same investment funds. This redemption of Ṣukūk al-Istiṣnā'is a form of selling the Ṣukūk to the issuer. This may happen when Ṣukūk holder wants to sell his portion in the project to the issuer of the Ṣukūk. In this regard, the terms and conditions of the sale contract should be observed in the retrieval of the Ṣukūk al-Istiṣnā'. The question that may arise is whether the retrieval of Ṣukūk al-Istiṣnā'can be done at the face value or at market value. To answer this question, Taqī says, it is impermissible to

retrieve Ṣukūk al-Istiṣnā‘ at the face value, because the transaction would then be considered a loan transaction in which it is impermissible to take any additional amount on or any benefit from it. However, it is permissible for the issuer of Ṣukūk to retrieve the Ṣukūk al-Istiṣnā‘at the market value. It is also permissible for the issuer to promise to retrieve the Ṣukūk at the market value. This is because this promise is a promise to buy the manufactured asset at the market value, which is permissible in Islamic law. Nevertheless, it is impermissible for the issuer to promise to retrieve the Ṣukūk at the face value. This would amount to buying the Ṣukūk at the principal amount that was paid by the Ṣukūk holders at the initial stage of the project. If the Ṣukūk is redeemed at the face value, then the transaction seems to be a ribā transaction that is forbidden in Islamic law.

Furthermore, (Alḍarīr, 1988) says, if the retrieval of the Ṣukūk is done at the face value, the contract is void. This would convert the Ṣukūk contract to a loan contract, which is not in accordance with the principles of Islamic law to take any financial or physical benefit from it. It is obvious from the above mentioned that, it is impermissible for the issuer of Ṣukūk al-Istiṣnā‘to redeem the Ṣukūk at the face value. On the other hand, it is permissible for him to redeem the Ṣukūk at the market value so that the retrieval of Ṣukūk al-Istiṣnā‘ would be done in line with the principles, terms and conditions of the Istiṣnā‘ contract that is in conformity with the principles of Islamic law.

1.10. Termination of Ṣukūk al-Istiṣnā‘

It was mentioned in the Sharḥ of Majallah al-ḥkām al-‘Adliyyah article (392) that the Istiṣnā‘contract is a binding contract on the contracting parties unless the manufactured asset is not made in accordance with the requirements (terms and conditions) and attributes that are stipulated in the contract, then the commissioner to manufacture has the right of option (option of sight) to take or reject it. This is because an Istiṣnā‘contract is considered a sale contract in which the option of sight is permissible, and a sale contract cannot be terminated by one party except by mutual consent of both parties (Alhasani, 2003). In addition to this, Ḥanafī jurists are of the view that if the manufactured asset is made according to the description and stipulation of the contracting parties at the session of the contract, and the manufacturer delivered it to the commissioner to manufacture without any defect, and the price that is agreed upon was paid to the manufacturer, then the contract of Istiṣnā‘is terminated (Alkasani, 2005).

Furthermore, an Istiṣnā‘contract can be terminated if one of the contracting parties resigned from the contract before the manufacturer starts to manufacture the asset and before the delivery of the asset to the commissioner to manufacture. This is because the contract is an optional contract before starting to manufacture the asset and before the delivery of the asset to the commissioner to manufacture in accordance with the terms and conditions that are stipulated in the contract. As a result of this fact, the Istiṣnā‘contract is a binding

contract once the manufacturer starts to manufacture the asset and deliver to the commissioner to manufacture (Alkasani, 2005). It can be deduced from the above mentioned that the Ṣukūk al-Istiṣnā‘ transaction can be terminated if the manufacturer, who is the issuer of the Ṣukūk, delivered the manufactured asset to the Ṣukūk holder based on the attributes that stipulated in the contract, and the price that agreed upon is paid to the manufacturer. It can also be unilaterally terminated if there is a defect in the manufactured asset, because the commissioner to manufacture has the right of the option of sight in the contract either to accept or reject the manufactured asset. This is because the Istiṣnā‘contract is considered a sale contract in which the option of sight is permissible. Therefore, the terms and conditions of the sale contract should be applied to Ṣukūk al-Istiṣnā‘transaction while the contract is terminating in order to prevent any damage from the contracting parties.

2. FINDINGS

It was argued in this paper that Istisna’ is a crucial element in the development of the economy of a country. Muslim Jurists have two views on the legality of Istisna’ contract in which the preferable view is that of Hanafis. It was found in the paper that Istisna’ contract is an independent contractor which is different from Salam and Ijarah contracts. Hence, Sukuk al-Istisna is a significant instrument which plays a crucial role to provide a fund for a project which will be manufactured in the future. The issuer of Sukuk can issue a parallel

Sukuk al-Istisna' to finance another project. Once the terms and conditions of the contract are met then the contract is binding on the contracting parties. Furthermore, issuance of Sukuk al-Istina' is not like issuance of Sukuk al-Ijarah and Mudarabah which are issued on a corporeal asset which is in existence while concluding the contract. Sukuk al-Istisna' is issued on an asset which will be manufactured in the future. In Sukuk al-Istisna' structure, it is not permissible for the issuer of Sukuk' to buy the Sukuk at face value, however, it is permissible for him to buy the Sukuk at market value. Therefore, Sukuk al-Istisna' has a specific structure, terms and conditions which should be observed while circulating and retrieving the Sukkuk in the secondary market in order to be in conformity with principles of Islamic law.

3. CONCLUSION

This paper has elaborated the importance of Ṣukūk al- Istiṣnā'in terms of flexibility to finance a project. It has also been highlighted that in a Ṣukūk al Istiṣnā' contract it is allowed for the contracting parties to stipulate compensation in relation to damage that may occur to one of them due to failure to perform their contractual rights and obligations. This compensation is not absolute, it is allowed only in the case of failure to meet pre-agreed conditions. In addition, for Ṣukūk al-Istiṣnā' transaction in order to be in conformity with the principles of Islamic law, the terms and conditions that are described in a classical Istiṣnā' contract should be observed in the Ṣukūk al-Istiṣnā'

contract. As a result of this fact, Ṣukūk al-Istisna' transaction should be done under some terms and conditions which the contracting parties must observe while concluding the contract so that the transaction would be done in accordance with the principles of Islamic law, and Ṣukūk al-Istiṣnā'will be traded in the stock market without any conflict with the principles of Islamic law.

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