

## EXISTING LEGAL & REGULATORY FRAMEWORK FOR SOVEREIGN SUKUK IN NIGERIA

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### ABSTRACT

*This paper critically examines the existing legal and regulatory framework governing sovereign Sukuk issuance in Nigeria, assessing its adequacy in supporting a robust and sustainable Islamic finance sector. The analysis identifies that Nigeria's framework is not underpinned by a standalone, comprehensive Islamic finance law. Instead, it is a hybrid structure built upon the amendments to conventional statutes, notably the Investments and Securities Act (ISA) 2007, alongside guidelines issued by the Securities and Exchange Commission (SEC), particularly the Rules on Sukuk Issuance (2013). The research employs a doctrinal legal methodology, analysing primary legislation, regulatory guidelines, and offering circulars for Nigeria's landmark sovereign Sukuk issuances. The study finds that while this adaptive framework has demonstrably facilitated successful issuances, it presents inherent challenges. Key issues include potential legal ambiguities in asset ownership and transfer central to Sukuk structures, the reliance on regulatory discretion rather than entrenched statutory provisions, and the absence of a dedicated dispute resolution mechanism for Islamic finance. The paper concludes that the current model, though pragmatically effective for kick-starting the market, may pose long-term constraints on depth, innovation, and investor confidence. It recommends the development of a more coherent and consolidated legal architecture, potentially through a dedicated Islamic Finance Act, to provide greater clarity, enhance the enforceability of investor rights, and ensure the framework's alignment with both global Shari'ah principles and Nigeria's unique socio-economic context. This evolution is crucial for positioning Nigeria as a regional hub for Islamic finance and leveraging Sukuk as a stable instrument for infrastructure development.*

**Keywords:** Shari'ah; Nigeria; Sovereign Sukuk; Regulatory Framework.

## Introduction

As part of Nigeria's cautious effort to ensure that there is indeed development as well as improvement in the evolving Islamic Capital Market (ICM), relevant legislation and regulations are being put in place. This is to ameliorate some problems with running an Islamic capital market in a legal and regulatory environment alien to *Shari'ah* rules governing Islamic Finance. In some other climes, for example, the UK, Hong Kong, and Singapore, new laws and regulations were enacted before *Sukuk* was issued. At the same time, in other countries around the world, the existing legal and regulatory framework was amended to give room for the issuance of *Sukuk* in the Islamic Capital markets. This later position was taken by Nigeria, which has been operating a legal regime that is more tilted to the English common law for decades despite the availability of other laws which are supposed to be operating side by side with the English common law. However, this is not the case, as will be shown in subsequent sections of this chapter.

In recent years, as many advanced nations are becoming involved in the issuance of *Sukuk*, it has become an alternative financing instrument that has also been considered the best in the economic sector of the government.<sup>1</sup> This

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<sup>1</sup> Accounting and Auditing Organization for Islamic Financial Institutions. (2017). *Shari'ah standards*. <https://doi.org/10.2139/ssrn.3089925>

Oladunjoye, M.O. 'Sukuk as a Tool for Infrastructural Development in Nigeria' (2014) 2(1) Journal of Islamic Banking and Finance p. 335.

was extensively discussed in the previous chapter. Thus, *Sukuk* has no doubt grown into the foremost and leading Islamic mechanism in the foreign capital markets, the attribute of which has resulted in its sustenance. Thus, *Sukuk*'s sustenance in Nigeria will depend mainly on the capacity and appropriateness of the legal and regulatory framework.<sup>2</sup> Thomson Reuters Zawya reported that *Sukuk*'s resources, both in Muslim and non-Muslim countries, have become increasingly significant and vital as Islamic financial instruments. The product helps to effectively raise finance regarding resource allocation and mobilisation in the international capital market.<sup>3</sup> The Nigerian capital market is also not an exception, with the right laws.

However, there will be a downside to this laudable achievement if the framework with which the product is to work is not in tandem with the principles that guide its operation. In other words, *Sukuk*, being a unique product comes with its unique *Shari'ah* features, and it is thus expected to be guided by the *Shari'ah*. However, Nigeria, having operated its financial market in line with the conventional practice for many decades, does not have the *Shari'ah* framework for the practice of Islamic Finance in general and specifically for the Islamic capital market in place as of the time of this research. Hence, *Sukuk* may need to explore the existing framework for its operation,

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<sup>2</sup> Kusuma A.K & Silva, C.A., *Sukuk Markets, A Proposed Approach for Development Policy* Research Working Paper World Bank Group Finance and Market Global Practice Group December 2014

<sup>3</sup> Ahmed, H., & Mohieldin, M. (2015). *On the sustainable development goals and the role of Islamic finance*. World Bank Policy Research Working Paper. <https://doi.org/10.1596/1813-9450-7266>

which might be inimical to its full development. Therefore, there is a critical need to examine the existing Legal and Regulatory Framework for the issuance of sovereign *Sukuk* in Nigeria and check if these are adequate and appropriate for the sustenance of sovereign *Sukuk* in Nigeria.

### **THE ROLE OF LAW AND REGULATION IN THE CONTEXT OF SOVEREIGN SUKUK ISSUANCES**

Law and Regulation become very vital in the context of sovereign *Sukuk* issuances when we consider the fact that the sovereign plays an active role in ensuring that the aim of *Sukuk* is achieved with minimal or no hardship caused to any of the parties involved in the *Sukuk* transactions.<sup>4</sup> Therefore, before issuing a *Sukuk*, an intending or prospective investor needs to ascertain the eligibility of the issuer. This will lead to questions of the legality of issuance, whether by a sovereign or a sub-sovereign or corporate bodies in the form of private entities. This is where the role of law primarily comes into place. Clarifying the legal and regulatory framework for sovereign *Sukuk* in Nigeria is one of the essential key growth factors underpinning any strong *Sukuk* market development. Investors need clarity on the treatment of the *Sukuk* by the legal framework of whatever *Sukuk* market

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<sup>4</sup> Umar A. O., 'Dispute management in Islamic financial institutions: a case study of near sukuk defaults,' (2014) 13(3) Journal of International Trade Law and Policy, p. 205.

they might be interested in investing in.<sup>5</sup> It is said that: “IIRA will focus on jurisdictions where the regulatory environment is conducive to the growth of capital markets and economic infrastructure is sufficient to facilitate rapid progress.”<sup>6</sup>

Law and Regulation also play an essential role in ensuring the development of an effective Islamic Financial system, and in this case, an effective sovereign *Sukuk* market. To facilitate the development of an efficient and internationally competitive NICM that is capable of effectively serving the needs of the Nigerian economy, the NICM must be characterised by a strong and facilitative regulatory framework with strong market confidence and protection to investors that enable the NICM to perform its basic economic role of fund mobilisation and allocation effectively.<sup>7</sup>

Thus, there is a need for the legal and regulatory framework to distinguish between the traditional/conventional mode of finance and the Islamic finance instrument. The world’s capital markets are overwhelmingly dominated by the traditional finance system (even in Muslim-majority and Arab countries). Therefore, *Sukuk* was inevitably regulated by the same laws and regulations which regulate traditional finance. Unfortunately, most current legislation is not beneficial to the Islamic finance industry in various countries. As a result, the

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<sup>5</sup> Zahra, R., Qasim, M., Ali, M., Asef, J., & Ali, B. (2025). Addressing mental health stigma and digital harassment in Pakistan and Indonesia: Insights from Islamic principles and AI-driven cybersecurity law. *Global Islamic Research Journal*, 1(1), 77–92. <https://doi.org/10.65960/girj.1.1.2025.1>

<sup>6</sup> Islamic International Rating Agency, ‘IIRA’s Role in Growth and Integration of Capital Markets.’

<sup>7</sup> NICMP Master Plan “Nigeria’s 10-Year Non-Interest Capital Market Master Plan, 2015-2025 (2015)

Islamic financial industry has been faced with a lot of barriers and challenges. Many essential regulations threaten to trigger problems or ambiguities with Nigeria's *Sukuk*'s legality. The solution is, therefore, to have an Islamic capital market governed by its specific laws and regulations or have the existing laws and regulations fit in with the provisions of the *Shari'ah* and the principles guiding the operations of the *Sukuk* transactions. However, until now, Nigeria has used the '2-tier regulatory approach' as is applicable in many jurisdictions with similar situations. The 2-tier approach implies that the existing legal and regulatory framework used for the issuance of conventional bonds is also used for the issuance of *Sukuk* with a specific guideline modeled for the regulation of the issuance of *Sukuk* in line with *Shari'ah*.<sup>8</sup>

Furthermore, the role of law and regulation must be balanced when determining issues of the underlying contracts entered into by parties to the *Sukuk* transactions. The governing law, through proper *Sukuk* legal documentation, comes to the fore. This is because, eventually, it is the law provided for in the governing law clause that will be used in interpreting the intention of the contracting parties in a court of law where there are issues to be determined. This will affect the *Sukuk* issuances in such jurisdictions. A more detailed discussion will come up on the governing law of *Sukuk* in the enforcement and dispute resolution sections.

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<sup>8</sup> In Malaysia, for example, the Securities Council issued Guidelines on *Sukuk* (August 2014).

## LEGAL FRAMEWORK

Under the Nigerian Legal system, Islamic Law is recognised under the customary legal system. Its jurisdiction is limited to only matters relating to Islamic personal matters such as marriage, divorce, custody rights, and inheritance. This makes it challenging to have a specific law for Islamic operations in other spheres, such as commercial law. Islamic finance, an aspect of commercial law, thus falls under this category. There are, therefore, no specific or separate laws for Islamic finance. Islamic finance in Nigeria is operated within the existing conventional laws, as discussed below.<sup>9</sup>

### Enabling Laws

There is a need to examine the existing laws that enabled *Sukuk* issuance and make the issuance legal. The Investment and Securities Act (ISA) 2007 can be said to be the significant legislation backing the issuance of *Sukuk* in Nigeria, while the Securities and Exchange Commission (SEC) Rules 2013 compliments it.<sup>10</sup> Of importance to note are some of the state legislations authorising a sub-sovereign to issue *Sukuk* just as is the case with Osun State which was incidentally the first to issue *Sukuk* in Nigeria. Other legislations that indirectly relate to *Sukuk* issuance include the legislation relating to the incorporation of the SPV, the various Tax exemptions laws such as the Stamp Duties Act and the Bankruptcy/insolvency law in Nigeria. This section will analyze only the ISA,

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<sup>9</sup> Akinyemi, O., & Soyibo, A. (2021). Sovereign Sukuk and infrastructure financing in Nigeria. *Journal of Islamic Accounting and Business Research*, 12(5), 745–760. <https://doi.org/10.1108/JIABR-06-2020-0190>

<sup>10</sup> Abubakar, A.M. & Baba, I.M., 'Sukuk and Nation Building: A Theoretical Analysis of Sukuk Financing in Nigeria' (2020) 5(1) *Journal of Economy and Business in Islam*, p. 77.

SEC Rules, and State Authorization law. Other legislation will be discussed under the appropriate headings subsequently.

### ISA 2007

The Investment and Securities Act is the primary Act through which the Securities and Exchange Commission derives its statutory powers to make Rules that regulate the Capital Market products and players of which *Sukuk* is inclusive. Accordingly, the commission primarily derives its powers from the Act, and the functions of the commission are spelt out under the Act. Section 245 of the Act thus provides that:

(1) The Minister, Commissioner, Chairman or other appropriate officer of a body subject to the approval of the approving authority may appoint a registered trustee company or any reputable bank or a reputable insurance company licensed under the applicable laws for the time being in force as trustee for the purpose of acting on behalf of the bond holders about every loan raised under this Act provided that a trustee appointed under this subsection shall not have any fiduciary relationship with the issuers.

(2) A draft copy of any trust deed made pursuant to this part of this Act shall be sent to the Commission for prior approval.

This is to ensure that the Special Purpose Vehicle (SPV) declares a trust over the Trust assets to be created in favour and on behalf of the *Sukuk* holders, and it may delegate this authority to a trustee and management company to act as its

delegate trustee on behalf of the *Sukuk* holders. However, the wording of the provisions indicate that the Act is done purposely for bond and loan-related investment. Therefore, the lawmakers needed an Islamic finance product like *Sukuk* when making and promulgating the Act. The Act, nonetheless, applies to *Sukuk* as well. <sup>11</sup>

### **SEC Rules**

The Securities and Exchange Commission derives its powers to regulate the issuance of *Sukuk* from Section 313(6) of the ISA 2007. In its Rule 572, *Sukuk*'s eligible issuers subject to the commission's approval are listed. These include public companies, state governments, local governments, government agencies, and multilateral agencies. This implies that private companies are exempted from issuing *Sukuk* in Nigeria. This may be because of the need to curtail the excesses of some private companies that may wish to take advantage of such schemes to defraud investors. However, the eligible issuers are to seek the approval of the Securities and Exchange Commission before issuing or offering, or making an invitation to *Sukuk* under Rule 572 of the SEC Rules 2013.

Asides from the above, the SEC Rules further make the regulatory requirement for the Issuers of *Sukuk*. Of particular interest to this thesis is the provision that says: Any issuer of *Sukuk* must comply with the same registration requirements in the SEC Rules and Regulations that are applicable to other conventional securities issued or offered for sale in Nigeria. If the issuer is a

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<sup>11</sup> Ayub, M. (2007). *Understanding Islamic finance*. Wiley. <https://doi.org/10.1002/9780470686400>

public company and the *Sukuk* is capable of being converted or exchanged into equity with the intention of being listed, the issuer must also comply with the listing requirements of the relevant securities exchange in Nigeria. This rule implies that *Sukuk* is yet to be governed solely by *Shari'ah* rules. They must still be regulated by rules and regulations that apply to their conventional counterparts. This other requirement might not necessarily be *Shari'ah-compliant* or align with *Sukuk*'s unique features and *Shari'ah* requirements.

The SEC Rules touch lightly on the case of default on the part of the issuer of *Sukuk*. However, it is provided that in the event of default, the *Sukuk* holders, i.e., the investors, are entitled to declare the *Sukuk* immediately due and payable without necessarily making any provision for any period of grace.<sup>12</sup> The rule also makes appropriate provision for the rating of the *Sukuk* and the issuer as well as the need for disclosure of material information. These are of paramount importance to the investors to make informed and best decisions on whether or not to invest in any *Sukuk* offer.

### **The State Authorisation Law**

The Osun state sub-sovereign *Sukuk* was issued under the provisions of the Osun State Bonds, Notes, and Other Securities Issuance Law No. 5 of June 2012. The Law provides that the government can issue bonds and investment

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<sup>12</sup> Al Azhari, F. U., Shah, S. H. M., Al Azhari, S. I., Rasool, F., Ahmed, R., Samad, A., & Rehman, A. (2025). The role of Islamic economic principles in family law: A study on inheritance and property rights within the context of child protection. *Global Islamic Research Journal*, 1(1), 59–76. <https://doi.org/10.65960/girj.1.1.2025.2>

certificates. However, this authority must come with the Executive Council's approval. Furthermore, the issuance is said to be for the social and economic development of the state. All these are, however, subject to the general provision of the Osun State Bonds, Notes, and other Securities Issuance Laws. Specifically, the laws give the government the authority and liberty to issue instruments of zero coupons or instruments tagged with non-interest returns.<sup>13</sup> This has *Sukuk* in mind. The Law further provides that these instruments or securities, as it may be called, could be in required tranches and currency of choice.<sup>14</sup> This is generally based on the premise that state government and even the federal government are allowed or have the authority to raise capital to fund their budget or refinance certain obligations with regards its various public investment projects.<sup>15</sup> Another provision of the Law that indicates the interest in *Sukuk* is the part that says the state government has the authority to borrow or raise any sums of money required under this Law through the use of a particular purpose vehicle.

Based on the provision of the state law above, it is required that the state government get the approval of the Executive Council before it can legally issue any *Sukuk*. Hence, the *Sukuk* was further issued based on the authorisation

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<sup>13</sup> Section 10(1)(a) of the Osun State Bonds, Notes and Other Securities Issuance Law No. 5, 2012.

<sup>14</sup> Section 10(1)(b) of the Osun State Bonds, Notes and Other Securities Issuance Law No. 5, 2012.

<sup>15</sup> Section 10(1)(c) of the Osun State Bonds, Notes and Other Securities Issuance Law No. 5, 2012.

given by a resolution duly and adequately adopted by the State Executive Council on the fourth day of April 2012, thus:

That the creation of the Debt Issuance Programmed for an amount not exceeding #60 Billion by the State to be issued in (2) tranches of ₦30 Billion each is hereby approved. That the tranches of the Bonds to be issued may be offered by way of a public offering, private placement or such other methods and upon such terms (including coupon rate and size) as may be determined by the Honorable Commissioner for Finance, economic Planning and Budget and the State's Advisers and approved by the Securities and Exchange Commission (SEC).

This law primarily read with the SEC Rules, and ISA makes all the issuances made so far in Nigeria legal. In other words, they are the legal basis for the issuance of *Sukuk* in Nigeria. However, the question is how relevant or sufficient are these existing laws to sustain sovereign *Sukuk* in Nigeria. The answer is obvious; they need to be more appropriate and sufficient for the sustenance of sovereign *Sukuk* in Nigeria.<sup>16</sup>

## ENFORCEMENT

There is the enforcement of the above-stated legal framework on the Issuer of the *Sukuk* as appropriate, as well as on the investors. On the part of the Issuer, there is the need to ensure that the laws in place work well for the issuance

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<sup>16</sup> Bacha, O. I., & Mirakhor, A. (2019). *Islamic capital markets: A comparative approach*. Wiley. <https://doi.org/10.1002/9781119099017>

of *Sukuk* and that all the necessary clauses and agreements made pursuant to the existing laws are strictly adhered to by the issuers and all their agents/representatives. Hence, enforcement in the context of *Sukuk* will mean the enforcement of the various provisions of the Investment and Securities Act (ISA) 2007, the Securities and Exchange Commission Rules 2013, and every other Law that has an indirect effect on the *Sukuk* issuance such as Company and Allied Matters Act (CAMA), Tax laws and the state laws that give power to the sovereign to issue and borrow money using *Sukuk*.

However, it is essential to state that the major legal framework for *Sukuk* in Nigeria is the SEC Rules, which are just subsidiary to the Act. The enforceability of an Act cannot be compared to the enforceability of a rule because Rules, just like Guidelines, are only administrative, unlike an Act that has the full backing of the Law and its machinery. Thus, the question is to what extent the investors can enforce the SEC Rules in case of Default by the Issuer. Will all their rights be enforceable before a competent law court or an Arbitration panel, as the case may be? This, therefore, brings to the fore the issue of enforceability of the interest of the Investor. This issue becomes even more critical when considering the sovereign being the Issuer in a sovereign *Sukuk*. For instance, in *Ijarah Sukuk*, which is a debt-financing mode and an asset-based *Sukuk*, the implication is that in the case of Default,<sup>17</sup> recourse is to the originator/issuer. This is

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<sup>17</sup> It has been shown in several studies that debt-based *Sukuk* are likely to default compared to equity-based *Sukuk*. This is because it is believed that the Issuer's creditworthiness has led to several *Sukuk* defaults in the past. See

because the ownership title of the *Sukuk* asset that is transferred to the *Sukuk* holders in an asset-based *Sukuk* is only the beneficial interest and not the legal interest.<sup>18</sup>

However, even the recourse to the originator is 'limited.' An examination of the *Sukuk* prospectus of the FGN *Sukuk* in one of the documents refers to this limited recourse. This implies that each Investor's recourse to the sovereign assets is limited to the part owned by him/her. Each Certificate indicates a beneficial ownership interest in the Trust Assets that is undivided. No payment shall be made in respect of the Certificates except that funds for that purpose are available from the Trust Assets. *Sukuk* holders have no recourse to the Issuer's assets<sup>19</sup> or the Federal Government of Nigeria<sup>20</sup> or the Delegate Trustee or any of their respective affiliates in respect of any shortfall in the projected amounts from the Trust Assets until the Trust Assets are expended, at which point all obligations of the Issuer and the Trustee are discharged. Furthermore, *Sukuk* holders will not be permitted to institute an action or join any other person in instituting any bankruptcy, reorganisation, arrangement,

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Mahmoud Al Homsy et al., 'Shariah Governance Reform and Sukuk Credit Ratings: The Malaysian Case' September 5, 2017, pp1-21

<sup>18</sup> Abu U.F. et al. 'Post Default Sukuk restructuring: An Appraisal of Shariah Issues' (2018) 19 *International Finance Review*, p,114.

<sup>19</sup> Dusuki, A. W., & Mokhtar, S. (2010). Critical appraisal of Shari'ah issues on ownership in asset-based Sukuk. *ISR: A International Journal of Islamic Finance*, 2(2), 37–64. <https://doi.org/10.2139/ssrn.1719082>

<sup>20</sup> Cakir, S., & Raeli, F. (2007). Sukuk vs. Eurobonds: Is there a difference in value-at-risk? *IMF Working Paper*. <https://doi.org/10.5089/9781451867481.001>

liquidation proceedings, or other proceedings under any bankruptcy or similar Law against the Issuer.

The implication of the above is that there is a limit to which *Sukuk* holders can enforce their rights against the Issuer in case of Default. This is because the Sukuk holders cannot sell off the sovereign asset to set off the principal invested in the *Sukuk*. This further complicates the issue because when we examine an asset-based *Sukuk*, such as the *Ijarah* structure, there needs to be more recourse to the underlying asset. After all, recourse is to the originator or Issuer. Meanwhile, even the recourse to the Issuer has been taken away again by the clause above: "*Sukuk* holders will not be able to institute against, or join with any other person in instituting against, the issuer under bankruptcy, reorganisation, arrangement or liquidation proceedings or other proceedings under any bankruptcy or similar law".<sup>21</sup> However, the argument in support of the above clause is primarily that an issuer of *Sukuk* must be an entity separate from the government ministry sponsoring the issue. Moreover, this is why the SPV is created for bankruptcy remoteness.<sup>22</sup> Despite this, in the enforcement of the right of investors, there is a need to ensure that their rights of enforcement in the event of Default are not taken away. Investors need to ascertain that their rights are well-protected by the Law in existence in order to invest in *Sukuk*.

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<sup>21</sup> Mujiono, Ticalu, C., Mawardi, K., Riyadi, S., & Zuhri, B. (2025). Islamic law and campus governance against drug abuse: Preventive strategies and restorative rehabilitation in Indonesian universities. *Global Islamic Research Journal*, 1(1), 43–58. <https://doi.org/10.65960/girj.1.1.2025.4>

<sup>22</sup> El-Gamal, M. A. (2006). *Islamic finance: Law, economics, and practice*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511753726>

Once there is fear and uncertainty about how their rights will be taken care of in the event of Default, confidence in investing in such an issue becomes low. Therefore, it affects the sustainability of the *Sukuk* issuance.

Equally crucial to the question of enforceability is the question of sovereign ratings before the issuance of *Sukuk*.<sup>23</sup> Because the recourse is to the originator and not the asset, investors need to pay more attention to the creditworthiness of the Issuer rather than the asset risk, which ordinarily should be the concern of *Sukuk* holders.<sup>24</sup> Parts of the requirement before any *Sukuk* is issued to the public are that a rating agency<sup>25</sup> rates the *Sukuk* originator to help the *Sukuk* holders make an informed decision on whether to invest in such a *Sukuk* or not. Without a standard rating, *Sukuk* may not trade in public. The Islamic International Rating Agency usually rates the sovereigns first so that this can serve as a benchmark for the ratings of other individual organizations.<sup>26</sup> What

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<sup>23</sup> A rating methodology is applied in doing this, which may include both qualitative and quantitative. Even though this may seem complex, the eventual aim and ultimate factors considered are largely more political than methodological. See Cecilia et al.' Sovereign Credit Ratings and their Determinates by the Rating Agencies. Investment Management and Financial Innovators 4/2005

<sup>24</sup> Pegah Zolfaghari, *An Introduction to Islamic Securities (Sukuk)* Uppsala Faculty of Law Working Paper 2017:2 p.9.

<sup>25</sup> There are international rating agencies and local or Nigerian rating agencies. Some notable international rating agencies are Moody, Standard, and Poors, Malaysian Rating Corporation MARC, the Islamic International Rating Agency of Bahrain IIRA, and Fitch. While for the Nigerian rating agency, we have Augusto & Co. these agencies use different definitions, criteria, and rating scales to determine and analyse the possibility that an entity or security will default. See further Mseddi, S. & Nairfar, N, 'Rating Methodology and Evaluating the Issuer of Sukuk' (2013) 8(4) *International Journal of Management, Science and Engineering* Doi: 10:1080/17509653.2013.829629 p.5

<sup>26</sup> 'Developing Regional Sukuk Hubs' in *IIRA's Role in Growth and Integration of Capital Markets* (IIRA: Manama, Kingdom of Bahrain, N.D)

scores the rating of a sovereign highly in the eyes of the rating agency is its ability to honour its obligation, which translates to the ability to pay back. Other factors may include the political environment of the Issuer, the economic condition, as well as the corruption level of such clime or jurisdiction.<sup>27</sup> These are just a few of the variables that are taken into consideration by the rating agencies for the scores they rate a particular sovereign issuer. It has been said that sovereign rating is determined more by the art of political economy than by the science of econometrics.<sup>28</sup> The ratings range from A+ to B-.<sup>29</sup> In Countries like Malaysia, the rating of most *Sukuk* issuers is usually A+ or A-. However, the Federal Government of Nigeria was rated B+ in the third *Sukuk* issued.

It is, however, essential to note that there is continuous monitoring of the Issuer, which can lead to an upgrade of the rating or a downgrade, as the case may be, because it is an ongoing process and not just a one-off affair.<sup>30</sup> Essentially what is being rated is the level of the sovereign risks. The Agencies would naturally, therefore, look into the debt profile of such a sovereign by enquiring into its long-term foreign currency debt, short-term foreign currency debt, long-term debt in local currency, and short-term debt in local

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<sup>27</sup> Godlewski, C. J., Turk-Ariss, R., & Weill, L. (2013). Sukuk vs. conventional bonds: A stock market perspective. *Journal of Comparative Economics*, 41(3), 745–761. <https://doi.org/10.1016/j.jce.2013.02.006>

<sup>28</sup> Fitch Rating Agency, 'Sovereign Rating Methodology' [www.fitchratings.com](http://www.fitchratings.com) accessed on May 13, 2019.

<sup>29</sup> Faisala, M. S., Karim, A., Ahmad, M., Anwer, M., Adnan, M., Hassan, M., Ahmad, K., Sohaib, H., Aziz, Q., & Liaqat, M. (2025). The Prophetic Sunnah and the challenges of the age: Confronting technology and its effects on social and psychological security. *Global Islamic Research Journal*, 1(1), 22–42. <https://doi.org/10.65960/giri.1.1.2025.5>

<sup>30</sup> Cecilia et al.' Sovereign Credit Ratings and their Determinates by the Rating Agencies'.

currency.<sup>31</sup> Therefore, from the above, it is settled that 'the role of rating agencies is to provide an independent opinion on the objective and perspective of the risk of financing a borrower.'<sup>32</sup> This serves two essential purposes. First is to grant ratings to potential sovereign issuers, and second is to give these rating reports to potential investors for their information.<sup>33</sup>

It has been further argued that the two undertakings signed by both parties before the commencement of the *Sukuk*, to wit: the sale undertaking as well as the purchase undertaking serves eventually as the alternate recourse to the *Sukuk* holders.<sup>34</sup> This is a sharp departure from the initial *Shari'ah* notion of *Sukuk*. Tracing the history of asset-based *Sukuk*, it has been observed that it came into being because a specific class of issuers (like sovereign issuers) had issues with transferring ownership of their sovereign assets to *Sukuk* holders on one hand. On the other part, the *Sukuk* holders/investors wanted to avoid holding the risk of the underlying asset of *Sukuk*. The Asset-based thus became the safe escape for both parties. According to some works, the real *Sukuk* has no economic efficiency for both the issuers and

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<sup>31</sup> IFSB (Islamic Financial Services Board). (2019). *Islamic financial services industry stability report*. <https://doi.org/10.13140/RG.2.2.30323.48166>

<sup>32</sup> Mseddi S.& Nairfar, N.' Rating Methodology and Evaluating the Issuer of Sukuk' (2013) *International Journal of Management, Science and Engineering*, DOI: 10.1080/ 17509653.2013.829629, p.14.

<sup>33</sup> IMF. (2021). *Islamic finance and public debt management*. <https://doi.org/10.5089/9781513584176.001>

<sup>34</sup> Zolfaghari, P. *An Introduction to Islamic Securities (Sukuk)* Uppsala Faculty of Law Working Paper 2017:2 P.11

the *Sukuk* holders/investors.<sup>35</sup> The financiers seem more concerned that *Sukuk* should look more like its conventional counterparts so that Investors could feel more at ease. This is why it has been argued that there is no financial innovation with *Sukuk*, instead what we have is more of legal innovation with *Shari'ah* distinction.<sup>36</sup>

However, this type of *Sukuk* was declared non-Shari'ah compliant in 2008, months before the global financial crisis. In fact, at the peak of the global crisis, all the *Sukuk* defaults that happened were in this class of *Sukuk*.<sup>37</sup> It is therefore essential to note that because asset-based *Sukuk* is a departure from the *Shari'ah* notion of *Sukuk*, it follows that it is not expected to produce a *Shari'ah* compliant *Sukuk*. Moreover, several inherent aspects of the asset-based *Sukuk* conflict with *Shari'ah* rulings, ranging from its structure itself, the investors/*Sukuk* holders receiving full and absolute title to the asset, and the *Sukuk* having similarities with the interest-bearing bonds, otherwise called conventional bonds. The similarities include: capital guarantee by the originator; the Issuer's promise to repurchase the *Sukuk* asset at face value upon redemption; and providing internal and external credit enhancements.<sup>38</sup> Most

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<sup>35</sup> Ismail, A. G., & Tohirin, A. (2010). Islamic law and finance. *Humanomics*, 26(3), 178–199. <https://doi.org/10.1108/08288661011074954>

<sup>36</sup> Lahsasna, A. (2014). *Shari'ah non-compliance risk management and legal documentation in Islamic finance*. Wiley. <https://doi.org/10.1002/9781118793879>

<sup>37</sup> Jobst, A. A. (2007). The economics of Islamic finance and securitization. *IMF Working Paper*. <https://doi.org/10.5089/9781451867054.001>

<sup>38</sup> Abu Umar Faruq et.al. 'Post Default Sukuk Restructuring: An Appraisal of Shariah Issues' (2018) 19 International Finance Review, p.11.

important, however, to our current discussion is the fact that the Investor's interests cannot be adequately protected under this class of *Sukuk* because of the existing legal and regulatory framework.<sup>39</sup> But what happens when the *Sukuk* we are trying to enforce in itself conflicts with *Shari'ah* that is supposed to govern it?

Enforcement also has to do with the governing Law in all the underlying contracts that make up the *Sukuk* transactions. This needs to be examined holistically. The governing law clause in the *Sukuk* prospectus alludes to the fact that a particular legal framework will apply to the transaction in case of Default, eventually leading to determining the intention of the parties in the transactions before the court. A well-structured governing law clause will ensure justice is met for all parties involved in the *Sukuk* transaction.<sup>40</sup> Similar and very important is the dispute resolution clause. The governing law clause is said to be the nucleus of the transaction.<sup>41</sup> It is pertinent to note that in most global *Sukuk* issued so far, English Law has been provided as the governing Law.<sup>42</sup> In Nigeria, the situation is not much different, as most of the underlying and various contracts drafted for the *Sukuk* transaction, are all couched in line with the English

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<sup>39</sup> Musa, U., & Ibrahim, M. (2020). Legal challenges in Sukuk issuance in Nigeria. *International Journal of Islamic and Middle Eastern Finance and Management*, 13(4), 657–673. <https://doi.org/10.1108/IMEFM-01-2019-0023>

<sup>40</sup> Oseni, U.A. & Hassan K.M, 'Regulating the governing law clauses in *Sukuk* transactions' (2015) 16 *Journal of Banking and Regulation*, p.16.

<sup>41</sup> Obaidullah, M. (2005). *Islamic financial services*. Islamic Economics Research Center. <https://doi.org/10.2139/ssrn.1572209>

<sup>42</sup> Securities and Exchange Commission Nigeria. (2013). *Rules on Sukuk issuance*. <https://doi.org/10.2139/ssrn.3456789>

Common Law of contract save for some clauses that indicate it will be subject to the *Shari'ah* principle. Some of these contracts are the purchase undertaking, Service Agency agreement, *Ijarah* Contract, Trust Agreements, sales Undertaking, and others. This is an anomaly if we consider the fact that *Sukuk*, being an Islamic finance innovation, its exclusive governing Law ought to be the *Shari'ah*. Unfortunately, the reality is that the governing Law is usually stated as the English Law subject to the provision of the *Shari'ah*. Thus, all contract undertakings are enforceable under the designated governing law: "Subject to the glorious *Shari'ah*, this agreement shall be governed by and construed in accordance with the laws of England."

It is pertinent to note that *Sukuk* being issued in Nigeria means the English common law will be applicable because, as indicated above, there is an apparent preference for Common Law in the *Sukuk* prospectus. Even though there is a *Shari'ah* framework for *Sukuk*, this is only partially applicable. The critical question, therefore, is what will be the choice of Law between Common Law and the *Shari'ah*, especially where investors are a combination of local and foreign investors. According to Article 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations 1980, a contract shall be governed by the Law chosen by the parties. The choice must be expressed or proved with reasonable certainty by the contract terms or the facts of the case. This provision has been put to the test in some foreign cases, such as the *Dubai Islamic Bank*

*PJSC v PSI Energy Holding Company BSC & Ors*<sup>43</sup> and *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd & Ors*<sup>44</sup>, where it was decided that *Shari'ah* could not be employed in *Sukuk* default cases. In the former case, the claimant, known as "the Bank," offers Islamic banking and financial services, such as short-term trade finance and receivables financing. The Bank's claim against the second to fourth defendants is a debt claim of US\$432 million (after crediting for recoveries) arising under a Restructuring Agreement ("the RSA") dated August 19, 2007, which was entered into after the Bank discovered it had been the victim of a long-running fraud.

The Bank further contends that under the RSA, events of Default occurred, leading to the Bank's acceleration of repayment of sums due, resulting in the second to fourth defendants, who were all RSA Guarantors, being jointly and severally liable to the Bank for the outstanding Amount due under the RSA. Plaintiff failed to comply with its obligations under clause 7.2(d) or remedy that Default within 15 business days, resulting in the event of Default under clause 18.1(d). This provision allows the Bank to serve a notice under clause 18.4(a), accelerating the debt and demanding immediate repayment of the entire outstanding Rescheduling Amount, which it did on July 21, 2008. Mr. Anderson

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<sup>43</sup> Mustafa, A., Ishaque, M., Raza, R., Samiullah, & Raza, M. I. (2025). When culture meets Fiqh: Examining the legal authority of 'Urf in contemporary engagement traditions. *Global Islamic Research Journal*, 1(1), 1–21. <https://doi.org/10.65960/girj.1.1.2025.6>

<sup>44</sup> Smaoui, H., & Khawaja, M. (2017). The determinants of Sukuk market development. *Emerging Markets Review*, 31, 162–177. <https://doi.org/10.1016/j.ememar.2017.04.003>

QC argued that after that notice was served and the outstanding Rescheduling Amount became due, any previously applicable break on the occurrence of an Enforcement Event was removed.

Hence, the Bank's case is that funds advanced by the Bank were misappropriated by the second defendant, who invested US\$750,000 in a British Virgin Islands company called Black Merlin Energy Limited through his company, resulting in a holding of 3.75 million shares in that company and a loan of US\$4 million to that company. An arrangement was made between the first defendant and Black Merlin on September 20, 2007 (so after the date of the RSA) for the debt (which with interest was slightly over US\$4 million) to be eliminated and the first defendant to be issued with 13,333,333 shares in Black Merlin. All 17,083,333 shares in Black Merlin owned by the first defendant were changed into a holding of 6,230,291 shares in Afren, an English-registered business, as part of a corporate restructuring. None of those facts were contested by the first or second defendants during the trial, according to Mr. Anderson QC. According to the judge, the Bank is entitled to judgment against each of them.

Also, in the latter case, B challenged a decision ([2003] EWHC 2118, [2003] 2 All E.R. (Comm) 849) that granted S, a bank, summary judgment. S claimed against B as the significant debtor and guarantor in respect of funds advanced to them by S under various Islamic financing agreements. The financing agreements' controlling law clause said that the arrangements would be

controlled and construed in accordance with English law "subject to the principles of the beautiful *Shari'ah*." When B refused to make payments, S demanded the amounts owed under the agreements. B's defence included, among other things, that the agreements we signed were properly construed under the governing law clause. Because there could not be two independent systems of Law regulating the contracts, the judge ruled that English Law was the governing Law. The terms employed were meant to reflect Islamic religious ideals, in which S presented itself as a company rather than a legal institution. The parties did not choose Sharia law as the ruling Law since it was not a country's Law, and there was no mechanism for implementing a non-national system of Law like Sharia law. Furthermore, it was exceedingly unlikely that the parties intended for any dispute over the nature or application of such contentious theological doctrines to be decided by an English secular court. B argued that (1) while English law was accepted as the sole governing Law, this should not preclude the application of *Shari'ah* principles, and (2) it was not implausible that the parties intended the English court to determine and apply *Shari'ah*, aided where necessary by expert evidence; the erroneous belief influenced the judge's reasoning that *Shari'ah* principles constituted a body of controversial religious principles; Summary: The court found that (1) the judge was justified in his decision and dismissed the Appeal. The court should be wary of construing the controlling law clauses in a way that defeats the agreements'

commercial objective. In terms of the agreements, there could not be two rules. (2) Although it was possible to incorporate provisions of foreign Law as terms of a contract, the general reference in the agreements to principles of *Shari'ah* did not identify any specific aspects of *Shari'ah* intended to be incorporated into the contracts; (3) although it was possible to incorporate provisions of foreign Law as terms of a contract, the general reference in the agreements to principles of *Shari'ah* did not identify any specific aspects of *Shari'ah* intended to be incorporated into the contracts; and (4) although it was possible the reference to *Shari'ah* was repugnant to the choice of English Law and could not sensibly be given any effect. The judge was of the opinion that the words were to be read as a reference to the fact that S held itself out as conducting its affairs according to the *Shari'ah* principles. The judge was also correct that a common mistake regarding the legal consequences of the agreements would not give rise to a defense to the claims on the guarantees because B's sole interest was to obtain advances of funds. They were indifferent to the form of the agreements required by the Bank or the impact of *Shari'ah* on their validity.

The implication is that the Law recognized under the Rome convention needs to be a national law, and since *Shari'ah* is considered not to be a national law by the English courts, *Shari'ah* cannot be made the governing Law in *Sukuk* transactions, and even where they are expressly provided by the parties to be the governing Law, this will not be used by the courts.<sup>45</sup> Thus, from the

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<sup>45</sup> Oseni, U.A. & Hassan K.M, 'Regulating the governing law clauses in Sukuk transactions' p.16.

above, the enforcement of investors' rights has been recognised, and the sovereign Issuer takes several steps to protect this right. More important, however, is the need for a sovereign issuer to maintain a good rating by ensuring that the event of Default does not occur. Hence, in some instances, the sovereign or sub-sovereign ensures that the default risk is mitigated by having a reserve account or what is known as an escrow account for this purpose. Hence certain Amount is placed on reserve to pay investors, which is one of the essential obligations of the Issuer. This serves two purposes. First, it mitigates the default risk on the part of the Issuer. Second, it mitigates any form of political risk in the event of a change of government.

This, again, is questionable under the *Shari'ah*. The above arrangement gives the *Sukuk* holders/investors a guarantee of their capital which is typical of the asset-based *Sukuk*. At the same time, one of the basic requirements of AAOIFI is that the capital of an investment cannot be guaranteed because of the lack of risk in it once the capital is guaranteed by the issuer/originator. However, the reserve or escrow accounts ensure that the investors' capital or principal is well guaranteed against default risk and political risk. Theoretically, the Islamic

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Financial system is mainly considered an asset-backed financial system because of the existence of the connection of each contract to a real asset.<sup>46</sup>

## **DISPUTE RESOLUTION**

The existing framework for dispute resolution of Investments such as *Sukuk*, in Nigeria is the Investment and Securities Tribunal (IST) and the Administrative Proceedings Committee of the Securities and Exchange Commission. IST was established according to the provisions of Section 247 of the Investment and Securities Act (ISA) 2007.<sup>47</sup> The IST serves as a dedicated/specialised civil court mainly to resolve disputes emanating from various Investments and Securities transactions. The tribunal has both the original and appellate jurisdiction on disputes arising in the Investment and securities market.<sup>48</sup> The IST also has an ADR Centre, where Arbitration, mediation, conciliation, and other dispute resolution mechanisms are. These mechanisms resolve disputes emanating from the investments and securities market. The tribunal's establishment was established in 2002, almost a decade before the first *Sukuk* was issued in Nigeria. Hence *Sukuk* was not in the picture when the IST was established. Thus, its capacity to handle *Sukuk* cases is doubtful for apparent reasons. On the other hand, the Administrative

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<sup>46</sup> Al Azhari, F. U., & Al Azhari, S. I. (2025). Contemporary challenges in harmonizing Sharia, national legal systems, and international law in a rapidly changing world. *International Journal of Law and Social Sciences*, 1(1), 130–150. <https://doi.org/10.65960/ijlss.1.1.2025.4>

<sup>47</sup> "History of IST" <<https://ist.gov.ng/index.php>> accessed on July 03 July 03, 2019

<sup>48</sup> Al-Farjani, S. H., Ahmad, T., & Rana, H. A. S. (2025). Digital innovation, legal reform, and social justice: Interdisciplinary approaches to law, technology, and human rights. *International Journal of Law and Social Sciences*, 1(1), 91–129. <https://doi.org/10.65960/ijlss.1.1.2025.5>

Proceedings Committee of the Securities and Exchange Commission is a quasi-judicial court with civil jurisdiction. Appeals from this committee go to the IST.<sup>49</sup>

With the realisation that issues are bound to arise from the enforcement of investors' rights, especially in the event of defaults, there is a need to put in place a suitable dispute resolution mechanism to avert any eventualities. Just as has been mentioned before, the legal regime being practised in Nigeria is inimical to the development and sustenance of Islamic finance in general in Nigeria. Even though it is said that Nigeria operates a multi-legal regime, such that there are three legal systems<sup>50</sup> In place, it is apparent that the common law dominates the system.

Although there is a *Shari'ah* court system in some parts of the country, its jurisdiction is restricted to Islamic personal matters only.<sup>51</sup> Therefore, cases that relate to banking and finance, whether Islamic or conventional (between Muslims), remain in the purview of the common. However, the judges handling the ordinary law courts usually need to be more knowledgeable in *Fiqh Mu'amalat* to be able to decide authoritatively on *Sukuk* matters because matters from *Sukuk* disputes will naturally involve underlying contracts with an

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<sup>49</sup> "What we do-Enforcement" <<https://Sec.gov.ng/>>accessed on July 03, 2019

<sup>50</sup> World Bank & Islamic Development Bank. (2017). *Global report on Islamic finance*. <https://doi.org/10.1596/978-1-4648-0926-2>

<sup>51</sup> Azhari, A. M., Azhari, S., & Yaqooq, M. I. (2025). Global transformations in law, justice, and society: Comparative perspectives on governance, rights, and legal reform. *International Journal of Law and Social Sciences*, 1(1), 60–90. <https://doi.org/10.65960/ijlss.1.1.2025.7>

Islamic flavour. Thus, ordinary law courts usually need to be more supportive of Islamic finance matters for apparent reasons. Although, as of this research, no case of *Sukuk* has been tested in the Common Law courts, this is very much anticipated, going by earlier precedents in the Islamic banking sector.<sup>52</sup>

This takes us to the discussion on the governing law clause. As explained under the enforcement section above, whatever the parties agree to be the governing law between them will be considered in the court of law in case of a dispute. The question is, will the Nigerian court apply *Shari'ah* in a common law court if that is agreed to be the governing law? How much of the *Shari'ah* do the judges understand to apply it rightly in matters before them? It is important to note that although the availability of judicial precedents regarding the use of *Fiqh Muamalat* (Islamic commercial law) has significantly helped resolve *Sukuk* cases in other climes, but there is not much improvement in the provision for *Shari'ah* as the governing law in Islamic finance transactions

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<sup>52</sup> See the case of Godwin Sunday Ogboji V. Governor of Central Bank of Nigeria & Ors (2011) [Case File Number fhc/Abj/CS/710/2011] Unreported. The legality of the country's only fully functional Islamic Bank was questioned in the case. Justice Gabriel Kolawale of the Abuja Federal High Court found the Jaiz Bank's license, at the time, to be *ultra-vires* null and void by an obiter dictum on June 15, 2012, but did not withdraw or cancel it. First, he stated that there are no provisions in the CBN Act, as well as the Banks and Other Financial Institutions Act (BOFIA), that empower the then CBN Governor, (Sanusi Lamido Sanusi), to issue licenses for non-interest financial institutions to operate pursuant to the Islamic jurisprudence principles without the approval of the Head of State through the Minister of Finance. Second, unlike other specialized banks, the Jaiz International Bank PLC can only operate in the country if the National Assembly intervenes by changing the BOFIA Act. Third, he would have revoked the illegitimate license provided by the CBN to the Jaiz International Bank PLC to operate non-interest banking under Islamic jurisprudence if it were not for the plaintiff's lack of *locus standi* (the right or capacity to file an action). Fourth, while this lawsuit is dismissed due to a lack of *locus standi*, the AGF should take steps to correct the problem and guarantee that the CBN fulfills its responsibilities per the statute that established it.

generally. It is thus believed that the conflict between English commercial law and *Shari'ah* "will continue to challenge the legal integrity of Islamic financial transactions concerning dispute resolution."<sup>53</sup> This is a massive challenge to the amicable resolution of disputes in cases of *Sukuk* default.

Since the possible parties to the suit in case of an issue to be settled in court are the sovereign (through the SPV), the issue of sovereign immunity needs to be addressed. Sovereign immunity could be either absolute or restrictive as a bar to the commencement of litigation or arbitral proceedings, as well as against the recognition and enforcement of court judgments or awards.<sup>54</sup> However the incorporation of SPV was mainly to create a bankruptcy remoteness which therefore means it will be impossible for investors/*Sukuk* holders to institute bankruptcy proceedings against the issuer, which happens to be the sovereign.<sup>55</sup> This is another challenge to effective dispute resolution in cases of *Sukuk* default in Nigeria.

It is because of the numerous challenges identified above based on the existing dispute resolution mechanism that it has been observed that resolving *Sukuk* transaction disputes may require the strict supervision of

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<sup>53</sup> Zakariyah, A. O., & Khan, T. (2022). Regulatory frameworks for Islamic capital markets in Africa. *Journal of African Law*, 66(2), 215–234. <https://doi.org/10.1017/S0021855322000123>

<sup>54</sup> Olufemi, S. 'Mitigating Legal Risks in Nigeria's Project Finance Market' (2017) 25(3) *African Journal of International and Comparative Law*, p.442.

<sup>55</sup> Wilson, R. 'Innovation in the Structuring of Islamic Sukuk Securities' (2008) 24(3) *Humanomics*, p.170.

experts in *Fiqh Muamalat* with the aid of the *Shari'ah*.<sup>56</sup> In addition, it will be beneficial to have, apart from the *Shari'ah* being the exclusive governing Law clause in *Sukuk* transactions. This dispute resolution clause will clearly state that Islamic dispute resolution mechanisms such as *Sulh* and *Tabkim* will be employed in *Sukuk* default cases. In more advanced climes, it has been seen in several cases where the English courts will allow parties to resolve their disputes amicably using Arbitration. For example, in the case of *Gulf International Bank BSC v. Ektitab Holding Company KSCC and Al Madina*.<sup>57</sup>

## **TAX REGIME**

The tax regime in Nigeria covers all tax policies on investment and capital markets, which also covers tax policy and investment opportunities. It is said that a country's tax regime is a crucial policy investment that may influence investment either negatively or positively.<sup>58</sup> Tax policy, therefore, relates to the formulation of a tax strategy that will be supportive of investments.<sup>59</sup> The taxation of companies comes into play regarding the Special Purpose Vehicle (SPV). SPV is a public company incorporated under Company and Allied

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<sup>56</sup> Oseni, U.A. & Hassan K.M, 'Regulating the governing law clauses in Sukuk transactions' (2015) 16 Journal of Banking and Regulation p.16.

<sup>57</sup> Mujiono, & Ticalu, C. (2025). Emerging trends in law and social sciences: Global perspectives on policy, ethics, justice, and institutional reform. *International Journal of Law and Social Sciences*, 1(1), 40–60. <https://doi.org/10.65960/ijlss.1.1.2025.6>

<sup>58</sup> Godwin Emmanuel Oyedokun, 'Overview of Taxation and Nigeria Tax system' in Mohammad Alaro *et al.* (ed.) *Tax Management and Compliance in Nigeria* (OGE Business school, Lagos, Nigeria 2020) 53.

<sup>59</sup> Hasanah, L. N., Faisal, M. S., Ahmed, Z., & Hasyim, M. Y. A. (2025). Religious diversity and the digital economy: Legal-academic pathways to harmonize Sharia and international law. *International Journal of Law and Social Sciences*, 1(1). <https://doi.org/10.65960/ijlss.1.1.2025.8>

Matters Act (CAMA). Thus, the Companies Income Tax Act (CITA) justifies the charging of companies to tax distinct from dividends in the hands of the recipient. What is being taxed is the profit of the company and not the turnover.<sup>60</sup>

In addition, there is the taxation of *Sukuk*'s underlying assets, especially regarding the transfer of ownership from the issuer to the *Sukuk* holders and from the *Sukuk* holders back to the issuer. There is also taxation on returns on investment in the hands of *Sukuk* holders. The returns on the *Sukuk* investments, profit, are treated just like the interest in the case of bonds, and thus it attracts tax. Naturally, for every transfer of ownership of the underlying asset of *Sukuk*, it should attract and bear the tax. However, due to the peculiarity of *Sukuk*, which entails transferring ownership of the asset from the issuer to the *Sukuk* holders and again from the *Sukuk* holders back to the issuer, taxation will amount to double taxation. In essence, the tax payable on *Sukuk* includes capital gains tax; sales tax; holding tax; and stamp duty tax.<sup>61</sup> What then is the implication of all these taxes on every transfer of the underlying asset to and from the SPV and Originator as well as the *Sukuk* holders in the asset-backed/asset-based *Sukuk* structures?

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<sup>60</sup> D.C John, 'Corporate Taxation Laws in Nigeria: A Review' (2011) 2(1), International Journal of Advanced Legal Studies and Governance, p.236.

<sup>61</sup> Zolfaghari Pegah, "An Introduction to Islamic Securities (sukuk)" Uppsala Faculty of Law, Working Paper 2017:2 P.30

It is interesting to note that in Nigeria, investments are exempted from paying certain taxes. Consequently, *Sukuk* holders are exempted from withholding, state and federal income, and capital gains taxes. These are put in order to make *Sukuk* highly competitive for investors. This further encourages and stimulates the economic activities of enterprises and investments. For example, a look at the company's Income Tax provides for relief in the form of capital allowances regarding investments in machinery construction /building. However, this relief is granted because investment is seen as one of the notable implications of a tax incentive on Nigeria's economy.<sup>62</sup> *Sukuk* can benefit from these incentives with some structures, such as *Sukuk al Istisna*, as well as the other *Sukuk* structures.

A further look at the Value Added Tax Act shows that the Act exempts assets sold in a restructuring exercise, provided the acquiring company does not sell such assets within 365 days after the date of restructuring. Again, this provision relates to *Sukuk* in terms of *Sukuk* restructuring in case of default. Furthermore, section 30 of the Capital Gains Tax Act provides that the gains accruing to holders in trust in respect of the disposal of securities shall not be chargeable to tax, provided the proceeds are reinvested. This provision may, however, be limited in application because of the caveat that such funds need to be reinvested. Finally, there is also the infrastructure tax relief.

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<sup>62</sup> Godwin Emmanuel Oyedokun *et al.*, 'Overview of Taxation and Nigeria Tax system' in Mohammad Alaro *et al.* (ed.) Tax Management and Compliance in Nigeria (OGE Business school, Lagos, Nigeria 2020) 330.

However, the effectiveness of these tax neutrality or incentives remains a subject of academic debate over time. In a study, it was argued that despite these incentives, there still exists an abundant multiplicity of taxes, uncertain incentive tax regimes, as well as subtle withdrawal of such incentives through ambiguous tax legislations and enforcements.<sup>63</sup> For instance, by the provisions of Personal Income Tax (Exemption of Bonds and Short-Term Government Securities) Order (PITEO) 2011 and Value Added Tax (Exemption of Bonds and Short-Term Government Securities) Order (VATEO) 2011, it is unclear whether *Sukuk* would enjoy the tax exemption for ten years or for an unlimited period. This ambiguity is because of the inconsistency in the provisions of the principal Acts (Personal Income Tax Act 2011 and Value Added Tax Act 2004) and the subsequent Exemption Orders.

The Non-Interest Finance (Taxation) Regulations 2022, recently released by the Federal Inland Revenue Service (FIR), establish a framework for taxing financial institutions in Nigeria that offer non-interest financial products and services. In accordance with the FIRS's authority under Section 61 of the Federal Inland Revenue Service Establishment Act (FIRSEA), the Regulations were issued with an effective date of 1 April 2022. The CIT Act (as modified) and CIT (Exemption of Bond and Short Securities) Order 2011 will therefore apply to

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<sup>63</sup> Godwin Emmanuel Oyedokun *et al.*, 'Overview of Taxation and Nigeria Tax system' in Mohammad Alaro *et al.* (ed.) Tax Management and Compliance in Nigeria (OGE Business school, Lagos, Nigeria 2020) 330.

the *Sukuk* arrangement in the same way as they do to conventional bonds. As a result, CIT will not apply to any other *Sukuk* than those issued by the Federal government. The Regulations also make it clear that the SPV, a pass-through vehicle, shall be subject to the tax administrative processes outlined in the applicable tax regulations, including return filing.<sup>64</sup>

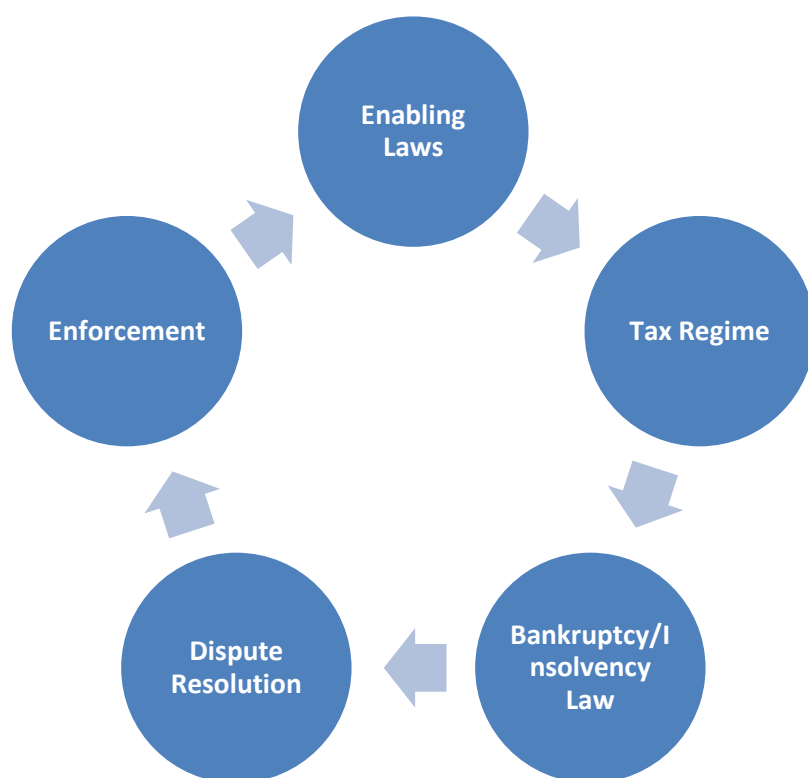


Figure1 shows the relationship between the legal and regulatory framework

**Source:** Author

This figure shows a significant relationship among the variables of Enforcement, Dispute Resolution, Bankruptcy, Tax, and enabling laws. In essence, having all

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<sup>64</sup> Adewale Ajayi, "FIRS issues Regulations for taxation of institutions offering non-interest financial products and services in Nigeria" <https://assets.kpmg.com/content/dam/kpmg/ng/pdf/firs-issues-regulations-for-taxation-of-institutions-offering-non-interest-financial-products-and-services-in-nigeria.pdf> accessed on 23 December 2022.

these variables working hand in hand will culminate in a strong and effective legal and regulatory framework for sovereign *Sukuk* in Nigeria.

## CONCLUSION

An attempt has been made to analyse the existing legal and regulatory framework for *Sukuk* in Nigeria. This analysis is necessary to show the various lacunae in the existing framework, albeit with some laws like the taxation regime that has, in principle, taken care of the challenge of double taxation of *Sukuk* transactions because of its inherent uniqueness. However, as pointed out in the discussions above, the existing legal and regulatory framework leaves more to be desired. This requires an in-depth analysis of the challenges caused by the existing framework and suggestions to be made on the way forward. The result from the analysis will clear the air on the erroneous belief in some quarters that *Sukuk*, in practice, is driven by market considerations and not by Islamic law or the law in existence in any jurisdiction.

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