



# Trustees' role in sukuk structuring

**By Haji Idrus bin Ismail**



In Malaysia, a trustee appointed for an Islamic bond or sukuk structuring is governed by both the *Companies Act 1965* and the *Capital Markets and Services Act 2007*. In addition to applicable common law duties, the role of the trustee is spelt out in detail in these statutes, and the trustee's fiduciary duties under these acts are *in pari material* (to be construed as being consistent with each other as far as possible).

Essentially, the trustee is the independent referee for the players in the sukuk transaction flow, and acts as the watchdog for Malaysia's Securities Commission, to which it reports any breach of statutory provisions by either the borrower or guarantor.

Vigilance is the key word, and the trustee has to monitor the debenture deed and ensure that the rights and obligations of the borrower and guarantor are observed in relation to the beneficiaries under the debenture, namely the investors or debenture-holders. Owing a duty of care exclusively to the beneficiaries, the trustee plays a proactive role in ensuring that the debenture is enforced, especially in the event of default. In a recent interaction with the Securities Commission in relation to proposed amendments to the Commission's Guidelines on sukuk structuring and issuance, various trustees were debating the issue of whether trustees ought to be involved in the transactions leading to a sign-off, mindful of the already onerous duties of trustees to a debenture. It is the view of the writer that being involved in the transaction documents and deliberations should not be

avoided as trustees, by the very nature of their statutory duties, are responsible to ensure that the beneficiaries' interests are always protected.

Short of signing off (which they should not be asked to do as this would compromise their independence), trustees should be involved in the transaction documents at every stage of a sukuk structuring – such interaction will provide them with critical knowledge about the state of affairs of the transaction, especially in regard to the solvency of the parties on which they are bound to report. More importantly,

involvement in the transaction will be proof that due diligence and care has been exercised in carrying out the duties as trustees.

As both statutes do not allow exclusion of liability as trustee, the best way for trustees to protect themselves is by passing the 'reasonable trustee' test: that notwithstanding a breach, the trustee has done what a reasonable trustee ought to have done to discharge its fiduciary duties. Being involved in the transaction flow instead of being passive allows trustees to show that they are exercising due diligence and care, hence demonstrating that they are reasonable trustees as expected

in common law as well as under the relevant statutes which provide guidance on the role and duties of trustees.

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