Ijarah

Introduction

"Ijarah" is a term of Islamic fiqh. Lexically, it means 'to give something on rent'. In the Islamic jurisprudence, the term 'Ijarah' is used for two different situations. In the first place, it means 'to employ the services of a person on wages given to him as a consideration for his hired services." The employer is called 'musta'jir' while the employee is called 'ajir'.

Therefore, if A has employed B in his office as a manager or as a clerk on a monthly salary, A is musta'jir, and B is an ajir. Similarly, if A has hired the services of a porter to carry his baggage to the airport, A is a musta'jir while the porter is an ajir, and in both cases the transaction between the parties is termed as Ijarah. This type of Ijarah includes every transaction where the services of a person are hired by someone else. He may be a doctor, a lawyer, a teacher, a laborer or any other person who can render some valuable services. Each one of them may be called an 'ajir' according to the terminology of Islamic law, and the person who hires their services is called a 'musta'jir', while the wages paid to the ajir are called their 'ujrah'. Labor

The second type of Ijarah relates to the usufructs of assets and properties, and not to the services of human beings. 'Ijarah' in this sense means 'to transfer the usufruct of a particular property to another person in exchange for a rent claimed from him.' In this case, the term 'Ijarah' is analogous to the English term 'leasing'. Here the lessor is called 'Mu'jir', the lessee is called 'musta'jir' and the rent payable to the lessor is called 'ujrah'.

Both these kinds of 'Ijarah' are thoroughly discussed in the literature of Islamic jurisprudence and each one of them has its own set of rules. But for the purpose of the present book, the second type of Ijarah is more relevant, because it is generally used as a form of investment, and as a mode of financing also.

The rules of Ijarah, in the sense of leasing, is very much analogous to the rules of sale, because in both cases something is transferred to another person for a valuable consideration. The only difference between Ijarah and sale is that in the latter case the corpus of the property is transferred to the purchaser, while in the case of Ijarah, the corpus of the property remains in the ownership of the transferor, but only its usufruct i.e. the right to use it, is transferred to the lessee.

Therefore, it can easily be seen that 'Ijarah' is not a mode of financing in its origin. It is a normal business activity like sale. However, due to certain reasons, and in particular, due to some tax concessions it may carry, this transaction is being used in the Western countries for the purpose of financing also. Instead of giving a simple interest - bearing loan, some financial institutions started leasing some equipment's to their customers. While fixing the rent of these equipment, they calculate the total cost they have incurred in the purchase of these assets and add the stipulated interest they could have claimed on such an amount during the lease period. The aggregate amount so calculated is divided on the total months of the lease period, and the monthly rent is fixed on that basis.

The question whether or not the transaction of leasing can be used as a mode of financing in Shari'ah depends on the terms and conditions of the contract. As mentioned earlier, leasing is a normal business transaction and not a mode of financing. Therefore, the lease transaction is always governed by the rules of Shari'ah prescribed for Ijarah. Let us, therefore, discuss the basic rules governing the lease transactions, as enumerated in the Islamic Fiqh. After the study of these rules, we will be able to understand under what conditions the Ijarah may be used for the purpose of financing.

Although the principles of Ijarah are so numerous that a separate volume is required for their full discussion, we will attempt in this chapter to summarize those basic principles only which are necessary for the proper understanding of the nature of the transaction and are generally needed in the context of modern economic practice. These principles are recorded here in the form of brief notes, so that the readers may use them for quick reference.

Basic Rules of Leasing

1. Leasing is a contract whereby the owner of something transfers its usufruct to another person for an agreed period, at an agreed consideration.

2. The subject of lease must have a valuable use. Therefore, things having no usufruct at all cannot be leased.

3. It is necessary for a valid contract of lease that the corpus of the leased property remains in the ownership of the seller, and only its usufruct is transferred to the lessee. Thus, anything which cannot be used without consuming cannot be leased out. Therefore, the lease cannot be effected in respect of money, eatables, fuel and

ammunition etc. because their use is not possible unless they are consumed. If anything of this nature is leased out, it will be deemed to be a loan and all the rules concerning the transaction of loan shall accordingly apply. Any rent charged on this invalid lease shall be an interest charged on a loan.

4. As the corpus of the leased property remains in the ownership of the lessor, all the liabilities emerging from the ownership shall be borne by the lessor, but the liabilities referable to the use of the property shall be borne by the lessee.
Example:
A has leased his house to **B**. The taxes referable to the property shall be borne by A, while the water tax, electricity bills and all expenses referable to the use of the house shall be borne by B, the lessee.

5. The period of lease must be determined in clear terms.

6. The lessee cannot use the leased asset for any purpose other than the purpose specified in the lease agreement. If no such purpose is specified in the agreement, the lessee can use it for whatever purpose it is used in the normal course. However if he wishes to use it for an abnormal purpose, he cannot do so unless the lessor allows him in express terms.

7. The lessee is liable to compensate the lessor for every harm to the leased asset caused by any misuse or negligence on the part of the lessee.

8. The leased asset shall remain in the risk of the lessor throughout the lease period in the sense that any harm or loss caused by the factors beyond the control of the lessee shall be borne by the lessor.

9. A property jointly owned by two or more persons can be leased out, and the rental shall be distributed between all the joint owners according to the proportion of their respective shares in the property.

10. A joint owner of a property can lease his proportionate share to his co-sharer only, and not to any other person.

11. It is necessary for a valid lease that the leased asset is fully identified by the parties.

Example:
A said to B. "I lease you one of my two shops." B agreed. The lease is void, unless the leased shop is clearly determined and identified.Determination of Rental

12. The rental must be determined at the time of contract for the whole period of lease.
It is permissible that different amounts of rent are fixed for different phases during the lease period, provided that the amount of rent for each phase is specifically

agreed upon at the time of effecting a lease. If the rent for a subsequent phase of the lease period has not been determined or has been left at the option of the lessor, the lease is not valid.

Example (1) :A leases his house to B for a total period of 5 years. The rent for the first year is fixed as Rs. 2000/- per month and it is agreed that the rent of every subsequent year shall be 10% more than the previous one. The lease is valid

Example (2): In the above example, A puts a condition in the agreement that the rent of Rs. 2000/- per month is fixed for the first year only. The rent for the subsequent years shall be fixed each year at the option of the lessor. The lease is void, because the rent is uncertain.

The determination of rental on the basis of the aggregate cost incurred in the purchase of the asset by the lessor, as normally done in financial leases, is not against the rules of Shari‘ah, if both parties agree to it, provided that all other conditions of a valid lease prescribed by the Shari‘ah are fully adhered to.

14. The lessor cannot increase the rent unilaterally, and any agreement to to this effect is void.

15. The rent or any part thereof may be payable in advance before the delivery of the asset to the lessee, but the amount so collected by the lessor shall remain with him as 'on account' payment and shall be adjusted towards the rent after its being due.

16. The lease period shall commence from the date on which the leased asset has been delivered to the lessee, no matter whether the lessee has started using it or not.

17. If the leased asset has totally lost the function for which it was leased, and no repair is possible, the lease shall terminate on the day on which such loss has been caused. However, if the loss is caused by the misuse or by the negligence of the lessee, he will be liable to compensate the lessor for the depreciated value of the asset as, it was immediately before the loss.

Lease as a mode of financing

Like murabahah, lease is not originally a mode of financing. It is simply a transaction meant to transfer the usufruct of a property from one person to another for an agreed period against an agreed consideration. However, certain financial institutions have adopted leasing as a mode of financing instead of long term lending on the basis of interest. This kind of lease is generally known as the 'financial lease' as distinguished from the 'operating lease' and many basic features of actual leasing transaction have been dispensed with therein.

When interest-free financial institutions were established in the near past, they

found that leasing is a recognized mode of finance throughout the world. On the other hand, they realized that leasing is a lawful transaction according to Shari‘ah and it can be used as an interest-free mode of financing. Therefore, leasing has been adopted by the Islamic financial institutions, but very few of them paid attention to the fact that the 'financial lease' has a number of characteristics more similar to interest than to the actual lease transaction. That is why they started using the same model agreements of leasing as were in vogue among the conventional financial institutions without any modification, while a number of their provisions were not in conformity with Shari‘ah.

As mentioned earlier, leasing is not a mode of financing in its origin. However, the transaction may be used for financing, subject to certain conditions. It is not sufficient for this purpose to substitute the name of 'interest' by the name of 'rent' and replace the name of 'mortgage' by the name of 'leased asset'. There must be a substantial difference between leasing and an interest-bearing loan. That will be possible only by following all the Islamic rules of leasing, some of which have been mentioned in the first part of this chapter.

To be more specific, some basic differences between the contemporary financial leasing and the actual leasing allowed by the Shari‘ah are indicated below.

The commencement of lease

1. Unlike the contract of sale, the agreement of Ijarah can be effected for a future date.1 Thus, while a forward sale is not allowed in Shari‘ah, an 'Ijarah' for a future date is allowed, on the condition that the rent will be payable only after the leased asset is delivered to the lessee.

In most cases of the 'financial lease' the lessor i.e. the financial institution purchases the asset through the lessee himself. The lessee purchases the asset on behalf of the lessor who pays its price to the supplier, either directly or through the lessee. In some lease agreements, the lease commences on the very day on which the price is paid by the lessor, irrespective of whether the lessee has effected payment to the supplier and taken delivery of the asset or not. It may mean that lessee's liability for the rent starts before the lessee takes delivery of the asset. This is not allowed in Shari‘ah, because it amounts to charging rent on the money given to the customer which is nothing but interest, pure and simple.

The correct way, according to Shari‘ah, is that the rent be charged after the lessee has taken delivery of the asset, and not from the day the price has been paid. If the supplier has delayed the delivery after receiving the full price, the lessee should not be liable for the rent of the period of delay.

Different relations of the parties

It should be clearly understood that when the lessee himself has been entrusted with

the purchase of the asset intended to be leased, there are two separate relations between the institution and the client which come into operation one after the other. In the first instance, the client is an agent of the institution to purchase the asset on latter's behalf. At this stage, the relation between the parties is nothing more than the relation of a principal and his agent. The relation of lessor and lessee has not yet come into operation.

The second stage begins from the date when the client takes delivery from the supplier. At this stage, the relation of lessor and lessee comes to play its role. These two capacities of the parties should not be mixed up or confused with each other. During the first stage, the client cannot be held liable for the obligations of a lessee. In this period, he is responsible to carry out the functions of an agent only. But when the asset is delivered to him, he is liable to discharge his obligations as a lessee.

However, there is a point of difference between murabahah and leasing. In murabahah, as mentioned earlier, actual sale should take place after the client takes delivery from the supplier, and the previous agreement of murabahah is not enough for effecting the actual sale. Therefore, after taking possession of the asset as an agent, he is bound to give intimation to the institution, and make an offer for the purchase from him. The sale takes place after the institution accepts the offer.

The procedure in leasing is different, and a little shorter. Here the parties need not effect the lease contract after taking delivery. If the institution, while appointing the client its agent, has agreed to lease the asset with effect from the date of delivery, the lease will automatically start on that date without any additional procedure. There are two reasons for this difference between murabahah and leasing:

Firstly, it is a necessary condition for a valid sale that it should be effected instantly. Thus, a sale attributed to a future date is invalid in Shari‘ah. But leasing can be attributed to a future date. Therefore, the previous agreement is not sufficient in the case of murabahah, while it is quite enough in the case of leasing.

Secondly, the basic principle of Shari‘ah is that one cannot claim a profit or a fee for a property the risk of which was never borne by him. Applying this principle to murabahah, the seller cannot claim a profit over a property which never remained under his risk for a moment. Therefore, if the previous agreement is held to be sufficient for effecting a sale between the client and the institution, the asset shall be transferred to the client simultaneously when he takes its possession, and the asset shall not come into the risk of the seller even for a moment. That is why the simultaneous transfer is not possible in murabahah, and there should be a fresh offer and acceptance after the delivery.

In leasing, however, the asset remains under the risk and ownership of the lessor throughout the leasing period, because the ownership has not been transferred. Therefore, if the lease period begins right from the time when the client has taken

delivery, it does not violate the principle mentioned above.

Expenses consequent to ownership

As the lessor is the owner of the asset, and he has purchased it from the supplier through his agent, he is liable to pay all the expenses incurred in the process of its purchase and its import to the country of the lessor. Consequently, he is liable to pay the freight and the customs duty etc. He can, of course, include all these expenses in his cost and can take them into consideration while fixing the rentals, but as a matter of principle, he is liable to bear all these expenses as the owner of the asset. Any agreement to the contrary, as is found in the traditional financial leases, is not in conformity with Shari‘ah.

Liability of the parties in case of loss to the asset

As mentioned in the basic principles of leasing, the lessee is responsible for any loss caused to the asset by his misuse or negligence. He can also be made liable to the wear and tear which normally occurs during its use. But he cannot be made liable to a loss caused by the factors beyond his control. The agreements of the traditional 'financial lease' generally do not differentiate between the two situations. In a lease based on the Islamic principles, both the situations should be dealt with separately.

Variable Rentals in Long Term Leases

In the long term lease agreements it is mostly not in the benefit of the lessor to fix one amount of rent for the whole period of lease, because the market conditions change from time to time.

In this case the lessor has two options:

(a) He can contract lease with a condition that the rent shall be increased according to a specified proportion (e.g. 5%) after a specified period (like one year).

(b) He can contract lease for a shorter period after which the parties can renew the lease at new terms and by mutual consent, with full liberty to each one of them to refuse the renewal, in which case the lessee is bound to vacate the leased property and return it back to the lessor.

These two options are available to the lessor according to the classical rules of Islamic Fiqh. However, some contemporary scholars have allowed, in long-term leases, to tie up the rental amount with a variable benchmark which is so well-known and well-defined that it does not leave room for any dispute. For example, it is permissible according to them to provide in the lease contract that in case of any increase in the taxes imposed by the government on the lessor, the rent will be increased to the extent of same amount. Similarly it is allowed by them that the

annual increase in the rent is tied up with the rate of inflation. Therefore if there is an increase of 5% in the rate of inflation, it will result in an increase of 5% in the rent as well. Based on the same principle, some Islamic banks use the rate of interest as a benchmark to determine the rental amounts. They want to earn the same profit through leasing as is earned by the conventional banks through advancing loans on the basis of interest. Therefore, they want to tie up the rentals with the rate of interest and instead of fixing a definite amount of rental, they calculate the cost of purchasing the lease assets and want to earn through rentals an amount equal to the rate of interest. Therefore, the agreement provides that the rental will be equal to the rate of interest or to the rate of interest plus something. Since the rate of interest is variable, it cannot be determined for the whole lease period. Therefore, these contracts use the interest rate of a particular country (like LIBOR) as a benchmark for determining the periodical increase in the rent.

This arrangement has been criticized on two grounds:

The first objection raised against it is that, by subjecting the rental payments to the rate of interest, the transaction is rendered akin to an interest based financing. This objection can be overcome by saying that, as fully discussed in the case of murabahah, the rate of interest is used as a benchmark only. So far as other requirements of Shari‘ah for a valid lease are properly fulfilled, the contract may use any benchmark for determining the amount of rental. The basic difference between an interest - based financing and a valid lease does not lie in the amount to be paid to the financier or the lessor. The basic difference is that in the case of lease, the lessor assumes the full risk of the corpus of the leased asset. If the asset is destroyed during the lease period, the lessor will suffer the loss. Similarly, if the leased asset looses its usufruct without any misuse or negligence on the part of the lessee, the lessor cannot claim the rent, while in the case of an interest-based financing, the financier is entitled to receive interest, even if the debtor did not at all benefit from the money borrowed. So far as this basic difference is maintained, (i.e. the lessor assumes the risk of the leased asset) the transaction cannot be categorised as an interest-bearing transaction, even though the amount of rent claimed from the lessee is equal to the rate of interest.

It is thus clear that the use of the rate of interest merely as a benchmark does not render the contract invalid as an interest - based transaction. It is, however, advisable at all times to avoid using interest even as a benchmark, so that an Islamic transaction is totally distinguished from an un-Islamic one, having no resemblance of interest whatsoever.

The second objection to this arrangement is that the variations of the rate of interest being unknown, the rental tied up with the rate of interest will imply Jahalah and Gharar which is not permissible in Shari‘ah. It is one of the basic requirements of Shari‘ah that the consideration in every contract must be known to the parties when they enter into it. The consideration in a transaction of lease is the rent charged from the lessee, and therefore it must be known to each party right at the beginning of the contract of lease. If we tie up the rental with the future rate of interest, which is

unknown, the amount of rent will remain unknown as well. This is the Jahalah or Gharar which renders the transaction invalid.

Responding to this objection, one may say that the Jahalah has been prohibited for two reasons: One reason is that it may lead to dispute between the parties. This reason is not applicable here, because both parties have agreed with mutual consent upon a well defined benchmark that will serve as a criterion for determining the rent, and whatever amount is determined, based on this benchmark, will be acceptable to both parties. Therefore, there is no question of any dispute between them.

The Second reason for the prohibition of Jahalah is that it renders the parties susceptible to an unforeseen loss. It is possible that the rate of interest, in a particular period, zooms up to an unexpected level in which case the lessee will suffer. It is equally possible that the rate of interest zooms down to an unexpected level, in which case the lessor may suffer. In order to meet the risks involved in such possibilities, it is suggested by some contemporary scholars that the relation between rent and the rate of interest is subjected to a limit or ceiling. For example, it may be provided in the base contract that the rental amount after a given period, will be changed according to the change in the rate of interest, but it will in no case be higher than 15% or lower than 5% of the previous monthly rent. It will mean that if the increase in the rate of interest is more than 15% the rent will be increased only up to 15%. Conversely, if the decrease in the rate of interest is more than 5% the rent will not be decreased to more than 5%. In our opinion, this is the moderate view which takes care of all the aspects involved in the issue.

Penalty for Late Payment of Rent

In some agreements of financial leases, a penalty is imposed on the lessee in case he delays the payment of rent after the due date. This penalty, if meant to add to the income of the lessor, is not warranted by the Shari‘ah. The reason is that the rent after it becomes due, is a debt payable by the lessee, and is subject to all the rules prescribed for a debt. A monetary charge from a debtor for his late payment is exactly the riba prohibited by the Holy Qur’an. Therefore, the lessor cannot charge an additional amount in case the lessee delays payment of the rent.

However, in order to avoid the adverse consequences resulting from the misuse of this prohibition, another alternative may be resorted to. The lessee may be asked to undertake that, if he fails to pay rent on its due date, he will pay certain amount to a charity. For this purpose the financier / lessor may maintain a charity fund where such amounts may be credited and disbursed for charitable purposes, including advancing interest-free loans to the needy persons. The amount payable for charitable purposes by the lessee may vary according to the period of default and may be calculated at per cent, per annum basis . The agreement of the lease may contain the following clause for this purpose:

"The Lessee hereby undertakes that, if he fails to pay rent at its due date, he shall pay

an amount calculated at ....% p.a. to the charity Fund maintained by the Lessor which will be used by the Lessor exclusively for charitable purposes approved by the Shari‘ah and shall in no case form part of the income of the Lessor." This arrangement, though does not compensate the lessor for his opportunity cost of the period of default, yet it may serve as a strong deterrent for the lessee to pay the rent promptly.

The justification for such undertaking of the lessee, and inability of any penalty or compensation claimed by the lessor for his own benefit is discussed in full in the chapter of 'Murabahah' in the present book which may be consulted for details.

Termination of lease

If the lessee contravenes any term of the agreement, the lessor has a right to terminate the lease contract unilaterally. However, if there is no contravention on the part of the lessee, the lease cannot be terminated without mutual consent. In some agreements of the 'financial lease' it has been noticed that the lessor has been given an unrestricted power to terminate the lease unilaterally whenever he wishes, according to his sole judgment. This is again contrary to the principles of Shari‘ah.

In some agreements of the 'financial lease' a condition has been found to the effect that in case of the termination of lease, even at the option of the lessor, the rent of the remaining lease period shall be paid by the lessee. This condition is obviously against Shari‘ah and the principles of equity and justice. The basic reason for inserting such conditions in the agreement of lease is that the main concept behind the agreement is to give an interest-bearing loan under the ostensible cover of lease. That is why every effort is made to avoid the logical consequences of the lease contract.

Naturally, such a condition cannot be acceptable to Shari‘ah. The logical consequence of the termination of lease is that the asset should be taken back by the lessor. The lessee should be asked to pay the rent as due up to the date of termination. If the termination has been effected due to the misuse or negligence on the part of the lessee, he can also be asked to compensate the lessor for the loss caused by such misuse or negligence. But he cannot be compelled to pay the rent of the remaining period.

Insurance of the assets

If the leased property is insured under the Islamic mode of takaful, it should be at the expense of the lessor and not at the expense of the lessee, as is generally provided in the agreements of the current 'financial leases'.

The residual value of the leased asset

Another important feature of the modern 'financial leases' is that after the expiry of the lease period, the corpus of the leased asset is normally transferred to the lessee.

As the lessor already recovers his cost along with an additional profit thereon, which is normally equal to the amount of interest which could have been earned on a loan of that amount advanced for that period, the lessor has no further interest in the leased asset. On the other hand, the lessee wants to retain the asset after the expiry of the leased period.

For these reasons, the leased asset is generally transferred to the lessee at the end of the lease, either free of any charge or at a nominal token price. In order to ensure that the asset will be transferred to the lessee, sometimes the lease contract has an express clause to this effect. Sometimes this condition is not mentioned in the contract expressly; however, it is understood between the parties that the title of the asset will be passed on to the lessee at the end of the lease term.

This condition, whether it is express or implied, is not in accordance with the principles of Shari‘ah. It is a well settled rule of Islamic jurisprudence that one transaction cannot be tied up with another transaction so as to make the former a pre-condition for the other. Here the transfer of the asset at the end has been made a necessary condition for the transaction of lease which is not allowed in Shari‘ah.

The original position in Shari‘ah is that the asset shall be the sole property of the lessor, and after the expiry of the lease period, the lessor shall be at liberty to take the asset back, or to renew the lease or to lease it out to another party, or sell it to the lessee or to any other person. The lessee cannot force him to sell it to him at a nominal price, nor can such a condition be imposed on the lessor in the lease agreement.

But after the lease period expires, and the lessor wants to give the asset to the lessee as a gift or to sell it to him, he can do so by his free will. However, some contemporary scholars, keeping in view the needs of the Islamic financial institutions have come up with an alternative. They say that the agreement of Ijarah itself should not contain a condition of gift or sale at the end of the lease period. However, the lessor may enter into a unilateral promise to sell the leased asset to the lessee at the end of the lease period. This promise will be binding on the lessor only. The principle, according to them, is that a unilateral promise to enter into a contract at a future date is allowed whereby the promisor is bound to fulfil the promise, but the promisee is not bound to enter into that contract . It means that he has an option to purchase which he may or may not exercise. However, if he wants to exercise his option to purchase, the promisor cannot refuse it because he is bound by his promise. Therefore, these scholars suggest that the lessor, after entering into the lease agreement, can sign a separate unilateral promise whereby he undertakes that if the lessee has paid all the amounts of rentals and wants to purchase the asset at a specified mutually acceptable price, he will sell the leased asset to him for that price.

Once this promise is signed by the lessor, he is bound to fulfil it and the lessee may exercise his option to purchase at the end of the period, if he has fully paid the amounts of rent according to the agreement of lease. Similarly, it is also allowed by

these scholars that, instead of sale, the lessor signs a separate promise to gift the leased asset to the lessee at the end of the lease period, subject to his payment of all amounts of rent. This arrangement is called 'Ijarah wa iqtina'. It has been allowed by a large number of contemporary scholars and is widely acted upon by the Islamic banks and financial institutions. The validity of this arrangement is subject to two basic conditions:

Firstly, the agreement of Ijarah itself should not be subjected to signing this promise of sale or gift but the promise should he recorded in a separate document. Secondly, the promise should be unilateral and binding on the promisor only. It should not be a bilateral promise binding on both parties because in this case it will be a full contract effected to a future date which is not allowed in the case of sale or gift.

Sub-Lease

If the leased asset is used differently by different users, the lessee cannot sub-lease the leased asset except with the express permission of the lessor. If the lessor permits the lessee for subleasing, he may sub-lease it. If the rent claimed from the sub-lessee is equal to or less than the rent payable to the owner / original lessor, all the recognized schools of Islamic jurisprudence are unanimous on the permissibility of the sub lease. However, the opinions are different in case the rent charged from the sub-lessee is higher than the rent payable to the owner. Imam al-Shafi'i and some other scholars allow it and hold that the sub lessor may enjoy the surplus received from the sub-lessee. This is the preferred view in the Hanbali school as well. On the other hand. Imam Abu Hanifah is of the view that the surplus received from the sub-lessee in this case is not permissible for the sub-lessor to keep and he will have to give that surplus in charity. However, if the sub-lessor has developed the leased property by adding something to it or has rented it in a currency different from the currency in which he himself pays rent to the owner/the original lessor, he can claim a higher rent from his sub-lessee and can enjoy the surplus.

Although the view of Imam Abu Hanifah is more precautions which should be acted upon to the best possible extent, in cases of need the view of Shafi'i and Hanbali schools may be followed because there is no express prohibition in the Holy Qur'an or in the Sunnah against the surplus claimed from the lessee. Ibn Qudamah has argued for the permissibility of surplus on forceful grounds.

Assigning of the Lease

The lessor can sell the leased property to a third party whereby the relation of lessor and lessee shall be established between the new owner and the lessee. However, the assigning of the lease itself (without assigning the ownership in the leased asset) for a monetary consideration is not permissible.

The difference between the two situations is that in the latter case the ownership of the asset is not transferred to the assignee, but he becomes entitled to receive the rent

of the asset only. This kind of assignment is allowed in Shari‘ah only where no monetary consideration is charged from the assignee for this assignment. for example, a lessor can assign his right to claim rent from the lessee to his son, or to his friend in the form of a gift. Similarly, he can assign this right to any one of his creditors to set off his debt out of the rentals received by him. But if the lessor wants to sell this right for a fixed price, it is not permissible, because in this case the money (the amount of rentals) is sold for money which is a transaction subject to the principle of equality. Otherwise it will be tantamount to a riba transaction, hence prohibited.

Securitization of Ijarah

The arrangement of Ijarah has a good potential of securitization which may help create a secondary market for the financiers on the basis of Ijarah. Since the lessor in Ijarah owns the leased assets, he can sell the asset, in whole or in part, to a third party who may purchase it and may replace the seller in the rights and obligations of the lessor with regard to the purchased part of the asset.

Therefore, if the lessor, after entering into Ijarah, wishes to recover his cost of purchase of the asset with a profit thereon, he can sell the leased asset wholly or partly either to one party or to a number of individuals. In the latter case, the purchase of a proportion of the asset by each individual may be evidenced by a certificate which may be called 'Ijarah certificate'. This certificate will represent the holder's proportionate ownership in the leased asset and he will assume the rights and obligations of the owner/lessor to that extent. Since the asset is already leased to the lessee, lease will continue with the new owners, each one of the holders of this certificate will have the right to enjoy a part of the rent according to his proportion of ownership in the asset. Similarly he will also assume the obligations of the lessor to the extent of his ownership. Therefore, in the case of total destruction of the asset, he will suffer the loss to the extent of his ownership. These certificates, being an evidence of proportionate ownership in a tangible asset, can be negotiated and traded in freely in the market and can serve as an instrument easily convertible into cash. Thus they may help in solving the problems of liquidity management faced by the Islamic banks and financial institutions.

It should be remembered, however, that the certificate must represent ownership of an undivided part of the asset with all its rights and obligations. Misunderstanding this basic concept, some quarters tried to issue Ijarah certificates representing the holder's right to claim certain amount of the rental only without assigning to him any kind of ownership in the asset. It means that the holder of such a certificate has no relation with the leased asset at all. His only right is to share the rentals received from the lessee. This type of securitization is not allowed in Shari‘ah. As explained earlier in this chapter, the rent after being due is a debt payable by the lessee. The debt or any security representing debt only is not a negotiable instrument in Shari‘ah, because trading in such an instrument amounts to trade in money or in monetary obligation which is not allowed, except on the basis of equality, and if the equality of value is

observed while trading in such instruments, the very purpose of securitization is defeated. Therefore, this type of Ijarah certificates cannot serve the purpose of creating a secondary market. It is, therefore, necessary that the Ijarah certificates are designed to represent real ownership of the leased assets, and not only a right to receive rent.

Head-Lease

Another concept developed in the modern leasing business is that of 'head-leasing.' In this arrangement a lessee sub-leases the property to a number of sub-lessees. Then, he invites others to participate in his business by making them share the rentals received by his sub-lessees. For making them participate in receiving rentals, he charges a specified amount from them. This arrangement is not in accordance with the principles of Shari‘ah. The reason is obvious. The lessee does not own the property. He is entitled to benefit from its usufruct only. That usufruct he has passed on to his sub-lessees by contracting a sub-lease with them. Now he does not own anything, neither the corpus of the property, nor its usufruct. What he has is the right to receive rent only. Therefore, he assigns a part of this right to other persons. It is already explained in detail that this right cannot be traded in, because it amounts to selling a receivable debt at a discount which is one of the forms of riba prohibited by the Holy Qur’an and Sunnah. Therefore, this concept is not acceptable.

These are some basic features of the 'financial lease' which are not in conformity with the dictates of Shari‘ah. While using the lease as an Islamic mode of finance, these shortcomings must be avoided.

The list of the possible shortcomings in the lease agreement is not restricted to what has been mentioned above, but only the basic errors found in different agreements have been pointed out, and the basic principles of Islamic leasing have been summarized. An Islamic lease agreement must conform to all of them.