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Ijarah

1. Introduction and Definition

Ijārah, often translated as hiring or leasing, in Islamic mercantile law refers to the sale of the usufruct of corporeal entities or living beings, both man and animal, for an agreed upon period, in exchange for a known remuneration.¹

The construction “usufruct of corporeal or living beings” in the above definition excludes the sale of corporeal entities, namely, the *bayʿ* contract. Further, usufruct, which linguistically refers to the right to use another’s property, is extended in this manual to the right to engage the services of living beings, man and animal alike. Thus, *ijārah* as defined is a wide-ranging contract which comprises of at least five contracts when compared to that of secular law. These five contracts are: (a) the lease²; (b) employment; (c) service contracts; (d) carriage and storage; and (e) the hire-purchase contract.

Living in an Islamic diaspora, a country governed by a secular legal system, the author has opted to address the *ijārah* contract in light of the five aforementioned contracts. The incentive for this, so to say, new approach is an analysis driven by relevance and context, though firmly grounded in classical scholarship. Furthermore, as a result of living in a predominant Shāfiʿī community, this manual, with an exception of the hire-purchase contract, is based on the Shāfi school. In the hire-purchase contract, the

author has drawn extensively from Shaykh Wahbah az-Zuhaylī in his brilliant work, *al-Mu'āmalāt al-Māliyyah al-Mu'āsirah*, wherein the author has not restricted himself to any one particular school.

2. Legal Justification of the Ijārah Contract

The vast majority of Islamic scholars infer the legal justification of the ijārah contract from three agreed-upon sources of Islamic law. In order of legal priority, they are the Qur'ān, Sunnah and Consensus.

Qur'ān:³

- Allah, the Most High, says in the inimitable Qur'ān: *﴿So if they breastfeed (your infants) forward them their due payment﴾* [65:6]
- Allah, the Most High, also says: *﴿One of the two (daughters of Prophet Shu'ayb) said: Oh my father engage his services, as verily the best of men for you to hire is the strong, the trustworthy. He said (to Mūsā): Verily I desire to marry you one of these two daughters of mine, on condition that you serve me for eight years. Should you, however, complete ten it would be charitable﴾* [28:26-27]

Sunnah:

- ibn 'Abbās *radīyAllahu 'anhu* narrates that the Prophet *sallAllahu 'alayhi wa sallam* had cupping done and, subsequently, paid the cupper his fee (Bukhāri: vol.4 pg.572).
- 'Āishah *radīyAllahu 'anhā* narrates that the Prophet *sallAllahu 'alayhi wa sallam* and Abū Bakr *radīyAllahu 'anhu* engaged the services of an individual from *Banī ad-Dīl*, who adhered to the religion of the disbelievers of the *Quraysh*, as a guide to *Madīnah*. They entrusted him with two riding camels and arranged for him to meet them at the cave of *Hirā* three days later (Bukhāri: vol.4 pg.553).

Consensus:

- Consensus on the legitimacy of the ijārah contract from the time of *Sahābah* (Companions of the Prophet *sallAllahu alayhi wasallam*) has been quoted by ibn Hajar al-Haytami and others⁴.

3. Elements of the Ijārah Contract

There are four elements (*arkān*) which serve as components to the ijārah contract; an ijārah contract cannot exist without them. These elements are: (a) Form (*sīghah*), or a particular verbal utterance consisting of an offering and compliance; (b) remuneration; (c) usufruct; and (d) contractors. Each element will be briefly discussed commencing with the latter.

a) Contractors

Adolescence, contractual competence (*ar-Rushd*) and freedom from unjustified coercion⁵ are the three prerequisites for both contractors in all monetary transactions. The absence of any of these prerequisite will render the contract invalid. The prepubescent, insane and mentally incapable are, therefore, not legitimate to engage in any form of transacting.

It should be noted here that according to the Malikī, Hanafī and Hanbalī schools, the prepubescent, when being able to distinguish between right and wrong (*mumayyiz*), will be permitted to transact, provided that (1) he acquires permission from his legal guardian before transacting, according to the Hanbalī school and (2) his legal guardian approves of his contract after transacting, according to the Mālikī and Hanafī schools.⁶

Depending on the subject of the contract, different terms will be given to the contractors. In the lease and carriage and storage contracts, where the subject is a corporeal entity, the terms lessor and lessee will be used in

reference to the contractors. When the subject is a service rendered by an individual, this individual could either be an *Ajīr Khāṣ* or *Ajīr Mushtarak*, defined below:

Ajīr Khāṣ [also known as *Ajīr Munfarid*]: one who works for an individual for a known period in such a manner that he is prohibited from rendering services to any other than that individual during the stipulated period. In this case the terms employer and employee will be used in reference to the contractors. The reason for equating the *Ajīr Khāṣ* with that of the employee will be explained under a discussion relating to the nature of the employment contract.

Ajīr Mushtarak: one who renders his service to the general public – tailors, panel beaters and the like – and differs from the *Ajīr Mushtarak* as he is allowed to render his service to many individuals concurrently. For convenience, the terms mandator and mandatory will be used in reference to the contractors.

b) Form

The form consists of an offering and compliance. The preponderant view holds that the verbal utterance of the form is a prerequisite. This view is substantiated by the Qur’anic verse: ﴿*Oh those who believe! Eat not up one another's property unjustly, except it be a trade amongst you with mutual consent*﴾ [4:29]; and the Prophetic tradition: «Transactions are only (concluded) with mutual consent» [ibn Mājah: vol.2 pg.277; and ibn Hibbān: vol. 11 pg. 340]. Mutual consent, the jurists argue, is only realised through verbal utterance.

Mu'āṭāt

An inevitable issue to be addressed here is that of *mu'āṭāt* (transacting with mutual consent without the verbal utterance of the offering and acceptance); an issue where the views of scholars have varied. Among the Madhāhib, the

Mālikiyyah, Hanafiyyah⁷ and Hanābilah have all accepted mu`ātāt as valid form of transacting. The Shāfi`iyyah, on the other hand, considered the verbal utterance of the form a prerequisite and thus regarded mu`ātāt as an invalid form of transacting.

The Earliest Shāfi`i jurists on record for having had adopted an alternative view were Abū al-`Abbās ibn Surayj and ar-Rūyānī. They held that while mu`ātāt will not be accepted in the sale of corporeal entities with high value, it will be permitted in the sale of inexpensive corporeal, day to day necessities. Latter scholars placed custom (*'urf*) as a yardstick in determining which transactions will and will not accept mu`ātāt⁸. The most prominent among them being ibn aṣ-Ṣabbāgh, al-Mutawallī, al-Baghawī and al-Imām an-Nawawī.

The widely accepted custom in our society ostensibly conforms to the view expressed by ibn Surayj and ar-Rūyānī. High valued corporeal such as motor vehicles or houses are sold with the signing of documents, the deed of sale, while low valued items are sold with mu`ātāt. The signing of the deed of sale is an accepted representation of mutual consent, considered, by some, more effective than verbal utterance.

c) Usufruct and service rendered

The usufruct differs from one contract to the other. In the lease contract the usufruct of the leased, in this case the house, is residing therein, whereas in employment the usufruct of the employee is the service rendered by him. Hereinafter, the term "service rendered" will be used in reference to the usufruct of individuals.

The usufruct and service rendered has five conditions that have to be met for the contract to be valid. These conditions, with those contracts which are nullified on account of their absence, are listed hereunder:

a) *The usufruct and service rendered has to have both a customary and Islamic value.*

The leasing of a house for residing purposes will be valid, as the usufruct has both an Islamic and customary value. On the other hand, the hiring of musical instruments will be invalid, as the usufruct holds no Islamic value.

b) *The lessor or ajīr has to be capable of handing over the usufruct or service rendered*

The lessor or *ajīr* (employee and mandatory) has to be capable of handing over the usufruct or their services physically and legally. Inability, whether physical or legal, would result in the vitiation of the contract.

Examples of physical incapability:

- Leasing of land that has not a continuous water supply and receives no rain, for agricultural purposes.
- Renting out a missing or stolen vehicle.

Examples of legal incapability:

- A lady in menstruation offering her services for the cleaning of a masjid. She, the lady in menstruation, is not permitted to enter the masjid.
- A married lady offering her services of breastfeeding without her husband's consent, as her time belongs to him.

c) *The usufruct and service rendered has to be stipulated and fixed*

It is necessary for the usufruct and service rendered to be fixed in three aspects in order for the contract to be valid.

- i. *'ayn*: the lessor, who owns more than one house, has to specify what house he intends leasing.

- ii. sifah: He has to state for what purpose he intends leasing the house, i.e. for either residing or commerce purposes. (This definition is specific to leasing. Wouldn't the issue of sifah mean simply articulation of the purpose of the usufruct?)
- iii. *Period of lease*: Depending on the type of contract, the period of lease differs in manner of estimation.

Contracts estimated by time only: where estimation is only possible with time, such as the leasing of houses for residing or commerce purposes.

Contracts estimated by performance only: where estimation is not possible with time, such as engaging a tailor's services for the specific action of tailoring a shirt or the like.

Contracts estimated either by time or performance: where estimation is possible with both time and performance, such as hiring an individual for tailoring or driving. Thus estimation by time will occur by hiring an individual to drive or tailor for a day; and estimation by performance by hiring an individual to transport goods from A to B or a tailor for the tailoring of an article of clothing.

d) The (fruits of the) usufruct or service rendered has to accrue to the lessee.

The hiring of an individual to perform acts of worship that do not permit proxy will not be valid, as the hired and not the hirer receives the reward. The hiring of an individual to perform acts of worship that accepts proxy will be valid as the reward ends up with the hirer and not the hired.

e) The usage of the usufruct should not result in the exhaustion of the subject of lease deliberately

Renting an orchard with the primary purpose of reaping its fruits, is impermissible as the object let is exhausted deliberately. The renting of a house annexed to an orchard, with the primary purpose of residing and secondary purpose of reaping fruits will be valid, as the exhaustion of the object let came about subsequently and not deliberately.

d) Remuneration

The remuneration has to be fixed and known by both contractors at the time of contract. Should any of the two be incognizant of the remuneration, the contract will be nullified. Thus, the leasing of property for the remuneration of its renovation would be invalid if the exact cost of renovation was not fixed and known by both lessee and lessor at the time of contract.

Remuneration could either be one of two: *dhimmah* or specific.

Dhimmah: whereby the lessor or ajir (employee and mandatory) stipulates a described remuneration, such as a 2002 model Toyota Corolla, i.e. any Toyota fitting this description

Specific: whereby the employee and mandatory specifies a particular remuneration, **in such a manner that the employee or mandatory indicating to a car says: I want this specific car as remuneration.**

The general form of remuneration in this present day is pecuniary, or monetary. Monetary remuneration, whether described or specified, forms within the category of *dhimmah* type of remuneration. The benefit of this division will become clear during the study of *ijārah al-'ayn*⁹.

Commission

Due to the fixed nature of remuneration, commission, a popular mode of transaction in the present day, is impermissible as neither the employee nor the employer has knowledge of the exact amount of remuneration.

It should be noted that, between buyer and seller, commission will always be fixed and known. By way of example, a salesman for Rola Motors receives three percent commission for every car he sells. Subsequently, when he sells a car of one hundred thousand, his commission percentage is fixed and known. Three percent of one hundred thousand is three thousand; thus, this is not the problematic area. The problematic area exists between the salesman and his employer as his salary is not fixed and known. Both the salesman and his employer are uncertain as to what he will be earning at the end of the month. **A probable, yet not practical, solution to this predicament is for the employer to fix the salary of the salesman. Thereafter whenever the salesman concludes a sale, he should purchase the car from the company at a reduced price and sell it to the client at a profit.**

4. The various Ijārah contracts

Before delving into the various types of contracts, there are two chief categories of ijārah which require discussion. All the various ijārah contracts have to be addressed in light of these two categories, *ijārah al-'ayn* and *ijārah adh-dhimmah*¹⁰. The discerning difference between these two categories lies in the subject of sale; is it one of *dhimmah* or specific?

Dhimmah: whereby the lessee leases a described corporeal without specification, such as any three bedroom house; or the mandator engages the services of an individual without any specification, such as the service of a panel-beater who may conduct the work by himself, seek someone's assistance or merely appoint one to panel-beat on his behalf.

Specific: whereby the lessee leases a specific corporeal, such as a particular house; or the mandator engages the services of an individual and specifies that he performs by himself.

When the subject of sale is one of dhimmah the contract will be classified as ijārah adh-dhimmah; where the subject is specific the contract will be labeled as ijārah al-`ayn.

Conditions of ijārah al`ayn

- a) The subject of contract has to be present and seen by both contractors at the time of contract. However, had both contractors seen the subject prior to the time of contract, and it maintains its original state, the contract will be valid.
- b) The lessee's acquisition of the usufruct should commence once the contract is concluded; no interval should exist between the contract and acquisition thereof. **Thus the leasing of property beginning in the following year or engaging someone's services beginning of the following month will not be valid.**
- c) The remuneration could either be one of dhimmah or specific¹¹. Delay in payment or credit will be allowed when the remuneration is one of dhimmah. Cash, however, is a prerequisite when the remuneration is specified.

Conditions of ijārah adh-dhimmah

- a) Cash is a condition and credit is thus not acceptable. This is so due to the fact that ijārah adh-dhimmah is the leasing version of *bay' as-salam* (forward buying). Credit or delay in payment would tantamount to the sale of debt with debt.
- b) **Declaring the class, category and ... of the leased article is essential. Hence, should the services of a freighting company be engaged for the delivery of certain goods, it is imperative that both contractors are aware of (a) which means of conveyance will be employed, for example air, road or rail; (b) whether its big or small and (c) whether its old or new.**

N.B. essentially, each of the forthcoming contracts accepts both forms of ijārah. As a result, the category under which the undertaken contract occurs has to be acknowledged and, subsequently, its respective conditions have to be adhered to.

To be continued

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¹ See, ibn Hajar al-Haytamī, *Tuhfah al-Muhtāj*, ;Shirbīnī, *Mughnī al-Muhtāj*, 3: 438.

² JTR Gibson, the author of *South African Mercantile and Company Law*, after affirming the dual meaning of the lease contract, i.e. comprising of moveable and immoveable property, as used by the author of *Principles of South African Law* carries on to say: "The term is, however, a term of convenience and, for the purpose of this chapter, it is convenient to confine its use to contracts of letting and hiring of immoveable property." In this short manual the present author shall not confine its use to that of immovable property. Rather, the lease contract will be divided in two: (i) the lease of immoveable property and (ii) the lease of moveable property.

³ The intent here is not to bring-forth a detailed presentation of all corroboration to be found in the *Qur'ān* and Sunnah. Thus we have sufficed ourselves with two of each.

⁴ There existed a group of scholars who denied the validity and legitimacy the *ijārah* contract, viz. Abū Bakr al-Aṣam, Ismā'il b. 'Ulayyah, al-Ḥasan al-Baṣrī, al-Qāshānī, an-Nahrawānī and ibn Kaysān. Their view, however, is nullified by this previous existing Consensus.

⁵ By the insertion of 'unrightfully' rightful coercion is excluded. Thus, the transaction of someone coerced to transact by the order of an Islamic court will be valid, as it is considered rightful coercion.

⁶ Tawfīq al-Būtī, *al-Buyū' ash-Shā'i'ah*, pg. 44

⁷ There does, however, exist some difference between Hanafī scholars as to whether the validity of *mu'ātāt* is restricted to *muhaqqarat* items or throughout. The preponderant view, however, being the latter.

⁸ i.e. whatever transactions are customarily accepted with *mu'ātāt* will be accepted and vice versa.

⁹ See below Types of 'Ijārah, *ijāh al-'ayn* and its conditions'

¹⁰ The Hanafiyyah has a similar division whereby *ijārah* denotes one of two, viz. (a) engaging the services of an individual in return for wages and (b) transfer of the usufruct of property and assets to another in return for remuneration.

¹¹ See above 'Remuneration'