

# HEINONLINE

Citation: 13 Minn. J. Global Trade 35 2004



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Wed Nov 11 18:52:45 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

# Harmonizing Risk and Religion: The Utility of *Shari'a*-Compliant Transaction Structuring in Commercial Aircraft Finance

Angelo Luigi Rosa\*

## INTRODUCTION

In March 2001, Emirates Airlines closed an \$88.6 million aircraft finance transaction with HSBC Holdings, Dubai Islamic Bank, National Bank of Dubai, and the British Arab Commercial Bank, for an Airbus A330 aircraft.<sup>1</sup> The transaction was built around a ten-year financing lease, structured along terms that comported with the *Shari'a* (or Islamic law) pertaining to commercial transactions, arranged by HSBC, and guaranteed by British, French, and German export credit agencies.<sup>2</sup> As the first Islamic finance transaction in the commercial aviation sector, the transaction garnered numerous accolades,<sup>3</sup> and was

---

\* J.D., American University, Washington College of Law; B.A. *magna cum laude*, University of California at Los Angeles. My heartfelt thanks go to Professor Kenneth Anderson for his mentoring, his friendship, and his encouragement, from before my entrance into law school up to the present. Most importantly, loving gratitude goes to my fiancée, Deborah, for her belief, care, loveliness, and support. It is to her that this article is dedicated.

السلام، الصلوة، الرخاء

1. See Press Release, Emirates Airlines, Emirates Completes Landmark Financing Deal (July 30, 2002) (on file with issuing company) [hereinafter Emirates Airlines]; see also *First Islamic Lease with Export Credit Support: Aircraft Deal of the Year*, ASSET FIN. INT'L, Apr. 2002, at 16 [hereinafter *Asset Finance Deals*] (furnishing the structural details of the financing and alluding to a more general trend of market convergence between traditional Western finance methods and Islamic finance methods).

2. See Emirates Airlines, *supra* note 1, at 1. The financing for the transaction was eighty-five percent guaranteed by the UK's Export Credit Guarantee Department (ECGD), Germany's HERMES, and France's COFACE. *Id.*

3. See *Asset Finance Deals*, *supra* note 1, at 16. The transaction won the Euromoney Aircraft Finance Deal of the Year and the Jane's Transport Finance Air-

praised as indicative of the promise Islamic finance techniques hold for the broader practice of international asset-financing.<sup>4</sup> Substantial concentrations of wealth in the hands of Islamic investors and a desire on the part of those investors to utilize investment vehicles congruent with their spiritual beliefs compels an analysis of the numerous issues present in the emerging field of mixing religious laws with asset finance.<sup>5</sup>

Part I of this article will summarize the ideological points of reference necessary for those unacquainted with Islam to understand the motivations that govern finance transactions under an Islamic system. Part II compares the general characteristics of aircraft finance under conventional (i.e. Western) practice and under *Shari'a*-compliant methods. Parts III and IV illustrate the issues posed in creating an environment of mutual acceptability of both methods in the commercial aircraft finance sectors.<sup>6</sup>

## I. ISLAMIC LEGAL AND FINANCIAL THEORY SUMMARIZED

Social and economic intercourse in the Muslim community is guided by factors that are fundamentally integrated into the Muslim belief system as a whole. This belief system, known as

---

craft Leasing Deal of the Year for 2001. *Id.*; Vimala Vasan, *Emirates Gains Islamic Funding for Aircraft*, HINDU BUSINESSLINE, Mar. 14, 2002, at 1.

4. Emirates Airlines, *supra* note 1; *see also* Vasan, *supra* note 3 (extolling the scope of possibilities that Islamic finance techniques hold for asset finance in the transportation sector given that a pool of investors previously precluded from involvement in such deals, due to religious restraints, may now make such investments if adhering to the proper structure). The promise that such financing techniques hold for future asset finance transactions is emphasized by Emirates. Emirates Airlines, *supra* note 1.

5. *See* Zamir Iqbal, *Islamic Banking Gains Momentum, Expands Market and Competes with Conventional Banking in Arab States*, 21 MIDDLE E. EXECUTIVE REP. 9 (1998) (illustrating the significance of the Islamic investment concept and the vast resources in terms of number of adherents to the Muslim faith and the wealth associated with that demographic).

6. The ideological themes presented in this paper relate to Islam as a whole. Variations in *Qur'anic* interpretation exist in relation to sectarian beliefs. However, differing interpretations exist as to how broadly the precepts of the *Qur'an* should be interpreted in light of the vast differences in commercial intercourse that exist between the time the *Qur'an* was assembled and today. Detailed commentary on the numerous scholarly debates ongoing in the Muslim world is beyond the scope of this paper, largely because the influence of these debates on Islamic derivations of asset finance in the international community has not been significant. However, as the potential of *Shari'a*-compliant finance is more widely realized, this influence is sure to grow.

*fiqh* (literally "understanding") is embodied in the *Shari'a*, or divine law, as developed primarily through the *Qur'an* (the Islamic holy book) and the *Sunna* (example attributed to the Prophet Mohammad).<sup>7</sup> Consequently, the conception of Islamic law and society is one where divisions between the secular and non-secular do not exist.<sup>8</sup> Conceptions of Islamic law must therefore be viewed as holistic rather than compartmentalized into certain conditional categories.<sup>9</sup>

Included in the *Shari'a* is a precise set of guidelines to which the financial transactions of practicing Muslims must conform. The fundamental objective of *Shari'a* in the context of economic intercourse is the facilitation of broad socioeconomic welfare and economic stability.<sup>10</sup> For those unfamiliar with Islam, understanding these guidelines requires re-thinking many fundamental financial concepts through an ideological context.<sup>11</sup> The most crucial distinction between the two systems exists in relation to the value attributed to money and an intolerance of excessive risk taking. Under Islamic law, all property is within the sole ownership of God.<sup>12</sup> The role of a person is merely that of a trustee, in whose hands God's property is placed in protec-

---

7. See generally ZIAUDDIN SARDAR & ZAFAR ABBAS MALIK, INTRODUCING ISLAM 62-66 (2001) (furnishing a general overview of the sources of *Shari'a*). *Shari'a* is a general term of reference relating to the body of Islamic law in general. *Id.* In addition to the *Qur'an* and the *hadith* are teachings from several sources, most notably the *Sunna*, or teachings attributed to the Prophet Mohammad; *ijma*, which are determinations of law based on community-wide consensus; and *qiya*, analogical reasoning stemming from other points of reference within the Islamic legal structure. *Id.*

8. See generally FRANK E. VOGEL & SAMUEL L. HAYES, III, ISLAMIC LAW AND FINANCE 1-5 (2000) (summarizing the basic tenets of the guidelines surrounding Islamic financial transactions and the origin of the laws pertaining thereto). While this statement has been the subject matter of numerous general works on Islamic finance and banking, the generalization can be made that religious beliefs are tied inextricably to financial transactions under Islamic law. *Id.*

9. See *id.*

10. See generally M. UMER CHAPRA, TOWARDS A JUST MONETARY SYSTEM 33-37 (1985) (presenting an overview of the social and economic objectives of the Muslim social model).

11. See generally VOGEL & HAYES, *supra* note 8, at 53-69 (providing an overview of the conceptions of Islamic economic discourse as part of a larger corpus of thought guided by the *Qur'an* and the *Sunna*).

12. THE HOLY QUR'AN 7:128 (Presidency of Islamic Researchers ed., al-Madi'nah: King Fahd Holy Qur'an Printing Co. 1994) [hereinafter QUR'AN] ; see also VOGEL & HAYES, *supra* note 8, at 56-59 (discussing the distinctions in property ownership under Islamic law and the consequent effects on notions of wealth). The *Qur'an* is explicit in this belief, the central affirmation of which may be found in the statement "the earth is Allah's, To give as a heritage To such of His servants as He pleaseth." QUR'AN, *supra*, 7:128.

tive care.<sup>13</sup> This Muslim definition of ownership informs the notion of money as existing solely as a medium of exchange and therefore lacking any appreciable or depreciable value and, consequently, beyond the influence of artificial notions such as inflation and time value.<sup>14</sup> Consequently, the legitimacy of a transaction under Islamic law is contingent upon its conformity to the following principles: interest (*riba*) and excessive risk taking (*gharar*) must be avoided, and the transaction must reflect the belief that money is not a commodity, and that it has no time value.<sup>15</sup> These concepts furnish the ideological underpinning for Islamic financial transactions and help define the boundaries of permissible economic intercourse for devout Muslims. Within the context of the relevant *Shari'a* pertaining to economic intercourse, the prohibition of interest, and the prohibition of excessive risk taking are central to the operation of financial transactions, particularly the financing of goods.<sup>16</sup>

The *Qur'an* imposes an obligation to refrain from hoarding in order to facilitate the free flow of goods and services.<sup>17</sup> Consequently, rewarding hoarding with interest, or *riba*, is counter-intuitive to the notion of avoiding interruptions in economic exchange.<sup>18</sup> It is this prohibition of *riba* that guides the behavior of the devout Muslim in economic activities.<sup>19</sup> With respect to

13. QUR'AN, *supra* note 12, 2:29-30 ("It is He Who hath created for you All things that are on earth . . . Behold, thy Lord said to the angels; 'I will create A viceregent on earth.'"); see also *Id.* 6:165, 7:129 (affirming the position of man as the inheritor of the earth).

14. See MUHAMMAD TAQI USMANI, AN INTRODUCTION TO ISLAMIC FINANCE 19 (1998) (introducing the assertion that money has "no intrinsic utility" and exists "only as a medium of exchange"); PAUL S. MILLS & JOHN R. PRESLEY, ISLAMIC FINANCE: THEORY AND PRACTICE 11-12 (1999) (illustrating the Muslim critique of the value of capital as distinct from those of the Western financial traditions and the consequent disaffection therewith by Islamic financial ideology). The time value of money is based on the notion that a unit of currency now is worth more than one in the future, even after adjusting for inflation, because a unit of currency now can earn interest or other appreciation until the time the currency in the future would be received. BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 650 (John Downes & Jordan Elliot Goodman eds., 5th ed. 1998).

15. See Gohar Bilal, *Islamic Finance: Alternatives to the Western Model*, 23 FLETCHER F. WORLD AFF. 145, 146 (1999) (summarizing the general ideals of the Islamic finance model in the context of a methodology of relatively recent vintage).

16. *Id.*

17. QUR'AN, *supra* note 12, 9:34-35.

18. MILLS & PRESLEY, *supra* note 14, at 12.

19. See QUR'AN, *supra* note 12, 2:275-78. The pertinent sections of the *Qur'an* provide that:

Those who devour usury Will not stand except As stands one whom The Satan by his touch Hath driven to madness. That is because they say:

excessive risk, or *gharar*, most guidelines come from *hadith*, describing transactions characterized by pure speculation, uncertain outcomes, and unclear future benefits.<sup>20</sup> Classical interpretations of this concept have been forwarded as contrary to many modern financial transactions, given that such concepts would extend to prohibit investment in futures and commodities options.<sup>21</sup> However, more moderate views exist with respect to contracts defining, with a substantial degree of precision, the object to be financed.<sup>22</sup>

*Qur'anic* prohibitions on interest and risk taking, as outlined above, present a stumbling block to the Muslim seeking to invest through standard financial intermediaries.<sup>23</sup> The proliferation of Islamic banks is a phenomenon of recent times.<sup>24</sup> It is therefore only recently that the devout Muslim has been able to invest with a perspective that is both regional and interna-

---

'Trade is like usury,' But Allah hath permitted trade And forbidden usury. Those who after receiving Admonition from their Lord, Desist, shall be pardoned For the past; their case Is for Allah (to judge); But those who repeat (The offence) are Companions of the Fire: they will abide therein (for ever); Allah will deprive Usury of all blessing, But will give increase For deeds of charity: For He loveth not Any ungrateful sinner. Those who believe, And do deeds of righteousness, And establish regular prayers And give Zakat, Will have their reward With their Lord: On them shall be no fear, Nor shall they grieve; O ye who believe! Fear Allah, and give up What remains of your demand For usury, if ye are Indeed believers.

*Id.*; see also Barbara L. Seniawski, Note, *Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 707-09 (2001) (providing a synopsis of *riba* interpretation by various schools of Islamic thought at various periods in history).

20. See VOGEL & HAYES, *supra* note 8, at 87-89 (outlining the general concepts that constitute the prohibition on *gharar*).

21. See *id.* at 93.

22. See *id.* The Hanbali and Maliki schools of Islamic thought interpret the *hadith* concerning *gharar* as not precluding from permissibility the sales of absent goods provided that the contract describes the goods concerned and that the terms of said contract are defined with equal specificity. See *id.* This requires that the price of goods and services be ascertained at the time of contract, rather than allowing their price to float contingent upon the economic factors that may define price at the time specified for performance. See *id.*

23. See generally MILLS & PRESLEY, *supra* note 14, at 15-33 (discussing the difficulties associated with creating an effective institutional infrastructure for Muslim investment based on an interest-free financial system).

24. See generally MERVYN K. LEWIS & LATIFA M. ALGAOUD, *ISLAMIC BANKING* 5-7 (2001) (summarizing the development of modern Islamic banking). The first modern Islamic bank was established in Egypt in 1963 with a functionality based on that of a rural cooperative bank. *Id.* However, it was not until the oil crises of the early 1970s that Arab oil wealth, and the sense of regional self-confidence that accompanied it, began to dictate a necessity for economic development with a financial underpinning consistent with Muslim ideology. *Id.*

tional.<sup>25</sup> Expanding the scope of opportunities for Muslim investors is a process that involves consultation with the appropriate religious authority.<sup>26</sup> There exists some debate amongst contemporary Muslim scholars over the applicability of *Qur'anic* stipulations in an economy much evolved from that of Mohammad's time.<sup>27</sup> However, the prevailing view is that the prohibition of interest provides a basis from which financial activity is directed and transactions are structured.<sup>28</sup>

It is necessary to illustrate the concerns that guide the structuring of Western asset finance transactions in order to present a comparison of the key foundation points and to subsequently assess compatibility between Western and Islamic finance methods. Two overarching concepts will guide the analysis of the harmony and discord between the two methodologies: first is the difference in conceptions of monetary value and the associated risks that inform the nature of the transaction structure; second is the need for a transaction-structuring formula adaptable to a finance system grounded in vastly divergent ideological underpinnings.<sup>29</sup>

---

25. *Id.*; see also Bilal, *supra* note 15, at 145.

26. See VOGEL & HAYES, *supra* note 8, at 47-50 (describing the structure of religious advisory in modern Islamic financial institutions). Traditionally, scholars are relied upon for *fatwas*, or scholarly opinions on matters of sensitivity. See *id.* However, an increasing number of Islamic banks have composed in-house *Shari'a* boards, designed to evaluate transactions in relation to the law. See *id.*

27. See, e.g., *id.* at 77-86 (detailing the academic debate over the utility of measurement systems that are ill-suited to contemporary commercial transactions). Some schools of Muslim thought consider the particularities of certain *Qur'anic* prescriptions archaic given that commerce is conducted in very different contexts in modern times. *Id.* As a consequence, financial transactions in general are analyzed from a structural viewpoint in order to determine their permissibility in general while dispensing with archaic constructions, such as those concerning the measurement of fungibles in relation to non-fungibles. *Id.*

28. See *id.*

29. STEPHEN HOLLOWAY, AIRCRAFT ACQUISITION FINANCE 114 (1992) (identifying the crucial reasoning behind the corporate finance exercise in general as the identification of a transaction's risk profile vis-à-vis asset value risk, balance sheet objectives, interest rate objectives, currency risk objectives, tax objectives and macroeconomic objectives).

## II. AIRCRAFT FINANCE: OBJECTIVES AND METHODOLOGIES

### A. WESTERN TECHNIQUES

While the purpose of an aircraft finance transaction is functionally driven by the conveyance of a useful asset between the contracting parties, the premise underlying the structure of the transaction itself is an effective apportionment of risk.<sup>30</sup> It is therefore crucial to understand the financing methodology as being governed by the conventional desires to mitigate risk and maximize return.<sup>31</sup>

Primary sources for commercial aircraft finance are traditionally corporate and individual savings, channeled through financial institutions that act as intermediaries in direct lending, securitization, or aircraft leasing arrangements.<sup>32</sup> Traditional financing methodology revolves around two factors: the amount to be invested and the source from which the amount to be invested will be obtained.<sup>33</sup> Consequently, concerns regarding risk are shaped in terms of asset value risk and market access risk; however, the fundamental economic concerns often rotate around the time value of money.<sup>34</sup>

Leasing is the most commonly used medium of finance because it is most congruent with the economic demands the transaction must satisfy.<sup>35</sup> Within this general paradigm, two

---

30. *Id.*

31. *Id.*

32. See generally PETER S. MORRELL, AIRLINE FINANCE 145-65 (1997) (summarizing the sources of financing for airlines in commercial aircraft transactions and the general structuring of those transactions).

33. See HOLLOWAY, *supra* note 29, at 83, 107-08. These concerns are tied directly to the importance of the identity of the party holding title to the aircraft and the economic and legal consequences to that party. *Id.* The rights of the owner in the chain of title are of primary concern, as are the flow of tax benefits corresponding to jurisdictions that affect the operation of the transaction. *Id.*

34. HOLLOWAY, *supra* note 29, at 85, 91. Asset value risk pertains to the likelihood that the asset value will change in conformity with certain premeditated expectations, taking into account certain operational and economic factors. *Id.* at 91. Market access risk pertains to the likelihood that an asset will be used in a productive manner under certain market conditions (in a specific capacity in a specific area with operational support available at favorable rates). *Id.* An example of this would be the use of an aircraft on a certain route where certain supply and maintenance arrangements have been secured at favorable pricing.

35. See generally MORRELL, *supra* note 32, at 169-79 (describing the leasing process as applied to aircraft in the context of finance leases, operating leases, wet leases, and sale and leasebacks). Conceptually, an aircraft lease does not vary from



forms of leasing are prevalent: finance leasing and operating leasing.<sup>36</sup> The decision to adopt one over the other is driven by the particular economic needs of the parties to the lease.<sup>37</sup> The most common leasing mechanisms involve a leveraged transaction,<sup>38</sup> allowing the aircraft to be acquired using mostly debt finance<sup>39</sup> and a significantly lesser amount of equity finance.<sup>40</sup> Leveraged leases involve an investor lessor and airline lessee,

---

any other sort of lease. *See generally id.* Underlying motivations for entering into a leasing transaction as opposed to another form of financing are generally driven by the objectives of the parties to the transaction. *See generally id.* Typically, the lessee is an airline seeking to conserve working capital and credit capacity. *See generally id.* Lessors will typically be investors seeking capital allowances to offset income of a level that triggers liability in a high tax bracket of their respective tax systems. *See generally id.*

36. *See generally id.*, at 172-78 (describing the basic characteristics of a finance lease and an operating lease); HOLLOWAY, *supra* note 29, at 140-61. A finance lease is a full payout financing facility whereby the economic risks and rewards fall on the lessee. *See MORRELL, supra* note 32, at 172-75; HOLLOWAY, *supra* note 29, at 141. The term of a finance lease is generally ten to twelve years. MORRELL, *supra* note 32, at 172. The lessor expects to profit from rental income, tax benefits and any residual value projected for the end of the lease term. *Id.*; HOLLOWAY, *supra* note 29, at 155-61. An operating lease is a non-payout finance vehicle. MORRELL, *supra* note 32, at 175-82. The term of an operating lease is shorter than a finance lease, generally between one and seven years. *Id.* at 175. The lessor places more importance on the residual value of the aircraft given the possibility that the asset can either be released, sold, or both upon the termination of the initial lease. *Id.*; HOLLOWAY, *supra* note 29, at 144-46.

37. *See HOLLOWAY, supra* note 29, at 141-43. The decision to utilize a finance lease in a leveraged dimension is based on the tax consequences for the parties to the lease: the airline may claim tax allowances in their home country and the investors in the jurisdiction in which the investment vehicle is situated may claim full tax allowances on the same asset, a process known as "double dipping." *Id.* Lessors typically expect a return of capital, plus interest, and a margin representing profit for the term of the lease. *Id.* Those investors motivated by the tax benefits possible under the lease will be concerned more about the economic efficiency of the lease mechanism as they relate to the tax requirements of the particular national tax and accounting frameworks in which they are accountable. *Id.* Under an operating lease, the shorter term of the lease precipitates concerns about the condition of the asset at the end of the lease term. *See MORRELL, supra* note 32, at 175, 177. Furthermore, the lessor typically assumes the risks of obsolescence. *Id.* at 177. Therefore, the lessor needs some measure of sophistication with respect to the intricacies of the airline business and the demand for aircraft of a particular configuration. *Id.*

38. BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS, *supra* note 14, at 322. Leverage refers to the use of debt in relation to equity in the capital structure of an investment; the greater the proportion of debt to equity, the greater the capital is leveraged. *Id.*

39. *See id.* at 90. Debt finance refers to the bonds, debentures, mortgages or other forms of financial obligation assumed to finance the acquisition or use of an asset. *Id.* Equity finance is financing tied to an ownership interest of the financing party in the thing financed. *Id.*

40. *See MORRELL, supra* note 32, at 172.

joined by a lender providing funds to finance the lease, debt service that is funded out of rental proceeds and a mortgage secured by the asset itself.<sup>41</sup> Most often, the choice of lease structure stems from a desire to combine the particular economic demands of the airline with the mutual desires of the lessor and lessee to avail themselves of the tax benefits the finance structure allows.<sup>42</sup>

Tax reforms in recent years significantly limit the beneficial tax treatment lease transactions once offered investors in many jurisdictions.<sup>43</sup> In place of the leveraged lease are operating leases, which are slowly gaining acceptance in an investment world previously reluctant to assume the asset risks that operating leases entail when such risks could be mitigated or eliminated through the use of a leveraged finance lease.<sup>44</sup>

An alternative to the lease exists in the form of export credit agency financing.<sup>45</sup> This type of financing is designed to

---

41. See HOLLOWAY, *supra* note 29, at 165-68 (describing the mechanics of a leveraged lease transaction and the motivations that give rise to such transactions).

42. *Id.*; Jutta Schneider & Martin Schodermeier, *Aircraft Finance in Germany*, ASSET FIN. INT'L, Dec. 1, 1997, at 10 (describing the structure of German leveraged aircraft leases). Equity investors in such a leasing relationship will form a special purpose entity (or "vehicle") that will serve as the legal owner and lessor of the aircraft. See HOLLOWAY, *supra* note 29, at 165-68. This structure is tax-neutral in some jurisdictions (in the past the most notable of these has been Japan). *Id.* Such an arrangement allows the tax losses generated by the entity to pass through to the beneficial owners of the vehicle, who in turn may use those losses to offset income from other sources. *Id.* But see *Revisited: As Traditional Tax-leveraged Lease Markets Learn to Live with More Restrictive Tax Regulations in Japan and Germany, Airlines Are Increasingly Looking Toward New Structures in the Capital Markets as well as Traditional Export Credit Finance*, AIRLINE BUS., Feb. 1, 2001, at 54 [hereinafter *Revisited*] (discussing Japanese and German tax reforms and the consequent reduction of benefits associated with leveraged leasing in those countries).

43. See generally *Revisited*, *supra* note 42, at 54.

44. *Id.* at 54-56; see also Dominic Jones, *Stacking up the JOL*, ASSET FIN. INT'L, May 15, 2002, at 1. Japanese Operating Leases (JOLs) are being marketed to foreign carriers as a replacement for previously utilized Japanese leveraged leases. *Revisited*, *supra* note 42, at 54-56. The JOL has been in existence for several years but with appeal to a more narrowly defined investor base. *Id.* In Germany, a similar product, the German Operating Lease (GOL), is presented as the alternative to the German leveraged lease. *Id.*

45. See generally MORRELL, *supra* note 32, at 157-60 (describing the role of export credit agencies in the aircraft financing process); see also HOLLOWAY, *supra* note 29, at 217-20 (noting the role of export credit agencies in leasing and the utility of such methods as amenable to tax-driven transaction structuring as well as for the more straightforward purpose of title-retention in circumstances where airline credit rating does not inspire institutional confidence or the country of operation is off-cover for the specific agency providing the guaranty/financing). Export credit agencies are typically government-controlled or government-endorsed entities designed to facilitate the export of goods from their respective countries through the use of

exist alongside institutional lending or to bolster such financing in circumstances characterized by unusual levels of volatility with respect to either country risk, borrower risk, or both.<sup>46</sup>

## B. SHARI'A-COMPLIANT FINANCE METHODOLOGY

It is difficult to identify the differences between the objectives of asset-financing under conventional Western models and their Islamic counterparts. Instead, it is the considerations that motivate the structure of the transaction that distinguish the two. The fundamental structures utilized in conventional aircraft leasing transactions are compatible with Islamic finance methods, provided that these structures comport with the stipulations of the *Shari'a*.<sup>47</sup> The ideological conception of money as having no intrinsic value, and consequently no time value, affects the finance structure most significantly because of the inability to levy interest.<sup>48</sup> In addition, this prohibition precludes the notion of profit-taking in a lender-borrower context.<sup>49</sup> Therefore, the characterization of profit and its link to the particularities of the lender-borrower relationship will determine its permissibility under Islamic law.

Three Islamic transaction structures, by virtue of the subject matter they embrace, are compatible with transactions involving physical assets and, consequently, aircraft finance transactions. The first structure is *Bay'mu'ajjal*, or credit sale, which is the structure permissible under Islamic law most analogous to conventional Western interest finance.<sup>50</sup> The second structure is *murabaha*, a form of "mark-up" contract whereby a bank purchases an asset on the buyer's behalf and sells the asset to the buyer at a price with a profit element built into it; the buyer then makes incremental payments.<sup>51</sup> Under a *murabaha* arrangement, a bank's exposure to risk is mitigated because the transaction is preconditioned upon the assurance that a buyer will purchase the underlying goods/assets from the

---

guaranties or insurance. MORRELL, *supra* note 32, at 157. This source of financial support can augment institutional lending in situations where banks are reluctant to furnish complete financing. *Id.* at 157-58. These institutions may also lend money directly, in whole or in part through syndicated loans. *Id.* at 158.

46. MORRELL, *supra* note 32, at 157.

47. See *supra* note 15 and accompanying text.

48. See *supra* notes 18-19 and accompanying text.

49. See *supra* notes 18-19 and accompanying text.

50. See generally VOGEL & HAYES, *supra* note 8, at 139-40 (providing a general overview of *Bay'mu'ajjal*).

51. See generally *id.* at 140-43; see also Bilal, *supra* note 15, at 153.

bank, and will often furnish the bank with instructions as to how the initial purchase may be transacted.<sup>52</sup> A third structure is *ijara*, or lease financing. Under an *ijara* structure, a bank undertakes to purchase an asset and then leases it to the client, charging a fee for the rental.<sup>53</sup>

In the context of the aircraft finance transaction, the most applicable concepts in the Islamic finance milieu are a combination of *murabaha* and *ijara* methods of finance.<sup>54</sup> More generally known as *ijara wa-iqtina*, the *ijara* lease is coupled with a purchase facility at the end of the lease term that allows the underlying asset to be transferred in a fashion similar to a conventional leveraged lease.<sup>55</sup> It is this combination of finance techniques that poses the greatest promise to innovators seeking to finance long-term assets.<sup>56</sup> Both traditional lease financing and the *ijara wa-iqtina* structure have the ability to produce a fixed debt obligation that can be collateralized.<sup>57</sup> Since the price of the asset is fixed under Islamic sale/lease arrangements, future benefit streams may be quantified for the purposes of hedging risk, and perhaps most crucially, the lease terms can reflect prevailing interest rates for the purposes of pricing the lease.<sup>58</sup> This method allows for a certain amount of compensatory income to be factored into the terms of the lease.<sup>59</sup>

Debate amongst Muslim scholars exists over the contention that modern finance techniques and the *hadith* blessing their validity are runaround tactics utilized to accomplish the same fiscal objectives as the Western practice of levying interest.<sup>60</sup>

---

52. VOGEL & HAYES, *supra* note 8, at 140-41.

53. See Bilal, *supra* note 15, at 154 (providing a general overview of the *ijara* structure and the *ijara wa-iqtina* facility that would allow the lessee to purchase the asset at the end of the lease term).

54. See VOGEL & HAYES, *supra* note 8, at 140, 260-69 (discussing the innovation that can be accommodated within the boundaries of tolerance applicable to the *ijara* leasing model and combinations of the *ijara* and *murabaha*). Classic definitions of *murabaha* involve a sales contract with a simple mark-up element on the cost of the item purchased. *Id.* Contemporary practice generally involves one party requesting (or commissioning) another party (usually a banking institution) to purchase an asset and, once the second party has purchased the asset(s) in question, to sell the asset(s) to the commissioning party under a *murabaha* structure. *Id.* This arrangement is known as *al-murabaha lil-amir bi-al-shira*. *Id.*

55. See Bilal, *supra* note 15 and accompanying text.

56. See VOGEL & HAYES, *supra* note 8, at 260-61.

57. *Id.*

58. *Id.*

59. *Id.*

60. See, e.g., *id.* at 8-9 (illustrating a scholarly apprehension toward the widespread use of *murabaha* techniques given that the ability to inject a profit associated

For instance, the profit element under a *murabaha* transaction has been argued to be tantamount to an interest-bearing transaction under a different label.<sup>61</sup> Counterarguments assert that such a profit is justified on the basis of the risk taken with respect to the payor.<sup>62</sup> Additional arguments revolve around the notion of pricing in an *ijara wa-iqtina* transaction. Islamic law is relatively accommodating with respect to the methodology employed in pricing of the lease rental.<sup>63</sup> Consequently, some lenders will utilize conventional interest rate indexes, such as the U.S. Prime Rate or the LIBOR, in determining a rental price that reflects a fair yet competitive amount.<sup>64</sup>

Despite the foregoing discussion of the compatibility between conventional Western asset finance and its Islamic incarnation, there are several key differences that must be acknowledged by the practitioner, lest the essence of a *Shari'a*-compliant transaction be lost.<sup>65</sup> First, all finance must be directly tied to tangible assets.<sup>66</sup> Therefore, many forms of securitization would not be acceptable under the tenets of Islam.<sup>67</sup> Second, benefits to the institution purchasing the asset for subsequent sale/lease are limited to the agreed upon prices while liability of the lessee/purchaser is limited to the agreed upon price.<sup>68</sup> This precludes compensation to the lender for opportunity cost during any period of default, unlike most Western finance arrangements where interest continues to accrue during periods of default.<sup>69</sup>

---

with the lending process parallels conventional Western banking practice in a way that is potentially inconsistent with the *Shari'a*).

61. *Id.*

62. See, e.g., VOGEL & HAYES, *supra* note 8, at 139-40 (discussing that recourse based on the concept of compensating the lender for lost use of the funds lent to defaulting party is acceptable in the event of late payment or default by the borrower).

63. *Id.* at 261.

64. *Id.* Some scholars consider the use of indices, like the LIBOR, to give too great a deference to conventional Western finance methodology and therefore transgress the boundaries of permissibility under Islamic law. *Id.*

65. The subject of the lease must have a utility, and therefore cannot be an intangible object. See USMANI, *supra* note 14, at 68-69 (listing guidelines for a lease to be valid under Islamic law).

66. *Id.* at 19.

67. Lease securitization is a prevalent form of financing aircraft, particularly in the context of large-scale transactions. See, e.g., Thatcher A. Stone et al., *The Securitization of Aircraft Lease Receivables*, in HANDBOOK OF AIRLINE FINANCE 361-74 (Gail F. Butler & Martin R. Keller eds., 1999) (furnishing an overview of the securitization process as applied to airline finance transactions).

68. See USMANI, *supra* note 14, at 132 (discussing the feasibility of penalties for late payment of rent under an *ijara* lease).

69. See *id.* Penalties for late payment, if intended to give the lender additional

### III. CREATING ACCEPTANCE IN THE MUSLIM WORLD

Academic debate within the Muslim community has raged over whether Islamic finance methods are little more than financial sleight-of-hand designed to technically comply with theological requirements governing the finance exercise while resulting in the same flow of capital as if a Western finance model were employed.<sup>70</sup> Scholarly comparisons between the two paradigms have ranged from an embrace of these analogies to a condemnation of all non-Muslim methods.<sup>71</sup> While both methods may yield a transaction whose structure accomplishes similar objectives, the pivotal distinction between conventional and *Shari'a*-compliant finance arrangements arises from entirely divergent ideological standpoints.

First, the conception of profit is not necessarily tied to a tangible quantification of the value of money.<sup>72</sup> Under Islamic law, money has no intrinsic value.<sup>73</sup> Consequently, the injection of a profit at the front end of a transaction accomplishes the imposition of profit taking without resorting to the prohibited practice of charging interest for the rental value of money. Second, consequences of risk differ under Islamic models; the injection of a premium is tied to risk while variable amounts attached on top of the principal are tied to variations in risk rather than the time period of the lending relationship.<sup>74</sup>

---

income, are prohibited by the *Shari'a*. *Id.*

70. See Seniaewski, *supra* note 19, at 707-09 (providing a synopsis of the varying views of *riba*). But see Bilal, *supra* note 15, at 148-58 (illustrating the ideological differences that alter the meaning of the transaction on a fundamental level). Judicial determinations made in several Muslim countries broadly interpret the concept of *riba* as meaning any increase over the value of the sum lent to the borrower. See Seniaewski, *supra* note 19, at 707-09. Such a view is known as the "Classical View." *Id.* In contrast, reformist Muslim scholars reject traditional conceptions of *riba* as anachronistic and ill-suited to the economic development that has occurred since those traditional conceptions were formulated. *Id.*

71. See, e.g., USMANI, *supra* note 14, at 15-16 (postulating that the distinction between capital and Islamic economies is a lack of acknowledgement in capital economies of the ultimate power of God and divine guidance compared with Islamic economies which view God as the source of all ideological guidance).

72. See MILLS & PRESLEY, *supra* note 14 and accompanying text.

73. *Id.*

74. It is helpful to illustrate this concept with an example. Assume that investor A wishes to purchase an aircraft costing \$100 million. Using a basic Western leveraged lease, equity investor A will contribute twenty percent of the aircraft cost, and debt provider B would furnish the remaining eighty percent, at a rate of five percent over a ten-year term, or \$4 million per year. In comparison, a *Shari'a*-compliant transaction conceptually similar to a Western leveraged lease would be structured as follows: An aircraft costs \$100 million, equity investor A contributes

Distinctions are more clearly seen in what is *prima facie* forbidden under the *Shari'a*.<sup>75</sup> For instance, since all transactions must be tied to an underlying asset, methods of mitigating risk through swapping liabilities incurred on the asset are forbidden under Islamic law.<sup>76</sup> Therefore, fewer market access risk considerations exist with respect to the financing structure.<sup>77</sup> Similarly, for projecting return on investment, time value calculations are precluded from consideration, making calculations based on book value more appropriate.<sup>78</sup>

In order to reconcile the investment demands of investors with individual spiritual demands imposed on one or a number of them, some degree of accommodation is demanded of the religious paradigm with which the terms of the transaction are harmonized. Moderate views of the *riba* prohibition are beneficial to the attainment of the objectives of the Muslim investor.<sup>79</sup> Yet there is no need to abandon investment ambitions due to seemingly prohibitive practices.<sup>80</sup> In spite of the paradigm shift that utilization of Islamic finance models entails, the adaptability of such methods to conventional finance transactions is not impossible.<sup>81</sup> The fundamental investment objectives associated

---

twenty percent of the aircraft cost, Islamic Bank B is approached to fund the remaining eighty percent of the aircraft, taking title to same and leasing it to A for \$120 million, payable in installments over a ten-year period, with the capability to transfer title at the end of the lease term to A. The end result of both transactions is identical. However, whereas the profit for B under the conventional model is tied to the time period of the lease and grounded in considerations over the opportunity cost and time value of the funds lent, B's profit under the *Shari'a*-compliant transaction is characterized as compensation for higher risks taken over the term of the lease. This allows an integration of the *murabaha* and *ijara* structures, with the buyout facility furnished as an *ijara wa-iqtina*. See Bilal, *supra* note 15, at 146; HOLLOWAY, *supra* note 29, at 165-66 (furnishing a general model for a basic leveraged lease structure). Furthermore, various duties may be allocated to the parties in anticipation of foreseeable events (e.g. the duty to maintain), however those not necessarily foreseeable cannot be factored into the rent/lease payments unless the contrary can be shown. VOGEL & HAYES, *supra* note 8, at 144-45.

75. See, e.g., USMANI, *supra* note 14; HOLLOWAY, *supra* note 29, at 91 (illustrating the growth in interest rate and currency swaps as indicative of a desire to take advantage of raising funds in one financial market and swapping the resulting liability into an obligation denominated in more favorable currency, or an alternative interest rate mechanism resulting in more favorable pricing).

76. See, e.g., USMANI, *supra* note 14, at 19.

77. See *id.*; HOLLOWAY, *supra* note 29, at 91.

78. See HOLLOWAY, *supra* note 29, at 84.

79. See Seniaowski, *supra* note 19, at 727.

80. *Id.* at 726-27.

81. See Phil Carter, *Plenty of Interest*, ASSET FIN. INT'L, Nov. 2001, at 23-25 (discussing the promise Islamic finance techniques hold for the more spiritually aligned Muslim investor demographic in the process of international finance).

with aircraft leasing are regular transactions, regardless of the ideological underpinning of the transaction.<sup>82</sup> Leasing constitutes a productive use of funds as the flow of capital is toward an actual asset, the productivity of which will produce benefits to the overall economy concerned.<sup>83</sup> This basic concept is harmonious with the holistic conception of society and economy that dominates the Islamic financial *modus operandi*.<sup>84</sup>

Transaction structuring guided by a desire to reap the tax benefits available in a particular jurisdiction (or jurisdictions) is a practice not inconsistent with Islamic financing guidelines. The cross-border lease is the *sine qua non* of international aircraft finance.<sup>85</sup> The tax consequences associated with a jurisdiction are the driving force behind choice of venue.<sup>86</sup> The use of jurisdiction-specific lease structures that have proven their usefulness as tax-favorable or tax-neutral entities endures.<sup>87</sup> While a *Shari'a*-compliant finance lease confers no specific tax benefit, the potential exists to combine such a lease within the appropriate jurisdictional context so as to be classified as a Japanese Operating Lease or its German equivalent for the purposes of tapping less costly sources of investment capital.<sup>88</sup> Alternatively, the use of export credit sources of capital is possible, though generally not as cheap a source of funding as an operating lease.<sup>89</sup>

The Emirates transaction combined export credit agency guarantees with commercial debt financing and a Japanese Operating Lease.<sup>90</sup> In reality, the transaction was not entirely *Shari'a*-compliant.<sup>91</sup> However, the ability to tack an Islamic lease onto a finance transaction allows the Muslim investor to reap the benefits the transaction provides while remaining faithful to the ideological principles that would otherwise prohibit involvement in the conventional element of the transaction. As a practical concern, the Islamic lease is the final piece of the transaction structure; finance leases must be structured

---

82. *See id.*

83. *Id.*

84. *Id.*

85. *See generally* Michael Downey Rice, *Current Issues in Aircraft Finance*, 56 J. AIR L. & COM. 1027, 1034-40 (1991) (furnishing a basic overview of cross-border leasing).

86. *Id.*

87. *See supra* note 42 and accompanying text.

88. *See Carter, supra* note 80, at 23-25.

89. *See supra* note 1 and accompanying text.

90. *Id.*

91. *See Asset Finance Deals, supra* note 1, at 16.



beforehand and any export credit arrangements must be made in order to gauge the terms of the financing and tailor the profit component of the *Shari'a*-compliant lease accordingly.<sup>92</sup>

Conventional financing preoccupations with the time value of money can be addressed with some foresight. Given that time value is tied to inflation, a concept contradictory to the basic tenets of Islamic economic theory, the problem of reconciling the concept of inflation with the structuring of *Shari'a*-compliant financing is solved through the inclusion of a profit element with a portion dedicated to the outpacing of projected inflation.<sup>93</sup> This solution acknowledges the use of monetary systems incongruous with Islamic techniques, yet observes the tenets forbidding interest without risking transgression.<sup>94</sup>

#### IV. CREATING ACCEPTANCE IN THE INTERNATIONAL FINANCE SECTOR

The international finance community has exhibited significant reservations as to the broader utility of Islamic finance. No less significant is the concern about the availability of remedial measures consistent with traditional aircraft finance transactions.<sup>95</sup> Creating acceptance of Islamic finance techniques in the international community requires not only an understanding of the theoretical differences in financial practice and how such differences may be harmonized, but also the creation of an environment of trust and assurance to allow such a coexistence to bear fruit. Apprehension toward Islamic finance often relates to the desire to obtain assurances that lending relationships will be secure and that adequate recourse will exist in the event recourse is necessary.

Characterizing an aircraft finance transaction is of crucial significance because such characterization will affect the status of parties depending on the operation of the laws of a particular jurisdiction.<sup>96</sup> Problems in multi-jurisdictional transaction structuring relate to the way in which transactions are viewed

---

92. See *id.*

93. See Seniawski, *supra* note 19 and accompanying text.

94. *Id.*

95. See *Asset Finance Deals*, *supra* note 1 (describing the difficulties associated with assuring export credit agency parties of the security of using Islamic lease techniques in the Emirates transaction).

96. See HOLLOWAY, *supra* note 29, at 107-18 (furnishing an overview of transaction characterization and its effects on security, bankruptcy, registration, tax, and other concerns).

under the laws of a particular jurisdiction. It is therefore incumbent upon the aircraft finance lawyer to structure a transaction in a manner that avails the relevant parties of the tax, security, and title retention objectives sought.<sup>97</sup> A useful method of mitigating risk in aircraft finance involves the taking of a security interest in the underlying asset.<sup>98</sup> The primary rationale for such a step pertains to a dual desire to bolster deficiencies in creditworthiness and to participate in asset value risk.<sup>99</sup>

Irrespective of the variety of security interests taken in the aircraft being financed, jurisdictional issues arise as to whether the security interest will be upheld in a particular jurisdiction.<sup>100</sup> The majority of jurisdictions favored in aircraft finance transactions possess sufficiently developed analytical structures to facilitate complex commercial intercourse.<sup>101</sup> Similarly, lessors seeking to secure their respective interests will often be amenable to any of several choice of law provisions that guarantee recourse in the event it is necessary.<sup>102</sup> However, the utility of Islamic finance techniques, given their relative obscurity, may precipitate anxiety with respect to the enforceability of legal instruments. Clearly, aircraft finance transaction models based on the anticipation of multi-jurisdictional operation are not incongruent with the notion of adding a conduit of investment capital that conforms to *Shari'a* principles. Resolution of this anxiety requires analysis on both a functional and a fundamental level.

---

97. *Id.* at 111; see also Dean N. Gerber, *Aircraft Financing*, in 2 EQUIPMENT LEASING LEVERAGED LEASING 17-1, 17-66 (Ian Shrank & Arnold G. Gough, Jr. eds., 4th ed. 2003) (furnishing a general statement of concerns the prudent aircraft finance practitioner should bear in mind while contemplating the structure of a cross-border transaction); see generally John T. Stewart, Jr., *Obtaining Title and Financing Transport Category Aircraft—National and International Implications*, 50 J. AIR L. & COM. 191 (1985) (providing a comprehensive view of cross-border aircraft finance from the perspective of an American practitioner).

98. See generally HOLLOWAY, *supra* note 29, at 125-28, 134-38 (describing the role of secured lending in aircraft finance and the jurisdictional considerations shaping this role).

99. *Id.* at 125-26. In this regard, the most common instrument of security is the mortgage. *Id.*

100. *Id.* at 126-27.

101. See *id.* at 127, 134-35. Uncertainty may exist in less sophisticated jurisdictions as to the perfection or enforcement of a security interest, conditions of default, or casualty loss. *Id.* While more established jurisdictions such as England, Germany, and France see a substantial proportion of finance laws arranged under its laws, there is risk of unenforceability in areas with less sufficient commercial laws in place. *Id.*

102. *Id.* at 108-12.

As a practical solution to conflict of law concerns, the successful utilization of *Shari'a* structures lies in the acknowledgment of their role as corollary to the underlying transaction structure. The Emirates transaction was completed in stages in order to secure the positions of both Muslim and non-Muslim finance sources: a traditional finance lease was coupled with an export credit agreement prior to tacking on an Islamic lease.<sup>103</sup> In this way, the English provision governed the choice of law for the operating lease, while the *Shari'a* governed the Islamic lease.<sup>104</sup> If fashioned in this manner, the choice of law provision may govern solely the operating lease and consequently will not precipitate conflict with the *Shari'a*-compliant lease attached to furnish the investment capital, nor will the choice of law provision governing the operational elements of the transaction be preempted by Islamic law. Lenders will have access to the traditional remedial implements customary in conventional aircraft finance transactions. This relationship allows the lender recourse to the established and more predictable legal treatment afforded by English or German jurisprudence while allowing *Shari'a*-compliant methods to be utilized as investment vehicles for interested parties. In short, capital is infused into a transaction in a manner that comports with the mandates of Islamic law while permitting the existence of an operating lease or export credit arrangement, which may contain elements that are not consistent with Islamic law.

The two-step process observed above is a pragmatic and fully workable solution to what is regarded as a difficulty in merging operations across two contrasting systems. From the perspective of lenders furnishing a conduit for Muslim wealth, there are stability concerns with respect to Islamic banking institutions.<sup>105</sup> To date, major banks that maintain a small contingent of professionals well-versed in the particularities of Islamic finance have handled most internationally significant Islamic finance transactions.<sup>106</sup> While this arrangement may satisfy the immediate needs of the international finance sector, the growth of pure Islamic banks as facilitators of such commerce is an area fraught with concern. Prudent banking practices are an inextricable component of stable economic dis-

---

103. See *Asset Finance Deals*, *supra* note 1, at 16.

104. *Id.*

105. See *id.* The Emirates transaction was conducted by HSBC in conjunction with a number of Islamic finance institutions in the United Arab Emirates. See *id.*

106. See *id.*

course, yet the ideological uniqueness of Islam poses new challenges to regulatory powers.<sup>107</sup> The embryonic nature of Islamic banking poses unique challenges regarding stability in lending, presenting risk to the entire finance structure, namely with respect to sovereign lender-of-last-resort status and deposit insurance.<sup>108</sup> Generally, the regulatory processes that govern the majority of international banking operations are guided by the objective of facilitating stability on a macroeconomic level.<sup>109</sup> Dual regulation may pose a workable solution given Western regulatory concerns regarding intelligent assessment of risk with appropriate control.<sup>110</sup> In spite of operational dissimilarities, Islamic concerns with excessive risk-taking are consistent with the objectives of international banking regulators.<sup>111</sup> Nevertheless, some adaptation is necessary from both the perspective of the institutions such as the Basle Committee and the Islamic banking sector. The success of such an adaptation remains to be seen.

Substantial debate exists regarding the feasibility of combining Islamic finance techniques with Western transactions. However, it is undeniable that, with over one billion adherents to Islam in the world, including many wealthy investors, the Muslim demographic cannot be ignored.<sup>112</sup> Muslim values and the spiritual conscience of individual investors who adhere to its

---

107. See generally IBRAHIM WARDE, *ISLAMIC FINANCE IN THE GLOBAL ECONOMY* 196-201 (2000) (discussing the difficulties associated with reconciling Islamic banking with the objectives of international banking regulatory structures).

108. See *id.* (discussing the lack of contingency planning in the regulation of Islamic banks).

109. See generally GEORGE ALEXANDER WALKER, *INTERNATIONAL BANKING: LAW, POLICY AND PRACTICE* 26-32, 35, 41 (2001). The primary policy-making entity in the international banking sector has been the Basle Committee on Banking Regulation. *Id.* The Basle Committee is comprised of the central bank governors of the G10 nations, whose association as such was precipitated by the failure of Franklin National Bank and Bankhaus Herstatt, which had previously been significant elements in the international banking community. *Id.* The Committee's formation revolved around a mutual desire to impose guidelines on banking practices and to supervise the international banking market. *Id.* The Committee reports to the governors of the G10 and while possessing no formal status or adherence to any prefabricated guidelines, it has been a central figure in the supervisory and regulatory framework as applied to international banking. *Id.*

110. WARDE, *supra* note 106, at 196-97.

111. See discussion of *gharar*, *supra* notes 20-22 and accompanying text.

112. See Iqbal, *supra* note 5; see also Ariel Berschadsky, *Innovating Financial Securities in the Middle East: Surmounting the Ban on Interest in Islamic Law*, 9 U. MIAMI BUS. L. REV. 107, 111 (2001) (illustrating the resources of the Muslim world and the corresponding promise of the substantial pool of wealth from Muslim investors).

precepts necessitate a methodology of investment that is congruent with Muslim beliefs.<sup>113</sup> The Islamic investment modus is typically more amenable to long-term investments, favoring the stable investment in substantive projects rather than short-term speculation.<sup>114</sup> Drawbacks and benefits exist in relation to the growth of Islamic finance opportunities in conjunction with internationally active financial institutions. However, the drawbacks that exist are more logistical than fundamental simply because the capacity of major institutions devoted to *Shari'a*-compliant transactions is somewhat limited.<sup>115</sup> Consequently, the ideological issues militating against the involvement of Muslim investors in international asset finance are few.

Notwithstanding the resolution of functional issues relating to choice of law provisions and lender stability, more fundamental concerns exist with respect to the growth of Islamic finance in the international finance sector.<sup>116</sup> It is common sense that some semblance of trust must exist for productive business transactions to transpire. This raises the need for a discussion of the Western conception of Islam. Political issues tend to (inaccurately) color conceptions of Islamic finance as the product of a belief system that is instable, rigid, and anti-Western in its ideology, rather than connotative of the unique monetary practices it actually embodies.<sup>117</sup> Congruence between the holistic nature of Islamic ideology and medieval rigidity is not necessarily well-founded.<sup>118</sup> While more comprehensive than other spiri-

---

113. See Rodney Wilson, *Islamic Banking and its Impact on the International Financial Scene*, 10 J. INT'L BANKING L. 437, 443 (1995). The conscience of the individual investor is more central to the investment exercise in an Islamic system. See *id.* Thus, the investor will likely seek assurances that the methodology employed reflects religious and social responsibility as a Muslim. See *id.*

114. See *id.* at 444.

115. See *supra* note 1 and accompanying text. The international banking community has yet to commit significant resources towards the development of Islamic investment and finance divisions. See *supra* note 1 and accompanying text. HSBC and Citibank are expanding into Islamic finance but there is no identifiable trend on a large scale towards accommodating these techniques. See *supra* note 1 and accompanying text.

116. See generally WARDE, *supra* note 106 and accompanying text.

117. See WARDE, *supra* note 106, at 12-13, 15 (emphasizing the necessity of a more factually sound conception of Islam in creating a more receptive environment for Islamic finance techniques in the international business community). Certain connotations associated with Islam are focused on the Arabic-speaking element and the Arab ethnic component of Islam. *Id.* While noteworthy, the Arab demographic constitutes 200 million out of over one billion Muslims in the world. *Id.*

118. See *id.* at 14 (offering support to dispel inaccurate views of Islam as predominately a political belief system with overly specific spiritual guidelines).

tual constructs in its proscriptions regarding living and conducting the affairs of life, the applicability of Islamic methodology is not limited to the Muslim world. The existence of transactions such as the Emirates aircraft lease is indicative of this truth, and is equally indicative as to the potential hybrid financing poses. Raising the comfort level of the international finance community with Islamic techniques requires transcending distorted and inflammatory preconceptions of Islam and placing more emphasis on fact.

### CONCLUSION

The Muslim world, by virtue of its numbers alone, constitutes a formidable investor pool. As more Muslims turn to their spiritual belief systems, the methods utilized to invest will dictate practices congruent with their faith. The foregoing discussion demonstrates that Islamic finance methods as they apply to asset finance show great promise. The integration of a *Shari'a*-compliant lease structure adds complexity and time to the execution of a transaction. However, the Emirates deal is a promising indicator of the possibilities of fusing *Shari'a*-compliant structures with conventional Western transaction methodologies, though the practice is by no means a matter of routine at present. These differences in technique notwithstanding, the utility of Islamic finance methods is largely unexplored at present. The Emirates lease transactions are an innovation that reflect the needs of an economically formidable investor demography, and are indicative of flexibility in financing that does credit to those wishing to combine the secular with the non-secular in the pursuit of profitability.

