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The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence

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ABSTRACT. To know the reason why *Gharar* (risk or uncertainty) would be tolerated in some transactions, can be the base to modify *Gharar*-loaded contemporary transactions such as futures and options.

After defining risk uncertainty and *Gharar*, which are found to be almost the same, we show that the prohibited *Gharar* is a gambling like transaction. We look at the permissible *Gharar* in some transactions and find out that jurists departure from original rule (*hukm*), that is, the prohibition of *Gharar*, was justified by "*maslahah*" which can be considered as particularization of a general ruling (hukm) on the basis of stronger evidence which is either obvious or imbibed.

Introduction

Most of the financial derivatives in financial markets are rejected by modern jurists mainly because of *Gharar* involved in these transactions, but according to Badawi (1998), the precise meaning of *Gharar* is uncertain, and jurists have been unable to define the exact scope of *Gharar* according to Vogel (1998). Recent studies attempt to find contemporary meaning and application for *Gharar*. Al Suwailim (2000) tried to develop a framework to analyze *Gharar* based on the economic aspects of game theory and he concluded that the *Gharar* contract is characterized as a zero-sum game with uncertain payoff. El-Gamal (2000) proves that Al-Suwailim's conclusions are flawed as he showed that certain zero-sum exchanges are not forbidden on the basis of *Gharar*, and certain types of contracts are forbidden on the basis of *Gharar* without having a zero-sum component. Based on empirical and experimental data which are in favor of prospect-theoretic "bounded rationality" El-Gamal concluded that with this bounded rationality individuals will reach inefficient risk-trading solutions instead of efficient risk sharing ones, which means that prohibition of risk trading (*Gharar*) is efficiency enhancing.

In this article an attempt is made to narrow the gap between the conventional definition of risk and uncertainty, and the traditional and Sharia definition of *Gharar* which might help to understand the nature of *Gharar* in new transactions, such as option trading, futures and swap trading transactions, before any judgment on transactions can be made.

Uncertainty and Risk

Risk is taken to be a measure of uncertainty about the frequency and consequences of an unacceptable event or, the probability of an undesired outcome expressed in money terms (Chicken, 1966).

According to Knight (1921), "[a] situation is said to involve risk if the randomness facing an economic agent can be expressed in term of specific numerical probabilities (these probabilities may either be objectively specified as with lottery tickets, or else reflect the individual's own subjective beliefs) while, uncertainty situations arise when the agent cannot (or does not) assign actual probabilities to the alternative possible occurrences.

Uncertainty (as opposed to risk) has been the subject of extensive literature. Recent books and surveys are Balch, McFadden and Wu (1974), Diamond and Rothschild (1978), Hirshleifer and Riley (1979), Lippman and McCall (1981), Fishburn (1982), Schoemaker (1982), Sinn (1983) Karni (1985) and Dreze (1987).

The devices of state contingent consequence function and state preferences have been used to model preferences under uncertainty as uncertainty arises whenever decisions can lead to more than one possible consequence. According to Savage (1954, Ch. 2) (State of the World) is used to describe whatever determines the uncertain consequences of a decision, where no decision can possibly have more than one consequence.

Instead of using numerical probabilities, this approach represents the randomness facing the individual by a set of mutually exclusive and exhausitive states of nature or states of world.

Different kinds of uncertainty can be considered in the State of the World.

First: The exogenous uncertainty: Which are factors affecting the exogenous variables such as consumer's taste and firms' technologies. Even though the economic system cannot reduce exogenous uncertainty, insurance may help to soften its impact upon individuals.

Second: Endogenous uncertainty: Which is concerning the operation of the economic system in market economy, like the buyer uncertainty about the suitability of the seller he meets, or the quality of the commodity he buys or the term of the trade that will take place. This uncertainty can be reduced to some extent by individuals who take the trouble to search extensively, but it can be created by sellers who change their prices frequently and unpredictably, so the endogenous uncertainty is a result of economic agents decisions and the task of economist to explain and predict.

Third: Policy uncertainty: Which is concerning economic policy and its impact on the tax system, interest rate, the provision of public good, etc. It can be considered

exogenous uncertainty to the economist since it is the task of political science to explain policy.

Fourth: Extrinsic uncertainty: According to Cass and Shell (1983) there is no uncertainty about the usual exogenous variables such as taste and technology which are (intrinsic) uncertainties likely to affect the allocation of resources in an economy.

They give 'sunspot' as an example of extrinsic uncertainty where there are some agents who cannot insure themselves against extrinsic uncertainty before they are born, there may exist 'sunspot' equilibrium in which the allocation depends upon the outcome of extrinsic uncertainty.

In many studies risk is used to mean uncertainty, so risk is defined to be 'the possibility that adverse consequences might occur'. Exposure to risk is the condition of being unprotected against the possibility that adverse consequences might accrue (Adams, 1995).

However different interpretations of an adverse consequence can be found, as some enterprises consider loss to be adverse consequence while others may consider fluctuation in income, prices, interest rate, foreign exchange, or cash flow to be adverse consequences.

In business generally there are two types of risks:

The first type is *business risk*: which pertains to product markets in which a firm operates and includes innovation, technological change and marketing. This risk may take the following forms:

a) Market risk: which occurs when the prices of goods or services change because of market factors such as demand, input cost, technology etc.

b) Credit risk: which is the risk of loss due to the other party defaulting on contracts or obligations.

c) Operational risk: which covers the risk of running a business and may occur in the following business aspects of inadequate systems, insufficient management control, personnel control, various degrees of management failure, and criminal acts by employees or directors.

d) Legal risk: which is the risk that a company's activities may lead to legal action being taken against it.

e) Liquidity risk: which occurs when a company's cash-flow position leaves it unable to meet payment obligations.

The second type is *Financial risk*: which is defined as the volatility of unexpected outcome which affects the financial variable. Broadly speaking, there are four different types of financial risks: interest rate risk, foreign exchange risk, equity risk and commodity price risk..

***Gharar*, Uncertainty and Risk**

The Muslim jurist's perception and implication of risk and uncertainty is not far from those of economists. Economists recognize risk as a measure of uncertainty about

the frequency and consequences of unacceptable or unpleasant events. The uncertainty arises when an agent cannot assign actual probabilities to the possible alternative occurrences to the unacceptable or unpleasant event. Their objective is to model these uncertainties and to find the optimal behavior of the economic agent facing uncertainty. Expected utility function is used to model decision making under uncertainty and modern axiomization of this theory was provided by Von Neuman and Morgenstern (1944) and Savage (1954) and the proposed utility theory was introduced by Friedman and Savage (1948).

Islamic jurisprudent recognizes *Gharar* which is a kind of uncertainty. Literally it means uncertainty, risk or hazard. *Taghreer* being the verbal noun, it means, deception or misrepresentation, which includes exposing oneself or others or his own property or others to jeopardy. *Gharar* is defined as the risk or jeopardy which is the state of being near to destruction or wreckage. When some one risks himself, he would be in the above state(1).

The Jurists' aim is to show that *Gharar* is one of the major Islamic constraints on transaction which renders some transactions as invalid and void. Some jurists do permit some *Gharar* transaction if the *Gharar* is light or in the face of necessity for that transaction, given that this need is both general and specific and there is benefit (*Maslaha*) from the given trasaction.

Definition of *Gharar*

In jurispudntial terms, *Gharar* has many definitions which can be summarised under three headings: (Al-Darir 1977)

First: *Gharar* means doubtfulness or uncertainty as in the case of not knowing whether something will take place or not; this excludes the unknown. Ibn Abidin defines *Gharar* as 'uncertainty over the existence of the subject matter of sale'(2). This definition is shared by *Hanafi* and *Shafi'i* Schools.

Second: *Gharar* also means ignorance and this can be when the subject matter of sale is unknown. This view is adopted by the *Zahiri* School alone. According to Ibn Hazm "*Gharar* in sale occurs when the purchaser does not know what he has bought and the seller does not know what he has sold"(3).

Third: *Gharar* means both the unknown and the doubtful. According to Al-Sarakhsi "*Gharar* obtains where consequences are concealed"(4). This view is shared by most jurists.

Muslim Jurists disagree on the degree of uncertainty in a transaction to be considered *Gharar* transaction: the probability of undesired outcome is envisaged into three classes.

First: *Gharar* occurs when consequences are totally concealed, which means the probability takes the value between zero to one. This can be understood from the definition of *Gharar* by Al-Sarakhsi: "*Gharar* obtains when consequences are concealed" (4) and by Al-Babarti: "*Gharar* obtains when the subject matter is unknown"(5). Ibn Abidin maintains that "*Gharar* is uncertainty over the existence of the subject matter of sale", and Ibn Taymiyyah that "*Gharar* is the unknown consequences"(7).

Second: *Gharar* occurs when the probability of existence is equal to the probability of non-existence. According to Al-Kasani "*Gharar* is the risk where the probability of existence and the probability non-existence have the same value"[8]. In *Al-Bahr Al-Zakhkhar* it is noted that '*Gharar* is the oscillation between the occurrence and non occurrence neither of which can outweigh the other'[9]. According to *Al-Dusuqi*, '*Gharar* is the oscillation between two things of which one of them is the subject matter'[10].

Third: *Gharar* occurs when the non-existence of the subject matter outweigs its existence. According to Al-Ramli "*Gharar* occurs when there is a possibility of two things occuring, the more likely is the one you fear to occur"[11]. For *Al-Sharqawy* "*Gharar* is the oscillation between two matters, the most likely to occur is the one you fear to happen"[12]. So we cannot consider the degree of uncertainty or risk to distinguish between the prohibited and allowed *Gharar*.

The Prohibition of *Gharar*

Though there is no verse in the Qur'an to proscribe *Gharar* explicity, vanity (*al-batil*) is forbidden in many verses: "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges" (2:188). "O ye who believe! Eat not up your property among yourselves in vanities; but let these be amongst you traffic and trade by mutual good will" (4:161).

There is a consensus among interpreters of three verses that *Gharar* is vanity. Ibn Al-Arabi explains that vanity (*al-batil*) is unlawful because it is prohibited by Sharia such as usury and *Gharar*[13]. While *Al-Tabari* considers vanity as eating up other's property in a manner which was not permitted by Sharia[14], Zamakhshari considers the act which was forbidden by Sharia as vanity such as theft, dishonesty, gambling and *Gharar* contracts[15].

Dr. Darir defines vanity as (eating up property in ways forbidden explicitly by Sharia. The Quran explicitly forbids gambling (*maysir*) and usury, while the Sunnah forbids *Gharar* sale, and there are many transactions which can be considered vanities yet not mentioned explicitly in the Quran and Hadith but left to good Muslim's judgment to consider it[16].

Reliable sources have reported through a number of the Prophet's companions that the Prophet (pbuh) has forbidden *Gharar* in trading.

The Hadith is considered as one of the cardinal principles of sale's law and the groundnorm of all rules governing *Gharar* contract[17].

This Hadith gives rise to three juristic consequences:

a) The prohibition of *Gharar* sale, this is the outcome of general consensus of Sharia scholars[18]..

b) The invalidity of *Gharar* contract as it is considered null and void by the consensus of Sharia scholars.

c) The prohibition extends to all forms of *Gharar*[19].

The Prohibited *Gharar* and Gambling

Gambling includes the idea of voluntary and deliberate risk taking (Samuelson 1976). Commercial and organized gambling can be divided into two types. The games of chance such as lotteries and casino games and games of chance and skill such as betting on outcome of horse races, football games, etc. Brenner (1990) called the second type i.e. the game of chance and skill, speculation. According to him, speculation is an act where the participants, i.e., the gamblers pursue monetary gain by using their skill, and when they carry out the act, they do not have enough evidence available to prove whether they are right or wrong. Gambling and speculation refer to their noncustmary act as a deviation from the majority opinion, as they are against the established one or against the market.

According to Brenner (1990) both gambling and speculation are motivated by the hope of getting rich and doing that quickly and that in both cases a relatively unimportant sum of money can be increased through gambling and speculation to an important sum.

Muslim Jurists agree that only the excessive *Gharar* is prohibited as it impairs the validity of the contract. They give the example agreed upon excessive *Gharar*:

1. The “Pebble” “touch” and “toss” sale.
2. Selling the unborn animal without its mother.
3. Selling the fetuses and embryos.
4. Selling fruit before its emergence.
5. Selling the find of the diver in advance.
6. Selling the unborn animal (*Habal-al-Habalah*).
7. Selling the object of unknown identity without the buyer having the right to specify it.
8. Selling an object of unknown genus.
9. Deferment of the price to an unknown future date.

If these examples are examined, similarities can be found between them and gambling, which are:

1. In both of them the buyer voluntarily takes the risk of the transaction.

2. The outcome of the transaction depends mostly on chance and the same extends to skills.

3. In both of them the buyer pursues monetary gain.

4. In both of them the buyer faces exorbitant risk and uncertainty.

5. In both of them the buyer is motivated by the hope of getting rich.

6. In both cases the expected return is exceptionally high as a small amount of money which is usually paid to buy the object in case of excessive *Gharar* or in case of Gambling can yield a large amount.

The similarity between gambling and excessive *Gharar* was first noticed by *Ibn Taymiyah* and *Ibn Al-Qayyim* as they consider exorbitant *Gharar* as a type of gambling, according to Ibn Taymiyyah “*Gharar* obtains where consequences are cancelled. Excess *Gharar* is *maysir*, which is gambling. When a camel or horse is lost, its owner can sell it

with very low price and very high risk, so if the buyer finds it, the seller would tell him, you deceived me and bought the camel with very low price, but if he could not find it the buyer would complain that he paid and got nothing in exchange, this will result in enmity and hatred between them. Exorbitant *Gharar* sale is vanity and injustice, it causes enmity and hatred in the society"[20].

Classification of *Gharar*

In real life *Gharar* like uncertainty cannot be avoided totally. Al-Shatibi says "to remove all *Gharar* from contracts is difficult to achieve, besides, it narrows the scope of transactions. Jurists agree that the *Gharar* which affects the contract, is the excessive *Gharar*, as it impairs the validity of the contract while a slight *Gharar* has no impact at all. With the absence of concept to measure *Gharar*, wide differences exist among jurists in classifying *Gharar* and its applications. There are some cases where Muslim jurists agreed to represent slight *Gharar* such as:

1- Selling a lined overcoat though its lining is not seen.
2- Selling a house though its foundations have not been seen.
3- Renting a house for month, where the month can be thirty days or thirty one.

And there are some agreed upon cases to represent excessive *Gharar* such as:

1. The "pebble", "touch" and "toss" sale.
2. Selling the unborn animal without its mother.
3. Selling fetuses and embryos.
4. Selling an unborn animal (*Habal-al-Habalah*).
5. Selling the find of the diver in advance.
6. Selling an object of unknown genus.
7. Deferment of price to an unknown future date.

But there are wide differences among jurists in the intermediate cases where *Gharar* oscillates between being excessive and slight, and its effects on the contract is disputed and this disputed *Gharar* is more than the *Gharar* where effects is agreed upon, such cases as:

1. Selling what is hidden in the ground.
2. Selling in lump sum.
3. Selling at 'market price' without specifying the exact amount.
4. The buyer selling the object bought before he receives it.
5. Selling products that mature in successive phases.
6. Selling an absent object.
7. Share cropping.

Some jurists try to lay down a rule for excessive and for slight *Gharar*. According to Al-Baji, the slight *Gharar* is that (from which hardly a contract is free while excessive *Gharar* is that which dominates the contract that it comes to characterize it)[21]. But the characterization of contract as "*Gharar* Contract" is subjective and inevitably influenced by differences in technology, time, societies, and individual taste and preferences.

In terms of degree of permissibility of *Gharar* in Islamic transactions, *Gharar* can be classified into four types:

First: The Prohibited *Gharar*:

This is the gambling type of *Gharar* which includes the idea of voluntary and deliberate *Gharar* taking, also involving sterile transfer of money or good between individuals, with no value added or created from the transaction. Ibn Taymiyah and Ibn Al-Qayyim consider exorbitant *Gharar* a type of gambling. According to them "*Gharar* obtains where consequences are concealed, selling with excessive *Gharar* is *Maysir* which is gambling: that if camel or horse lost, its owner can sell it with a very high risk and very low price, so if buyer finds it, the seller will tell him, you deceived me and bought it with very low price, but if he could not find it, the buyer would complain that he paid and got nothing in exchange. This will result in enmity and hatred between them. Exorbitant *Gharar* sale is vanity and injustice and causes enmity and hatred in society.[22] Examples of this typical *Gharar* are pebble, touch and toss sales. Authentic hadiths have been reported forbidding these types of sales. The majority of jurists are in agreement that the common reason for prohibition of all these types of sale is the fact that they involve exorbitant *Gharar*.

The pre-Islamic society had known contracts which were laden with excessive *Gharar*, but Islam came to specifically forbid them because the exorbitant *Gharar* in them impaired their validity of them. These are:

1- The "pebble", "touch" and "toss" sales.
2- Selling the unborn animal without its mother.
3- Selling the fetuses and embryos.
4- Selling fruit before its emergence.
5- Selling the unborn animal (*habal-al-habalah*).
6- Selling the find of a diver.
7- Selling the object of unknown identity.
8- Selling an object of unknown genus.
9- Deferment of the price to an unknown future date.

Second: The Permissible *Gharar*:

According to Shatibi, the *Hadith* (which prohibits *Gharar*) does not intend to prohibit all *Gharar* because jurists permit some transactions which have *Gharar* such as selling what is hidden in the ground, selling a house though its foundation has not been seen. The Hadith intends to prohibit *Gharar* which can cause dispute and cannot be tolerated. According to him this is the essence of the rule (*manat al-hukm*) Istihsan, whis is, according to Ibn-al Arabi "to abandon exceptionally what is required by the law, because applying the existing law would lead to departure from some of its own objectives"[23] *Istihsan* is used by jurists to permit some *Gharar* transactions, and they stipulate conditions to reduce the cause of dispute to acceptable level.

Accoridng to al-Shatibi, (n.d.)[24], Imam Malik and Abu Hanifa consider *istihsan* as particularisation of general on the basis of stronger evidence which is either obvious or implied. This was inclined by Imam Malik on the basis of *maslahah*, which means giving preference to a particular *maslahah* over the general ruling of *qiyas*. This departure can be from an obvious *qiyas* to a hidden *qiyas*, and must rely on specific evidence, which may be ruling of the text, general consensus, nessessity, public interest or custom, it must be persuasive enough to convince the *mujtahid* that there is a case of *istihsan*.

Gharar can be permissible when there is no general agreement among the schools of jurisprudence that this *Gharar* is prohibited and the contract that involves this *Gharar* is invalid. If at least one school permits it with or without conditions, then it is considered permissible *Gharar*. The following are some cases of the permissible *Gharar*:

1- *Two sales in One*

The ban on combining two sales in one is reported in a number of authenticated *hadiths*, but jurists have differed in interpreting these *hadiths*. They specified instances to which it applies. One of these is, (two sales in one) which means that a single contract relates to two sales. This can be when seller says, "I sold you this item at a hundred in cash today and hundred and ten a year hence". The buyer says, "I accept", without specifying at which price he buys the item. If this sale is binding there they will be *Gharar* in the price as the seller does not know what price he will receive.

But if this sale is not binding in any of the two forms and one or both of them has option to choose, then Maliki school accepts it as it is one of the allowed options in the school[25].

2- The option sale (Arbun Sale)

In this sale, purchaser pays down payment and he has the option to default, so if he takes the item, the amount paid will be part of the total price. But if he does not, he would forfeit the down payment and the seller will keep it.

There are two hadiths on the (*arbun* sale). One narrated by Malik says that "The Prophet (pbuh) has forbidden *arbun* sale"[26]. The other which quotes Zaid Ibn Aslam as saying that he asked the Prophet (Pbuh) on *arbun* as part of a sale and that Prophet permitted it[27].

Muslim Jurists have disagreed on the permissibility of *arbun* sale, it is prohibited by the Hanafis, the Malikis, the Shafi'is and Zaidi Shi'ites. But it was approved by Imam Ahmed who narrated its permissibility on the authority of Umar and his son and others.

Even though in Islamic Sharia, sale is a binding contract if it meets its conditions, Sharia permits option to protect contractor benefits and his contentment and to prevent society from enmity and hatred as seller or buyer may conclude the transaction in unfavored conditions, and they regret the deal later, so conflicts and disputes may arise in execution of the contract and this will destabilize the transaction.

Despite the *Gharar* involved, Sharia permits option sale where the buyer may have the option to default with two conditions: (1) they have to agree on that in advance; (2) there must be a reason to justify the option[28].

3- *Conditional (Muallaq) Sale:*

In this sale the conclusion of it is made conditional upon another uncertain event through the use of a conditional clause. For example seller would say, "I will sell you my house if so and so sells me his". The buyer would say, "I accept". Majority of jurists consider this sale as null and void because of the *Gharar* involved, as both parties do not know whether the subject matter of the condition will be realized and the sale will

be completed or will not as the condition will not obtain. And there is *Gharar* in the time as to when will it conclude as none of them know when the condition will occur[29].

Ibn Taymiyah considers suspended sale with condition as permitted. If these conditions are achieved, parties benefit provided they do not contradict the Quran and Sunnah text[30]. In his view conditional sale is valid as it contains no *Gharar*. If condition would meet, then the sale will be executed otherwise there will be no sale contract.

4- Gharar in the kind/type of the object

Want of knowledge with regard to genus which includes the ignorance of the entity, type and attributes of the object, is considered by some jurists exorbitant *Gharar*. They invalidate any sale contract that contains this kind of ignorance[31]. For example, the seller would say, "I sell you an item (or some thing) for ten Dollars", the buyer would say, "I accept". However, Maliki school permits the sale of something of an unknown genus on condition that the buyer has the right to "option of inspection", where he has the option to reject this object of the sale after the sight and rescinds the sale[32].

The Hanafi school gives this right (i.e. option of inspection) to the buyer without it even being stipulated in the contract[33].

5- Gharar in the species of the object

Some jurists stipulate that ignorance of the species of the object invalidates the sale contract, because it involves excessive *Gharar*[34], while other jurists stipulate only the need for the object description[35].

6- Gharar in the attributes of the object

Muslim Jurists have differed as to whether the description of attributes is an essential condition for the validity of the sale. Some of them consider it a condition of validity, while others do not. For example, the Hanafi school views that when an object or its price is within sight, it needs no description[36] as there is no *Gharar* involved. However, Hanafi jurists differ on the condition of describing an unidentified object of sale. Some of them consider it a prerequisite of the validity of the sale and to avoid *Gharar* while others say that it is not, because the buyer has the option of inspection and this will eleminate *Gharar* and the want of knowledge (*jahalah*). But there is no disagreement between Hanafi jurists on the requirement that the price should be clearly described[37].

The Maliki jurists consider that validity of sale depends upon knowledge of the attributes of the sold object and its price to avoid *Gharar*[38]. Some Hanbali jurists share this view with Malikis while others do not[39] and Shafi'i jurists have the same differences[40].

7- Gharar in the quantity of the object

Knowledge of object's quantity is also a condition for the validity of its sale as it is invalid to sell an object with unknown quantity or unknown price. There is general agreement among jurists on this principle except Al-Sharnbelan of the Hanafi school who disagrees with them[41]. This sale is prohibited because it involves *Gharar* as

Shafi'i and Maliki jurists have stated[42]. A clear example of *Gharar* due to ignorance of the quantity is *al-muzabanah* sale, which means the sale of dates on the palm trees for dried dates, measure for measure. Al-Bukhari defines *muzabanah* as selling the estimated (*khars*) dates on palm tree by measured dried dates[43], if the estimation is not correct the buyer will bear the consequences and this is *Gharar*. That is why several authentic hadiths have forbidden *muzabana* sales[44]. But *al-araya* (sirgular-*ariyyah*) are excepted from the ban on *muzabana* based on authentic hadiths which were accepted by all jurists[45]. *Araya* are palm trees, the fruits of which have been given as a gift. The Sharia permitted the owner (the recipient of the gift) to sell his *araya* on the tree by way of estimation with the condition that such fruit does not exceed 5 *awsuq*. Despite the *Gharar* involved, this sale has been sanctioned for the sake of the needs of those who own these (*araya*) but have nothing to exchange for fresh dates except the dry dates. This exception is based on the Islamic legal maxim (removal of hardship).

8- Gharar due to identity of the object:

When the genus, species, type, attributes and quality of sold thing are known but the identity of it is unknown then *Gharar* is present and dispute may arise on specifying its identity. Jurists agree that this *Gharar* is forbidden. But if buyer has the (option to specification), that is the right to choose one of the things and leave the others, Malikis permit it because in their view, this option renders *Gharar* ineffective. While Shafi'i, Hanbali and Zahiri schools forbid it, and so does Hanafi school when there are more than three to choose from, and allows it when there are three or less[46].

9- Gharar due to delivery time

Jurists agree that ignorance of time in delivering the object or its price is exorbitant *Gharar*, which renders the contract invalid.[47] An example of this is the sale of the unborn animal which was forbidden by several hadiths, because the time of delivery is unidentified. But if the identification of time is not exact, as to harvest time which was called by Hanafi (light want of knowledge), Maliki and Hanbali schools permit it, while Hanafi and Shafi'i schools prohibit it[48].

10- Gharar due to non-existence of the object:

Muslim Jurists agree that sale of the non-existent object which involves flagrant *Gharar* is impermissible, such as sale of what a she-camel may give birth to, and the sale of the fruit before it is formed[49]. But not every non-existent object cannot be sold, especially the one whose sale implies no *Gharar.*

According to Ibn Taymiyyah, there is no evidence to prove that the sale of the non-existent object is impermissible[50]. Examples of the non-existent objects at the time of the contract but which are customarily certain to exist, are *salam*, *istisna'* (manufacturing contract), and the sale of the thing which will come into existence in succession. Based on necessity the Malikis and some jurists of the Hanafi schools said that it is permissible to sell what did not emerge along with what did and there is concensus of jurists that it is permissible to sell the ripe fruit with unripe in one single yield[51].

Third: The Acceptable *Gharar*

We adopt the conventional definition of risk to be the measure of uncertainty about the frequency and the consequences of an unpleasant or unacceptable event or (the probability of undesired outcome expressed in money terms) and uncertainty arises whenever a decision can lead to more than one possible consequence. In the (State of World) approach, uncertainty is represented by the randomness facing the individual which is a set of mutually exclusive and exhaustive states of nature.

In the Islamic context jurists define *Gharar* to mean risk, and some of them tend to prohibit all risks and *Gharar* but we found that only gambling and gambling-like activities are prohibited. In this context risk and uncertainty are considered synonyms to *Gharar*. Meanwhile, almost all economic activities involve uncertainty or commercial risk or *Gharar* as the profits out of them are uncertain(52).

Ibn Taymiyyah said (there is no evidence from Sharia text to oblige prohibition of all risk (*Gharar*) as we know that Allah and his messenger do not prohibit every risk (*Gharar*). "In all tradings each party hopes for profit and fears to lose. This risk is permitted by the Quran, Sunnah and consensus of scholars, the business man is a risk taker"(53).

From the above we conclude that when the endogenous or the exogenous uncertainties are the main sources of *Gharar* then this *Gharar* can be considered acceptable *Gharar*. Examples of exogenous uncertainty are changes in consumer's taste, firms' technologies and weather conditions, and of endogenous uncertainty, the buyer's uncertainty about the suitability of the seller he meets, or the quality of commodity he buys, or the term of the trade that will take place.

Fourth: The Mandatory Uncertainty

In this case *Gharar* (uncertainty) is a prerequisite to the validity of the contract. This is the well-established view concerning the *musharakah*, *ijarah* and *mudarabah* contracts. This is based on the Islamic legal maxim "Damage and benefit go together," that is to say, that a person who obtains the benefit of a thing takes upon himself also the loss from it(54), and the Islamic legal maxim which is based on the Prophet (pbuh) saying "Revenue goes with liability(55).

In the *musharakah* contract all parties are partners in case of profit and liable in case of loss and no minimum profit can be assured to one party, or one party is entitled to a share in profit only while the other party is made liable for the entire loss along with his share in profit as these situations could contradict the above maxims.

In *mudarabah* contract, the financier, or *rabb al-mal* is the only one liable to loss if there is any and he cannot be guaranteed the principle of minimum profit by the *mudarib*, or the working partner.

In a renting or leasing contract the tenant or lessee cannot be liable to damages in the house or equipments if these damages are due to earth quake or flood because the owner who is earning its rent should also bear the loss.

In current accounts, where the depository is liable to guarantee and return the deposit, he is entitled to take away any profit out of that deposit if it is invested.

Conclusion

Since not all *Gharar* transactions are prohibited and the essence of the prohibition (*manat al-hukm*) is to prevent *Gharar* which can cause dispute and cannot be tolerated, jurists do permit some *Gharar* transactions based on *maslahah* and some of them which stipulate conditions such as give both or one party an option, so as to reduce the causes of dispute to an acceptable level and to make the *Gharar* involved a light *Gharar*.

By using *istihsan* and based on *maslahah* as a measure, modern jurists can stipulate conditions to contemporary financial transactions such as futures options and swaps to reduce the *Gharar* involved to an acceptable level and reduce the causes of dispute among the contracting parties in these transactions.

Endnotes

(1) **Al-Fayumi, Ahmad,** (n.d.) *Al-Misbah Al-Munir*.
(2) **Ibn Abidin**, (1252 A.H.), *Radd al-Muhtar*, 4/147.
(3**) Ibn Hazm,** (1351 A.H.), *Al-Muhalha*, 8/343, 389 and 43.
(4**) Al-Sarakhsi**, (n.d.), *Al-Mabsaut*, 13/194.
(5) **Al-Babarty** (n.d.), *Fath-Al-Qadir*, 5/192
(6) **Ibn Abidin,** (1252 A.H.), 4/147.
(7) **Ibn Taymiyyah** (n.d.), *Majmu' Fatawa*, 3/275.
(8) **Al-Kasani** (1910), *Al-Badai*' 5/263.
(9) **Al-Hasani** (1350 A.H.), *Al-Bahr A-Zakhkhr*, 3/293.
(10) **Al-Dusuqi** (1230 A.H.), *Al-Sharh Al-Kabir*, 3/49.
(11) **Al-Ramli** (1357 A.H.), *Nihayat Al-Muhtaj* 3/392.
(12) *Tuhfat Al-Tullab* with Notation of **Sharqawi** 29.
(13) **Ibn Al-Arabi,** (1376 A.H.) *Ahkam Al-Quran*, 1/41-42.
(14) **Al-Tabari** Tafsir, **3**/949.
(15) **Al-Zamakhshari,** (1373 A.H.), *Al-Kashshaf* (538 A.H.), 1/502.
(16) **Al-Darir,** (1990), *Al-Gharar in Contract*, p. 26.
(17**) Al-Alim, Yusuf Hamid,** (1415 A.H.), *Al-Maqasid Al-Ammah li'l Shari'ah Al-Islamiyyah*, p. 415-520.
(18) **Al-Nawawi**, *Annotation* to "Sahih Muslim", 10/156.
(19) **Al-Amidy,** *Al-Ihkam fi Usul Al-Ahkam* (1332 A.H.), 2/257-272.
(20) **Ibn Taymiyyah,** Al-Qawa'id Al-Nuraniyyah (1370 A.H.), p. 116,
Ibn Al-Qayyim, (751 A.H), *I'lam-Al Muwaqqein*, 1/358.
(21) **Al-Baji** (1332 A.H.), *Al-Muntaqa Sharh Al-Muwatta*, 1/41.
(22) **Ibn Taymiyyah,** *Al-Qawa'id, Al-Nuraniyya*, p. 116.
(23) **Kamali, M.H.,** (1417 A.H.), *Istihsan and its Application*, (1977), (IRTI, IDB), Jeddah, p. 25.
(24) **Al-Shatibi,** A.I., (n.d.), *Al-Muwafaqat*, ed., S.A. Diraz, IV, p. 208.
(25) **Al-Qurtubi,** (1370 A.H.), *Bedayat-Al-Mujtahed*, II/154, *Al-Mudawwnah*, 9/151,
Al-Shawkani, *Nayl Al-Awtar*, 5/249.
(26) **Al-Muwatta,** on the margin of Muntaqa 4/157.
(27) **Shawkani** (1372 A.H.), *Nayal Al-Awtar*, 5/250.
(28) **Al-Jaziri,** (1987), *Kitab Al-Fiqh*, 2/170-171.
(29) **Al-Nawawi** (n.d.), *Al-Muhadhdha* with *Al-Majmuh*, 9/340.
(30) **Ibn Al-Qayyim** (n.d.), *I'alam Al-Mawaqqi'in*, 3/337-33.
(31) **See Ibn Abidin,** 4/87.
(32) **Al-Baji,** (1332 A.H.), Al-Montaqa, 4/287.
(33) **Ibn Al-Humam**, (n.d.) *Fath Al-Qadir***,** 5/137.
(34) **Al-Qarafi** (1344 A.H.), *Al-Furuq*, 3/265.
(35) **Ibn Abidin,** 4/29.
(36) Ibid.

(37) **Ibn Al-Humam,** *Fath Al-Qadir Sharh al-Hidaya*, 5/83.
(38) *Al-Muntaqa,* 5/41 and *Bidayat Al-Mujtahid,* 2/148.
(39) **Al-Sharbini** (977 A.H.), *Al-Mughni*, 4/109.
(40) **Al-Nawawi,** *Al-Majmu'*, 4/109, Al-Majmooh 9/288.
(41) **Ibn Abidin,** 4/56.
(42) **Ibid**, 14/28; *Kasani, Al-Bada'e'* 5/158.
(43) **Al-Bukhari,** *Sahih,* **(**1314 A.H.), *Hadith* No. 12.
(44) Ibid, 3/75, *Muslim Sahih,* 10/201.
(45) *Al-Jami' Al-Sahih,* 3/527, *Al Muwatta,* 3/246, **Al-Bukhari,** *Sahih,* 3/155 and **Muslim**, *Sahih*, 10/187.
(46) See *Al-Muhadhdhab,* 1/263, *Al-Mughni*, 4/131, and *Al-Bada'e*, 5/158.
(47) **Ibn Abidin** in *Al-Durr*, 6/7 and *Al-Montaqa* in the margin of *Muwatta*, 5/21.
(48) *Al-Mudawwanah***,** 11/158, *Al-Mughni*, 4/1111/292, **Al-Qurtubi,** *Bidayat Al-Mujtahid*, 2/156 and *Fath Al-Qadir Sharh Al-Hidayah*, 5/219.
(49) *Al-Majmu'* ala *Al-Muhadhdhab,* 11/258.
(50) **Ibn Taymiyyah,** *Al-Qiyas fi Al-Shara Al-Islami*, pp. 26-27.
(51) **Ibn Taymiya**, *Nazariat Al-Aqd,* p. 233, and *I'lam Al-Muwaqqein*, 1/361.
(52) **Rafic Al-Masry** (1993), *Al-Mayser wa'l Qimar*, p. 35.
(53) **Ibn Taymiyya,** *Mukhtasar Al-Fatawa Al-Misriyyah*, p. 532.
(54) **Haydar, Ali,** *Majallah* (Art. 87).
(55) ***Ibid.*** (Art. 85). *Sunan Ibn Maja*, Chapter on Tijarat and *Sunan Al-Nasai,* Kitab Al-bay.

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الغرر المسموح به في الشريعة الإسلامية

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المستخلص: يعتبر الغرر من أهم مفسدات العقود في الشريعة الإسلامية ولكن هناك معاملات جائزة على الرغم من وجود الغرر بها، لذلك فإن معرفة الأسباب التي أجيزت بسببها بعض المعاملات على الرغم من وجود الغرر بها يمكن أن يكون أساسًا لتطوير بعض المعاملات المعاصرة التي تتسم بارتفاع المخاطر والذي هو قريب في تعريفه من الغرر مثل عقود المستقبليات والاختيارات .

وفي هذه الورقة بعد استعراض التعريفات المختلفة للغرر وعدم التأكد والخطر، والتي وجدت أنها متشابهة تقريبًا، وجد أن الغرر المحرم هو الضرر الفاحش والذي يمكن أن يكون في معاملات تشبه الميسر والقمار، كما وجد أن الفقهاء أجازوا بعض المعاملات التي يكون بها غرر بناءً على المصلحة العامة، والذي يعتبر تخصيص حكم عام بناء على شواهد قوية سواء مباشرة أو ضمنية .

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