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## **SHARIAH JURISTICAL EFFECT OF GHARAR IN PREDETERMINING TAKAFUL CONTRIBUTION**

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### **Abstract**

*The paper attempts to ascertain the act of applying gharar (risk) in predetermining Takaful contribution (premium) hence to offer a juristic opinion from Islamic Shariah perspective. The general concept of gharar will be comprehended and briefly compared with the concept of risk. Subsequently, the act of making a gharar in fixing the Takaful contribution will be debated and juristically analysed. The paper, however, does not attempt to reassess the Muslim jurists' ruling on the permissibility of neither insurance nor takaful. It is concluded that the gharar (risk) in principle is a subject that is recognized in Islam. It would then lead to main inference that making a gharar (risk) as a consideration in contribution calculation is permissible from Shariah perspective.*

**KEYWORDS:** Risk, Gharar, Insurance, Takaful.

### **INTRODUCTION**

In principle, the Muslim scholars do associate gharar with the risk and uncertainty. Their view of risk is indeed not far off the economists'. According to ISO GUIDE 73:2009, the risk is defined as the combination of the probability of an event and its consequences. The term "risk" means gharar in Arabic etymology.<sup>1</sup> In both definition of risk and gharar, there exists an element of uncertainties or hazard that include events (which may or not happen) and uncertainties caused by ambiguity or a lack of information. In the discipline of Fiqh Muamalat (Islamic commercial law), the Muslim scholars always judiciously examine the presence of gharar in the commercial transactions. Should gharar be identified in the transaction, for example in insurance, it will be deemed as void and prohibited. Some Muslim jurists permit some Gharar transaction if the Gharar is non-excessive or maslahah (necessity). As accentuated earlier, insurance is deemed as prohibited by the Muslim jurists because they claimed that the risk which is uncertain by its nature contains an element of gharar (uncertainty), riba (usury) and maysir (gambling).<sup>2</sup> Hence,

the concept of Takaful emerges to fulfil the Muslim needs in terms of Islamic insurance, which the three listed elements earlier have been eliminated by the principles of tabarru' (donation). However, one may validly ask whether gharar has been absolutely removed in the Takaful offerings. This concern is simply based on the fact that the contribution (referred as premium in conventional insurance) is still derived from the calculated risk<sup>3</sup> that the motive of the participants (the insured) is participating in the Takaful contract.

Therefore, the paper attempts to examine the act of applying gharar (risk) in predetermining Takaful contribution (premium) hence discuss the ruling from Shariah perspective. Section 2 provides an overview and theories of gharar by the Muslim jurists. Section 3 sum-ups the Islamic rulings on gharar followed by its classifications in Section 4. Section 5 discusses on the application of gharar in Takaful contribution. Section 6 presents the analysis from the Islamic juristic perspective and Section 7 concludes.

## THEORY OF GHARAR

Gharar is etymologically defined as risk or hazard.<sup>4</sup> The Muslim jurists further defined gharar from the jurisprudence perspective, such as:-

- a. Athir defined gharar as something that is doubtful and unconvincing.<sup>5</sup>
- b. Sarkhasi defined gharar as something that its consequences are totally concealed.<sup>6</sup>
- c. Qarafi explained that gharar occurs in two conditions, uncertainty over the subject that exists (gharar fi al-wujud) for example selling birds flying on the sky and uncertainty in weight (gharar fi al-miqdar) for example selling pebbles.

According to Darir<sup>8</sup> and Saati<sup>9</sup>, the various definitions of gharar can be summarized under three headings:-

- a. Doubtfulness or uncertainty. This definition is shared by Hanafi and Shafi'i schools.
- b. Ignorance this can be when the subject matter of sale is indefinite. This view is adopted by the Zahiri school alone.
- c. Both the unknown and the doubtful. This view is shared by most Muslim jurists (jumhur ulama').

The risk, in addition to its standard definition by ISO GUIDE 73:2009, also has several definitions that are accepted by the Muslim jurists.<sup>10</sup> Among them are:-

- a. Risk is the possibility of unfortunate events to occur
- b. Risk is the uncertainty of loss.

Based on the definitions by the Muslim jurists and economist, gharar has the same meaning with risk that is the uncertainty on the subject matter.

## CLASSIFICATION OF GHARAR

Shatibi<sup>15</sup> in his book, *Muwafaqat*, acknowledged the difficulty to remove all gharar from contract. It is by nature that gharar may exist in any contract, with only an excessive gharar is prohibited. This view is similar to the economists' perception on risk that it cannot be totally avoided. Based on the former, the Muslim jurists have classified gharar into two types<sup>16</sup>:-

- a. Excessivegharar. Muslim jurists agree that only excessive and extreme gharar should be prohibited as it harms the validity of contractand promotes gambling and excessive speculation. They give the examples of excessive gharar such as selling pebbles, selling the unborn animal and selling the fruits before its emergence.
- b. Slightgharar. The jurists opine that this type of gharar does not impair the contract at all, for example selling a house though its foundation cannot be seen or the quality of the items bought. Hence, the jurists agree that this gharar is permissible or acceptable in contract. It should be stressed that there are arguments among the jurists in classifying each gharar.

The permissible gharar, according to Shatibi, occurs when there is no general conclusion among the schools of Islamic jurisprudence that this gharar is prohibited.<sup>18</sup>If at least one school permits it conditionally or otherwise, then it is considered as permissible gharar, for example gharar due to delivery time. The acceptable gharar refers to business risk taken by a businessman to gain profit and avoid loss. Such risks are for instances the changes in consumer's taste, firms' technologies and weather conditions. The mandatory ghararon the other hand refers to a criterion to the legitimacy of the contract.

## APPLICATION OF GHARAR IN TAKAFUL CONTRIBUTION

Based on the theories of gharar discussed earlier, it is now valid to claim that both gharar and risk have similarity that is the uncertainty. The Muslim jurists have also agreed that making gharar as a subject matter in a contract would be deemed as prohibited, that includes an insurance contract. The Muslim jurists rule the insurance as unlawful due to the inherent element of gharar (uncertain) in the contract, in addition to *riba* (usury) and *maysir* (gambling).<sup>20</sup> Siddiq concluded that any sales transaction containing gharar, either in the form of *sighah* (wordings of contract) or *mahall* (shape or condition) is strictly forbidden. It is so far necessary to highlight that no juristic analysis has been noticeably discussed by the Muslim jurists on the ruling of applying the gharar as a tool or medium to determine the rate of Takaful contribution. The valid reason to this scenario is unknown; it could probably be due to the fatwa (rulings) that gharar is not accepted in Takaful contract and the contribution (premium) fixed in the contract is based on the principle of *tabarru'* (donation) hence eliminating gharar and making the Takaful contract permissible from Islamic perspective. Should we analyse the element that makes up the Takaful contribution, we could not deny the fact that the contribution paid by each participant is rated based on the calculated risk.<sup>22</sup> For example, the contribution paid for motor Takaful is not levelled with the

rate charged for other Takaful products such as property, aviation, family and medical Takaful. The basis of calculated risk by actuaries, in spite of the objective to achieve an adequate and fair contribution,<sup>23</sup> is still founded on the risk that is conceptually similar with gharar.

Hence, the valid question would necessarily be, does the application of gharar (in this case the calculated risk) is permissible by the Muslim jurists and not invalidate the Takaful contract?

## JURISTIC ANALYSIS

To juristically analyse the ruling on applying gharar (risk) in determining Takaful contribution, it is pertinent to examine intensely the adaptation of risk in daily routines particularly in economic activity (muamalah). It has been earlier underlined that gharar and risk has the same meaning and characteristic that is the lack of knowledge on future occurrences. This is according to Quran:- “It is He Who sends down rain, and He Who knows what is in the wombs. Nor does anyone know what it is that he will earn on the morrow: nor does anyone know in what land he is to die. Verily with Allah is full knowledge and He is acquainted (with all things).” (31:34) To overcome this lacking, the mankind have been effortlessly trying many methods to obtain the best and most accurate information about future. Some apply fortune telling and horoscope whilst some prefer more scientific methods by collating the historical facts, statistically analyse the frequency and severity to forecast and forecast the number of occurrence and impact in future. A question may arise whether Islam condone this conduct or whether Islam does only command the followers to qada’ and qadar (destiny). “O ye who believe! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows, are an abomination— of Satan's handiwork: eschew such (abomination), that ye may prosper. (90) Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye not then abstain?” (5:90-91)

The verse clarifies on the forbidden conducts such as maysir (gambling) and ansab (fortune telling) to abstain from the risk of hatred and hostile in society.<sup>24</sup> Even though there are many definitions of maysir (gambling), among them by Qurtubi,<sup>25</sup> Nazih Hamad<sup>26</sup> and Qalaji,<sup>27</sup> all agree that maysir (gambling) and ansab (fortune telling) are the betting contract between two or more individuals on a future subject matter with two possible outcomes either be lucky and win the bet or loss the bet. This type of contract is fasid (invalid) and batil (vanity). The reason (illah) for this fasid and batil is the element of gharar (uncertainty). Based on this argument, we could then apply a method of qiyas (analogy) hence make a preliminary conclusion that gharar should not be applied as a medium in daily transaction including tool to determining the Takaful contribute rate as it will result the vanity of the contract. For easy reference, the method of qiyas is the technique of vindicating a ruling of a new emerging case based on the precedent case since both have an illah (same basis or reason). On further deliberation, there are several differences between gharar that exists in the contract of insurance and gharar applied in determining Takaful contribution that could discount the above early assumption:-

- a. The gharar that is made as a subject matter in insurance contract refers to future occurrence that is uncertain, whilst the gharar used in rating the contribution is based on historical events.<sup>30</sup>
- b. The actual amount of compensation would only be certain if the forecasted gharar eventually occur.<sup>31</sup> On contrary, gharar in contribution would result to a fix rate and amendable provided both participant and Takaful operator agree on the new rate.
- c. Illah of uncertainty or gharar in insurance contract is to evade potential misjudgement, hatred or intimidating, which is based on Islamic legal maxim of *maslahah* (benefit) to rid of *mafsadah* (harm and detriment).<sup>32</sup> On the other hand, gharar in contribution does not have such detriment characteristics, instead it is beneficial for the mankind to identify potential risk in future and get prepared. Since the earlier *qiyas* (analogy) is not applicable in deciding the ruling for applying gharar in computing Takaful contribution, the next basic Islamic legal maxim that can be referred is "everything is permissible unless there is *anas*(evidence) prohibiting the same".<sup>33</sup> This maxim has been widely applied in *muamalah* and accords with the Prophet's hadith:

"That which is lawful is made lawful by Allah in His Book, and unlawful things are forbidden in His Book, and things not mentioned is the forgiven."

The risk and uncertainty has been generally indicated in Quran as follow:-

"Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence; but if they leave (the residence) there is no blame on you for what they do with themselves, provided it is reasonable And Allah is Exalted in Power, Wise." (2:240) The verse indirectly stresses the potential risk would be faced by the family if their bread winner demise. Therefore, Islam encourages the husband to plan for a financial aid and a living for a minimum period of one year to their family.<sup>35</sup> He would have to estimate and prepare the necessary amount that is sufficient accordingly after his death and this can be best estimated based on the current and historical expenses and needs. By applying *qiyas* in this case, it is acceptable that an individual or an organization uses the past experiences to estimate the future monetary impact they would have to face if specific risks occur and those include road accidents, natural disasters and many other unfortunate events. Other than the verses and hadiths quoted earlier, there are many other evidences demonstrating that the awareness and taking appropriate actions towards expected risks are in fact a basic command and necessity (*maslahah daruriyyah*)<sup>36</sup> to protect religion, life, mind, offspring and property.<sup>37</sup> Prophet Muhammad peace be upon him once asked a Bedouin who had left his camel untied, "Why do not tie your camel?" the Bedouin answered, "I put my trust in Allah" the prophet then said, "tie up your camel first then put your trust in Allah". This hadith emphasizes that the identified risk, the camel is stolen, can be prevented by taking the initiative to tie it and then put the trust in God. Without a vigilant attitude and ability to identify relevant risks, perhaps there is no attempt being made or even if there is, the initiative may not be appropriate such as total submission to God without preventive efforts taken. Apart from the above hadith, there are many other instances show that the risk is actually recognized in the form of *mafsadah*(harm and damages) and *al-`usr wa al-haraj* (difficulties) and various

measures were taken to control it either in the form of punishment, the reduction level of difficulty and risk transfer. Some examples of punishment to control risk is amputating the hands of thieves intended to preserve *maslahah* of property which is one of the five basic necessities (*maslahah daruriyah*) to be taken care of. Based on the risk of losing the property to the detriment of the owner, then this punishment is prescribed in Islam is based on the several hadith of the Prophet.<sup>39</sup> Other examples visibly show that the risk or inconvenience (*masyaqqah*) can be dealt in proper ways including by reducing the level difficulty as *qasar* (shortened) prayers for travellers, transfer the difficulty as *jama' ta'khir* or *taqdim* (cumulated prayers). Apart from that, there are a variety of texts, whether directly or indirectly command the mankind to avoid or handle risk properly.

“Allah intends every facility for you He does not want to put you to difficulties. (He wants you) to complete the prescribed period, and to glorify Him in that He has guided you; and perchance ye shall be grateful.”(2:185)

“Allah doth not wish to place you in a difficulty, but to make you clean, and to complete His favour to you, that ye may be grateful.” (5:6)

Based on earlier texts, it is clear that mankind are given the option to not encounter difficulties, so it is not a sin if one identifies specific risks that may occur, even though he may not be able to guarantee its occurrence, and make the past as a basis for considering proper action to deal with the risks. Based on this juristic analysis, the risk is actually recognized and certified in Islam hence should be identified for the human to either taking initiatives to avoid or deal with difficulties that may occur. Therefore, applying the risk (*gharar*) to determine the *Takaful* contribution is permissible. Making the risk as such tool does not mean the risk (*gharar*) is made as a subject matter of the *Takaful* contract. The contract itself should be free of *gharar* element as the subject matter and has already been eliminated by the principle of *tabarru'* (donation).

## CONCLUSION

Based on the discussions and the juristic analysis above, there are several conclusions could be made:-

- a. In principle, the concept of *gharar* is equivalent with the concept of risk. Both means doubtfulness and uncertainty on future occurrences. The Muslim jurists also recognize the similarities of these two concepts.
- b. All Muslim jurists agree that excessive *gharar* will affect any contract including commercial contract thus making it unlawful from Shariah perspective, for example insurance contract which *gharar* (uncertainty on future loss) is made as the subject matter of the contract.
- c. *Gharar* applied in determining *Takaful* contribution does not against any Islamic texts, even it is a subject that is generally recognized in Islam particularly in the form of *masyaqqah* (difficulty). This *gharar* is different against the *gharar* that inherent in insurance contracts.

d. In the case of gharar being applied as an element to predetermining the Takaful contribution, the writer is in opinion that it does not impair the Takaful contract. Instead, the application of gharar or risk in this circumstance is consistent with the motives of people seeking for Takaful coverage. Arising from this analysis, there are at least two recommendations that need to be observed:-

a. Further study need to be conducted to assess the application of law of the large number in determining the Takaful contribution. It is noted that the in order to achieve a lower contribution rate, the larger base of participant seeking for the same coverage is required. This could be a set back to the principles of Takaful where it should offer an unconditional justice to people.

b. The distinct differences between excessive gharar and slight gharar should be thoughtfully studied and clearly determined by the Muslim jurists to avoid misconception and misapplication during formulating new Islamic finance products including Takaful.

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