The Concept of Uncertainty in Islamic law: Its Reasons and Related Terms

Fazli Dayan\(^1\) and Mian Muhammad Sheraz\(^2\)

\(^1\)PhD Scholar, Visiting Assistant Professor, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan.
\(^2\)PhD Scholar, International Islamic University, Islamabad, Pakistan

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ABSTRACT

The Holy Quran and the Sunnah of the Prophet Muhammad (peace be upon him) do not define ‘gharar’ as the concept of ‘gharar’ was clear to the people. However the classical jurists give different definitions. They all agree that ‘gharar’ being out of the suspicious of danger because of the uncertainty of outcomes of the contract. Some well-known contemporary scholars have also defined it. The meaning of ‘gharar’ to the modern jurist is similar to that of the classical, except that they attempt to give more contemporary definitions, where the concept of risk is being introduced in the context of contemporary circumstances. On the other hand looking towards various kinds of ‘gharar’ it seems that ‘gharar’ is not completely prohibited; a certain degree of ‘gharar’ is allowed in Islam, although there is no clear line between major and minor uncertainty. Therefore it is very much necessary to revisit the concept of uncertainty keeping in view the principles of Islamic law in order to fully understand the implications of uncertainty, So that we can do our daily business in accordance to Islamic law and Shariah rules.

KEYWORDS: Uncertainty or Gharar, Contracts, Islamic law, Islamic Banking

INTRODUCTION

Uncertainty (gharar) is one of the major vitiating factors of transactions in Islamic Law. It especially affects the validity of commutative contracts such as, sale, leasing and hiring contracts. It refers to the lack of knowledge of necessary terms of contract, which may lead to dispute and in result to litigation.

Uncertainty is a very important issue which is discussed in Islamic jurisprudence as well as in modern law. It adversely effects many transactions and agreements according to Shariah law. Uncertainty being one of such issues needs to be discussed in the light of Islamic principles and especially in this modern age, where modern Islamic banking system gained popularity in the whole world. Though this issue has been raised by various Muslims scholars from time to time, but there are some issues which are still lying untouched and also some issues which are slightly discussed.

The basic purpose of introducing the concept of uncertainty and its reasons, because of commercial activities in the modern age, where progress is being made in the field of Islamic commercial law –Islamic banking– an attraction for the investors with the assurance that the modern commercial activities and Islamic banking system are fully governed by Islamic principles.

Arguably we all know that modern Islamic banking system is considered to be based on the principles of Islamic law, so the requirement of time to discuss in details the concept of uncertainty and its effects on contracts, various transactions and agreements. Therefore this paper will keen to analyze the core concept of uncertainty and its reasons along with related terms.

CONCEPT OF GHARAR (UNCERTAINTY):

The concept of ‘gharar’ has been discussed by the classical jurists; to the very well known Hanafi jurist Imam Sarakhsi says: “gharar is any bargain in which the result or its consequences are hidden”.\(^1\) To Ibn juzy, a well known jurist has given a list of ten cases which constitute in his view a forbidden ‘gharar’.\(^2\) From these ten cases it

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\(^1\) Sarakhsi, Al Mabsut (Beirut, Dar Al Maarif, 1978, vol. 13) at p. 194; see also: Darir, Siddiq Muhammad Ami, Al Gharar wa Atharuhu Fi Al Uqud (Cairo, 1967) at pp. 48, 49

\(^2\) See for details: Ibn Juzy, Qawanin Al Ahkam Al Shariyyah (Darul Ilam lil Malayih, Beirut) at pp. 282-283

\(^3\) See: Ibn Juzy, Qawanin Al Ahkam Al Shariyyah, Darul Ilam lil Malayih, Beirut, pp. 282, 283; See also: Obaid Ullah, Muhammad, Islamic Financial Services, King Abdul Aziz University, Jeddah, Saudi Arabia, pp. 29, 30; and: Mansoori, Muhammad Tahir, Islamic Law of Contracts and Business Transactions, Shariah Academy, 2008, pp. 96, 97

Corresponding Author: Fazli Dayan, PhD Scholar, Visiting Assistant Professor, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan (Email: dayansherpao@gmail.com).
is clear that gharar does not have a single definition. Hence it is considered that gharar is a fairly broad concept as Mohammed Obaidullah also holds the view while commenting on the concept of gharar, that jurists defined it in two ways. First; ‘gharar’ implies uncertainty, secondly; ‘gharar’ implies deceit.4

‘Gharar’ is one of the major causes of the invalidity of a contract that is why the Holy Quran has clearly forbidden all business transactions and agreements, which causes injustice in any form to any of the parties to any contract or agreement. Therefore we will attempt to classify several categories of gharar and its effects on various contracts, transactions and agreements from the perspective of Islamic law and Shariah principles.

Meaning of Gharar (uncertainty):

The word ‘gharar’ comes from the root verb ‘gharara’; signifying to reveal oneself and one’s property to destruction with one being aware of it.5 Generally it refers to danger, peril, jeopardy, hazard or risk. Literally ‘gharar’ means risk or hazard. ‘Taghrer’ being the verbal noun of ‘gharar’ is to unknowingly expose oneself or one’s property to jeopardy.6 In Arabic language ‘gharar’ means to cheat, to tempt and to cause uncertainty. According to Islamic jurisprudence ‘gharar’ means a contract which consists upon some risk to the compensation of one of the parties and this risk relates to the actual ingredients of the contract.7 Thus we can say that ‘gharar’ literally means “uncertainty” as Omar Mustafa Ansari defined.8 Technically ‘gharar’ refers to uncertainty in a contract that may lead to unknown consequences or results, whereby one or both parties to the contract suffer injustice.9 Ambiguities in a contract are intended to commit fraud, cheat and exploit one of the parties. Hence ‘gharar’ is synonymous with the Arabic term ‘al khida’ (cheat) or fraud.10

Definition of Gharar (uncertainty):

Looking to the Holy Quran and the Sunnah of the Prophet Muhammad (peace be upon him), we can find that there is no direct definition of ‘gharar’.11 Various classical jurists12 give different definitions of ‘gharar’ but they all agree that ‘gharar’ being out of the suspicious of danger because of the uncertainty of outcomes of the contract. The contemporary scholars like Zarqâ’13 and Zuhayli14 have also defined ‘gharar’. The meaning of ‘gharar’ to the modern jurist is similar to that of the classical, except that their attempt to give more contemporary definitions, where the concept of risk is introduced.15 The jurists have devised various definitions of ‘gharar’ having to its different aspects, features and characteristic. So these definitions are as follows:

Hanafi School of thought:

4 For further details see: Mohammed Obaidullah, ISLAMIC FINANCIAL SERVICES (Islamic Economics Research Center, King Abdulaziz University, Jeddah, Saudi Arabia) at p. 29
5 Ibn Manzur, Lisan al Arab (Egypt, vol. 6) at p.314; Al Qamoos Al Muheeth, at p. 101; Darir, Siddiq Muhammad Amin, Al Gharar Wa Al Uqud WA Atharuhu Fi Al Tatbiqat Al Muasirah (Jeddah, Saudi Arabia, 1993) at p. 11; see also: Al Gharar wa Atharhu Fi Al Uqud (Cairo, 1967) at pp. 47-48; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia (Oman, Jordan, 1973, vol. 1) at p. 71
6 Ibid: For further details see: Wan Marhaini Wan Ahmad, SOME ISSUES OF GHRAR (UNCERTAINTY) IN ISURANCE, (Jumal Syariah, 10:2, 2002) at pp. 64-65
Abdul-Rahim Al-Saati, The PERMISSIBLE GHARAR (RISK) IN CLISCIAL ISLAMIC JURISPRUDENCE (King Abdul Aziz University, Jeddah, Saudi Arabia) at pp. 4-6
Samdani, Muhammad Ejaz Ahmad (ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at p. 15
Ansari, Omar Mustafa, MANANGING FINANCES-A SHARIAH COMPLINT WAY (Time Management Club, P.O. Box- 12356, DHA, Karachi, 2007) at pp. 186, 187
Muhammad Yousaf Saleem, A HAND BOOK ON FIQH FOR ECONOMICS II, at p. 8
For further details see: Wan Marhaini Wan Ahmad, SOME ISSUES OF GHRAR (UNCERTAINTY) IN ISURANCE, (Jumal Syariah, 10:2, 2002) at p. 65. (As he quoted: Ahmad Hidayat Buang (2000), at p. 41)
Sarakhsh, Al Mabsut (Beirut, Dar El Maarif, 2002) at p. 65; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharhu Fi Al Uqud (Cairo, 1967) at pp. 47-48; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia (Oman, Jordan, 1973, vol. 1) at p. 71
Darir, Siddiq Muhammad Amin, Al Gharar wa Atharhu Fi Al Uqud (Cairo, 1967) at p. 49; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia (Oman, Jordan, 1973, vol. 1) at pp. 73-74; Shiraazi, Abu Ishaq, Al Muhaddhab (Cairo, vol. 1) at pp.262 & 269; Ibn Taimiyah, Al Fatwa Al Kubra (Beirut, Dar Al kutub Al Ilimiyah, Lahore, vol. 3) at p. 275; sec: Al Qawaid Al Nainyiyah Al Fiqhiyyah (Damascus, 1951) at p. 116
Zarqa, Mustafa Ahmad, Al faj al Islam Al fahith (University Press, Damascus, 1959, vol. 1) at pp. 697-698
Zuhayli, Wahabah Al Zuhayli, Al Fiqh Al Islam wa Adilatuhu (Beirut, Daral Fikr, 1984, vol. 4) at pp. 436-437
El-Gamal, Mahmud A, AN ECONOMICS EXPLICATION OF THE PROHIBITION OF GHRAR IN CLASSICAL ISLAMIC JURISPRUDENCE (paper presented at the 4th International Conference on Islamic Economics in Leicester, U.K) at pp. 5-6; see also: Wan Marhaini Wan Ahmad, SOME ISSUES OF GHRAR (UNCERTAINTY) IN ISURANCE, (Jumal Syariah, 10:2, 2002) at pp. 65-66; Abdul-Rahim Al-Saati, The PERMISSIBLE GHARAR (RISK) IN CLISCIAL ISLAMIC JURISPRUDENCE (King Abdul Aziz University, Jeddah, Saudi Arabia) at pp. 4-8
Sarakhsh, Al Mabsut, (Beirut Dar Al Maarif, 1978, vol. 13) at p. 194; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharhu Fi Al Uqud (Cairo, 1967, pp. 48, 49; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia (Oman, Jordan, 1973, vol. 1) at p. 72;
According to Maliki school of thought: “gharar” is uncertainty concerning the existence of the subject matter of a contract. As a result, the intended contract loses its character and transforms into a new form which is undesirable one being more likely.”

According to Ibn Rushd al Jed, He said: “gharar sale, is a sale, as a grave element which overwhelms the essence of a particular contract. As a result, the intended contract loses its character and transforms into a new form which is considered as ‘gharar’. This is because when a thing is uncertain between two elements it can no longer be attributed to either of them”.

According to Ibn Rushd: “gharar is to be found in the contracts of sale when the seller suffers a disadvantage as a result of his ignorance with regard to price of the article or the indispensible criteria relating to the contract or its object or quality or time of delivery”.

Shafi school of thought:

Kasani a well known jurist of Hanafi school of thought narrated that Imam Shafi said: “gharar is risk/uncertainty”.

Al Shiraazi says: “gharar is something that is folded in its nature and concealed/hidden in its consequence”.

Al Isnawi a jurist of the Shafi school of thought said: “gharar is that which admits two possibilities with the less desirable one being more likely.”

Mansoori, Muhammad Tahir, ISLAMIC LAW OF CONTRACTS AND BUSINESS TRANSACTIONS (Shariah Academy, IIU, Islamabad, Pakistan, 2008) at p. 95

E. Gamal, Mahmud A, AN ECONOMICS EXPLICATION OF THE PROHIBITION OF GHARAR IN CLASSICAL ISLAMIC JURISPRUDENCE (First Version, May 2, 2001) at p. 3

Kasani, Badai Al Sanai Fi Tartib al Sharhiah, Cairo, 1906, vol. 5, p. 163; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud, Cairo, 1967, p. 48


Mansoori, Muhammad Tahir, ISLAMIC LAW OF CONTRACTS AND BUSINESS TRANSACTIONS (Shariah Academy, IIU, Islamabad, Pakistan, 2008) at p. 95

Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud (Cairo, 1967) at p. 49; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia (Oman, Jordan, 1973, vol. 1) at p.73

Ibn Rushd al Jed, Al Muqaddimat Al Mumahhadat (vol. 2) at p. 221

Mansoori, Muhammad Tahir, ISLAMIC LAW OF CONTRACTS AND BUSINESS TRANSACTIONS (Shariah Academy, IIU, Islamabad, Pakistan, 2008) at p. 96, see also: Ibn Rushd, Bidayat Al Munajah (vol. 2) at p. 156

Kasani, Badai Al Sanai Fi Tartib al Sharhiah (Cairo, 1906, vol. 5) at p. 163; Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud (Cairo, 1967) at p. 50

Shirazi, Abu Ishaq, Al Majma’ (Cairo, vol. 1) at pp.262, 269; Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Wa Atharuhu Al Islaam (Oman, Jordan, 1973, vol. 1) at p.74; Darir, Siddiq Muhammad Amin, Al Gharar WA Atharuhu Fi Al Uqud (Cairo, 1967) at p. 50

E. Gamal, Mahmud A, AN ECONOMICS EXPLICATION OF THE PROHIBITION OF GHARAR IN CLASSICAL ISLAMIC JURISPRUDENCE (First Version, May 2, 2001) at p. 5

Ibid
Humbali school of thought:

According to al Qazi and his companions, “gharar is the state of uncertainty between existence and non-existence and no one is clear or certain”. Ibn Taymiyyah said: “gharar is something that is unknown in its result or consequence” as defined by Sarakhsi, a jurist of the Hanafi school of thought.

Zahiri school of thought:

According to Ibn Hazam al Zahiri: “gharar is where the buyer does not know what he has bought and the seller does not know what he has sold”. In other words: ‘gharar’ occurs in the sale contract when both the buyer and seller have no knowledge of the particulars of the contract, means absolute want of knowledge.

It is now very much clear from the above definitions as defined by various jurists of different schools of thought, that ‘gharar’ does not have a single definition. It is a very broad concept that’s why the discussion is limited to the contracts we do our daily business. From the definition of ‘gharar’, I personally select, first; the definition of Sarakhsi a well known jurist of Hanafi school of thought, “gharar is that whose consequences are hidden”, which is very much conclusive and decisive one. The same holds by al Shiraazi a well known jurist of Shafi school of thought. Similarly, Ibn Taymiyyah, a very famous jurist, also holds the same definition for ‘gharar’ and his student Ibn al Qayyim also holds that.

Secondly, the definition of Imam al kasani, which is very explanatory in his nature, the same holds by Imam Ibn Abidin (also a Hanafi jurist) a summary of kasani’s definition, in other words, the more explicit definition given by Imam Ibn Abidin. The Malikist jurist also holds that. Lastly I want to quote the definition given by al Zuhayli and the definition of Mustafa Zarga.

Zuhayli says, in his famous book, Al Fiq al Islami wa Adillatuhu, that “gharar sale is any contact which incorporates a risk which affects one or more of the parties (to a contract, or agreement) and it may result in loss of property”. Mustafa al Zarga wrote in his book, that “gharar is the sale of the probable items whose existence or characteristics are not certain; due to the risky nature it makes trade similar to gambling”. He further stated in another place that “gharar is confined to the area of sale contract when the outcome of the sale is not certain but depends upon chance. He further stated that ‘gharar’ is forbidden when uncertainty exceeds acceptable limits”. And this is what the statement of our research paper that ‘gharar’ is not completely forbidden; a certain degree of ‘gharar’ is acceptable. Islam does approve the taking of the commercial risk, only excessive risk taking is prohibited.

It is a consensus amongst Muslim jurists that any financial contract, agreement or transaction containing uncertainty shall not be considered permissible and hence considered void from Shariah perspective. Thus it should be noted that Islam does not prohibit a contract or agreement merely on the basis risk, but when risk is a channel where one party (to a contract or agreement) earning at the cost of other then is becomes ‘gharar’ as Imam Ibn Taymiyyah makes this clear.

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29 *Al Fatwa Al Kubra* (Beirut, Dar Al kutub Al Ilimiyyah, Lahore, vol. 3) at p. 275; *Al Qawaid Al Nuraniyyah Al Fiqhiyyah* (Damascus, 1951) at p.116
30 Ibn Al Qayyim, *Ilan Al Mowaqqin* (Cairo, Maktaba Al Azhariyyah, 1986, vol. 1) at pp. 357-358
31 Mansoori, Muhammad Tahir, *ISLAMIC LAW OF CONTRACTS AND BUSINESS TRANSACTIONS* (Shariah Academy, IIU, Islamabad, Pakistan, 2008) at p. 96.
32 Darir, Siddig Muhammad Amin, *Al Gharar wa Atharuhu Fi Al Uqud* (Cairo, 1967) at p. 51.
33 Zarqa, Mustafa Ahmad, *Al fiqh al Islami fi Thawbih al jaded* (vol.1) at pp. 697-698.
becomes invalid due to the presence of 'gharar' before a contract of sale and cannot be eliminated. It is thus negligible in affecting the contract. In this intention, 'gharar' is similar to minor uncertainty, which is tolerable risk. Thus for them three conditions need to be fulfilled to identify that such uncertainty can also be regarded as a 'non zulm gharar' (non excessive uncertainty). Since it constitutes the risk one must take to justify Shariah legitimacy.

Generally gharar divided into two kinds or two categories, namely: 

1. First: 'gharar yasir' (slight, minor or trivial 'gharar') and secondly: 'gharar fahish' (serious, major or excessive 'gharar').

Mostly scholars and jurists referred these two kinds when classifying uncertainty; whether any agreement or contract becomes invalid due to the presence of 'gharar'. Thus the legal implications and the presence of 'gharar' in a contract or agreement depend, that on which category the 'gharar' falls into.

The jurists and contemporary scholars are unanimous on the point that minor 'gharar' is acceptable and tolerable. As regards the validity of a contract is concerned, the contract will be valid or to some instance voidable in nature until the element of uncertainty is removed, although major 'gharar' altogether nullifies a contract, agreement or transaction.

'Gharar fahish' or 'gharar kathir'; means excessive risk, the one that can affect a contract and nullifies it. Examples of the 'gharar fahish' in contracts are plenty as shown by the Ahadith and normally associated with the reasons why 'gharar' sale is prohibited.

'Gharar yasir' means small in amount or trivial, uncertainty that is always present in all contracts and conducts, thus it exists and tolerated. All scholars are agree that every transaction have some amount of 'gharar' in it but they start to differ when referring to the amount of 'gharar' contained in each. Some Muslim jurists such as al Baji try to set a measure to determine whether the 'gharar' is 'fahish' (excessive) or 'yasir' (minor or small). For him if the 'gharar' overwhels the contract until it becomes known through it only than the 'gharar' is exorbitant one. Other scholar’s approach it from the perspective of 'gharar yasir', a small or minor uncertainty, which is tolerable risk. Thus for them three conditions need to be fulfilled to identify that such 'gharar' as tolerable risk. The risk should be negligible in the sense that the probability of loss is small and its magnitude is limited. It also needs to be inevitable that is out of one’s control and lastly it should not be intentional.

Looking from a different perspective, there are other types of 'gharar' or uncertainty in any contract; uncertainty that happens naturally, and uncertainty that happens to deliberate act of parties involved in the contract. First; uncertainty that happens naturally or natural uncertainty is the uncertainty that will always preside in any contract, for example, the possibility of earning profits from the transaction or loss due to the lack of market for the seller is associated with market risk that remains outside the contract. So this form of uncertainty is naturally embedded before a contract of sale and cannot be eliminated. It is thus negligible in affecting the contract. In this sense it is similar to 'gharar yasir' or small 'gharar'. This form of uncertainty can also be regarded as a 'non zulm gharar' (non excessive uncertainty). Since it constitutes the risk one must take to justify Shariah legitimacy.

37 Salwani Siti Razali, A REVISIT TO BANKING FINANCING INSTRUMENTS WITH SPECIAL REFERENCE TO BAY AL INAN AND BAY AL DAYN (paper presented to Islamic finance conference) at pp. 3-5; see also: Kamali, Muhammad Hashim, UNCERTAINTY AND RISK TAKING (GHAHAR) IN ISLAMIC LAW (paper presented at international conference on Takaful/Islamic insurance, 2-3 July, 1999, Hotel Hilton, Kula Lampur); Wan Marhaini wan Ahmad, SOME ISSUES OF GHAHAR (UNCERTAINTY) IN INSURANCE (journal Syria, 10:2; 2002) at 61-80.
38 Salwani Siti Razali, A REVISIT TO BANKING FINANCING INSTRUMENTS WITH SPECIAL REFERENCE TO BAY AL INAN AND BAY AL DAYN (paper presented to Islamic finance conference) at pp. 3-5.
39 See for details: Zanqa, Nizam Al Tamin: Huqiqateh wa Al Bay Al Suwail (Beirut: Muassasat Al Risalah, 1994) at p. 65;  Wan Marhaini wan Ahmad, SOME ISSUES OF GHAHAR (UNCERTAINTY) IN INSURANCE (journal Syria, 10:2; 2002) at pp. 61-80.
40 Ibid
41 Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uquid (Cairo, 1967) at pp. 591, 592; see also: Wan Marhaini wan Ahmad, SOME ISSUES OF GHAHAR (UNCERTAINTY) IN INSURANCE (journal Syria, 10:2; 2002) at pp. 61-80.
42 Sami Al-Suwailem, TOWARDS AN OBJECTIVE MEASURE OF GHAHAR IN EXCHANGE, ISLAMIC ECONOMIC STUDIES (vol. 7, No: 1 and 2, Oct 99 and April 2000) at p. 36.
43 Sami Al-Suwailem, TOWARDS AN OBJECTIVE MEASURE OF GHAHAR IN EXCHANGE, ISLAMIC ECONOMIC STUDIES (vol. 7, No: 1 and 2, Oct 99 and April 2000) at p. 69; see also: Wan Marhaini wan Ahmad, SOME ISSUES OF GHAHAR (UNCERTAINTY) IN INSURANCE (journal Syria, 10:2; 2002) at pp. 61-80
Secondly: uncertainty that happens through deliberate acts of parties or by one of the parties of the contract such as putting forth vague or arising from putting uncertain terms. In this manner, many forms of ‘gharar’ will emerge like:

1. *Al Taghrer Fi’li* (arising from fraudulent acts)
2. *Al Taghrer al Qawli* (arising from fraudulent statements)
3. *Al Taghrer bi al Kitman* (arising from fraud or concealment)

In each of these activities, one of the contracting party or a third party will deceive the other party, thus inducing him to enter into contract. The deceived party is normally ignorant of the fraud and has no other means of knowing it. For example, in the case of “Tsariyah” the milk owner purposely tied up the udders of the livestock for few days so as to give the impression to the other party that the livestock have productive milk yield there by inducing him to buy them.44

Muhammad Hashim kamali, identifies three kinds of ‘gharar’, saying that “gharar, when excessive (gharar al kathir) concerning the object of sale renders the transaction invalid. The jurists are equally in agreement that trifling ‘gharar’ (Al gharar al yasir i.e. small or minor gharar) is tolerated and permissible. Average gharar (Al gharar al mutawassit) which falls between these two (excessive and non excessive or gharar fahibh and gharar yasir) extremes is perhaps most susceptible to being differently evaluated and place under one or the other of the two extremes. This is partly due to the circumstantial aspect of gharar which may be seen as excessive and unacceptable in a certain setting but may be judge differently under different circumstances. Some specific types of contract involving the average type gharar like:45

- Sale of what is hidden in the soil
- Lump sum sale or Bai al juzaf
- Sale at the market price (Bai bi sir al suq) in which the actual price is not specified
- Sale prior to taking possession (Bai qabl al qabd)
- Sale of consecutive produce in advance
- Sale of the absent (Bai al ghaba)

**GHARAR (UNCERTAINTY AND RELATED TERMS TO IT):**

The Arabic word ‘gharar’ is fairly a broad concept that literally means deceit, risk, fraud, uncertainty or hazard. *Gharar* in Islam refers in a transaction where the subject matter whose existence or description is not certain due to lack of knowledge and information. Islam has also categorically and firmly prohibited all forms of gambling like ‘Maysir’ and ‘Qimar’ etc. Thus it very necessary to know those forms which are prohibited by Islamic law, for this purpose we will discuss briefly those inter-related terms to understand the core concept of uncertainty with regard to related terms. As we know that there are some words which are inter-related with the word ‘gharar’ (uncertainty). They are as follow:

i- *Al Gharar wa al Gharor*

ii- *Al Gharar wa al Jihala*

iii- *Al Gharar wa al Qimar*

iv- *Al Gharar wa al Ghaban*

**i- Al Gharar wa al Gharor**

*Al Gharor* means uncrating, that happens through the deliberate act by one of the parties like, fraudulent acts, and fraudulent statements or through fraud or concealment.46 It means that ‘gharor’ is the ultimate result of a person/party to a contract or agreement to deceive other party through fraudulent acts, equally by fraudulent statements or concealments of such thing that probable objects or connected to the subject matter of the contract, agreement or transaction.

As for as ‘gharar’ is concerned, both the parties (to a contract, agreement, or a transaction) are unaware of the subject matter, whose existence or description are not certain due to the lack of information and knowledge.

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44 Yusoff, DEFECTIVE CONTRACTS IN ISLAMIC COMMERCIAL LAW: WITH SPECIAL REFERENCE TO AL GHABAN, AL ISHTIGHAL AND AL GHARAR (MCL. IUM, 1998) at pp. 206-229; Mahmood, Nik Ramlah, TAKAFUL: THE ISLAMIC SYSTEM OF MUTUAL INSURANCE, THE MALAYSIAN EXPERIENCE (Arab Law Quarterly, vol. 6, 1991) at pp. 283-284; See also: Wan Marhaini wan Ahmad, SOME ISSUES OF GHARAR (UNCERTAINTY) IN INSURANCE (journal Syria, 10:2 :2002) at pp. 61-80

45 Kamali, Muhammad Hashim, UNCERTAINTY AND RISK TAKING (GHARAR) IN ISLAMIC LAW (paper presented at international conference on Takaful/Islamic insurance, 2-3 July, 1999, Hotel Hilton, Kula Lampur); see also: Daradikah, Yaseen Ahmad Ibrahim, Nazriyat Al Gharar Fi Shariah Al Islamia (Oman, Jordan, 1973, vol. 1) at pp. 96-97

46 Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud (Cairo, 1967) at pp. 55, 56
Al Gharor some times and in some cases gives the right to the parties to revoke the contract. In other words, sometime al Gharor because of the presence in a subject matter gives to Maghroor right to revoke the contract. Whereas the ‘gharar’ it makes the contract void. Therefore we can say that ‘al gharor’ clearly differs from ‘gharar’ (uncertainty). Besides that various jurists use the word ‘gharar’ instead of ‘gharar’ like Imam Ibn Abidin.47 The Maliki jurists also used ‘gharar’ in the meaning of ‘gharar’, while Shafi School of thought taking ‘gharar’ by meaning of ‘gharar’ some time.48

ii- Al Gharar wa al Jihala

Gharar means, uncertainty about the subject matter whether it exists or not? Or uncertainty about the subject matter where the seller is not in position to hand over the things purchased; like “sale of fish in the water, sale of birds in the air or sale of stray animal”. In other words, in such situation ‘gharar’ does not arising due to the non existence of the subject matter, rather it arises where things are not in the (physical or constructive) position of the seller, and thus the seller is not in a position to hand over the subject matter to the purchaser, irrespective of that whether subject matter is in exist or otherwise.

Jihala means, where the uncertainty may be caused by lack of sufficient value related to information or lack of knowledge. Like sale of fetus in the womb. In other words ‘jihala’ means that the person is unaware from adequate relevant information regarding the subject matter of a contract. Scholars have described that ‘jihal’ means “want of knowledge with regard to the subject matter, the price or the characteristics of the price or of the subject matter, and the date of settlement of contract, agreement of transaction”.49 In my view so for this reason ‘jihala’ is a kind of ‘gharar’. Thus information (with regard in all aspects) is the main component in Islamic law of contracts and business transactions; an absence of accurate information, (jihala) want of knowledge and lack of information is a source of ‘gharar’. Imam Ibn Taymiyyah also holds this view.50 We can say that ‘gharar’ is the uncertainty about the subject matter; price and the date of settlement of contract etc. whereas ‘jihala’ is the want of knowledge, lack of information about the features of the subject matter of a contract, agreement or transaction.

iii- Al Gharar wa al Qimar

Gharar means risk, deception or speculation; it includes also cheating and fraud. The Holy Quran prohibited all those transactions, agreements and contracts where one party is earning at the cost of other. That’s why “gharar is the sale of probable items whose existence or characteristics are not certain”.51 Qimar or Maysir both these referred to gambling in Arabic language means ‘any activity that involves an arrangement between two or more parties, each of whom undertakes the risk of a loss, where a loss for one means a gain for the other, as it is common for the (qimar or maysir) gambling activities’. Islam prohibited mankind particularly the Muslims from having any kind of connection to gambling activities including participating, investing or financing any business related to gambling, or associated with the gambling industry, or associated with such an industry doing unlawful business and transactions.52

Gharar (Uncertainty) and Qimar (Gambling):

These two words are not synonymous though they are inter-related to each other. Gambling is identical to ‘gharar’ and gives same meaning to it under such circumstances. Furthermore, ‘qimar’ and ‘maysir’ are necessary forms of gambling transactions that are totally prohibited in Islam law. Thus ‘qimar’ means ‘the game of chance in which one gains at the cost of others’, whereas ‘maysir’ means ‘the easy acquisitions of wealth by chance, whether or not it deprives others right’.

It is very much clear from the above discussion that ‘qimar’ or ‘maysir’ both refers to gambling. Meaning there by ‘qimar’ is gambling and hence equally termed as ‘maysir’ in Arabic language. But ‘gharar’ (uncertainty) is not synonymous to ‘qimar’ (gambling), although they are related to each other. According to Ibn Taymiyyah and his

47 Ibn Abidin, Radd Al Mukhtar (vol. 4) at pp. 86 & 224; Darir, Siddiq Muhammad Amin, Al Gharar WA Atharuhu Fi Al Uqud (Cairo, 1967) at p. 56.
48 Darir, Siddiq Muhammad Amin, Al Gharar WA Atharuhu Fi Al Uqud (Cairo, 1967) at pp. 56, 57
49 Obaid Ullah, Muhammad, ISLAMIC FINANCIAL SERVICES (King Abdul Aziz University, Jeddah, Saudi Arabia) at pp. 31-32; See also: Al Qarafi, Al Faruq (Dar Al Kutub Al Ilmiyyah, Beirut, 1986, vol. 3) at p. 265
50 Ibn Taymiyyah, Al Qawaid Al Nuraniyyah Al Fiqhiyyah, (Damascus, 1951) at p. 117; See: Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud (Cairo, 1967) at p. 59.
52 See for details: Bay Al Madum (Paper presented in International Islamic Conference, Malaysia, 1997)
student Ibn Qayyim; ‘gharar’ (uncertainty) is a form of ‘qimar’ (gambling), and in other words ‘gharar’ refers to ‘qimar’ in view of these two jurists.\(^{53}\)

iv- **Al Gharar wa al Ghaban**

Ghaban means, ‘loss suffered by a party to the contract as a result of concealment or misrepresentation, or deception of fraud practiced by the other’. Thus if the loss is excessive (exorbitant) in nature, it is then termed as ‘ghaban fahish’ (excessive ghaban) and if the loss is minor or small in amount then it is known as ‘ghaban yasir’ (non excessive ghaban or simply termed ghaban). Ghaban fahish gives to purchaser right to revoke the contract in view of the Hanafi school of thought; but the Shafi jurists do not admit the right of revocation for the buyer. They are of the view that this is in fact buyer negligence and on buyer’s part. Ghaban fahish affects the contracts and makes it voidable at the option of the party suffered loss irrespective of the fact that is a result of fraud or otherwise according to Hanbli School of thought.\(^{54}\)

**REASONS OF GHRAR (UNCERTAINTY):**

As we know that there are at least two essential ingredients of a contract; subject matter and consideration. Any contract containing upon uncertainty with regard to either these two ingredients or one of them will be considered ‘gharar’. If one muse on a sale contract, it will appear through examining, that the reasons of ‘gharar’ are three namely; first: uncertainty in the existence of things sold, secondly: uncertainty in the possession of Subject Matter, thirdly: ignorance (jihalat)

**First: Uncertainty in the existence of things sold**

Uncertainty of the things sold; means that the position of the subject matter is not certain, and it is doubtful, whether the subject matter is available in the position of seller or not. Meaning thereby that there is a possibility that the seller would be able to posses the subject matter and on another hand there is a possibility that the seller could not be able to posses the subject matter. So this type of uncertainty is further divided in order to fully understand various situations of uncertainty regarding the existence of things sold.

a. Sale of a thing which is not in existence

b. Sale of a thing which is not ones property
c. Sale of a thing which is not in possession

a. **Sale of a thing which is not in existence**

It means, a thing which is sold on the grounds of presumption, that it will become in existence in some future date and time, while it does not exists at the time of its sale. In other words: ‘sale of a thing which is not in existence’. Means that a thing which is not in existence or not available or nonexistent subject matter at the time of contracting, and the seller are only insuring its delivery to some future date and time. Like a sale of fetus in the womb (the sale of a thing which is not in existence or not available or nonexistent subject matter at the time of contracting, and the seller are only insuring its delivery to some future date and time). It implies that a man would buy unborn offspring of a she camel, known in Islamic law as ‘habal al habala’.

*Ibn Umar* reported that the people of pre Islamic era used to practice ‘habal al habala’ which means that a person would by the unborn offspring of a she camel. ALLAH’s messenger Muhammad (peace be upon him) forbids that transaction.\(^{55}\) Thus a thing which has not yet come into in existence cannot be sold, but if a nonexistent thing has been sold even though by mutual consent, the sale is void according to Shariah and Islamic principal .e.g. “if person ‘A’ sells the unborn calf of his cow to person ‘B’ the sale contract is void”.\(^{56}\)

b. **Sale of a thing which is not ones property**

Sale of a thing which is not one’s property or which is not the property of seller. Means that selling of a thing by a seller which he does not have a time of the sale and intending that he will bring it from some where else. This type of sale has been prohibited by the ALLAH’s messenger Muhammad (peace be upon him). It is reported that he said to *Hakim Bin Hazam* (May ALLAH be please with him) “don’t sale a thing which is not in your possession”. All the jurists are unanimous on the point that the sale of a thing which is not ones property is not legal.\(^{57}\) Thus the subject

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\(^{53}\) Darir, Siddiq Muhammad Amin, *Al Gharar wa Atharuhu Fi Al Uqud* (Cairo, 1967) at p. 61; see also: Ibn Taymiyyah, *Al Qawaid Al Nuraniyyah Al Fiqhiyyah* (Damascus, 1951) at p. 116

\(^{54}\) Mansoori, Muhammad Tahir, *ISLAMIC LAW OF CONTRACTS AND BUSINESS TRANSACTIONS* (Shariah Academy, IIU, Islamabad, Pakistan, 2008) at pp. 149-150

\(^{55}\) Obaid Ullah, Muhammad, *ISLAMIC FINANCIAL SERVICES* (King Abdul Aziz University, Jeddah, Saudi Arabia) at p. 31

\(^{56}\) AIMS, Academy for International Modern Studies, Islamic Rules for Sale (Bai), p. 1

\(^{57}\) Samdani, Ejaz Ahmad, *ISLAMIC BANKING AND UNCERTAINTY* (Darul Ishaat, Karachi, 2007) at pp. 17-18
of sale must be in the ownership of the seller at the time of sale. It means that what is not own by the seller cannot be
sold, if he sells something before acquiring his ownership the sale is void, even though if he insures timely delivery of
things that are not in possession or in the hands of seller at the time of contract. For example: “If person ‘A’ sells
to ‘B’ a car which is presently own by a third person ‘C’ but ‘A’ is hopeful that he will buy it from ‘C’ and will
deliver it to ‘B’ subsequently, the sale contract is void on the grounds that the car was not own by ‘A’ at the time of
contract or sale”.

c. Sale of a thing which is not in possession
Sale of a thing which is not in possession; means that someone after buying a thing sells it to another without taking
it into his possession, thus the subject matter of the sale must in the possession of the seller (whether physical or
constructive possession) when he sells it to another person. Physical possession means; ‘where the possessor has
taken the actual physical delivery of the commodity that come into his control and he practically occupy the things
purchased or taken the actual possession of things purchased in his custody’. Whereas constructive possession is that
‘the possessor has not taken the physical delivery of the commodity purchased, yet the commodity has come into his
control with all the rights and liabilities of the purchased commodity are passed into him including the risk of its
destruction’. For example: “if person ‘A’ has purchased a car from ‘B’ and ‘B’ after indentifying the car has placed
it in a garage to which person ‘A’ has free access, and ‘B’ has allowed him to take the delivery from that place
whenever and wherever he wishes”. Thus the risk of the car has passed on to person “A”. The car is in the
constructive possession of “A” now. “If ‘A’ sells the car to a third person ‘C’ without acquiring a physical
possession, the contract of sale is valid according to Shariah principals”. Therefore we can say that the contract of
sale of goods or commodity permissible after its physical and actual possession, likewise it is also permissible even
after its constructive possession.

After analyzing various situations we came to know that a person cannot sell some goods or commodity until and
unless: first: it has come into existence, secondly: it is owned by the seller, and thirdly: it is in the physical or
constructive possession of the seller i.e. possessor.

Secondly: Uncertainty in the possession of subject matter
As far the possession of the subject matter is concerned in a contract, Islam stresses on that the subject matter
(mahal) of a contract must be legally owned and must be lawfully be in possession of the seller, and also must be
exist at the time of contract. Means if the supplier of goods sold is not able to hand over it to the purchaser, this
situation creates uncertainty. Such risk is seen to be present when the seller has no control over the subject matter
and this is called counter party risk in conventional parlance. An example is found in tradition narrated by Ibn
Abbas: ALLAH’S messenger Muhammad (peace be upon him) said “he who buys food grain should not sell until he
has taken possession of it”. Ibn Abbas said, I regard everything as a food (so far as this principal is concerned).
Furthermore that the purchaser got the possession of the things purchased but if he wants to sell it further he is not
able to hand over to the new customer .e.g. someone bought a car and got its possession but it was stolen away, it
will not be permissible to sell it further to hand over the car to the next purchaser. There is a possibility that he may
get back the car or he may not get it, and the possession of the car in this condition is uncertain. Therefore we can
say that the delivery of the sold commodity to the buyer must be known, certain and should not depend on any
contingency or a chance. For example: “A sells his car stolen by some unknown persons and the buyer purchases it
on the hope that he will manage to take it back. The sale contract is void”.

Thirdly: Ignorance (jihalat)
Generally speaking, Islamic law has persistently emphasized at the time such a transaction is concluded. in other
words: no material want of knowledge (jihal) should subset with regard to the exchanged counter values, otherwise
‘gharar’ (uncertainty) have a greater chance to infiltrate the transaction. The safe way to avoid ‘gharar’ would be to
have the exchanged counter values in hand.

Looking towards the essential elements of a valid contract takes place in Islamic law; when certain conditions are to
met mainly, beside of offer and acceptance, subject matter of the contract, consideration/price and the time of

58 Usmani, Muhammad Ashraf, MEEZAN BANK’S GUIDE TO, ISLAMIC BANKING (Darul Ishaat, Karachi, 2002) at pp. 78-79; see also:
Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at pp. 18, 19
59 Obaid Ullah, Muhammad, ISLAMIC FINANCIAL SERVICES (King Abdul Aziz University, Jeddah, Saudi Arabia) at p. 30; See also: Samdani,
Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at p. 20
60 Salih, Nabil A, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW: RIBA, GHARAR AND ISLAMIC BANKING (Cambridge
University Press, 1986: Reviewed by, S.M. Hassan Uzzaman, Chief Research Department, State Bank of Pakistan, Karachi, JKAU: Islamic
Economic, 1991, vol. 3) at pp. 115-124
period/the limitation of the contract (that those things must be delivered in such and such times). The point is that while discussing the uncertainty arising from ‘jihalat’ (ignorance), these elements will be elaborated. For the purpose ignorance (jihalat) is further divided into four kinds.61

KINDS OF IGNORANCE:
A we stated that ignorance is further divided into four kinds. These kinds are namely; first: ignorance in the contract, secondly: ignorance in the subject matter, thirdly: ignorance in the period of time, and fourthly: ignorance in the price.

First: Ignorance in contract
The main objective of the parties entering into a contract or agreement is to gain lawful ownership, i.e. the buyer may lawfully benefit from. Therefore Islamic law specifies that the subject matter of a contract must be something which can be physically and legally delivered, because uncertainty about the subject matter will make the contract invalid for the reason of ‘gharar’. Uncertainty in a contract or agreement sometimes emerges from the words expressed by the parties. Like when a person “A” “says to “B” that I sold you this thing for rupees one thousand on cash payment and for rupees twelve thousand on differed payment and both the parties “A” and “B” broke up before taking any decision.

A contract or agreement when some conditions are attached, these must be lawful and permitted by Islamic law, i.e. their terms must be made clear, because unclear and ambiguous terms and conditions can effect the legality of a contract or agreement, and the reason for this negative effect is uncertainty (gharar). So we can say that the specification of terms and conditions in a contract or agreement in Islamic law, to prevent the contracts and agreements from the involvement of (gharar) uncertainty, because the attachment of the element of uncertainty (gharar) will block the accomplishment of contractual justice, which nullify/invalidate the contracts and agreements. Terms and condition are mostly specified by the contracting parities at the time of contract by expression of their statements. The element of uncertainty (gharar) which enters into a contract through terms and conditions are limited as follows:

- Combination of two contracts of sale in one transaction (Bay’ tan fi bay)
- Two contracts in one agreement (Safaqtan fi safaga)
- Contract stipulated on another (Aqd mullaq)
- Token money (Aqd al Urbon)

Combination of two contracts of sale in one transaction (Bay’ tan fi bay)
It means to combine two contracts of sale in one transaction. Literally means two sales in one. In other words: two bargains in one. In legal terms, Imam Shafi held that its meaning can be in two forms: First: when one says to another “I sold you for two thousand dirham’s on credit or one thousand dirham’s in cash, you can choose whichever term you wish.62 Secondly: when one says to another “I sold you my slave on a condition that you will sell me your horse”. So uncertainty emerged in this agreement for the reason that the completion of the sale of slave remains dependant on the sale of horse, which creates uncertainty. That is why one contract is dependent on another and the dependency of two contracts on each other, called ‘gharar’ (uncertainty).63 Some scholars argued that the second form is prohibited because of the want of knowledge in the price.64 But this argument is rejected by many scholars while some offered some compromise by stating that the sale is void, if the parties without having ascertained the price.65

Two Contract in one agreement
Safaqtan fi safaga means to combine two contracts in one agreement, as one of them is conditioned upon another, comprises upon uncertainty (gharar). For example: when person “A” says to “B” that on the condition that you should give me loan, I have sold you my house, is not permissible for the reason of uncertainty. It means that there

61 Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at p. 24
62 Sanani, Muhammad Ibn Ismail, Sabul Al Salam: Sharh Bulagh Al Maram Min Jami Adillat Al Akham, (Dar Al Kitab Al Arabi, Beirut, 1987, vol. 3) at p. 31; See also: Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Ahadith Sayyid Al Akhyar (Maktaba Usmaniyya, Egypt, vol. 5) at p. 152
63 Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at p. 26
64 Baghwai, Al Husain Ibn Masaud, Sharh Al Sunnah (Al Maktaba Al Islami, Damascus, vol. 4) at p. 143
65 Ibid
should not be any stipulation/condition at the time of contract which results in uncertainty. In such a situation, the condition renders the contract null and void.66

➢ Contract Stipulated/conditional on another

Al Bay al Mullaq means, a contract of sale in which the completion depends on some other event which may possibly occur in future. In other words: when the contracting parties to a contract one or both stipulates, that the conclusion of the contract of sale depends upon the occurrence of some future event, which may possibly to occur, such a contract is illegal. For example: “A person says: I will sell you this house for rupees ten thousand on the condition that somebody else sells me his house”. So in such a situation the completion of the first sale depends on the occurrence of the second sale, which may or may not happen.67 Majority of jurists are of the opinion that this contract is not valid.68 This is because that the element of uncertainty is present in such a contract. So we can say that, the completion of the second sale in future is not certain, that’s why the first sale is not certain as it depends on the completion of second sale. Also the time of completion of second sale is some future event, which is not known, that’s why the time of the completion of the first sale is unknown. These types of uncertainties may lead to dispute between the parties. Thus this contract ‘bay al mullaq’ is invalid. According to Hanafi jurists, it is similar to gambling and ‘qimar’.69

➢ Token money “Bai al Urbon”

Bai al urbon is a sale in which a certain percentage of money-the price which is paid in advance prior to the delivery of subject matter-will not be refunded to the buyer on a condition, if the buyer changes his mind and cancels the contract.70 In other words: the buyer deposits a certain amount of money prior to taking the delivery of subject matter on a condition that if the agreement is concluded and has been finalized, the deposit will be a portion of the price. But if the buyer revokes the contract, then the deposit will belong to the seller. So we can say that token money is the advance made by buyer to seller, on a condition that, if the contract is concluded, it will be a portion of the price. Otherwise the seller will not return the money, if the buyer revokes the contract.

Majority of jurists are of the opinion that token money is legally invalid.71 Because of the Hadith where “the Prophet Muhammad (peace be upon him) has prohibited bay al urbon”.72 While on the other hand, majority of the Hanbali jurists validated ‘bay al urbon’;73 on the grounds that there is a Hadith in which Zaid Bin Asam once asked the Prophet Muhammad (peace be upon him) about ‘bay al urbon’ and the Prophet Muhammad (peace be upon him) permitted it. That is why some scholars permitted ‘bay al urbon’ on the ground that the Hadith is weak, although the Hadith is mentioned in ‘Sunan Ibn Majah’. But they considered as weak transmitter that had no merit in transmitting a sound Hadith.74 The Islamic fiqh academy, Jeddah after a long deliberation permitted ‘bai al urbon’.75 And t is because that Umar Bin al Khattab once practiced it with another companion Safwan Bin Umayyah.76

Secondly: Ignorance in subject matter

Lake of knowledge in subject matter implies that being of subject matter itself is uncertain or unknown to the contracting parties. So it is a form of ignorance creating uncertainty (gharar). This uncertainty might give rise to dispute between the parties to a contract. Ignorance or lake of knowledge in the subject matter is of several kinds namely:

➢ The unknown Jins (nature of the subject of matter not known) i.e. Majhul al Jins

66 Samdani, Ejaz Ahmad, Islamic Banking and Uncertainty (Darul Ishaat, Karachi, 2007) at p. 30
67 Ibn Abidin, Radd Al Mukhtar (vol. 4) at p. 307; see: Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at p. 32
68 Ibn Abidin, Radd Al Mukhtar (vol. 4) at p. 308; see also: Al Qarafi, Al Furuq (Dar Al Kutub Al illimiyyah, Beirut, 1986, vol. 3) at pp. 228-229; See: Ibn Qudamah, al Mughni (Dar al Fikr, Beirut, 1985, vol. 6) at p. 599; See: Al Nawawi, Al Majmu (vol. 9) at p. 34
69 Ibn Abidin, Radd Al Mukhtar (vol. 4) at p. 324
70 Ibn Rushd, Bidayat Al Mufidh (vol. 2) at p. 172
71 Ibn Rushd, Bidayat Al Mufidh (vol. 2) at p. 162
72 Sanani, Muhammad Ibn Ismail, Subul Al Salam: Sharh Bulugh Al Maram Min Jami Adillat Al Akham (Dar Al Kitab Al Arabi, Beirut, 1987, vol. 3) at p. 17
73 Ibn Qudamah, al Mughni (Dar al Fikr, Beirut, 1985, vol. 4) at pp. 176 & 232; see: Sanani, Muhammad Ibn Ismail, Subul Al Salam: Sharh Bulugh Al Maram Min Jami Adillat Al Akham (Dar Al Kitab Al Arabi, Beirut, 1987, vol.3) at p. 17
74 Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Aحاديث Sayyid Al Akhyar (Maktaba Usmaniyyah, Egypt, vol. 5) at pp. 153-154; see also: Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Ishaat, Karachi, 2007) at p. 37
75 Showkani, Muhammad Ibn Ali Muhammad, Nayl Al Aowtar: Sharh Muntaqa Al Akhbar Min Aحاديث Sayyid Al Akhyar (Maktaba Usmaniyyah, Egypt, vol. 5) at pp. 151-153, 162 & 250; See also: Ibn Qudamah, al Mughni (Dar al Fikr, Beirut, 1985, vol. 4) at pp. 175, 176
Lack of knowledge of ‘jins’ implies that the thing sold is unknown and either the contracting parties or one of them knows nothing whatsoever about the subject of matter of the contract. For Example: When the seller says “I sold to you something for ten pounds” the buyer replies “I accepted it”.\(^{77}\) The jurists maintain that this type of ignorance is excessive in contract or worst type of ‘gharar’. That is why all the jurists generally invalidate the contract where the ‘jins’ of the subject matter is unknown. On the other hand Imam al Sarakhsi from Hanafi school of thought and Al Baji from Maliki School validate it on the basis of ‘khiyar al ruyah’.\(^{78}\) But this view is dismissed on the fact since one does not know what one is buying.

- The unknown Zat (subject matter not defined) i.e. Majhul al Zat
  
  Lack of knowledge in ‘zat’ (subject matter not defined) Means either the contracting parties or one of them does not know a thing which is unidentified, makes the contract invalid. For example: the seller says “I sold to you an animal for fifty dinar” and the buyer says “I accept it. Both the parties to a contract or one of them does not know about the specification, i.e. sheep camel or cow and etc, makes the contract is invalid.\(^{79}\) This transaction is not permissible according to Shariah for the reason that the animal for sale is not specified.\(^{80}\)

- The unknown Sifah (characteristics of the subject matter) i.e. Majhul al Sifah
  
  Majhul al sifah means to sell a particular things, qualities of which are not known. In other words: that knowledge of the characteristics of the subject matter can be obtained through indications, description, and advance inspection through a sample or specimens of the subject matter.\(^{81}\) Almost all the jurists are in consensus that lack of knowledge of the characteristics of subject matter would invalidate a contract.\(^{82}\) The specification or the characteristics of the subject matter depends on the situation whether this type of sale can cause quarrel between the parties or not. In case of not defining qualities of the subject matter may cause dispute between the parties, it will become impermissible, and if there is not a possibility of dispute among the parties, the contract would become permissible.\(^{83}\)

- The unknown Qadar (quantity of the subject matter ) i.e. Majhul al Miqdar
  
  Majhul al miqdar means when the quantity of subject matter is not known to the parties. Want of knowledge in the quantum could happen in a contract, if the seller does not specify the quantity of the subject matter that parties intends to sell. Most of the jurists attribute the reason for this opinion to gharar.\(^{84}\) Uncertainty in the quantum of subject matter also contravenes the ‘riba’ rules. Therefore the requirement of full knowledge of the quantum of a subject matter is very much emphasized by the jurists, especially in ‘ribawi’ goods. However this does not mean that the requirement of certainty in the quantum is not applicable to non ‘ribawi’ goods.

### Thirdly: Ignorance in the period of time

Ignorance in the period of time means when the delivery of subject matter or the time period of payment is not known. There is a consensus among the jurist that if the delivery of the subject is deferred to some future date, then in such a case the exact date of delivery must be fixed at the time of contract. Failure to a fixed future date of delivery will invalidate the contract because of uncertainty (gharar).\(^{85}\) The Hanafi school of thought divides ignorance regarding the time of delivery of subject matter into two categories.

- Major Ignorance (Al Jihalah al Muta'afishah)
  
  It means that when the delivery is made subject to something else, such as the occurrence of a certain events when it is not certain, makes the contract invalid.

- Minor Ignorance (Al Jihalah al Yasirah)
  
  It means that when the delivery is made subject to the occurrence of the certain event which has to occur, but its exact time of occurrence is not certain and not known.\(^{86}\) Generally, if the delivery is made subject to the occurrence of a certain event, where the exact time of such an event is known, the jurist holds that the contract is valid.

### Fourthly: Ignorance in price

The price can also be subject to a condition and an object of a contract to which the parties agree to accept a thing. It is necessary for the validity of a contract that the price should be mentioned in the session of agreement between the

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\(^{77}\) Kasani, Badai Al Sanai Fi Tartib al Shariah (Cairo, 1906, vol. 5) at p. 157

\(^{78}\) Al Baji, Al Muntaqa (vol. 4) at pp. 287, 288; Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Isbaat, Karachi, 2007) at p.41

\(^{79}\) Ibn Abidin, Radd Al Mukhtar (vol. 4) at p. 29

\(^{80}\) Samdani, Ejaz Ahmad, Islamic BANKING AND UNCERTAINTY (Darul Isbaat, Karachi, 2007) at p. 41

\(^{81}\) Darir, Siddiq Muhammad Amin, Al Gharar wa Atharuhu Fi Al Uqud (Cairo, 1967) at pp. 404, 405 & 414

\(^{82}\) Ibid at p. 172

\(^{83}\) Samdani, Ejaz Ahmad, ISLAMIC BANKING AND UNCERTAINTY (Darul Isbaat, Karachi, 2007) at pp. 41-42

\(^{84}\) Ibn juyu, Qawwin Al Akham Al Shariyyah, at p. 248

\(^{85}\) Ibn Abidin, Radd Al Mukhtar (vol. 4) at p. 529

\(^{86}\) Ibn Abidin, Radd Al Mukhtar (vol. 4) at pp. 164-165; see also: Kasani, Badai Al Sanai Fi Tartib al Shariah (Cairo, 1906, vol. 5) at p. 157
contracting parties. If the price is not mentioned at the time of agreement, makes the agreement void. Generally selling of a thing on which price is written and the parties are unaware of it, the contract is not valid. But if the parties knew the price and agreed upon it, the contract will become valid.

CONCLUSION

Juristically ‘gharar’ refers to the state of uncertainty and ignorance (jihala) of an object of a transaction in terms of its ‘genus’, species, characteristics, quantum, time of delivery and the consideration/price. All the ‘fiqh’ legal schools are unanimous that the involvement of ‘gharar’ renders any transaction void, and according to the Hanafi school of thought makes it irregular (fasid). The later jurist (of maliki school of thought) Ibn Taymiyyah says: “It is well known that ALLAH and his messenger the Prophet Muhammad (peace be upon him) did not prohibit every kind of risk nor all kinds of transactions that involve the possibility of gain or loss are prohibited, what is prohibited is eating wealth for nothing, not mere risk”. Mustafa Zarqa says: “gharar is forbidden when uncertainty exceeds acceptable limits, hence ‘gharar’ is not completely forbidden, and a certain degree of ‘gharar’ is accepted. Islam does approve the taking of commercial risk; only excessive risk (gharar fahish) taking is prohibited”. Notably, minor risk is that when parties identify that such ‘gharar’ as tolerable and negligible with the sense that the probability of loss is small and its magnitude is limited, equally it needs to be inevitable that is out of one’s control, and hence it should not be intentional in any case. Assertively, this is more suitable to the present scenario where the people are in great need and they are taking risks in their business in order to make profits, however it is very much necessary to keep in view the principles of Islamic law, otherwise their passion and desire for seeking an increase in wealth will spoil the principles of Islamic law.

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