

UNCERTAINTY PRACTICES IN DAILY TRANSACTIONS: CASE STUDIES OF MALAYSIA

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Abstract

Gharar (uncertainty) is one of prohibited elements that should be avoided in the transaction because it might affect the validity and permissibility of the contract. However, this element should be given concern to ensure our daily transactions will be free from gharar. Therefore, this study will discuss the definition of gharar, examples of gharar in our daily life transactions specifically in Malaysia and the prevention methods. This study applied qualitative method, and this can be a guideline and reference to the public mostly in Malaysia to avoid them from be involved with gharar. The objective of this study is to provide some guidelines and solutions to the public on how to handle and avoid transactions involving the element of uncertainty.

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I. INTRODUCTION

Gharar is one of the crucial elements that should be considered in order to ensure our daily transactions are valid from *Shariah* point of view. This issue has been discussed by the scholars since a long time ago until now. However, due to lack of awareness regarding *Shariah* requirements in transactions, unwittingly *Gharar* has been rooted in the Muslims daily transactions. In this study, firstly we will discuss about definition of *Gharar* and the texts which are related to it. Secondly, we provide examples of *Gharar* which are commonly and widely been practiced in our society in three business sectors; Foods and Beverages Sector, Services Sector and Banking Sector. Finally we provide the solutions for all of the common *gharar* that been practiced in our society. The significance of the study is to create awareness about *Gharar* and provide guidance and solutions to the Muslims society.

The Arabic word *gharar* means uncertainty, deceit and hazard. The related word *taghrir* means 'to expose to danger'.⁵ From the business perspective, it means exposing oneself to deception in business transactions due to uncertainty about the price, the quality and quantity of the counter-value, the ability of either the seller or buyer to fulfill his commitment, or the ambiguity of the terms of the deal, thereby exposing to unnecessary risk⁶. No verse from the Quran can be found explicitly prohibiting *gharar*⁷. However, it had clearly prohibited all forms of business transactions which cause injustice or oppression to any of the parties. The Quran reads:

- a. (He has enjoined on you) that you use full measure and a just balance. We charge every person only a much responsibility as he can bear. (6:152)
- b. Believers! Do not devour one another's property by unlawful means. Instead of this do business with mutual consent. (4:29)

The jurists agree that the word *batil* (unlawful) in the above verse includes all categories of illegal and defective elements in commercial contracts, including that of *gharar* as it could result in taking the property of others without a justified basis⁸.

The Prophet also forbade and condemned *gharar* in trading:

- a. Said Ibn Musayyab reported that the Prophet prohibited sale with uncertainty in it.
- b. The Prophet passed by a man who was selling grain. He asked him, "How are you selling it?" The man then informed him. The Prophet then put his hand in the heap of grain and found it was wet inside. Then he said, "He who deceives other people is not one of us"
- c. Abu Hurayrah reported that Allah's Messenger forbade a transaction determined by throwing stones and the type which involves some uncertainty i.e. *gharar*.

The Islamic jurists have several perspectives on *gharar*. There are three main definitions of *gharar* which were derived from their works. Their differing opinions had an impact on the resulting rulings⁹.

The first type is the *Gharar* which means jahalah about the products. Al-Sarakhsi and Al-Zaila'ie from the Hanafi mazhab are of this opinion. Al-Sarakhsi had defined *gharar* as something with unknown consequences¹⁰.

⁵ Ibn Mandhur (2009), *Lisan al-Arab*, , DKI, Beirut.

⁶ Hossein Askari, Zamir Iqbal and Noureddine Krichenne, *The Stability of Islamic Finance: Creating a Resilient Financial Environment for a Secure Future*, Wiley, 2010, p. xv.

⁷ Ad-Darir, As-Siddiq Muhammad Al-Amin. *The Amount of Gharar That Prevents Transactions from Being Valid*, A paper presented at the 4th conference of the Shariah Boards of Islamic Financial Institutions, held in the Kingdom of Bahrain on the 3rd and 4th of October, 2004

⁸ *Islamic Financial System: Principles and Operations*, ISRA, 2011 p.181

⁹ *Resolutions of Securities Commission*, 2nd Edition 2006 p.112

¹⁰ Al-Sarakhsi, *Al-Mabsut*, Dar al-Ma'rifah, 1989, v. 12, p.194

The second type is *Gharar* that refers to suspicion, according to Al-Kasani and Ibnu Abidin from the Hanafi mazhab and Al-Dusuqi from the Maliki mazhab. According to Al-Kasani, *gharar* is the potential risk faced by a person, with a 50% possibility that the goods may or may not eventually exist (*syak*)¹¹. To Al-Khasani, *gharar* is the suspicion that a good may not exist.

For the Hanafi mazhab, such a trade is lawful because the buyer is given the right to make a choice after he has viewed the goods. This view is based on the Prophet s.a.w. hadith: “Whosoever buys something that has not been viewed, he has *khiyar* (choice to buy or reject) after viewing it”.

The Hanafi mazhab was of the opinion that the risk of the buyer being exposed to cheating is minimum, as when the goods arrive, the buyer can make a choice based on what he sees.

The third type of *Gharar* refers to something with unknown consequence. This was the opinion of a majority of Islamic jurists.

The Shafi'e mazhab defined *gharar* as *khatar* (of high risks). Al-Shirazi, a jurist in this mazhab, defines *gharar* as something whose condition and consequence are unknown¹². Al-Ramli stated that, *gharar* is something that has two assumptions, positive and negative, with the negative being bigger¹³. Al-Sharqawi and Al-Qalyubi, also jurists from the Shafi'e mazhab, defined *gharar* as something whose consequence is unknown and has two assumptions, positive and negative, with the negative outweighing the positive¹⁴.

Between the views of the Hanafi and Syafi'e schools of thought, the Syafi'e mazhab was of the opinion that the *jahalal* about a product during the buying and selling contract is a significant *gharar*. This nullifies the contract. That is why the Syafi'e mazhab stipulated that at the time of the contract, a buyer must know the specifications and features of the product he is interested to buy.

It can be concluded that based on the above jurist views, the question of *gharar* revolves around the meaning of fraud. In the context of buying and selling, as stated by Islamic jurists, *gharar* is related to the product to be traded. The risks the buyer faces are from four angles:

- i. Whether the product to be traded exists.
- ii. Whether the seller can hand over the product.
- iii. How the seller commits fraud to attract buyers to agree to the 'aqd.
- iv. Contract that is unclear can expose the buyer to risks.

According to Muhammad Beltaji, it is impossible for the buyer and seller to avoid *gharar* completely. Therefore, past ulama' have differentiated between *gharar* which nullifies contract and *gharar* which can be excused based on maxims of Islamic Jurisprudence, such as *raf'u al-haraj* and *la dharar wa la dhirar*. As a result of his study, a majority of Islamic Jurists have placed three requirements in declaring something as *gharar* that can be excused:

- i. The *gharar* is minor and small.
- ii. Such trading is needed by society
- iii. The *gharar* cannot be avoided without *masyaqqah* (hardship) that is recognised by *Syara'*.¹⁵

¹¹ Al-Kasani, *Bada' I al-Sana' i*, v. 5, p. 163.

¹² Al-Syirazi, *Al-Muhazzab*, v. 1, p. 262

¹³ Muhammad al-Ramli, Syamsuddin, *Nihayah al-Muhtaj*, Dar al-Fikr, Beirut, 1984, v. 3, p. 405.

¹⁴ Al-Syarqawi, *Hasyiah al-Syarqawi, Matba'ah al-Babi al-Halabi*, Cairo, 1941, v. 2, p. 9

¹⁵ Hasan, Muhammad Beltaji, *Al-Milkiyyah al-Fardiyyah fi al-Nizam al-Iqtisadi al-Islami*, Maktabah al-Syabab, Cairo, 1988, hh. 202-203.

II. LITERATURE REVIEW

Transactions Affected by Gharar

Based on hadiths that discussed on gharar, they are all in sale contracts which may give impression that it has no impact in other than sale contracts. Jurist agree that gharar affects the validity of all exchange contracts based on analogy of sale contract.

The strongest view is that of the Malikis: *gharar* has an effect on exchange contracts but has no effect on donation contracts. That is because freedom of contract is a basic principle of Islamic jurisprudence unless there is a text to restrict that freedom. It was reported in authentic *hadiths* that the Prophet (peace be upon him) forbade *gharar* in sales. Therefore, it is obligatory to implement those *hadith* and prohibit any sale containing *gharar*.¹⁶

Example of *Gharar* in Muslim's Daily Transactions

Gharar in Conventional Insurance:

As in conventional insurance contracts i.e. life and general insurance policies, *gharar* appears in a situation whereby premium is paid regularly to the insurance company, and in the event of an insured losses, the insured receives compensation. In this case, the jurists argue that the insured may collect a large sum of money after paying only one monthly premium. In contrast, the insured may also make many monthly payments without collecting even once any money from the insurance company.

In other situation, whereby a buyer is given an option to subscribe for insurance coverage on product that he has bought e.g. cell phone with some upfront payment to the seller. In a nutshell, it means anything happen to the cell phone for example accidental damage and liquid damage during this insurance period is covered by the seller or insurance provider and the buyer just need to return it back to the seller/ insurance provider for a repair or replacement without any charges.¹⁷

Shariah requires all particulars of the contract to be known by the parties during the contract or otherwise it is invalid. Since 'insurance' itself cannot be considered an object of sale, whereby in both examples of life insurance/ general insurance and product's insurance above, the subject matter or the insured events are uncertain and cannot be determined when they would take place. The events may happen or may not happen at all during the insured period. These contracts are rendered invalid because of the forbidden substantial level of *gharar* and therefore prohibited in Islam¹⁸.

Unlike conventional insurance, *takaful* is based on donation (*tabarru'*) rather than premium and its operator is not the insurer that insures the participants but an administrator of the fund who will manage and invest it according to Shariah principles. In fact, the *takaful* participants themselves mutually guarantee, help and co-operate to one another¹⁹ to ameliorate the effects of losses that participants incur²⁰.

Gharar does not affect the validity of *takaful* contract since it is based donation (*tabarru'*)²¹ rather than sale contract in which contributed to the invalidity of conventional insurance.

¹⁶ Op. cit., Ad-Darir, As-Siddiq Muhammad Al-Amin.

¹⁷ < <http://www.mobisure.com.my/Products/Insurance.aspx> > (16 Oct 2013).

¹⁸ Al-Zuhaily, Wahbah, *Financial Transaction in Islamic Jurisprudence*, Dar al-Fikr, Damascus, 2003 v. 1, p. 90.

¹⁹ *Islamic Financial System: Principles and Operations*, ISRA, 2011 p. 504.

²⁰ Op. cit., Al-Zuhaily, p. 92.

²¹ Op. cit., Al-Zuhaily, p. 87.

***Gharar* in Foods and Beverages Sector**

Food and beverage sector is one of the largest economic sectors that being involved by the Muslim entrepreneurs in this country. A lot of stalls, cafeterias, restaurants and other type of food outlets can be found anywhere such as at the beside of the roads, between the shop lots, in the schools, universities, colleges, hotels and other places. The supply of foods and beverages must be maintained by the entrepreneurs due to its high demand especially in the urban areas because majority of them are working and they have lack of time to cook at home. This industry has contributed great wealth to the entrepreneurs for a long time. According to some research, the best business should be run in Malaysia is selling foods and beverages because Malaysians love to eat anytime and anywhere.

However, in this business, the problem arise is, ambiguity (*gharar*) and compulsion not forced (*ikrah ghairul muljik*) are commonly and widely practiced by the foods sellers in this country, especially in the mixed rice business. As we know, every foods seller has different method to sell and to determine the price of their foods. Below are 3 real situations of foods' sales and purchase transactions that commonly practiced in this country.

In **Situation 1**, a customer wants to buy mixed rice at a stall besides the road. He asks the seller to put some rice into a polystyrene container, and then he put the side dishes such as meat curry, some vegetables and some fried anchovies onto the rice by himself. Of course there is no any price tag being displayed at the foods' container or at the table of the stall. After that, the buyer asks the seller to calculate the price of the food that has been mixed together in a polystyrene container. Suddenly, the price that has been determined by the seller is very high and usually, the buyer doesn't bargain the price even though he does not satisfy with it. The element of ambiguity is there because the seller doesn't display the price specifically. The compulsion not forced also happen because of the buyer still has to pay for the foods and seldom have we seen the buyer cancels the purchase transaction of the mixed rice which has been mixed together in a polystyrene container. This matter maybe small for a rich buyer but not for the poor because he has to be very careful in budgeting his daily expenses.²²

In **Situation 2**, a customer goes to a cafeteria, canteen or restaurant to buy mixed rice and dine in there. After he puts together all the rice and the side dishes by himself, he sit somewhere in that place and starts eating the food. While he's eating, the cashier comes by to calculate the price of the food and the cashier keeps the price at the payment counter without telling the customer about the price of the food. The customer is wondering how much the price of the food that he is eating. Although there is a price list of the foods displayed at the wall, the customer cannot confirm the price by himself because the details of price is not very clear, for example, price of meat curry is RM3 but how many should he take for RM3. After he finished, he goes to the payment counter to pay for the food. Sadly, the actual price of the food is higher than what he expected and it makes him feel dissatisfied with the price that has been determined for him. Anyway, he still has to pay because the food was already eaten by him. This type of transaction also has problem due to ambiguity and compulsion not forced elements.²³

In **Situation 3**, a customer goes to a restaurant whether at a hotel or any place that offers "all-you-can-eat" buffet style meals. The customer needs to pay a fixed amount of money before he is eligible to enter the restaurant. As he enters, he can eat all the varieties of foods that being served in the restaurant as much as he wants with unknown amount until he is full. Normally, the foods that been eaten by a customer are worth lower if compared to the price of the buffet

²² This situation based on common practice by the seller and the buyer in Malaysia.

²³ This situation always been practiced by the Malay mixed rice restaurant in Malaysia.

entrance fee. The ambiguity element is there because the customer does not pay for specific food but he can eat all of the foods in the restaurant. In addition, some of the customers ate a large amount of foods and some of them ate lesser but still have to pay for the same price²⁴.

In order to completely avoid ambiguity and compulsion elements during performing these transactions, we provide the solutions that should be followed by the entrepreneurs who are running businesses in this sector. For **Situation 1** and **Situation 2**, firstly, we suggest the seller to display the price list for the menu of his foods with a detail description, such as, 1 scoop of meat curry is RM3.00, 1 piece of prawn is RM1.50 and 1 slice of omelet is RM1.00. Secondly, the seller should serves the customer by putting the foods into customer's plate by himself after the customer knows the price and agrees to choose that foods. For **Situation 3**, the weight of ambiguity and compulsion element is quite low which does not affect the validity of the transaction. Shaykh Ibn 'Uthaymeen (may Allaah have mercy on him) said: There are stores that sell food and say, "Pay twenty riyals and eat all you want". He said: It seems that this may be tolerated, because the size of an average meal is known and this is something that is allowed by custom. But if a person knows that he eats a lot, then he must tell the restaurant owner, because people vary.²⁵

***Gharar* in Services Sectors**

Beside uncertainty or *gharar* in foods and beverages sector, *gharar* also can occur in services sector. *Gharar* can be found in repairing vehicles services, taxi services, consulting and motivation services and others. With the existence of *gharar* in these sectors, it will lead to disagreement, oppression, injustice and quarrel between the parties involved²⁶. So it is important to detect and recognize in which part that *gharar* involved in order to avoid and ensure our daily services transactions are free from *gharar*.

Firstly we will examine *gharar* in repairing vehicles services. In Malaysia nowadays, vehicle either motorcycle or car has become crucial transports to move from one place to another places. The maintenance like repairing the vehicle when it broke down normally will involve with the elements of *gharar*. For example, when the customer sent his car to the mechanic, it will take several days for the mechanic to examine the problem and subsequently fix it. Repairing the car without the presence of the owner will lead the services to the uncertainty transaction. This is because the unethical mechanic may do the unnecessary thing like replace the spare part of the car which still can be used. In addition, when the car has been repaired, the mechanic will charge the customer with unreasonable amount whereby will lead to the argument and disagreement between both parties²⁷.

If we view the legality of the contract or transaction from Shariah point of view, we will find some lacking and loophole to the contract. Firstly, the repairing services have been done without the involvement of both parties. Therefore, it will affect the contact to become null and void due to absence of contracting parties in the contracting event. In addition, the subject matter which is the spare part of the car and the price charged to the customer also can be challenged due to presence of *gharar*. This is because the mechanic might do unnecessary work when repairing the car plus he charged more on it without the customer knowledge. Although the customer has

²⁴ This situation based on common practice for buffet food services in Malaysia

²⁵ *al-Sharh al-Mumti'* (4/322), Fajr Centre edition.

²⁶ Op. cit., ISRA, p. 181-182.

²⁷ Rahman, Zaharuddin Abd. 2008. *Wang, Anda dan Islam, Halal dan Haram dalam Kewangan dan Perbankan*. Kuala Lumpur: True Wealth Sdn Bhd, p. 59.

put a full trust to the mechanic, but in the event that he think the price that he should pay is unreasonable he might not satisfy with that services and charges imposed to him²⁸.

Therefore, it is important to the customer to ensure the services provided by the mechanic are free from any huge ambiguity. Among the action that can be taken by the customer is to specify with the mechanic what actually the problem with the car. For example, if the problem with the engine and need for further inspection, he has to confirm with the mechanic on the expected charges that he has to pay and agreed upfront before leave the car at the workshop. With this action, normally he can reduce the level of ambiguity that will lead the dispute to the contract. It is also advisable to the customer to have some knowledge about the car part by doing some research like the average price for car's spare parts, the function of the parts and others. Indeed, this will help the customer from being cheated by the mechanic.²⁹

The second scenario that *gharar* can frequently appear is in taxi rental services. In Malaysia, taxi is one of popular public transport to be used by the Malaysians as well as by the tourists due to it convenience and efficiency. Taxi in Malaysia normally will use a meter in order to determine the taxi fare. However, there are still taxi drivers mostly in rural area still do not use the meter and they prefer to quote the fare based on their discretion³⁰. This actually will lead to *gharar* in that service because the fare charged might not relevant with the service rendered³¹. The taxi that using the meter might also involved with the element of *gharar*. The event occurred when the taxi driver modified the taxi meter whereby will to uncertainty in the price quoted by the meter. The meter will be acted abnormally whereby the taxi fare will become expensive compare to normal usage³². Finally, the customer will be unsatisfied with the fare although the taxi driver has driven as usual. Both of these events will create the *gharar* in the services transactions.

If we examine and scrutinize these two scenarios, we can deliberate these situations whether it is permissible or not from Shariah point of view. Firstly, the subject matter which is the taxi services actually is permissible and the driver can obtain some fee for his services. However, if the customer thinks that the fare is unrealistic and unreasonable, these events can lead to injustice, dispute and quarrel between both parties³³. Therefore, to mitigate and reduce the level of *gharar* in this transaction, the customer and the taxi driver have to agreed upfront on the fare to be charged if the taxi not using the meter. So, any extra that request by the driver can be rejected because we have agreed upfront on the fare.

In other side, for the taxi driver that used the meter to determine the fare, the customer has to pay extra attention on how the taxi meter operated. The customer must ensure that the increasing fare displayed in the meter was operated normally as other taxi. The customer also has to have a reference on the normal taxi fare will be charged for every kilometer if the taxi driver uses the meter to determine the taxi fare. If not, the customer will be easily being cheated by the taxi driver.

²⁸Ad-Darir , As-Siddiq Muhammad Al-Amin. 2012. *Gharar Impact on Contracts in Islamic Fiqh* . Al-Baraka Banking Group., p. 517.

²⁹ Ibid., 59

³⁰ Heng, Natalie. (2012, October), KL cabbies living up to 'worst taxi drivers in the world' reputation, The Star Online, Retrieved 18 October, 2013 from the World Wide Web: <http://www.thestar.com.my/News/Nation/2012/10/07/KL-cabbies-living-up-to-worst-taxi-drivers-in-the-world-reputation.aspx>

³¹ Op. cit., Ad-Darir , As-Siddiq Muhammad Al-Amin, p. 517.

³² Rosly, Jumiati. (2008, August) Penipuan Meter Tambang Teksi Tambah Beban Pengguna, Bernama.com, Retrieved 18 October, 2013 from the World Wide Web: http://www.bernama.com/bernama/v3/bm/news_lite.php?id=351834

³³ Op. cit., ISRA, p. 181-182.

III. CONCLUSION

In many cases, *gharar* can be eliminated from contracts by carefully stating the object of sale, the price, the delivery of the object of sale and other required conditions to eliminate unnecessary ambiguities.

The prohibition of *gharar* is founded on the rule of justice and fair dealings. It is important to avoid any dispute, fraudulent and exploitation due to unfairness and injustices in dealing in any form to any of the parties. The risk pertaining to incomplete information in the contract may lead to speculation. These forbidden activities will destroy humanity's value, as well as discourage people from helping each other and doing well to one another, and these are against the spirit of mercy and charity, as required in Islam.

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