

# CONTEMPORARY PRACTICE OF *RIBĀ*, *GHARAR* AND *MAYSIR* IN ISLAMIC BANKING AND FINANCE

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## Abstract

The main purpose of this paper to provides proper understanding the concept and application of *ribā*, *gharar* (ambiguity) and *maysir* and how they may occur in Islamic banking and finance's products and services. The paper presents general basic principles in Islamic financial transactions from classical *fiqh* point of view including *ribā*, *gharar*, *maysir* and the prohibited contracts that are contain the element of *ribā*, *gharar*, *maysir*. This study reveals that Islamic banking and finance may involve the element of interest, uncertainty and gambling that are prohibited in *Sharī'ah* in their products and services which posits the *Sharī'ah* compliance products available today are not so different from their conventional counterparts. This might happen due to the lack of knowledge of the Islamic banking practitioners over the proper understanding of the concept of *ribā*, *maysir* and *gharar* when they structured the product including when they fixing the monthly installment in the contract of *wadī'ah*, *mudhārabah* and *mushārah* contract.

**Keywords:** *ribā*, *gharar* (ambiguity), *maysir* (gambling), Islamic Banking and Finance

## 1. INTRODUCTION

Understanding the basic *Sharī'ah* principles and parameters in structuring financial products and services in Islamic financial institutions either in Islamic insurance, Islamic banking, Islamic capital markets, Islamic pawnshops, *Baitul Maal wat Tamwil* (BMT), Islamic cooperative or other institutions offering Islamic financial services is very demanding for product development particularly *ribā*, *gharar* (ambiguity) and *maysir* (gambling). In Islam, the transaction in trade and commerce must conform to the requirement of *Sharī'ah* which means the abstinence from prohibitions (prohibited matters) and observing that every contract possesses all its essential elements and that every essential element meets its necessary conditions (Abdullah and Ramli, 2011).

This paper examnies the basic *Sharī'ah* principles in structuring the product in Islamic financial services particularly Islamic bank from *fiqh* point of view particularly basic

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general prohibition in commercial transactions such as *ribā* (usury or interest), *gharar* (uncertain or unclear elements in business contracts), *maysir* (transactions similar to gambling), and the contracts banned by *Sharī'ah*. Despite to ensure the *Sharī'ah* compliance of Islamic banking products and services in many countries must conform to the requirement of the agreeable fatwas and Central Banks Regulations. However, understanding of *fiqh* in basic general prohibitions in Islamic finance to meet the challenges of growth that may further strengthen Islamic banks is a must toward exploring various effective *sharī'ah* compliance banking products and services (Khan, 2007). Although some argue that the need to obtain *Sharī'ah* requirements is a hurdle in the path of Islamic banking product innovations (Benaissa, Parekh, and Wiegand, 2005).

Therefore, the paper first highlights the meaning of *ribā* and how they may occur in Islamic banking products and services. Second, examines proper understanding of *gharar*, types of *gharar*, *gharar* and risk, the forbidden contracts that contain the element of *gharar*, and how they may involve in Islamic banking and finance transaction. Third elucidates the concept of *maysir*, the difference between *maysir* and speculation.

## 2. SHARĪAH PRINCIPLES AND PARAMETERS IN PRODUCT DEVELOPMENT FOR ISLAMIC BANK

In general, the existence of Islamic financial industry on the surface in various parts of the world aiming to avoid *ribā* as it has been practiced for several centuries (Hasbi and Haruman 2011; Antonio, 2001; Ahmad, 1993; Juwaini, 2010; Kahf and Khan 1992; Siddiqui, 2005), *gharar* (ambiguity) and *maysir* (gambling) (Sudarsono 2003; Abdullah and Ramli, 2011; Dusuki and Abdullah, 2011; Ahmad et al., 2010). The objective is to provide peace in the hearts of Muslims and adherence of the prohibition in *mu'āmalah* so that they can live in accordance with what is specified by Allah (SWT).

The common practice to look whether the product in conformity with Islamic law is only referring at general prohibition of *ribā*, *maysir* and *gharar*, this study augments some few important points to ensure the product in Islamic financial institutions (IFIs) in accordance with *sharī'ah*. Like how the concept of hybrid contract in business transactions, from Islamic perspective the concept of hybrid contract in general is forbidden in the hadith. While the current contracts used in IFIs mostly a multi-contract, combination between one contract to another contract even more, because of the *Sharī'ah* prohibits two contracts in one transaction.

## 3. RIBĀ

*Ribā* is one of the major prohibited elements in Islamic finance and explicitly prohibited in the Qur'an as an undisputed sources of guidance of all Muslims. The word *ribā* also known as usury and interest, literally means as extra/excess/addition, expansion or growth or flourish (Ibn Rushd, ed. 1981; Al-Shirbīnī, ed. 2006; Al-Says, 2010; Ibn Manzur, ed. 1968; 'Imārah, 1993). Imam Sarakhsi (ed. 1986), Al-Shirbīnī (ed. 2006) and 'Imārah (1993) define *ribā* as an excess from initial capital that

required in a business transaction without any equivalent counter value (*iwadh*) that justified by shari'ah. The additional sense in the context of *ribā* is the extra money earned from the capital in a way that is not justified by shari'ah, whether it is small or big amount as indicated in the Qur'an.

In hadith, it is mentioned (this hadith becomes Islamic *Fiqh* Maxim, *Qā'idah Fiqh*): "Every *qordh*/loans that brings benefit (to the lender) is *ribā*". It should be noted here that the benefit that is mentioned in the hadith is not just extra money in the loan, but covering other benefits such as when A lends money of Rupiah 100 to B, but A requires B to do some job for him. Then the work done by B to A is one kind of *ribā* based on the above hadith.

*Ribā* in transaction generally categorized into two main characteristics: *ribā al-nasiah* and *ribā al-fadhl* (Ibn al-Qoyyim, ed. 1999), while Al-Shirbīnī (ed. 2006) divided *ribā* into three by augment *ribā al-yad* (sale with deferment on both (price and subject matter (or one of them)). *Ribā al-Nasīah* occurs when delay in the settlement or payment for one or both counter values as the interest charged on loans in conventional bank (Chapra, 2006). *Ribā al-Fadhl* occurs when a sale with a surplus or excess charged in the exchange of a specific commodities in barter transactions for example changing a latest model of gold of 100 gram with an old model of 110 gram (Al-Shirbīnī, ed. 2006).

**Table 3.1**  
**Types of *Ribā* and Its Application**

Term	Application
<i>Ribā al-nasī'ah</i> ( <i>ribā</i> in credit)	Involves a delay in the exchange of counter values, for example the exchange of one ounce of gold to be given now in return for one ounce of gold to be received next week.
<i>Ribā al-fadl</i> ( <i>ribā</i> in surplus)	Involves a surplus in the exchange of counter values, for example one ounce of gold to be given now in return for two ounces of gold to be received now.
<i>Ribā al-qurūd</i> ( <i>ribā</i> in surplus)	The lender of money contracts to receive more many in return than he parted with initially, commonly non as an interest bearing loan in western parlance.
<i>Ribā al-buyū'</i> ( <i>ribā</i> in sale and purchase)	Here, the counterparties in a trade of non-monetary commodities exchange unequal amounts of the same genus. For example a small weight of good quality that is traded in exchange for a larger weight of poor quality dates. This transaction also constitutes <i>riba al-fadl</i> .
<i>Ribā al-Qur'an</i> ( <i>ribā</i> that mentioned in the Qur'an)	The usury loan, being mentioned in the Qur'an, is a form of <i>riba al-Qur'an</i> .
<i>Ribā al-jāhiliyyah</i>	The pagan arabs would offer a debtor the opportunity to defer settlement of a debt in return for a larger payment in due course.

(The <i>ribā</i> that practiced in the time of ignorance among the Arabs, prior to the advent of Islam)	The elements of delay and surplus are clearly in evidence here.  Or it is an excess of debt that paid from loan principal at the time the debtor does not able to repay back the loan at a specified time
<i>Ribā al-hadith or ribā al-sunnah</i> ( <i>ribā</i> that defined in the <i>hadith</i> or by the example of the Prophet (pbuh))	The Prophet (pbuh) explained <i>riba al-buyu'</i> in the <i>hadith</i> , and this type of <i>riba</i> is therefore synonymous with some categories of <i>riba al-hadith</i> .

Source: Ahmad et al, 2010

### 3.1 *Ribā* and Interest in the Banking System

There is no dispute among sharī'ah scholars on the prohibition of bank interest since it is included in the prohibition of *ribā* that clearly stated in the Qur'an and Sunnah, loans with the condition of repayment with an excess over and above the principal based on the interest rate that stipulated in the contract (Siddiqi, 2004; Haque, 1995; Schacht, 1964). It is emphasized out by many fatwa's issued by International Shariah Standard in many countries such as MUI (Indonesian Council of *Ulamā'*) in Indonesia and SAC-BNM (Sharī'ah Advisory Council-Bank Negara Malaysia) in Malaysia that interest in the banking is *ribā*.

Some argue *ribā* in loan transaction (like what conventional bank does) is unlawful for consumptions and it is lawful if conventional bank does it for investment, production purposes (Ahmad and Hassan, 2008), and the empowerment of micro and small enterprises (Rahman, 2008). However, al-Qur'an laid down general prohibition that every form of fixed and predetermined interest (either small or big, for investment or consumption, saving or lending etc) is deemed to be considered as *ribā* regardless either it is use for consumption or other kind of purposes (Mannan, 1980).

## 4. GHARAR

*Gharar* is the second important element in transaction with the aim to avoid deception and to protect the right of contracting parties, minimize disputes and to reduce the opportunity of exploitation one counterparty by another in transactions, so that no one or both parties cheated or aggrieved. *Gharar* literally means: danger or exposure to destruction, risk or hazard or risk taking, deception, delusiveness, peril, hazard, fallaciousness, undisclosed, and uncertainty (Mālik, ed. 2005; al-Shāfi'i, ed. 2004; al-Nawawi, ed. 1996; 'Imārah, 1993; Ibn Manzur, ed. 1968). In financial application, *gharar* means deceptive uncertainty which indicating the one who practice *gharar* deceives or frauds through the use of uncertainty (Ahmad et al 2010). In *fiqh mu'amalah*, *gharar* means doing something blindly without sufficient knowledge, or take the plunge yourself from an act which carries the risk of not knowing exactly what will happen, or to enter the arena of risk without thinking the consequences, or something whose consequences are hidden, uncertainty or ignorance over the object of sale (al-Sarakhsi, ed. 1986; Kamali, 2000). According to Imam ibn Taymiyyah (ed. 1978), *gharar* occurs when someone does not know what is stored for him at the end of the trading activities which is similar to *qimār*.

*Gharar* may arise in form of uncertainty in the contract and anything that related to the contract such as uncertainty in the value of the subject matter, uncertainty in the time of payment on deferred sale, uncertainty in the quality and the quantity of the subject matter, uncertainty in existence, uncertainty in ownership, uncertainty in deliverability, uncertainty in availability or nature of the object of the contract (Imam Mālik, ed. 2005; al-Saati, 2003; Ayub 2007). For example it is prohibited for a person selling a car for Rp 100 million while he does not own the car, this is regard as *gharar* due to uncertainty in term of the ownership.

*Gharar* sale contains element of ignorance or uncertainty between the two parties in a transaction, where a thing which is not present at hand or a thing whose consequence is not known, or a sale involving hazard in which one does not know whether it will come to be or not (Ayub, 2007; Rodoni, 2009), or a sale and purchase agreement on something where the object (subject matter) would be delivered or not existence during transaction, e.g. the sale of a fish in water, or a bird in the air (Rodoni, 2009). (Ibn 'Ābidīn (ed.1966) defined *gharar* as doubts over the physical form of the object contract (*mabī'*). Ibn Hazm (ed. 1988) from Zahiri School of law said: "*gharar* in buying and selling is something that is not known to the buyer what he buys and the seller what he sells." Imam Sarakhsi (ed. 1986) defined *gharar* is something unpredictable consequences, and these are the opinion of the majority of jurists. Rosly (2005) stated that "*gharar* referred to validity or permissibility of the contract in which refer to risks and uncertainties that culminated from human manipulation actions which result in danger and injustice to another parties."

However, *gharar* sale only applied and appeared in the principle of '*uqūd mu'āwadhāt* (exchange contract) and does not applied in the principle of '*uqūd tabarru'at* (charitable contract) (Kamali, 2000). Because, in the charitable act in which the donor has no motive to increase his own wealth the *gharar* is excused. If the beneficiary recipient misses the benefit, he would not be hurt because he has not spent anything which is different with exchange contract where the beneficiary recipient pays to get something. If he does not receive what he paid for, he lost what he spent. It is clear that the wisdom of the prohibition of *gharar* from the law giver is to avoid harm to all contracting parties (al-Darīr, 2004).

The basis of prohibition is the word of the Prophet (peace be upon him) in the hadith of Abu Hurairah: "The Prophet (pbuh) forbade *al-hashah* sale and *gharar* sale." In *gharar* sale, there are elements of taking someone else's property by way of unjust (*bāthil*). Islam forbids eating someone else's property by way of unjust as mentioned in the Qur'an (*al-Baqarah*: 188).

#### **4.1 Types of Gharar**

Although some scholars put into three categories by add up average *gharar* (*gharar mutawassit*) into it such as Kamali (1999). Generally, *gharar* can be divided in two categories:

First: Tolerable *Gharar*: The Tolerable *gharar* (*gharar yasīr*, minor *gharar*) is *gharar* that can be tolerated and acceptable by both parties, and would not affect the essence

of the contract. For example, buy a specified car from dealer which will delivered by next week with agreed price for Rp 100 million. Although the car still not exist today (uncertainty in existence), the dealer however will ensure that the car will delivered to A at the time agreed. In case of hadith of the prophet who prohibits selling something which is not in the possession of the seller, some jurist such as Imam Ahmad bin Hanbal and his sympathisers including Ibn Taymiyyah and Ibn al-Qayyim interpreted the inability of seller to deliver the subject matter at the agreed time (Ahmad et al 2010 in kamali, 1999). Muslims jurists agreed that the minor *gharar* (*gharar yasir*) is tolerated and permissible (Kamali, 1999).

Second: Prohibited *Gharar*: The prohibited *gharar* (*gharar fahish*, major or excessive *gharar*) is an uncertainty which is so high and overwhelms a contract (Ahmad et al 2010). It may arise one the buyer or the seller is not capable of taking responsibility due to: not of majority age from legal and *Shari'ah* aspect and the buyer or seller is coerced, the object not exist, not free from encumbrances and not specified or not according to specification, or the price not stated in the agreement and two price in one transaction (Abdullah and Ramli, 2011). It is emphasized by Ibn Rushd (ed. 1981) the major *gharar* originates from the ignorance and lack of information over the nature and attributes of an object, a doubt over its availability and existence, doubt over its quantity and quality, or exact information concerning the price, the unit of the currency in which the price is paid, and the terms of payment. It also related to the time of payment and deliverability of the object.

Muslim Jurists agree that only the major *gharar* is prohibited as it impairs the validity of the contract. The prohibition of the major *gharar* is due to the similarities of major *gharar* with gambling which was first noticed by Ibn Taymiyah and Ibn Al-Qayyim as they consider exorbitant *gharar* as a type of gambling (Kamali, 1999). Excessive *gharar* is *maysir*, which is gambling. When a camel or horse is lost, its owner can sell it lower from the market price (al-Saati, 2003).

#### **4.2 *Gharar* and Risk**

*Gharar* in transaction that prohibits in *shari'ah* has no difference between deceiving that prohibited in business transaction where the object is not known and therefore the risk involved. There are several reasons behind the prohibition of *gharar* that cause the risk to the contracting party which is related to fraudulence where a sale amounts to obtaining the property of others by selling unavailable goods and the contract may lead to dispute and disagreements between the contracting parties (Hassan, 1997).

Some scholars differentiate the term uncertainty and risk in economic (Kamali, 1999). Risk describes as a situation in which the probability of an event can be measured. Therefore, this risk can be estimated theoretically.

#### **4.3 Wisdom beyond the Prohibition of *Gharar* Sale**

According to Imam Ibn Taymiyyah, the wisdom behind the prohibition of *gharar* sale or any contract contains the elements of uncertainty and hazard in which the sale will result taking someone else's property for vanities and injustice which is kind of immorality and hostility (Jum'ah, 2005). Among the lessons from this prohibition,

because it's kind of gambling and cause hostility to the inflicted loss party. This prohibition is also has a good intention with aim to keep the property among the people as one element in the *maqāshid sharī'ah* (the objective of sharī'ah) proposes protecting the wealth from the loss and to eliminate hostility attitude among the people due to this type of trading (Abu Asma, 7 February 2010).

#### 4.4 Sample of *Gharar* Sale in Trade

Some scholars allow the transactions where the object or subject matter actually not exist during transaction, with condition that the contracting parties having the control of the item where he/she can ensure the deliverability of the object or subject matter in the agreed future time (Rodoni, 2009).

There are many scholars explain the normal transaction that involve element of *gharar* in the contract in Islamic jurisprudence that normally did by the ignorance Arab at that time, there are as follows (Al-Shirbīnī, ed. 2006; Rodoni, 2009; Saleem, 2000; Bakhtiar, 2011; Bakar, n.d.; Zuhaili, 2007):

##### 1. *Al-Hashah* Sale (*bay' al-hashah*)

People in *jāhiliyah* used to do a contract of sale of land that not obvious in term of the size. They threw *hashah* (small stone), at the point where the stone falls become the limit of the sale. Another example is sale of goods that are not specified at the first place, then they threw *hashah*, the good that hit by the stone would be sold to the buyer.

##### 2. Dive Guess Sale (*Dharbatul Ghawwash / dharbat al-ghāis*)

People in *jāhiliyah* used to sell by way of diving. Item that found in the sea the time of diving would be transacted among the parties. The buyer paid the price in advance though at the end he does not receive anything from the transaction. Sometimes the seller delivers the goods that found even though the number of items reaches multiple times from the price received. The transaction else effected by saying: "I shall dive into the sea, if I have anything (pearl or precious stone) it will be yours at such and such a price (Bakar, n.d.)." This transaction called as a diving guess sale (*dharbatul ghawwash*).

3. *Nitaj* Sale: The contract of sale of the cattle before fruition, among of them is trading the milk that remains in mammary (milk bag) of the animal.

4. *Mulāmasah* Sale: This is the transaction where the buyer will buy the clothes according to what he/she touches among the clothes. Afterward the transaction should be proceed without the knowledge of the sale goods by the buyer and mutual consent among the parties, like or dislike to the touched item. The price of the clothes can be lower or higher from the market. The buyer just touches the sale item without any information whether the item in a good or fault condition. Say for example, the sale in the form of somebody says to his friend, "Whatever the suit that you touch, then it's yours and you have to pay this amount of rupiahs." Therefore, if he touches the expensive clothes, it means he was lucky, and if he touches the cheap one it means he lost.

5. *Munābazah* Sale: Where both parties either the seller nor the buyer denounce the stuff each other, and this practice become a form the basis of sale which has no mutual consent among the parties. For example some of them say to another party; "Take this stone, and throw it to the clothes! The hit cloth will be yours by way you pay me some amount of rupiahs." It can

be in the form of like someone said, “Throw me what you have, then I will throw to you what I have with me.” After throwing throw, the contract of sale will close. For example, Mr. X throws her clothes to Mr. Y and Mr. Y then throws his clothes to Mr. X which means each one of him has bought from another without checking and without any consent each of him, or it can be Mr. X throw the money to several clothes in the someplace, the money that touches the clothe will be the clothe that going to buy by the buyer.

6. *Muhāqalah* Sale: *Muhāqalah* is the sale of plants (food crops) with known scales. *Muhāqalah* is the sale by way of estimating while still in the fields or in the farm. For example, selling of crops or vegetables that are still in the farm before harvest (eg rice, peppers, and other vegetables). *Muhāqalah* sale can be in the way of swap, for instance exchange spikes grain with dry grain with only by estimation.

7. *Muzābanah* Sale: Sale of date that still in the tree with dried dates with scales (dry food with the wet food). Similarly do not sell the blood for treatment and for other purposes. If he/she need for treatment and he/she does not acquire it except by giving some amount of money (the price), so he/she may take it with a price and it is prohibited for him to accept some of that price.

#### 8. *Mukhādharah* Sale

Selling fruits that are still in the tree (not matured). For example selling the green dates in the tree before harvest where the quality of the object is uncertain (*ijon*).

#### 9. *Mukhābarah*

It is a working contracts between the landlord and the farmer on land that going to be farmed and the return will be shared accordingly (50:50, 25:75, 30:70 etc). The *mukhābarah* that has been banned by the Prophet is where condition the landlord would take the best half from the farm and the rest for the farmer. This contains the element of uncertainty to the farmer and loss to him. In case of the return from *mukhābarah* will be shared accordingly, this contract is lawful from sharīah.

#### 10. *Habalul Hablah* Sale (Sale of Fetus that still in the Mother’s Womb)

*Habalul hablah* sale is selling of product where the production still uncertainty, including the sale that popular in era of *jāhiliyyah*. They used to sell their animals that still in the womb of pregnant animals, and delay in term of delivery. Islam prohibits this kind of transaction. The element of *gharar* in the sale of *habalah habalul* is obvious in the first place if the aim of this transaction is to sell the fetus that still in the mother’s womb of camel, so the existence of that fetus is clearly uncertain. At the end of the day, the buyer could obtain the thing that he bought or otherwise.

**11. *Najash* Sale:** It is a contract where the seller asks another person to praise the object of sale (e.g. house) or bid with a high price so that others (the potential buyers) interested to buy that particular house. The potential buyer actually does not really intent to buy the house, however the seller wants to deceive this people who really want to buy with a high price to attract the real buyers that would be deceived from this mechanism (Karim, 2007).

12. *Talaqqi al-Rukkān*: It is an action taken by the town traders (those who have more complete information pertaining to the price) to buy the goods from the farmer (the goods



producer that do not have the correct information about market price) who stays outside the town, to acquire cheaper price from normal market price. The essence of the prohibition is an unfair action taken by the town trader who well informed the actual price in the market where sometimes the town traders gave wrong information pertinent to the price to the farmer. Although no prohibition on sale and purchase at a cheaper price in *sharī'ah*, however the transaction between two parties where one of them has complete information and another one does not know the real market price and thus situation will be utilized to generate more profit, then there will be injustice and vanities among the town trader with farmer outside the city (Karim, 2007). The town trader will buy the goods before they get into the city and have no information at all regarding to the price.

This is normally happen in Sumatra city where town traders buy chili from village farmers, normally the farmers has no information at all regarding the market price of chili at the time of transaction, the town trader will wait in some places before the farmers get in to the city. The town trader normally will manipulate the price or give wrong information pertaining to the price, for example the market price for chili Rp15.000 for one kilo, however town traders can buy chili Rp 7500 for per/kilo. If the farmer asking what it the market price for chili in the city, normally the town traders will answer with Rp10.000 or Rp9.500. From this kind of transaction we can see how the town trader deceives the farmer who has no information with the price.

13. Two sales in one sale (*bay'atain fi bay'ah*): It is a sale contract whereby there are two sales (two prices) in one transaction. For example the seller says to the buyer: "I am selling this dress to you at a price of Rp10.000 in cash and Rp20.000 in credit." Then the seller and the buyer agreed to deal without determine which price have been agreed between them either cash or credit. The transaction is become invalid and not permissible because there is element of *jahālah* (ignorance) in term of the price.

14. Sale of things which are not owned (*bay' mā lā tamlik*): It is a contract of sale where the subject matter not owned by the seller. *Ainiyah* sale is one of contract of selling without obtaining possessed the subject matter. It is a contract of sale of commodities, especially perishable, without obtaining their possession.

15. Sale of defected items

16. *Bay' al-Dayn bi al-Dayn*: It is a sale contract of payable right either to the original debtor, or to any third party (Rosly and Sanusi, 1999), the seller sells a particular asset (such as a laptop) to the buyer with installment in one year, in the middle of installment period the buyer cannot pay, the buyer then will buy his debt with a price higher than the original debt. Another example when a person buys something at a certain period of time from the supplier, however the goods have not been delivered. When it's time due, the goods ordered were not yet finished then the buyer says, "Sell the item to me until a certain time, and I would add some amount of money." A contract of sale which has no *taqobudh* (the handover of goods) where this form of contract is selling something that does not exist with something that does not exist.

In Islamic bank, selling of debt can happen in many form of contract. One of the examples, when the bank finances the customer to buy a particular asset (e.g. a car) for one year time, at month six the customer default, then bank needs liquidity for some purposes, the bank then will sell his debt to another party normally with discount to third party. This is selling of debt in the banking industry which is banned in *Sharī'ah* and considered as *ribā* or *bay' al-kali bi al-kali* referring to the hadith of Prophet: Prophet banned selling debt with debt (*bay' al-kali*

*bi al-kali*) (al-Shawkani, 2005). The jurists agreed that it is unlawful to sell debt with debt either sells it to the original debtor or to a third party (Zuhaili, 2007).

17. *Bay' Ma'adum* (Non-Exist Sale): It is trading of goods that do not exist or not yet exist. For example, selling fruit that not been matured yet and still on the tree, selling dairy animals that still in the tits (can look great, it turns out it fat, the milk is too liquid), so there is speculation in this transaction, which is uncertainty pertinent to the subject matter and vague from the first place.

This sale contract is trading the object (*mabi'*) that does not exist at the time of the contract. For example, Budi sells mobile phone to Adi, but at the time of the contract, mobile phone is not available.

18. *Bay' Ma'juz 'ala al Taslim*: It is trading where the seller has no capability to deliver the goods. According to majority Hanafi's school of law, the sale contract where the asset or goods cannot be handover or delivered to the buyer, this transaction considered as not valid, although the asset or goods own by the seller (Zuhaili, 2007). For example selling the missing motorcycle and still in the process of searching, selling mobile phone that still borrowed by a friend who escaped, selling property or land that the status of the asset remains vague (who is the actual owner), selling pets (such as pigeons) that might return to the nest but do not exist at the time of contract.

19. *Bay' Majhul* (Unknown Sale): It is a trading of goods which is unknown in terms of quality, type, brand or quantity (e.g. selling a radio that is not well explained in term of the brand etc). If the level acknowledgement is small so it does not cause conflict or dispute in the future, then the trading is lawful and permissible, since this ignorance does not preclude the submission and receipt of the goods (e.g. selling fruits by kilogram or in the stack). However, if selling Nokia mobile phone with *murabahah* contract that not clear in term of type. This trading is banned because it contains element of *gharar* (not clear, uncertainty, not sure which product would be purchased).

20. *Bay' Tsunaya*: It trading that is not clear which one excluded from the contract. Such as selling of fruits for example mango in the bag excluded the yellow one. Since the majority matured mango are yellow, so it is not clear which one excluded from the sale.

21. *Malāqih* Sale (fetal animals): It is selling an animal fetus that is still in the womb of mother. For example, selling kitten that is still in the womb of mother.

22. *Mu'awamah* Sale: It is a sale of fruits while upon in trees for one year, two years or more whether the fruits appear or not. This contract contains the element of *gharar* (Anas, n.d.). The implication of the prohibition of *gharar* is that to ensure justice and fairness to all contracting parties, thus avoiding disputes and disagreements between them.

#### **4.5 Gharar and Its Practice In Islamic Bank**

*Gharar* could happen in any kind of transaction in Islamic bnk, say for example when the existence of the goods transacted among the parties uncertain. It might happen also in transaction with the farmer where the transacted item not yet certain in term of harvest. Unlike *salam* contract, the transacted item although is not exist at the time of contract, yet the quality and the quantity of the transacted item are clear which will be delivered at the agreed time (e.g., 3 months later). It might happen also in house financing that use to happen in Islamic Banking industry where the house is still in

legal dispute that cause dispute among the parties at the end of the contract or in the future. Therefore, to avoid uncertainty in any transactions, the element that should be going concern among the parties are:

First, the transacted item has to be clear its existence not the item that still debatable in its existence.

Second, the transacted item should be clear in term of its ownership, since Islam prohibits selling the item or goods where he/she has no ownership over the good that will cause dispute in the future.

Third, it has to be certain in term of transacted item, if it is a house, it should be clear in terms of size of land, size of building, location and specifications of building. If it is a goods it has to be clear the type of the goods and specifications, and if it is a goods related to agriculture products, it is permissible to do a contract of *salam* where the details of the product ordered it has to be stipulated in the first agreement (how many kilos, types or class of the product) as well as the time of delivery. Say if it is a rice, it has to be clear what type of rice that going to be delivered in the future, is it *rojolele*, *pandan wangi* or other type of rice.

From the above discussion, it can be concluded that any contract that going to be done among the contracting parties commanded to have a clear transaction in the first place with the objective to avoid any possible dispute in the future date that resulted from uncertainty over the transacted item and this aim to protect the contracting parties from any possible quarrel in the future.

## **5. MAYSIR (GAMBLING)**

*Maysir* in the Arabic word from the word *al-yasar* (easy) literally mean easily available of wealth or game of chance (al-Qurtubī, ed. 2010; ‘Imārah, 1993), or refers to acquisition of wealth by chance whether or not it deprived the other people’s right and cause harm to others (al-Qurtubī, ed. 2010), or obtaining something easily without any hard work or receive benefits without working. According to al-Masri (1993) *maysir* and *qimar* has the same meaning, it is a game of chance with a combative relationship between two contracting parties, each of whom undertakes the risk of loss, and the loss of one means gain for the other. In other word it is a person puts some of his money or a part of his wealth at stake wherein the amount of money at risk might bring huge sums of money or might not bring any. In the common practice *maysir* use to called as a gambling. Another term used in the Qur’an is the word of ‘*azlam*’ means gambling practices (Kamali, 2000).

The term of Gambling in Islamic finance defined as "any transaction conducted by the two parties to posses the ownership of a particular asset or service which obtain benefit to one party and harm to others by linking a particular transaction with an act or event." Gambling basically forbidden in Islam, including bet, lottery and any kind of gambling activities (al-Qurtubī, ed. 2010; Sula, 2011). Ibn al-‘Arabi (ed. 1993) define *maysir* or *qimar* as “a game where each contestant seek to defeat his partner in order to take over the property that provided for the winner”. Al-Shawkani (ed. 1939)

defines *maysir* as “a condition where one of the contestant become a winner while the rest are losers.

Gambling is any kind of game that contains elements of betting (assets / materials) in which the winner will take the property / material of the losers. In order to be considered as a gambling at least there must have three elements to be met:

- a. The existence of betting subject matter / asset from both sides of the gambler.
- b. The existence of the game that use to determine who is the winner and who is loser.
- c. The winner will take the property (part / whole) that being bet, while the loser will lose his bet property.

Gambling is part of obtaining property by way of vanities and strictly opposed by the Qur'an (*al-Mā'idah*: 90-91), it avert the people from the remembrance of Allah (Qur'an, *al-Mā'idah*: 91), and the sin is the greater than the benefit (*al-Baqarah*: 219). In the hadith of Abu Hurairah r.a. which narrated by Bukhari and Muslim, the Prophet (pbuh) said: "Anyone who says to his friend: "Come here, I will do *qimar* (kind of gambling) with him, then he should give *shadaqah*." *Qimar* according to some Islamic Scholars is the same as gambling, and to some other scholars *qimar* only happen in *mu'āmalah* in the form of a game and bet. The hadith above shows the illegitimate of *qimar*/gambling and charges *kaffārah* (fine) for who dit it with *shadaqah* (Muawiyah, 2008).

### 5.1 *Maysir* and Speculation

Another term used in the current practice in finance for gambling is speculation. Some observers regard speculation and gambling as synonymous terms, particularly most of economist used to describe the gambling activities with speculation in the stock market. Some says investing in securities it means gambling in the future. Where every minute the speculators in the stock market always damage the share of the issuer based on their analysis. Any company that has the rights issue has the speculator. When the share price of particular entity falls then the speculators rush to buy by expecting the price will increase later, when the price goes up then speculators will sell it back to the stock market. This situation will cause the price of the composite stock index decline and even worsen the national's economy (Rianto, 2010).

However, Kamali (2005) differentiate between gambling and speculation from the nature of risk and potential contribution to the social good. Gambling involves creation of risk for the sake of risk. Horseracing and poker, for example, create risks that would not be present otherwise. The gambling activity seek out the risk that were previously not exist in which does not accomplish the social good. On the other hand, speculation in investment consists of committing capital to an enterprise with the expectation of earning a profit, where the profit earned in the future based on the performance of the company (effort). It means, the speculation on the investment in stock is based on the real value of the company where gambling relies on nothing. It means, speculation in investment on securities that represent no real value in the

economic is considered as gambling such as investing in conventional derivatives. However, distinguishing between investment, speculation, and gambling are not always clear.

Some observers says that the non-gambling speculation has the positive sense in which consists of intelligent and rational forecasting of future price trends on the basis of evidence and knowledge of past and present conditions. Speculators in investment in stock market are not simply gamblers, for the risks are real commercial risks, quite a different matter than the activity of a gambler, who assumes no risk other than that created by the rules of the game. It means the bottom line to differentiate the *maysir* (gambling) and lawful speculation is either of us who wins take the other's property as described by Ibn Qoyyim (Kamali, 2005).

## 5.2 The Relation Between *Gambling* and *Gharar*

*Gharar* as an act whose outcome is unknown and uncertain is prohibited in *Sharī'ah* because it is a form of gambling that takes place in trade rather than the common gambling that is usually associated with games (Yousef, n.d.). *Gharar* coincides with *maysir* which is the uncertainty over gain and loss, which is in common between *gharar* and gambling. Although there are many definitions of *gharar*, it is still not an accurate definition if it is applied in contract such as *mushārah* and *mudhārah*. However, gambling and *gharar* may happen simultaneously if one of the parties involved received its due but the other did not and the latter remained open to risk in a way that frustrated and nullified his right (Kamali, 2005).

Furthermore, Kamali (2005) puts a clear distinction between *gharar* and *maysir*. In *maysir* it is played for its own sake as a game whereas *gharar* proceeds over contracts. *Gharar* is usually not the purpose of a contract but incidental to it whereas *maysir* is the purpose of the game, which has no other subject matter, or purpose to beat the opponent in order to take others' wealth. In an attempt to ascertain the relationship between gambling and *gharar* in commercial transaction that is forbidden in *sharī'ah*, if gambling and *gharar* exist at the same time for example, a sale contains the element of uncertainty and devouring others' property.

Kholid (2011) gave one of al-Dharir statement, "where any transaction dealing with ambiguities either in foundation of wall or fruit that has not been matured, these are all included as *gharar*, but not *maysir*."

## 5.3 The Reasons Behind The Prohibition

Generally gambling is one of the sources of injustice and turn off the productive resources. This is happen where the winner can only gain if the other side suffering the loss which harm the right of others, and the gambler will neglect in remembering Allah and prayer as stated in the Qur'an in the surah al-Māidah verse 90 (Sena, 2010).

Sena (2010) further explains the reasons why *maysir* is prohibited from an economic perspective, such as:

1. Injustice income distribution. In gambling, profit only able to be obtained after one side wins, or has the same as the principle of *riba*, shifting risk (risk shifting) from the strong to the weak. Obviously this principle is unfair and set off the motivation of entrepreneurship, where income distribution should be based on the amount of real business activities or risk sharing among the parties.

2. Inefficient of economic resources allocation. Allocating the economic resources into gambling activities it will result the value-added in economy halted and potentially clogging the economy, which lead transferring the wealth from productive society to nonproductive society.

#### 5.4 Example of Maysir

The trade solely based on speculation that involves risks and uncertainties. This form prohibition is addressed to a businessman's attitude that greedy and selfish. In the banking case for example, treasury department normally used to place the surplus fund for speculative purposes with the expectation the return would be higher in the short time or long time. Where the underlying of transaction does not represent any real asset, usufruct or services. Such trade might not provide any job opportunity and positive contribution to society. Even this activity will lead to fluctuation of price in the market without any real economic activities involved, which result an economic crisis. In addition, character and moral factor are very important consideration. Therefore, Islam has a principle of prohibition against gambling and all kinds of *gharar*, as it brings into more harm in the society (Rianto, 2010).

Ayub (2007) put a relevant discussion on financial institutions are lotteries or prize-carrying saving accounts or prize-carrying schemes of bond that banks launch from time to time. The question is can Islamic banks launch any such kind of saving account scheme or bond schemes? In prize bond schemes and saving accounts, although investors and depositors' money remain safe, the prizes would be taken from the interest generated from the capital so accumulated. Pre-calculated interest is distributed among the bondholders. There is also the aspect of the chance for a few to get a prize without undertaking any liability or doing work for it, at the cost of other saving account holders and bond holders. Therefore, conventional prize-carrying schemes are repugnant to the tenets of the *Sharī'ah* due to the involvement of both *Riba* and *Maysir*.

Banks running such schemes normally give a very meager return to general participants of the scheme and give the difference between the meager rate given to the majority of the participants and huge prizes to a few out of hundreds of thousands of participants. This concept is not only not *Sharī'ah* compliance but also against the moral value and sound economic principles and similar to games of chance and speculation.

In Islamic bank, it depends on the contract used. in case of *wadī'ah*, the contest that carrying any prizes to the saving account holder and bond holders, would violate the *Sharī'ah* principles as it is deemed as *ribā*. In *wadī'ah*, the savers would not entitled any benefit over the principal as stated in the hadith of *ribā*. However, in *mudhārabah*

contract, some scholars allow Islamic bank to do some kind of contest with the condition that the prize money taken from the banks money. Otherwise, it is unjust act where the saving account holders and bond holders take the profit where the business activity does not start yet.

## 6. CONCLUSION

In Islam, the transaction in trade and commerce must conform to the requirement of *Sharī'ah* which means the abstinence from prohibitions (prohibited matters) and observing that every contract possesses all its essential elements and that every essential element meets its necessary conditions (Abdullah and Ramli, 2011).

This paper highlights general prohibition in commercial transaction such as *ribā* (usury or interest), *gharar* (uncertain or unclear elements in business contracts), *maysir* (transactions similar to gambling), and how they may involve in daily financial transactions. Although the *Sharī'ah* compliance standard in Islamic banking products and services in every jurisdictions is defer one another, yet they must conform to the requirement of the agreeable fatwas and regulations. The understanding of *fiqh* in Islamic commercial law particularly the basic general principles in Islamic commercial transactions to meet the challenges of growth that may further strengthen Islamic banks is a must toward exploring various effective banking products. Although some argue that the need to obtain *Sharī'ah* requirements is a hurdle in the path of Islamic banking product innovations (Benaissa, Parekh, and Wiegand, 2005).

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