(Legal) uncertainty: *Takaful* between English common law and *Shari’a* law

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Abstract

Concepts and principles of Islamic finance, which respect the beliefs and practices of the Muslim faith, are becoming more prevalent in the United Kingdom (UK). The concept of *Takaful* (Islamic insurance), while still in its infancy in the UK, is proving a viable alternative to traditional insurance models. This paper argues that increased efforts should be made by UK financial services regulators to develop suitable corporate governance standards and enhance *Takaful* awareness. Such efforts will ultimately increase domestic insurance penetration by providing Muslims with a compliant system of insurance, and, further, allow the UK to emerge as a viable and global *Takaful* market.

The comparative study between English common law and Islamic law in this paper illustrates, *inter alia*, the differences between risk (measurable uncertainty) and uncertainty (pure risk, namely an immeasurable form of hazard), with the goal of finding a uniform standard for the incorporation of the concept of risk management into English insurance contracts. Fundamentally, the difference between risk and uncertainty is derived from the understanding of Professor Frank Knight. Ultimately, the differences in the ideologies of risk-taking in Western countries and risk-sharing in Islamic countries, specifically in relation to the insurance industry, do not constitute a challenge, but instead, the basis for possible common ground upon which to build a mutual system of cooperation between different legal traditions.

*Keywords:* English common law, Islamic law, risk, *Takaful*, uncertainty

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1. Introduction

The concept of Takaful (Islamic insurance) is still in its infancy in the UK, although it is considered a potential new market with high prospects for profitability. This comparative study aims to illustrate the Takaful concept under Islamic (hereinafter referred to as Shari’a) law in order to assess whether Takaful could be considered a possible means of legal transfer1 under English common law. Toward this goal, the paper, inter alia, explores the concept of legal uncertainty in English common law, a legal system predominantly based on precedent, and the concept of uncertainty (Gharar) in Shari’a law, a legal system derived from the Qur’an and the Sunnah.

Some argue that, due to the mix of similarities and differences, reconciling the law on uncertainty is fraught with issues within both Shari’a law and English common law. Others theorise, using more critical analysis, that comparing the bases on which Shari’a law and English common law find value will lead to a greater understanding of the two legal systems and identification of their compatible aspects, leading to a more harmonious and mutually beneficial relationship. To this latter end, the philosophical, or better, the ontological meaning of uncertainty can best be understood if the concept is construed on a broader scale than its legal interpretations and effects. In this light, while legal interpretations might differ, an ontological approach to uncertainty may lead to a new way of thinking. Therefore, this article will consider the concept of uncertainty from both the legal and ontological perspectives.

In the insurance market and under insurance contracts, the concepts of uncertainty, legal uncertainty, and risk are dealt with differently: through risk-taking, under English common law, and risk-sharing, under Shari’a law. The differences reflect not only a word game, but also different legal views of insurable risk and uncertainty as between commercial and non-commercial insurance under the two legal traditions. This paper identifies the concept of “measurable uncertainty” – in accordance with Professor Frank Knight’s seminal book2 – as the only insurable risk. That concept also serves as the common element whose mutual understanding can form the basis for common ground in the regulation of the insurance market as between English common law and Shari’a law.

To this end, the first part of the article, in section 2 and sub-sections 2.1 and 2.2, looks at the concept of (legal) uncertainty under, respectively, English common law and Shari’a law. Section 2.3 then explains the ontological meanings of risk and uncertainty in order to highlight similarities between English common law and Shari’a law. Having provided the legal and theoretical backgrounds of key concepts related to the insurance market, sections 3 and 4 then illustrate Takaful (i.e., Islamic insurance) as an instance of risk-sharing by pointing out both the benefits of a possible implementation in the UK and the hurdles to implementation. The article’s content and arguments are summarized in the last part of the paper.

2. English Common Law: The concept of (legal) uncertainty

According to Husa,3 the English legal system is predominantly based on a common law approach and remains consciously tied to its historical origins despite social and economic changes. There has been resistance to major changes, even though various aspects of the legal system have come under

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1 ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993).
2 See generally FRANK H. KNIGHT, RISK UNCERTAINTY AND PROFIT (3d ed. 2002).
3 JAACKO HUSA, A NEW INTRODUCTION TO COMPARATIVE LAW 211 (2015).
investigation from committees and critics alike. This resistance raises questions as to how much the English legal system is open to influence from other legal systems of the world.

In the area of financial risk, however, recent years have shown some openness to change. One example is the Financial Services Bill. In December 2013, it passed into law as the Financial Services (Banking Reform) Act 2013 (UK). Arising from the concern about the massive financial frauds that the global financial crisis revealed, this legislation placed restrictions on high-risk investment-banking businesses. It also confirmed that senior managers could be liable to criminal prosecution for reckless misconduct, although one of the principal causes of the crisis has been identified as corporate governance failures. For this reason, the Act gave regulatory authorities greater powers to identify and address systemic risks as they emerge and provided for greater choice to consumers.

The adoption of the 2013 Act demonstrates that, without doubt, the laws that govern commercial and financial matters are of extreme importance for the UK, and that Parliament is willing to accommodate and accept changes to ensure stability of financial markets so that they remain economically competitive and offer greater choice.

Another indication of financial concern had happened even earlier, with regard to addressing legal uncertainty. The Financial Markets Law Committee (FMLC) was established in 2002 in the UK as a means of identifying issues of legal uncertainty or misunderstanding in financial markets, and of considering how such issues should be addressed. This Committee was also charged with liaising with the judiciary to help judges and courts remain up to date on developments in financial market practices. The establishment of the FMLC is important for strengthening the monitoring of financial markets as well as for acting on matters where issues are caused by legal uncertainty in the financial industry. But it should be highlighted that some aspects of legal uncertainty are inevitable in contemporary financial markets, which are by nature international and competitive.

A significant matter of debate that remains, however, is whether uncertainty in the common law, and specifically for commercial law, is a risk or an opportunity. With regard to legal uncertainty, there are two forms that are relevant in commercial law. The first is when some doubt remains unresolved over a substantial period of time. The second, although rare, occurs when a settled view of the law is changed by a court. Legal risk differs from legal uncertainty in that legal risk specifically focuses on the chances of being sued, being the subject of a claim in some other way, or suffering a loss due to a technical defect in a transaction.

Legal uncertainty can be linked with informed decision-making. In defining situations where uncertainty may arise, Professor Iain MacNeil uses three categories: first, when there is inappropriate use of language; second, when a word or words are used in a way that is inconsistent with the understanding of the

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6 Roger McCormick, Legal Risk in the Financial Markets 441 (2d ed. 2010).
contracting parties; and third, when there is unsettled usage in that there is no relevant agreement in the relevant community on the meaning of the word or words. When parties engage in commercial transactions, recognizing areas of legal uncertainty is part of an informed decision-making process, which in turn leads, ideally, to an efficient market. In other words, the contractual parties generally know the limits beyond which legal uncertainty can emerge, and they agree to contractual terms in order to avoid or at least mitigate that uncertainty. Should the parties go beyond those limits, they then may take on the legal risk of a possible claim or a loss.

Under English commercial law—as opposed to Shari’a law—risk-taking is not generally considered a negative strategy. Overall, English markets, as well as Western financial markets generally, are dominated by the idea of risk-taking in order to make a profit: the higher the risk, the higher the returns. The reliance on risk-taking necessitates a tricky balancing act in Western countries because, while contractual parties who go beyond legal uncertainty might be exposed to legal risk, nonetheless without a risk-taking approach there is no possibility of making profit. Specifically within the English insurance industry, the importance of risk-taking represents the crucial feature that allows the insurer to bear the possible risks that are incurred by the insured: risk-taking demands an available outlet for risk transfer.

Furthermore, recognizing that there are circumstances where uncertainty offers benefit to contracting parties—an opportunity—it has been suggested that legal uncertainty can best be reduced to the appropriate degree through contract terms that allocate or transfer risk arising from legal uncertainty and that use “clearance decisions,” guidance, and legal opinions to resolve matters. In other words, the commercial contract becomes a means through which the parties can govern uncertainty in a transaction and manage risk. It can even be said that, under English common law, the commercial contract becomes a risk-trading tool.

These concepts will be further explained below when the categories of risk and uncertainty are used as interpretation tools in order to underline similarities between English common law and Shari’a law.

2.1 (Legal) uncertainty under Shari’a law

Muslim scholars agree that the Qur’an and the Sunnah form the primary sources of Shari’a law, with its objective and purpose being the governing of all aspects of the private and public lives of Muslims. It functions as an all-embracing narrative of Islam as both a religion and a civilisation, and it encompasses a range of rules, regulations, teachings, and values. Shari’a law, like English common law, is not always straightforward, and must be interpreted by the judiciary. Such interpretation is particularly challenging when the social context changes. Further, unlike with English common law, decisions are made on a case-by-case basis with no judicial precedent. The decision of a court or a judicial committee

10Id. at 69.
11Please refer further to the concept of risk-sharing under Shari’a law discussed in paragraph 2.1, infra.
12In this light, legal uncertainty is translated into the general concept of risk, the latter interpreted as a form of measurable uncertainty in accordance with the understanding of Professor Frank Knight. It is, therefore, considered a negotiable object that can be transferred between contractual parties.
13MacNeil, supra note 9, at 69-99.
15Nima Mersadi Tabari, Islamic finance and the modern world: the legal principles governing Islamic finance in international trade, 31 The Company Lawyer 249, 249 (2010).
has no binding authority with respect to another case. Therefore, the Muslim judge needs to be suitably qualified to apply interpretation deemed to be appropriate within a given situation and ensure its consistency with Shari’a law.

The aspect of the law dealing with transactional matters, known as Muamalat, governs individuals’ interactions, including those concerning their financial and commercial affairs. Two key elements distinguish Muamalat: first, that individuals are always reminded that they need to obey God in their quest for their daily material needs, and second, that by acting upon the rules of Muamalat in daily life, a greater bond is created with God.

According to Dr. Patrick Soookhdeo, Islamic finance is not that relevant to the essential practices of Shari’a law. More controversially, he has stated that applying Shari’a law in finance is neither Islamic nor efficient. Others have argued, more persuasively, that Islamic finance is, in fact, an integral part of Shari’a law. Although it does not address finance in its modern form, Shari’a law does incorporate general principles governing the economic behaviour of Islamic society and specific instruments regulating classic commercial transactions. Indeed, throughout history, Islamic banking has gone through different phases of development with time required to transfer Islamic banking principles from the theoretical to the practical domain.

Facilitated to a large extent by the export of oil from Muslim states, Islamic finance and banking have seen a huge growth in recent years. As a result, Western institutions and governments have been keen to ensure they are part of the economic growth, and so have introduced Islamic finance and banking into their systems. This phenomenon has perhaps been a contributing factor in bringing Shari’a law and Islamic finance to the forefront of comparative study, discussion, and viable applicability.

Islamic scholars have found general rules governing economic activities in the Qur’an and within the Sunnah, and on that basis a doctrine of fairness in commercial dealings has been established. There are four components in this doctrine, namely, prohibition of Riba (usury), Gharar (uncertainty), and Qimar (gambling), as well as the encouragement of Ta’awon (mutual co-operation).

Gharar, literally translated, means uncertainty, hazard, chance, or risk, although there are a number of interpretations of what Gharar means in practice. Indeed, it can refer to a lack of knowledge itself or to

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16HALLAG, supra note 14, at 19.
17WEISS, supra note 14, at 8.
18BRIAN KETTELL, INTRODUCTION TO ISLAMIC BANKING AND FINANCE 15 (2011); MUNAWAR IqBAL & DAVID T. LLEWELLYN, ISLAMIC BANKING AND FINANCE: NEW PERSPECTIVES ON PROFIT SHARING AND RISK 95 (2002). For a good resource for understanding Muamalat as a concept, see NURADLI RIDZWAN SHAH MOHD DALLI, INTRODUCTION TO MUAMALAT (2008).
22Aldohni, supra note 20, at 249.
23SOOKHDEO, supra note 21, at 15.
25Aldohni, supra note 20, at 7-8; VISSER, supra note 14, at 12-26.
27SOOKHDEO, supra note 21, at 249.
28Indeed, according to the Financial Times Lexicon Gharar means “risk, uncertainty or hazard.” http://lexicon.ft.com/term?term=gharar. In particular, the Arabic word for Gharar is (Resources for understanding Gharar).

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a contracting party’s lack of knowledge. However, this broad interpretation needs to be defined and narrowed. In particular, the concept of Gharar is connected both to the concept of legal uncertainty and to uncertainty itself in economic terms. In this meaning, the concept of Gharar is linked to the concept of risk. It is, as it will be further explained, a pure form of risk, in accordance with the thesis of Professor Knight that defines uncertainty, as opposed to risk, as an unmeasurable form of hazard. With the moral aim of ensuring that contracting parties are clear on what they are agreeing to and understand their rights and obligations, Gharar is not permissible when there is an unknown outcome in an exchange. Indeed, it has been noted that contracts are forbidden under conditions of excessive uncertainty and unacceptable levels of risk. In this context, it is important to clarify that Sharia law, in reference to Gharar, usually does not go beyond the contract to ascertain what is in the minds of contracting parties. This means,

Footnote continued

Lambak, Shariah Juridical effect of Gharar in predetermining Takaful contribution, 1 INTL. J. EDUC. & RES. 1, 1 (2015). Although there is no verse in the Holy Qur’an that proscribes Gharar, vanity is forbidden in two Islamic verses that are usually connected to the prohibition of Gharar. The first one is under the Holy Qur’an, Surah 2, verse 188: “ٍوَأَطْلَعْتُمْ أَفْوَالَكُمْ بَيْنَنَا بِبَابِ الْبَابِ وَذَلِكُمْ يَا أَيُّهَا الَّذِينَ آمَنُوْا إِنَّكُمْ أَنْتُمُ الْمُأْمُوْنُ” (Verse 188). Verse 188 has been translated by the Islamic scholars Dr. Muhammad Taqi-ud-Din Al-Hilali, and Dr. Muhammad Muhsin Khan as follows: “<< And eat up not one another’s property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc.), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully >>. Translation of the meanings of the Noble Qur’an in the English language, 39. Furthermore, the other verse of the Holy Qur’an that concerns Gharar is the Surah 4, verse 29: “يَا أَيُّهَا الَّذِينَ آمَنُوْا إِنَّكُمْ أَنْتُمُ الْمُأْمُوْنُ” (Verse 29). Verse 29 has been translated always by the same Islamic scholars Dr. Muhammad Taqi-ud-Din Al-Hilali, and Dr. Muhammad Muhsin Khan as follows: “<< O you believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you >>. Translation of the meanings of the Noble Qur’an in the English language, 112. For an interpretation of these verses in terms of Gharar prohibitions, see Abdul-Rahim Al-Saati, The Permissible Gharar (Risk) in Classical Islamic Jurisprudence, 16 J. King Abdul Aziz U.: Islamic Econ. 3, 7 (2003). Finally, on the possible definitions of Gharar, see also Mohammad Al-Ameen Siddiq Al-Dhareer, Al-Gharar in Contracts and its Effects on Contemporary Transactions 10 (Eminent Scholars Lecture Series 1997). Indeed, Al-Dhareer divides Gharar in jurisprudential terms in three main definitions:

1. First, Gharar applies exclusively to cases of doubtfulness or uncertainty as in the case of not knowing whether something will take place or not. This excludes the unknown. The definition by Ibn Abidin is a case in point. “Gharar is uncertainty over the existence of the subject matter of sale”; second, Gharar applies only to the unknown, to the exclusion of the doubtful. This view is adopted by the Zahiri school alone. Thus according to Ibn Hazm: “Gharar in sales occurs when the purchaser does not know what he has bought and the seller does not know what he has sold”; third, a combination of the two categories above; Gharar here covers both the unknown and the doubtful, as exemplified by the definition proposed by Al-Sarakhsy: “Gharar obtains where consequences are concealed”. This is the view favoured by most jurisprudents. I have opted for this last definition because of its more exhaustive coverage of the jurisprudential elements collated under Gharar.

Id. at 10.


30Al-Saati, supra note 28, at 5.

31KNIGHT, supra note 2, at 233. In particular, the concepts of uncertainty and risk are extremely important in order to make the difference between insurable and uninsurable risks. Therefore, because this paper is focused on a comparative study of Takaful, its recognition and understanding is probably even more important in order to construct a common legal ground for the implementation of a legal transfer related to Takaful into the UK legal system.

32Aldohni, supra note 20, at 249.
therefore, that Gharar is not about deception nor, unlike uncertainty in the English common law, is it about taking a risk in decision-making.\textsuperscript{33}

However, the reality is that with commercial contracts there will always be some element of risk and uncertainty.\textsuperscript{34} Some Gharar is, therefore, acceptable as it will not always be possible to eliminate uncertainty totally from exchange contracts.\textsuperscript{35} Due to the prohibition of Gharar and, therefore, of risk-taking, contracting parties look to find risk-sharing solutions\textsuperscript{36} (for instance, the Takaful that will be further explained in this paper) instead of risk-trading tools. To this end, the risk of a commercial transaction is admissible only if all the contracting parties share the same level of acceptable risk inside a transaction.\textsuperscript{37}

Gharar in Islamic finance is not without issues, primarily because there is no universal agreement among Muslim jurists as to what degree of legal uncertainty is acceptable in commercial transactions. Gharar is therefore a matter of interpretation, which in itself can cause issues.\textsuperscript{38} In an attempt to counter such issues, learned scholars are generally relied upon to distinguish between contracts containing minor Gharar (allowed) and contracts containing substantial Gharar (forbidden, and therefore, void).\textsuperscript{39}

\subsection*{2.2 Legal uncertainty under English common law and under Shari'a law}

There are some significant differences between legal uncertainty in English common law and Islamic finance. A major difference is that the main principles of Islamic finance are governed by Shari'a, which is considered divinely revealed: Muslims must comply with it in order to perform their religious obligations. In contrast, English common law depends only on an earthly "law giver."\textsuperscript{40} The practical consequence is that some financial tools acceptable under English common law are not acceptable under Shari'a law.

For example, the prohibition of Gharar in Islamic finance means that a transaction involving what scholars deem to be an unacceptable level of uncertainty is void. Consequently, derivatives, including options, forward contracts, and futures, are invalid. Conventional insurance, too, is invalid because the total amount of the premium to be paid by the policyholder is undeterminable, and this imposes an unacceptable level of uncertainty on the price of the agreement.\textsuperscript{41} On the other hand, in the UK, conventional insurance is not usually deemed invalid. Hence, due to the prohibitions in the doctrine of fairness in commercial dealings, there is a limit on the financial offerings that an Islamic bank can make as compared with banks operating under English common law.

Another major difference in the approaches to legal uncertainty is that under English common law, legal uncertainty can be acceptable even when it is more than just a minor uncertainty; some even argue

\begin{thebibliography}{10}
\bibitem{IQBAL & LLEWELLYN} IQBAL & LLEWELLYN, supra note 18, at 32-34.
\bibitem{Aldohni} Aldohni, supra note 20, at 249.
\bibitem{Waheed Akhter} Waheed Akhter, Risk Management in Takaful, 2 ENTERPRISE RISK MGMT. 128, 129 (2010).
\bibitem{BALALA} BALALA, supra note 29, at 42. See Nehad A. A. Khanfar, A critical analysis of the concept of Gharar in Islamic Financial Contracts: Different Perspective, 37 J. ECON. COOPERATION & DEV. 1, 2 (2016).
\bibitem{BALALA} BALALA, supra note 29, at 39. In particular, she reported how the concept of Gharar usually distinguishes between forbidden Gharar and permissible Gharar. Only the forbidden Gharar can render a contract void. That is also the distinction that Al-Baji, a Maliki scholar, has made between major Gharar (forbidden) and minor Gharar (ineffective) (see Al-Saati, supra note 28, at 9).
\bibitem{Konrad Zweigert & Heim Kotz} KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 303-04 (3d ed. 2008).
\bibitem{SOOKHDEO} SOOKHDEO, supra note 21, at 15.
\end{thebibliography}
that implementing rules designed to promote legal certainty is a strategy that is doomed to failure.\textsuperscript{42} In contrast, in Islamic finance a great effort is made to reduce uncertainty as much as possible, and, as previously noted, what remains must be minor for a transaction to proceed.\textsuperscript{43}

On the other hand, there appears to be some common ground between English common law and Shari’\textsuperscript{a} law when compared based on the ontological, rather than legal, definition of uncertainty. This comparison reveals that both legal systems acknowledge and tolerate some level of uncertainty. English common law fosters a legitimisation of the concept of risk-taking when operating under conditions of uncertainty,\textsuperscript{44} while Islamic law does not entirely reject risk when operating under conditions of some uncertainty. Islamic law does not provide the contracting parties with the risk-trading solutions that English common law offers, but it does acknowledge the concept of risk-sharing. Thus, it cannot be argued that uncertainty itself as a pure form of risk is never capable of being shared or simply traded into a contract.

Underlying these approaches to uncertainty, it has also been argued by some that, compared to other systems, Islamic finance is not that different from Western world finance and is not that different from English common law and other Western legal systems.\textsuperscript{45} For example, in both systems, the decision-making about whether uncertainty is acceptable or renders a contract void has been left to individual judges to make. Of course, the judiciary under the English common law is restricted by a rule of precedent not applicable to Muslim judges. However, Muslim judges are also subject to restrictions because they need to ensure that the Qur’an and Sunnah are followed in their decision-making.

### 2.3 The concepts of risk and uncertainty: New interpreting tools to compare English common law and Shari’\textsuperscript{a} law

Despite the different approaches to legal uncertainty of English common law and Shari’\textsuperscript{a} law, uncertainty itself, as noted above, is a common feature of the two legal systems. Its importance in the insurance industry, for example, is self-evident. And in both systems, the philosophical concept of uncertainty goes beyond its apparent definition as “legal.” Indeed, the differentiation of risk from uncertainty and the categorisation of risk in its ontological meaning are key elements to understanding uncertainty and risk from a legal point of view.

In this light, the epistemological analysis is enlightening. If there is risk, there must be something unknown or that will produce an unknown result. Hence, knowledge about risk is knowledge about lack of knowledge. This hendiadys—knowledge and lack of knowledge—constitutes the focal point of risk analysis. It demonstrates that, epistemologically, knowledge of risk is the point at which the unknown (uncertainty) becomes knowable to a certain degree.

Risk, in this new light, becomes the probability of occurrence of an event that may or may not occur. Viewed in this light, risk is always a measurable uncertainty. According to Prof. Knight:

> the practical difference between the two categories, risk and uncertainty, is that in the former the distribution of the outcome in a group of instances is known (either through calculation \textit{a priori} or from statistics of \textit{past experience}), while in the case of uncertainty this is not true… the best example of uncertainty is in connection with the exercise of judgement or the formation of those

\textsuperscript{42}MacNeil, supra note 9, at 68-99.
\textsuperscript{43}BALALA, supra note 29, at 39.
\textsuperscript{44}See Section 2 of this paper, supra.
\textsuperscript{45}Aldohni, supra note 20, at 56.
opinions as to the future course of the events, which opinions (and not scientific knowledge) actually guide most of our conduct.46

So, it is possible to state that knowledge about risk is knowledge about a knowable situation. In other words, the ontological discourse on risk represents what is knowable in principle or a priori by virtue of the laws of probability and the science of statistics. It is knowledge of objective facts. On the other hand, uncertainty is the knowledge of unknowable instances; it is the estimate of estimates. As opposed to an objective conception of risk, uncertainty is subjective, relative, and a form of “pure” risk. For this reason, Prof. Knight describes risk as a measurable uncertainty (objective dimension) and uncertainty itself as an unmeasurable calculation of instances (subjective dimension).

As a result of this analysis, the steps needed to bring the two legal systems together follow logically. The need to interpret financial acts under English common law and under the main Shari’a sources (i.e., the Qur’an and Sunnah) has compelled both systems to acknowledge legal uncertainty and to attempt to manage it using forms of risk-taking (under the common law) and risk-sharing (under Shari’a law). The concept of risk management translates, in English common law, into the concept of consistency with precedent, and, in Shari’a law, into consistency with rules and principles (i.e., Gharar). While the differences in these laws might appear at first to be insurmountable, once risk is understood as a measurable uncertainty, the subject matter of insurance contracts between English common law and Shari’a law can coincide.

This coming-together results because both systems contemplate a certain level of measurement when determining what is and is not acceptable. The concept of Gharar is that legal uncertainty is permissible when it is minor; legal uncertainty under English common law, while generally admissible even if it is more than minor, is not acceptable if the commercial transaction leads to an unfair result.47 Thus, when the contractual parties are entering into a new transaction they are implicitly referring to a measurable uncertainty that can be governed through the means of the contract and/or through negotiations. In other words, they are referring to the conception of risk: a measurable uncertainty that can be negotiated because it can be measured, and in some instances under the law, it can even be corrected (through, for example, the principle of good faith).

On the other hand, when that same uncertainty is connected with the parties’ intentions or with a more general concept of desirability or opinions, uncertainty is no longer identifiable and measurable. In Professor Knight’s words, this is the reign of “pure” risk. This is the ontological existential space of uncertainty, namely, an unmeasurable instance of risk that cannot be controlled or governed or better managed. When there is uncertainty in the form of pure risk, there is not any possible risk-trading or risk-sharing solution to be implemented. It is a pure form of hazard.

Therefore, the ontological meanings of risk and uncertainty provide the reader with a new interpretation of legal uncertainty that derives from a sound understanding of uncertainty as an unmeasurable form of risk. Neither the law nor any other means of governance can interfere beyond this limit because in this space, risk-trading solutions and risk-sharing perspectives cannot be constructed. Uncertainty simply cannot be implemented or traded into a contract when it is a pure form of risk.

46Knight, supra note 2, at 233.
The next research question will centre on discovering how risk management, and therefore, means of governance are structured in law under a Takaful insurance contract and how a common law jurisdiction like the UK can accommodate the Shari’a construction of risk beyond its legal qualification.

3. **Takaful as an instance of risk sharing under Shari’a law**

In the Islamic world a considerable portion of the people and businesses are reluctant to use conventional insurance because a majority of Islamic jurists and scholars believe that it is not permissible under Shari’a law. Concerns about conventional insurance come first from the prohibition of Riba (interest), because excess premiums retained by insurers as profits are regarded as a form of prohibited excess; second, from the prohibition of Gharar (uncertainty), because amounts payable under insurance contracts depend on future events, which renders the outcome of the contract materially uncertain; and third, from the prohibition of Maisir (gambling), because these contracts are seen as speculative. This reluctance to rely on conventional insurance models has also increased in the last fifty to sixty years because of the growing political independence of many Muslim countries and their willingness to revive Shari’a law in place of secular legislation.

In this situation, Islamic scholars have endorsed the concept of Takaful as a permissible arrangement for the sharing of risk. Consequently, Takaful insurance products are emerging as a central part of a Shari’a law-compliant area of financial services, helping to meet insurance needs in ways that are consistent with Muslim beliefs.

**Takaful** is, in principle, a charitable construct through which participants aim to help others who have suffered misfortune in the spirit of cooperation, mutual benefit, and social protection. In support of this approach, in its session held in Riyadh in November 2013, the Council of the International Islamic Fiqh Academy (IIFA) adopted a resolution on cooperative insurance. According to the resolution, commercial insurance is different and separate from non-commercial insurance because the latter does not aim to achieve profit, but instead, to promote cooperation in the bearing of risk. It is a concept of risk-sharing where the risk is not transferred to the insurer. Therefore, Gharar is avoided. Indeed, the form adopted by Takaful providers is somewhat similar to that of a co-operative insurance organisation, but it complies with...
Shari‘a law requirements by addressing and resolving the objections against conventional insurance. Under conventional insurance the insurance company accepts the financial burden of others’ losses. In other words, the conventional insurance company is taking risk and is seeking profit by virtue of the premium that represents the price for the bearing of the insurer’s risk. In contrast, in a Takaful arrangement, the participants contribute a sum of money as a Tabarru (donation) into a common pool that is used to mutually assist the members against other areas of Islamic finance.

The Takaful structure adopted will vary from jurisdiction to jurisdiction, largely based on the school of thought of the legal jurists prevalent in the country. The most frequent structures adopted are based on either Mudaraba or Wakala models. In each case the funds from the Takaful participants are pooled. These pooled funds are then invested by the Takaful operators, typically in a balance of cash, short-term maturity investments, and longer-term maturity investments to ensure that the pool of funds is available to pay any claims as they arise. Additionally, Takaful operators will usually enter into a Qard Hassan (a compliant, interest-free loan) to meet any temporary liquidity shortfalls in the pool.

The principal difference between the Mudaraba and Wakala models is the manner in which the Takaful operators are remunerated. Under a Mudaraba structure, the Takaful operator is appointed as an investor of capital on behalf of the Takaful participants. The operator is entitled to a share of the profits of the venture (i.e., the excess contributions once claims have been paid) in return for the operator’s expertise in managing the investments and underwriting operations. In contrast, under a Wakala structure, the Takaful operator is paid a fee for managing the Takaful investments and underwriting operations, and the risk of the surplus being depleted is borne primarily by the participants. However, the operator’s remuneration may (depending upon the terms of the contract) include a performance fee, charged against any fund. In everyday practice it is common for Takaful structures to include both Mudaraba and Wakala elements, usually with the underwriting aspects of the business being subject to a Mudaraba arrangement, and the investment responsibilities of the Takaful operator regarding the Takaful pool being subject to a Wakala arrangement.

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57 Under conventional insurance the risk is shifted from the insured to the insurer. This understanding of conventional insurance in the UK is confirmed by recently-enacted legislation concerning the insurance market (Insurance Act 2015 (UK), http://www.legislation.gov.uk/ukpga/2015/4/contents, current as of 14 February, 2017). According to Section 3 of the Insurance Act, the insured has a duty of fair representation of the risk to the insurer. Id.


59 Wakala is a traditional Islamic contract that is equivalent to agency in UK. For more information on this area, see Jonathan Ercanbrack, Regulating Islamic financial institutions in the UK, in ISLAMIC FINANCE IN EUROPE 157 (Valentino Cattelan ed., 2013).

60 Hainsworth, supra note 53, at 193.


62 Murat Cizakca, Islamic Capitalism and Finance: Origins, Evolution and the Future 200 (Studies in Islamic Finance, Accounting and Governance 2011). In particular, evidence suggests that modern Takaful is based mainly on this model rather than the Mudaraba that was used more when the development of Takaful was starting in the 1980s.

63 Hainsworth, supra note 53, at 193.
It is crucial that all activities of the Takaful operation comply with Shari’a rules and principles. The main objective in this respect is to avoid Haram (prohibited) areas for underwriting and investments. The importance of Shari’a law compliance is the essence of Islamic financial services; therefore, Takaful companies must employ a mechanism to ensure that all their transactions (e.g., underwriting, claims, and investments) are Shari’a law-compliant.

Within the Takaful operation the role of overseeing this compliance with Shari’a principles is undertaken by a Shari’a Supervisory Board (SSB). The SSB is made up of an odd number of members (usually three or five), all of whom must be qualified jurists in Fiqh al-Muamalat (Islamic transactions jurisprudence) and have a suitable background and experience in insurance operations and concepts. The aim of the SSB is to support and advise Takaful companies to conduct their activities in compliance with Shari’a law principles. This includes reviewing contracts, clauses, and reinsurance treaties; reviewing investment transactions; answering questions from the board and employees relating to Shari’a law issues; and reviewing new fatwas (legal opinions) concerning insurance. The role of the SSB is not within day-to-day operations and transactions; the technical details in terms of underwriting and investment must be conducted by those with sufficient knowledge. Products that comply with Shari’a law principles earn the Islamic label, which is essential for uptake by Muslim consumers.

4. Takaful in the UK: perspectives and drawbacks

In 2013 the UK government launched an Islamic Finance Task Force with the objective of promoting the UK as an investment destination and to raise the profile of Islamic finance in the UK. The increased viability of the UK as a market led to it becoming the first country outside the Islamic world to issue a sovereign Islamic bond, called a Sukuk, with over USD 34 billion being raised through 49 issues to date. The UK is thus emerging as a suitable market for Islamic finance, but, despite its potential to bring significant benefits, the concept of Takaful remains largely in its infancy. Increased Takaful utilisation in the UK

64 The five main Haram areas can be summarised as follows: alcohol and drugs, including alcohol manufacturers, the transportation thereof and shops selling alcohol; prostitution, while legal in some countries this is strongly condemned in Islam; Haram items such as pork and pigs, pornography, gambling, and sculptures (as to not encourage idolism); and finally, any transactions involving Riba (interest), Gharar (uncertainty), and Maisir (gambling).


68 The largest growth in Takaful insurance is happening mainly in Muslim-dominated countries. This could be explained by a number of factors. First, the growing wealth in majority-Muslim countries has led to an increase in insurable assets and activities in the region. Second, some countries are showing a commitment to robust insurance regulation and the introduction of types of compulsory insurance, such as motor and medical, which is enticing risk and insurance concepts in to the minds of the local population. Finally, the development of Takaful as an alternative to regular insurance is giving a boost to the appetite for insurance among parts of the community who may have avoided conventional insurance in the past. By 2017, gross global Takaful contributions are estimated to reach over USD 20 billion. See Finance Forward, World Takaful Report 2016: Connecting the dots, forging the future, 6 http://www.takafulprimer.com/main/downloads/ms_5860.pdf. The growth is driven largely by the wider prospects of the Islamic banking sector in predominantly Muslim countries. Having said that, Takaful is serving as a viable alternative to conventional insurance, with countries like Saudi Arabia, Malaysia, UAE, Oman, Indonesia and Turkey all leading the way for the global development of Takaful products (see EY, Global Takaful Insights 2014: Market updates, growth momentum
would boost insurance penetration for Muslim consumers. In addition, as a socially conscious insurance model it can attract non-Muslim consumers seeking ethical financing, stability, and sustainability who recognise the significance of the emerging Takaful/Retakaful (Islamic reinsurance) market.

However, current approaches to regulating Takaful are problematic. The UK financial services regulator\(^\text{69}\) has suggested that it would treat a Takaful provider as it would any other insurance provider, assuming there was enough similarity in function and form. Further, while Takaful is beginning to grow as an alternative to conventional insurance outside its major markets of the Middle East and Malaysia, the lack of consistent regulation risks limiting its future growth.

In particular, current regulatory approaches outside its major markets do not adequately recognize how Takaful operates. Unlike conventional insurance, Takaful does not involve the transfer of risk. As explained above, the Takaful fund is owned by its consumers, who jointly take on the insurance risk and share in any surplus or shortfall. This means that participants are effectively both the insurer and the insured. The Takaful operators themselves do not own the funds and are more in the position of agent or fund manager. Yet, although conceptually different from conventional insurance, in many jurisdictions Takaful operators are regulated in the same way as conventional insurers. This approach may lead to accounting and reporting issues, which reflect Takaful principles unsuitably while also running the risk of affecting the long-term viability of the organisation.\(^\text{70}\)

In the UK in particular, Takaful operators are subject to the same regulatory requirements as conventional insurers because the UK the financial services regulator has not enacted specific rules adapting the requirements for conventional insurers. The financial services regulator has stated broadly that it will take a practical approach to its interpretation and supervision of Islamic finance, provided there is similarity in function and form to conventional financial services or services organisations.\(^\text{71}\) But providing Takaful organisations with the same legislative framework as the one designed for conventional insurers might hinder the development of the market when the new organisations have to address such issues as the requisite levels of solvency and liquidity, as well as accountancy and reporting requirements for the businesses. For the UK Takaful industry to achieve critical mass, the UK regulator needs to develop more specific reporting procedures and corporate governance standards that are suited for Takaful operators. This further development will help to improve the efficiency and transparency of the industry, along with providing much-needed regulatory support for the future growth of the industry.\(^\text{72}\)

The implementation of a Takaful market in the UK could be an especially attractive type of commercial insurance due to the profit-sharing to which the Takaful operators can be entitled once insurance claims have been paid off. Nonetheless, management of the pooled funds by Takaful operators requires a high level of expertise in relation to short-term as well as long-term investments. This feature could lead to a possible information asymmetry on the side of the participants (i.e., principals) who cannot directly control...
the investment decisions of the Takaful operators (i.e., agents). Therefore, a moral hazard issue can emerge if Takaful is implemented in Western countries because of the potential for Takaful operators engaging in risky investments to maximise their own profit over the interests of the participants to the pool. This could irremediably undermine the spirit of mutual cooperation of Takaful insurance. To this end, it would be a reasonable and cautious choice of English common law to regulate Takaful operators on the adopted model of conventional insurers by imposing, inter alia, reporting requirements on the business. This feature – in particular – can effectively prevent information asymmetry and protect investors from misleading conduct of management.

4.1 The hurdles to implementing a Takaful market in the UK

One of the issues facing the Takaful market in the UK is a lack of suitable reinsurance capacity. Takaful operators need to ensure that their organisations are run in accordance with the requirements of the jurisdiction. This includes the management of claim risk and liquidity. These risks in particular raise challenges in Islamic Takaful markets as well as international Takaful markets such as London’s since efficient risk-spreading amongst participants is dependent on there being enough Takaful and Retakaful pools to acquire critical mass. The global Retakaful market is still in its infancy, and many Takaful operators have had to resort to conventional reinsurance in order to manage their claims and liquidity levels in line with regulatory obligations. However, conventional reinsurance confronts the same prohibitions on Gharar and Riba as conventional insurance.

For these reasons, in order to obtain conventional reinsurance, Takaful operators must obtain special dispensation from their SSBs, relying on the principle of Darura (necessity). As global Takaful/Retakaful markets grow, it is inevitable that SSBs will be less approving of the use of conventional reinsurance on the grounds of necessity. Furthermore, being unable to obtain suitable reinsurance may suggest to some Muslim customers that the business is less authentic and not in compliance with true Shari’a law principles.

While the lack of Retakaful capacity is certainly a risk to all Takaful operators, it also poses an opportunity for the City of London. If UK Takaful operators were to promote themselves as open for wholesale operators who are struggling to find suitable reinsurance locally, it would increase the visibility of the UK as a global Takaful market.

While external factors may hinder the development of the UK market, some of the major risks to the success of the Takaful industry come from within the organisations themselves, chiefly the SSBs. One challenge in particular relates to the skills and qualifications of SSB members. The SSB takes responsibility for vetting products on behalf of consumers; therefore, the quality of their judgement and their ability to

73In particular, in terms of short-term market expansion, some UK companies may achieve success through the use of a Takaful window. In one type of such an arrangement, a conventional insurance provider will offer Takaful products through the same entity that offers conventional insurance, but on the understanding that Takaful funds are segregated from those of the conventional insurance funds held on the books. It can be argued that the use of Takaful windows undermines the sincerity of the intention which is necessary for Takaful to ensure its Shari’a law compliance since transactions are essentially operated together with the non-Shari’a pooled funds. This concern has also lead to the view that the expansion of the Takaful market in places like the UK is a marketing construct to sell insurance to Muslims and has little to do with religious or social objectives.

74Hainsworth, supra note 53, at 193.
comport their decisions with Shari’a law is vital. However, finding scholars that are knowledgeable both in Shari’a finance law and in financial and accounting practices is difficult. Furthermore, there is no formal accreditation available to provide the UK regulator with the confidence that Shari’a scholars have the requisite abilities to fulfil their auditing and advisory roles. A lack of standardisation and consistency in Shari’a legal opinions across Islamic financial institutions has the ability to undermine confidence in the industry and hinder its growth.

A further potential issue arising from the operation of the SSB may appear when it determines that an organisation has breached Shari’a rules. This declaration may affect consumers’ confidence in the organisation. This also has the effect of turning compromised assets into liabilities that need to be offloaded, potentially calling in to question the solvency of the organisation. At present the UK financial services regulator largely ignores these risks as they are seen as unquantifiable.

Presently in the UK, SSB members are usually appointed and suspended directly by company directors; therefore, they are effectively dependent on the firm’s management for their continued employment. SSB members can, therefore, be said to have an economic stake in the firm and cannot be said to carry out their roles independently. It could be imagined, however, that this risk could potentially be mitigated by imposing strict ethical standards so that reputations and future career prospects may be hindered should SSB member services be found contrary to Shari’a law principles.

However beneficial a strict moral constitution might be, though, it does not make up for a lack of specific corporate governance procedures regulating SSBs in the UK. The UK regulator has acknowledged the role of SSBs and recognised their potential impact on the solvency of Islamic financial services organisations. Nevertheless, it has stopped short of creating criteria and procedures to address the qualitative nature of SSBs. At present the regulator relies on its existing procedures to examine corporate governance as applied to all financial institutions. To date the regulator has decided that authorised Islamic financial institutions employ their Shari’a scholars in a strictly advisory role, meaning that their responsibilities are not to interfere in the management of the firm. Accordingly, the scholars employed by the organisation do not have to meet the “fit and proper” regulatory criteria applicable to company directors.

As secular regulators, the Prudential Regulatory Authority (PRA) and the Financial Conduct Authority (FCA) do not take a role in advising or endorsing the religious aspects or compliance of product offerings; it is left to the individual institutions to ensure that their products are Shari’a law compliant. Therefore, it does seem unlikely that any SSB will materially impact the management or direction of the firm in question. While the industry is in its formative years, this may be the simplest approach to adopt; however, the UK regulator must appreciate that the role of the SSB is pivotal within a business. The SSB legitimises the organisation and its role stimulates Muslim consumer demand for Islamic-compliant financial services.

Lastly, a further risk to the UK Takaful market may come from its likely consumers. Some Muslims are not convinced that Islamic financial products have achieved a sufficient standard of Shari’a law.

75JONATHAN ERCANBRACK, THE TRANSFORMATION OF ISLAMIC LAW IN GLOBAL FINANCIAL MARKETS 202 (2015) [hereinafter ERCANBRACK, TRANSFORMATION].
77ERCANBRACK, TRANSFORMATION, supra note 80, at 200.
78ERCANBRACK, TRANSFORMATION, supra note 80, at 203-206.
compliance. Ultimately, the issue of trust and confidence in the products available plays a significant role in the growth of the industry.\footnote{Zulkifli Hasan & Ahmad Fuad, \textit{New Takaful Framework under the Malaysian Islamic Financial Services Act}, 52 \textit{J. INT'L BANKING \\& REG.} 54 (2015).} This is also reflected in the price. Consumers will be willing to pay for quality products in the market. On the other hand, some consumers may respond to poorer quality products by decreasing their investments or utilising their exit option from the company or the \textit{Takaful} market altogether. To this end, it is important that trust, transparency, and disclosure are evident in the market. Hence, the UK regulator and industry groups should endorse minimum standards or best practices to ensure that low-quality producers do not saturate the market.

Despite the limited implementation of \textit{Takaful} in the UK market, the most prolific voice to emerge is Cobalt Underwriting. The company launched in 2012 as a managing general agent in the Lloyd’s of London insurance market, exclusively handling Islamic insurance with the capital backing of insurance companies such as XL, AIG and QBE. Cobalt has achieved a level of success offering a number of different insurance products, such as property and casualty, and has recently expanded into the financial market.\footnote{See Cobalt Underwriting Website, \url{http://www.cobaltuw.com}.} However, the Chief Executive Officer has suggested that going in to \textit{Takaful} insurance might not be as easy as it seems.\footnote{C. Parra-Serrano, \textit{UK insurance industry primed to target Takaful opportunities}, \textit{Insurance Post}, \url{http://www.postonline.co.uk/post/news/2304988/uk-insurance-industry-primed-to-target-takaful-opportunities}.}

5. Conclusions

The comparative research carried out in this paper has illustrated that although legal uncertainty is construed and approached in different ways between the two different legal systems, the concepts of uncertainty and risk in English common law and \textit{Shari'a} law can be analysed consistently in the evaluation, implementation, and promotion of \textit{Takaful}. Indeed, \textit{Takaful} implementation in the UK should not only have positive effects in terms of the national economy, but should also enhance social effects by offering Muslim consumers products that respect their beliefs. While, as described above, \textit{Takaful} certainly confronts risky areas and hurdles potentially limiting its full implementation in the UK market, specific regulatory support from the PRA/FCA and endorsement from industry groups could give the market the ability to soar.

In summary, \textit{Takaful} is a form of cooperative risk management and must be \textit{Shari'a} law compliant, unlike conventional insurance in the UK. \textit{Takaful} consumers effectively act as both the insurer and the insured. While the legal conception of uncertainty differs between English common law and \textit{Shari'a} law, the systems have a common understanding of the fundamental concept of uncertainty. Indeed, uncertainty plays an important role in structuring the risk management of insurance contracts in both English common law and \textit{Shari'a} law. Specifically, while English common law has adopted a concept of risk-taking through which the contract becomes a risk-trading tool used to deal with uncertainty in commercial transactions, under \textit{Shari'a} law the concept of risk-sharing is used to deal with uncertainty in commercial transactions. The difference in approach is critical because under \textit{Shari'a} law \textit{Gharar} cannot be negotiated, only limited.

It has been noted that the conception of uncertainty has mainly centred on its broad identification as an unmeasurable form of classification of instances. Uncertainty is the “pure” form of risk. But in the world of commercial transactions, most uncertainty arises as risk that is measurable, and therefore, capable of
being limited through negotiation. This measurable “real” risk can therefore legitimately represent the subject matter of an insurance contract under both Shari’a law and English common law. This common meaning of uncertainty as measurable risk thus bring together two different legal traditions, and can constitute the legal ground for the justification of a legal transfer of Takaful into English common law.

In the end, risk is a common feature that is always present in commercial transactions, but uncertainty is the negative outcome that always has to be avoided through negotiation, or at least limited by means of prohibitions (i.e., Gharar).

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