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Cover Page Footnote

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THE THEORY OF GHARAR (RISK AND UNCERTAINTY) IN ISLAMIC LAW

A Major Cause of Disputes in Construction Contracts•

Dr. Hisham Abdelrahim Mirghani,•

Abstract:

There is widespread interest in the applications of Islamic law in construction contracts. This is due to the ongoing construction boom in many countries in the Middle East whose civil codes are based on Islamic law. This paper addresses the applications of an important theory in the Islamic law of transactions to construction contracts. This theory of *gharar* – normally translated as risk and uncertainty- has wide ranging applications in the field of construction law. The paper defines *gharar* and summarises its basic principles. It then goes on to introduce the essentials of a valid contract in Islamic law. These essentials are then related to the contract documents normally used in construction contracts. Based on this, five specific practical applications of the theory of *gharar* in construction contracts are elaborated, and illustrated with some case studies. The paper concludes that risks and uncertainties are inherent in construction contracts, due to the special nature and complexity of these contracts. These risks and uncertainties tend to lead to conflict and disputes. The theory of *gharar* places a limit on the level of risk and uncertainty that is

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acceptable in contracts of exchange. Exceeding this limit leads to invalidity of the contract. The theory of *gharar*, therefore, has a major role to play in the prevention and resolution of construction disputes. It is of vital importance that those involved in the drafting and execution of construction contracts- be they construction lawyers or engineers- understand this theory and its applications.

Keywords: Construction law**,** Islamic law, construction contracts, dispute prevention, dispute resolution, risk management.

1. INTRODUCTION

The civil codes of many Middle East countries derive their major rules and principles from Islamic law (Shari'a). This includes the codes of the UAE, Qatar, Saudi Arabia(1), Jordan, Iraq and Sudan. Many of these countries are experiencing construction booms, with the local laws- including the local civil codes- governing most of the contracts involved.

The principle of *gharar*- usually translated as risk and uncertainty- is an important and leading principle in the Islamic Law of Transactions. It is embodied in the civil codes of the countries mentioned above. Much has been written in contemporary research in Islamic law on the applications of this principle in such areas as: commerce; insurance; banking and finance. Hitherto, little has been written regarding the applications of this important principle in the field of construction law.

Some contemporary researchers in Islamic law have called the principle of *gharar* a theory, as it is a collection of a number of principles and rules that relate to one subject.

(1) In Saudi Arabia, civil law is not codified but its rules are based on Islamic law, see A K Medalla A REVIEW OF PROJECTS AND CONSTRUCTION LAW PRACTICE IN SAUDI ARABIA (2015), 96-97.

This paper sets out to apply this important legal theory to the field of construction law. Some important conclusions are reached. Firstly, the presence of risk and uncertainty- as defined by this theory-is a major cause of disputes in construction projects. As a result of this, guidelines can be deduced from this theory to prevent or minimize disputes. Moreover, in addition to aiding in the prevention of disputes, the theory contains the cure for disputes when they do occur.

2.0 THE CONCEPT OF *GHARAR*

In this section, *gharar* is defined in some detail; its basic principles are briefly explained; the areas where it is relevant to construction law are identified; and its importance to construction professionals is highlighted.

2.1 Definition of *Gharar*

The Arabic word *'Gharar'* means risk, uncertainty, or hazard. When it is said in Arabic that a person has subjected himself or his property to *gharar*, it means that he has unknowingly exposed himself or his property to peril.(1)

Contracts of Exchange that contain *gharar* are prohibited in Islamic law, such as Contracts of Sale and other contracts where money, goods or services are exchanged. This prohibition is an important and leading principle in the Islamic Law of Transactions.(2)

Scholars of Islamic law have put forward various definitions of

(1) Mohammed bin Abubakr Al-Razi, MUKHTAR AL-SIHAH (No Date), 180,471; Academy of the Arabic Language in Cairo, AL-MO'JAM AL-WASEET (1985), vol.2, 672.
(2) Siddig M A Al-Dhareer, ALGHARAR IN CONTRACTS AND ITS EFFECTS ON CONTEMPORARY TRANSACTIONS (1997), 9; Mohammed bin Ali Al-Shawkani, NAIL AL-AWTAR SHARH MUNTAQA AL-AKHBAR, (2004),978; M Obaidullah,ISLAMIC FINANCIAL SERVICES (2005), 11 .

gharar. The definition favoured by most scholars- because it is both succinct and comprehensive- is that: "*gharar* pertains where the consequences of the transaction are not apparent."(1) When a contract of sale- for example- is formed, the Buyer should know the goods that he will be getting, and the Seller should know the price that he will receiving. However, *gharar* –if present in the sale- may render this outcome uncertain.

The forms in which *gharar* may be present in contracts are many and varied(2). These various forms may be classified into two categories:

a) Contracts whose fulfillment is uncertain. This could be either because it is contingent on the occurrence of a particular event, or on pure chance.

b) Contracts whose fulfillment is certain, but they contain some measure of the unknown.(3)

An example of the first category is the contract known in the Islamic law of transactions as the "Two sales in one". This occurs when the contract stipulates that a certain item is sold for, say, one hundred pounds cash payment, or one hundred and twenty pounds deferred payment for a year. The contract does not state which option has been chosen, or how it will be chosen. Thus, the two parties may part without being certain which sale will take place. A second example of this sale is where one party offers to sell his house, for example, to the other party for a certain price. The sale is conditional upon the other party selling his car to the first party for a stated price. The uncertainty here is whether the sale will take

(1) Al-Dhareer, 10 ; Abubakr Mohammed bin Ahmed Al-Sarakhsi, AL-MABSOOT, (2000), vol.12, 166; Obaidullah, 29.

(2) Al-Dhareer, 10-11.

(3) AlDhareer, 10; S S BinMahfouz, INVESTMENT CHARACTERISTICS OF ISLAMIC INVESTMENT PORTFOLIOS: EVIDENCE FROM SAUDI MUTUAL FUNDS AND GLOBAL INDICES (2012),71.

place at all.(1)

This first category of *gharar* is known in contemporary legal terminology as an Aleatory contract. The most common type of aleatory contract is an insurance policy. The French civil code contains a chapter on aleatory contracts, with specific provisions for gambling and life annuities.(2) The Egyptian civil code also contains such a chapter, and has entitled the chapter- quite appropriately- "Contracts of *Gharar*".(3)

The second category of *gharar* is where fulfillment of the contract is certain, but the subject matter of the contract contains some measure of the unknown. This second category of *gharar* is frequently known in Islamic Law as *jahala*. It is derived from the Arabic word *jahl*, which means ignorance or lack of knowledge.(4) It is this second category of *gharar* that has major applications in construction contracts.

Jahala - or lack of knowledge- can be in any one of the following aspects of the subject matter:

- the species;
- the type;
- the description or specification;
- the amount or quantity;
- the timing.(5)

Examples of species of the subject matter in classical Islamic Law of Transactions would be: land; clothing and foodstuffs. If land is

(1) AlDhareer, 15-16; Al-Shawkani, 980.
(2) Wikipidea search "Aleatory contract", https://en.m.wikipedia.org/wiki/Aleatory_contract, Accessed on 7th November 2015.
(3) The Egyptian Civil Code, Law No.131 of 1948, Book 4.
(4) Mohammed bin Makram Ibn Manzour Al-Ifriqy, LISAN UL ARAB, vol.11,129
(5) AlDhareer (n3), 23-30; BinMahfouz (n6), 71.

the subject matter, then the species is known. The type of land then needs to be stipulated, eg agricultural land. The description or specification should then be given, ie its exact location and boundaries. The amount or quantity would mean that the area should be stated. Finally, the timing of its handing over and of payment of the price need to be known.

Of the various aspects of the subject matter which could suffer from a lack of knowledge, two are of particular relevance in construction contracts. Namely, these are:

- lack of knowledge or uncertainty in the description, ie the design and specifications of the work.
- lack of knowledge or uncertainty in the amount, ie the quantity of the work or its cost.(1)

2.2 Basic Principles of *Gharar*

The basic principles of *gharar* – on which there is consensus between scholars- are as follows:

- Only excessive *gharar* is prohibited. Minor *gharar* is tolerated in contracts, as – in practice-very few contracts are likely to be free from some measure of risk and uncertainty.(2)
- When there is excessive *gharar* in a contract, it renders the contract null and void.(3)
- Prohibition of excessive *gharar* is mandatory, ie even if the

(1) H A Mirghani, UQOUD ALBINAA ALMO'ASIRA: HAQIQATUHA IBRAMUHA AHKAMUHA FIL FIQH ALISLAMI WAL QANUN ASSUDANI [CONTEMPORARY CONSTRUCTION CONTRACTS: A COMPARATIVE STUDY IN ISLAMIC AND SUDANESE LAWS], (2006), 176-179.

(2) AlDhareer (n3), 44; Mohammed bin Ahmed Ibn Rushd, BIDAYAT AL –MUJTAHID WA NIHAYAT AL-MUQTASID (1989),vol.2, 253; H. Shimuzu, PHILOSOPHY OF THE ISLAMIC LAW OF CONTRACT (1989), 65.

(3) AlDhareer (n3), 9; A AlSaati, THE PERMISSIBLE GHARAR (RISK) IN CLASSICAL ISLAMIC JURISPRUDENCE (2003), 3-19.

parties knowingly agree to it the contract will still be invalid.(1)

When a contract is held to be invalid in Islamic law, the parties are prohibited from proceeding with implementing it. If the contract has been implemented-wholly or partially- the parties are returned to the position they were in before the contract was formed. If this is not possible- as for example in a construction contract- the work done is valued at prices of similar works. This is done without reference to the price agreed in the contract that has been declared void.(2)

The reason that excessive *gharar* – or risk and uncertainty- is prohibited is that it leads to an inequitable contract, where one party may gain some benefit without giving any consideration in return. This is considered unjust enrichment that ultimately leads to disputes. (3)

Some scholars have sought to lay down a criterion that determines when *gharar* is excessive. The best criterion is that excessive *gharar* exists when it comes to characterize a contract, ie when a contract can be called a *gharar* contract. In effect, this means that excessive *gharar* is determined by custom. As customs vary due to such variables as: time, place and the type of transaction, this criterion is a flexible one, and can adapt to various circumstances.(4)

(1) S M A AlDhareer, ALGHARAR WATHARAHO FIL UQOUD [ALGHARAR AND ITS EFFECTS ON CONTRACTS (1990), 20-23.
(2) Mirghani (n12),166
(3) Shimuzu (n13), 64-65 ; Ibrahim bin Musa Al-Shatiby, AL-E'TISAM, vol.2, 143-144; S Suwelim, TOWARDS AN OBJECTIVE MEASURE OF GHARAR IN EXCHANGE (2012), 4.
(4) Suleiman bin Khalaf Al-Baji, AL-MUNTAQA SHARH AL-MOWATTA' (1999), vol.6, 399; AlDhareer (n3), 46

In construction contracts, therefore, it is the construction professionals who determine when excessive *gharar* or risk and uncertainty exists in any particular contract. These professionals may be engineers, quantity surveyors or construction lawyers. Through their knowledge of recognized good practice and custom, they will be able to judge when excessive risk and uncertainty has been introduced into a contract.

3.0 *GHARAR* AND THE ESSENTIALS OF A VALID CONTRACT IN ISLAMIC LAW

In order to understand how excessive *gharar* –or risk and uncertainty- may affect construction contracts, it is necessary to consider briefly the essentials of a valid contract in Islamic law.

The majority of scholars of Islamic law agree that there are three essentials to a valid contract. Namely, these are:

- The Parties, who must satisfy certain conditions, eg they must have capacity to enter into the contract.
- Agreement, ie there must be a valid offer and acceptance.
- The subject matter, which -in a construction contract -will be comprised of two parts: the work that is to be done by the Contractor, and the price to be paid by the Employer.(1)

The vast majority of practical applications of the theory of *gharar* in Islamic law pertain to *gharar* in the subject matter(2). In construction contracts, therefore, excessive risk and uncertainty in the work to be done or the price to be paid will have a profound

(1) Mirghani (n12), 127; M Vejzagic, FUTURE CONTRACTS: ISLAMIC CONTRACT LAW PERSPECTIVE, 8; Ahmed El-Sawi, BULGHAT EL-SALIK, vol.2, 3; Al-Kamal ibn Al-Humam, SHARH FATH AL-QADIR,(1995),vol.6,230; Mohammed bin Shihab Al-Ramli, NIHAYAT AL-MUHTAJ,(1993),vol.3,374; Mansour bin Idris Al-Bahouti, SHARH MUNTAHA AL-IRADAT,(1997),vol.2,611.

(2) AlDhareer (n3), 11

effect on the contract in Islamic law.

Many civil codes in the Middle East stipulate that the subject matter shall be free of excessive gharar. For example, Article 203 of the UAE Civil Transactions Code, Law No.5 of 1985 states:

(1) In contracts of exchange, the subject matter shall be specified in such a manner as to avoid excessive *Jahala* (lack of knowledge): by reference to it or to the place where it is, if it exists at the time the contract is formed, or by stating its identifying description and quantity if it is an item that can be measured, or by any other means that minimizes lack of knowledge.

(2) If the subject matter is known to both contracting parties, there is no requirement that it should be otherwise described or defined.

(3) If the subject matter is not specified as aforesaid, the contract shall be void. (1)

The article very clearly requires that the subject matter in any contract of exchange- a contract of sale or a construction contract- be specified or defined clearly. The standard of definition shall be such that excessive *jahala*, ie lack of knowledge, does not exist in the contract. Minor *jahala* can be tolerated. Whether the subject matter meets this standard of definition in any particular contract is determined by custom, ie by recognized practice in that type of transaction.

Similar articles exist in other civil codes in the Middle East, such as those of Qatar, Jordan and Sudan. These articles are to be found amongst the general rules of contract, which apply to all types of

(1) Very similar text with express mention of the term ”jahala” may be found in Qatar Civil Code 2004, art 150; Iraqi Civil Code, Law No.41 of 1951 art 128; Jordanian Civil Code, Law No.43 of 1976, art 161; Sudanese Civil Transactions Code 1984, art 79.

contract, including construction contracts.

To a lesser degree than the subject matter, *gharar* may also be found in the agreement. Agreement consists of offer and acceptance, and must be free of coercion (duress), fraud and mistake. The best definition of mistake in Islamic law is: "Mistake pertains when what is expressed does not correspond to the facts, without fraudulent intent."(1)

Mistake, therefore, is caused by lack of knowledge, where no fraud exists. The existence of mistake in a contract may invalidate it- in Islamic law- if there is excessive discrepancy in value or benefit due to the mistake. In other words, if the value of the subject matter or benefit gained by one party due to the mistake is excessive compared to the case where no mistake occurs, then the contract will be void.(2)

Practical examples of how excessive lack of knowledge in the subject matter or occurrence of mistake may affect construction contracts will be given in section 5.0, below.

4.0 CONSTRUCTION CONTRACT DOCUMENTS RELATED TO THE ESSENTIALS OF A VALID CONTRACT

In a typical construction contract, the main contract documents will consist of:

- Agreement,
- Conditions of Contract,
- Specification,
- Drawings,
- Bills of Quantities (measurement contract) or Price Schedules

(1) Mirghani (n12), 160; Ali Mohyideen Qurradaghi, MABDA' AR-RIDAA FIL UQOUD, (1985),801.
(2) Mirghani (n12), 160-164.

(lump sum contract).

There may be a soil investigation report that plays an important role in the preparation of the design and its pricing by the Contractor, but technically it does not form part of the contract.

In the author's opinion, the three essentials of a valid contract in Islamic law may be related to these documents as follows:

- The Agreement will contain all three essentials, ie the Parties; the agreement and the subject matter. However, the subject matter will be named only or described very briefly, and not set out in detail, as this will be done by other documents.
- The subject matter is comprised of the work to be done by the Contractor, and the price to be paid by the Employer. It will be set out in detail in the drawings and specification, which together stipulate the work to be done. The price to be paid will be stipulated in the bills of quantities/price schedules.

Therefore, three separate documents jointly set out the subject matter of the contract, namely: the drawings; the specifications and the bill of quantities. The subject matter is where *gharar* - or risk and uncertainty- is mostly to be found. As explained above, the subject matter must be free of excessive *jahala* or lack of knowledge, otherwise the contract will be null and void. It is clear, therefore, that these three technical documents must be prepared to a high level of definition before the contract can become valid. These three technical documents are normally prepared by the design engineers. It follows that this important legal concept- ie *gharar*- should be well understood by the engineers responsible for preparing these technical documents. The various forms in which *gharar* may be present in these documents should be known in order that they may be avoided or minimised.

The last main contract document is the conditions of contract. *Jahala* or lack of knowledge may also be present here: in clauses that deal with unforeseeable ground conditions, for example. This will be illustrated in the next section.

5.0 PRACTICAL APPLICATIONS OF *GHARAR* IN CONSTRUCTION CONTRACTS

As noted in sub-section 2.1 above, the forms in which *gharar* –or risk and uncertainty- may be present in contracts are many and varied. This is especially true of construction contracts. Hence, it is not possible to list exhaustively all forms in which such risk and uncertainty may be present in such contracts. However, five of the most common will be presented and explained. These various forms - or categories- of *gharar* listed below are based on the author's study of a number of published cases of construction disputes, as well as the author's own experiences.Where these case studies are taken from the author's own experiences on construction projects, they will be put in general form, without naming the parties involved.

These five common forms of *gharar*- or risk and uncertainty- in construction contracts are:

- Errors or lack of information in the Soil Investigation Report,
- Ambiguities or Uncertainties in the Specifications or Quantities of Specific items,
- Unforeseeable ground conditions,
- Inappropriate use of a lump sum contract,
- Large variations in the contract value or price.

5.1 Errors or Lack of Information in the Soil Investigation Report

It is widely accepted that a good soil investigation report is necessary for a successful project. In the FIDIC Red and Yellow

Books (1999 edition), the Employer is obliged to provide – during the tendering period- all relevant data in his possession on subsurface and hydrological conditions at the site. The Contractor is responsible for the interpretation of this data. The Contractor is also deemed to have visited the site and obtained data on ground conditions from any other available source, to the extent practicable during the tendering period. The Contractor is deemed to have based its tender price on such data provided by the Employer.(1) In English law, this effectively means that the Employer warrants the accuracy of the information it has provided.(2)

Therefore, if an error is discovered in the soil investigation report during construction, the Employer will probably be held liable under English law, if the contract is based on FIDIC Red or Yellow books. However, a properly drafted exclusion clause may absolve the Employer of responsibility.(3)

The position will probably be different in Islamic law. This will be illustrated with reference to the first case study.

CASE STUDY NO. 1: DEFICIENT SOILS REPORT RESULTING IN MAJOR CHANGES IN QUANTITIES

The Public Works Department in Hong Kong contracted for the construction of a water supply tunnel. The geological investigation report for the project left much uncertainty regarding the types of lining that should be adopted for the tunnel along its route.

(1) International Federation of Consulting Engineers (FIDIC), CONDITIONS OF CONTRACT FOR CONSTRUCTION AND CONDITIONS OF CONTRACT FOR PLANT AND DESIGN BUILD (1999), Sub-clauses 4.10 and 4.11

(2) D Atkinson, "Administration of Claims", in CONSTRUCTION LAW HANDBOOK, ed by Ramsey et al (2002), 4.1/53.

(3) ibid same page.

However, bills of quantities had been prepared for the six different designs for the tunnel lining that were shown on the drawings.

The quantities of work actually executed varied greatly from those in the bill. For example, the estimated length of the most expensive type of lining was 275 metres and the actual length constructed was 2,448 metres. The quantity of steel estimated as being required for the linings was 40 metric tons and the quantity actually used was 2,943 metric tons.

Construction had taken more than four years instead of the estimated two. The Contractor was awarded an extension of time to cope with the ground conditions, but with no additional cost. The Contractor claimed that it should be paid, pursuant to the terms of the contract, more than the Government ("the Employer") considered it was bound to pay. The Contractor contended that the rates were based on the estimated quantities and are unreasonable for the actual quantities executed, and it says that the Engineer has power to vary the rates accordingly

The resulting dispute went to arbitration; the High Court; the Appeal Court, and finally, the Privy Council in England. It was finally held that the large increase in quantities may be deemed as variations, which will allow a review of the unit rates. (1)

Applying the principles of *gharar* - or risk and uncertainty- such a contract would be considered invalid in Islamic law. The two parties were in mistake as to the reality of ground conditions. This mistake resulted in a significant variation in the quantities of work required. When the parties realize their mistake they will be required to halt

(1) MITSUI CONSTRUCTION CO LTD v. ATTORNEY GENERAL OF HONG KONG (Hong Kong) [1986] UKPC 6 (10 February 1986) (1984)

work. The Contractor will be entitled to the cost of work done based on rates for similar work. The parties will then be free to negotiate a new contract, or the Employer may decide to re-tender the remaining works.

5.2 Ambiguities or Uncertainties in the Specifications or Quantities of Specific items

The first case study presented above concerned risk and uncertainty that led to a fundamental change in the works as a whole. The second form of risk and uncertainty concerns only a specific item in the bill of quantities, which might suffer from ambiguities in its specification or uncertainties in its quantity.

Applying basic principles of Islamic contract law, one can say that the same requirements apply to each item in the bill that apply to the contract as a whole. In other words, each item in the bill is required to be free of excessive risk and uncertainty. If not, then the item may be declared invalid, whilst the rest of the contract remains valid and binding on the parties. This is done only if it is practical to separate the original bargain agreed between the parties in this manner. Article 211(1) of the UAE Civil Transactions Law states:"(1) If part of a contract is void the invalidity shall extend to the entire contract unless the subject matter of each part is (separately) specified in which case the contract shall be void as to the void part, and the remainder shall be valid."

Ambiguities in the specifications of specific items are quite common in construction contracts. The next case study will therefore present an example of uncertainty in the quantities. The name of the project and the identities of the parties will not be mentioned.

CASE STUDY NO. 2: UNKNOWN QUANTITIES

This case study concerns a demolition contract that involved dismantling, demolition and removal of about thirty five buildings and structures on a disused factory site. The factory owners intended to construct a new factory at the same location. The contract therefore required that the foundations of all buildings be removed, in addition to the superstructures.

The contract drawings showed only the superstructures. No information on the shape, size or quantities of the foundations was present anywhere in the contract documents. In fact, the item descriptions in the bill- for each building- were written thus: "Dismantle, demolish and cart away Building No. X, including removal of foundations". All these demolition items for the various buildings were lump sum items. The whole bill was less than fourty items.

During execution of the works it was discovered that the size of the foundations was between two to three times larger than expected. The Contractor claimed for unforeseen physical conditions, based on the FIDIC Red Book. The claim was rejected, as the removal of the foundations was very clearly required by the contract. It was only their size that was unknown.

After intervention by legal counsel on both sides, the dispute was eventually resolved by amicable settlement. The Contractor received some compensation (based on *ex gratia* principle), though not the full amount he had claimed.(1)

Transfer of the risk of the quantities to the Contractor in this manner would probably be held invalid in Islamic law. This is a

(1) Unreported dispute, source: the author's own experiences (the author worked on the project as the Consultant's Resident Engineer).

simple application of the principle that it is invalid to contract for a subject matter that is unknown in quantity or specification.

5.3 Unforeseeable Physical Conditions

Case Study 2 above illustrates a Contractor's claim based on Unforeseeable physical conditions that was rejected. The claim could have been successful, however, if based on the principle of *gharar.*

Unforeseeable physical conditions - in the FIDIC Red and Yellow Books- are an Employer's risk. The Silver Book makes an exception, and transfers this risk to the Contractor.(1)

Unforeseeable physical conditions are- by definition- unquantifiable. They cannot be estimated or costed by tenderers in the normal fashion as the quantities are unknown.

Hence, one can say that-in Islamic law- the risk of Unforeseeable physical conditions cannot be transferred to the Contractor. Such risks must remain with the Employer.

Conversely, it can be said that only a quantifiable risk may be transferred. Two case studies are presented below. Case Study No. 3 presents an arbitration case that concerned unforeseeable physical conditions. Case Study No. 4 presents an example of quantifiable risk. Again this latter case study is taken from the author's experience.

CASE STUDY NO. 3: UNFORESEEABLE PHYSICAL OBSTRUCTIONS

A contract was signed in Egypt in 1991 between a bank and a contractor to build a new branch for the bank. A soils investigation

(1) International Federation of Consulting Engineers (FIDIC), CONDITIONS OF CONTRACT FOR CONSTRUCTION AND CONDITIONS OF CONTRACT FOR EPC/TURNKEY (1999), Sub-clause 4.12.

of the proposed site was carried out in accordance with the relevant Egyptian codes, and the building's foundations were designed accordingly. The contract required the removal of surface obstructions and debris that extended to 1.5 metres below ground level. During construction it was discovered that these obstructions extended to 3.5 metres below ground level. The nature of the soil was also found to be weaker than expected, and the foundation design was consequently amended. The two parties could not agree on who should bear the additional cost, and the dispute went to arbitration. The arbitration tribunal held that these changed circumstances could not have been foreseen by either party. The tribunal then applied the "Theory of Incidental Circumstances", and ruled in favour of the Contractor.(1)

In the author's opinion, application of the "Theory of Incidental Circumstances" is not appropriate in this case. What should have been applied is the theory of *gharar*. The changed soil conditions could not have been foreseen. Hence, they were unknown. It is invalid to contract for an obligation that is unknown, either in description or in quantity. The Contractor cannot therefore be held responsible for these unforeseen conditions, and they should be borne by the Employer.

CASE STUDY NO. 4: QUANTIFIABLE RISK

A project was tendered for design build of several industrial buildings based on FIDIC Yellow Book (lump sum contract). The soil investigation report showed clearly the presence of expansive black cotton soil from ground level down to a depth varying between two to five metres. The report's recommendations for foundation design and construction were as follows:

(1) M M Khaloosi, USOOL ALTAHKEEM FIL MUNAZA'AT ALHANDASIYA [Fundamentals of Arbitration in Engineering Disputes], Cairo, 4th Ed, 2004, p 234-245

- Complete removal of the expansive clay soil below each pad foundation down to the underlying sand layer.
- The pad footings for the buildings to be founded at a minimum depth of two metres below ground level.
- In case excavation of black cotton soil was greater than two metres, selected compacted backfill would be placed up to a level of two metres below ground.

In this example, tenderers have sufficient information on which to prepare their preliminary design during the tender period. From this design the quantities will be estimated and the tender costed. Tenderers have a clear choice on the assumptions to be made regarding the depth of expansive soil to be excavated. They may choose the most optimistic option: all footings will be excavated to two metres only, or the most conservative, ie a depth of five metres for all footings. They may also assume any value in between.

In any case, the risk is clearly quantifiable. In the author's opinion, such a risk may be transferred to the Contractor under Islamic law.(1)

5.4 Inappropriate Use of a Lump Sum Contract

It is widely accepted good practice that a lump sum contract requires the following:

- Complete detailed design, if design is prepared by the Employer.
- Detailed performance specifications, if design is prepared

(1) Source: the author's own experiences (the author worked on the project as the Consultant's Resident Engineer).

by the Contractor.(1)

A project that does not satisfy either of these conditions should not be tendered on a lump sum basis. Tenderers will have insufficient information on which to base their tender prices.

The theory of risk and uncertainty in Islamic law reinforces this recognized good practice. Any contract that does not satisfy either of the two above-mentioned conditions may be held invalid. Tenderers will be asked to bear an unacceptable level of risk due to lack of knowledge of either design/specifications or quantities.

Examples abound in practice where such inappropriate use of a lump sum contract has led to disputes.(2)

5.5 Large Variations in the value of the Contract

A large increase or decrease in the Accepted Contract Price in a measurement contract could arise due to:

- "Natural" causes with no change in the design, ie the actual quantities differed substantially from those estimated, but no variations to the design were ordered.
- Variations ordered by the Employer or on his behalf.

In the civil legislation of most legal systems, agreement of the parties is required before a contract can be amended. Article 267 of the UAE Civil Transactions Code, Law No.5 of 1985 states: "If a contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a

(1) R J Marks, R J E Marks and R E Jackson, ASPECTS OF CIVIL ENGINEERING CONTRACT PROCEDURE (1985), 55-56.

(2) See for example an article analyzing the new Wembley stadium project, entitled " A tale of two stadiums" available online at http://www.newcivilengineer.com/a-tale-of-two-stadiums/482554.article. Accessed on 15th August 2016.

provision of the law."

Therefore, the express provision in most standard forms of contract allowing variation of the contract by the Employer is an exception to this general legal principle. As such, this exception must have a limitation. A question frequently asked is: what is the limit beyond which no variation can occur, whether natural or ordered by the Employer?(1)

It the author's opinion this limit- in Islamic law- is set by the theory of *gharar.* The principles of this theory determine what limits of risk and uncertainty are acceptable in contracts. Variations are - by definition - unknown at the time when the contract was formed. Therefore, they are a form of risk and uncertainty. If excessive variations occur, the contract could be rendered void.

Uncertainties tend to be least in building works, if properly designed. They are normally greater in earthworks and general civil engineering works, and highest in dredging works and tunneling work. Based on this, one can suggest a maximum limit for variations of:

- 15% (of the Accepted Contract Amount) for building works;
- 30% for earthworks and general civil engineering works, and
- 50% for dredging and tunneling works.

In other words, the limit beyond which no variations can be ordered is determined by the type of project. It is higher where the inherent uncertainties in the project are higher. Beyond this limit a natural variation will invalidate the contract, and an ordered variation will require the agreement of the contractor.

(1) J Uff, CONSTRUCTION LAW (1985), 132

6.0 *GHARAR* AND CAUSES OF DISPUTES IN CONSTRUCTION CONTRACTS

It has been said that: "Risk and uncertainty is inherent in all construction projects".(1) It has also been said that: "Uncertainty in a construction project tends to lead to conflict."(2)

There is a preponderance of evidence that the following are major causes of claims and disputes in construction contracts:

- Variations, or design changes required for various reasons,
- Unforeseen ground conditions,
- Errors or Ambiguities in contract documents, such as drawings or specifications,
- Incomplete designs, or delayed design information.
- Inappropriate risk transfer, e.g. through selection of inappropriate form of contract.(3)

(1) J Lewis, D W Cheetham and D J Carter, ''Avoiding Conflict by Risk Management—the Role of the Client's Project Manager'', in P Fenn and R Gameson (Eds), CONSTRUCTION CONFLICT MANAGEMENT AND RESOLUTION (1992), 71.

(2) D A Langford, P Kennedy and J Sommerville, ''Contingency Management of Conflict: Analysis of Contract Interfaces'', in P Fenn and R Gameson, ibid, 66

(3) V M Watts and J C Scrivener "Review of Australian Building Disputes Settled by Litigation" in P Fenn and R Gameson, (n 35) 213; S G Revay "Can construction claims be avoided?" in P Fenn and R Gameson, (n 35) 204-206; EC Harris LLP *Global Construction Disputes Report 2013*, Available online at https://slideshare.net/mobile/charliewoodleyech/ec-harris-global-construction-disputes-report-2013,4,6,8; E Cakmak and P I Cakmak *"An analysis of causes of disputes in the construction industry using analytical network process"*- Procedia - Social and Behavioral Sciences 109 (2014) 183 – 187-Available online at www.sciencedirect.com; Jackson McDonald-*"Construction Disputes – why do they happen?* P2- Available online at www. jacmac.com.au; Sai On Cheung and Hoi Yan Pang-Conceptualising Construction Disputes- in S. O. Cheung (ed.), *Construction Dispute Research*, Springer International Publishing Switzerland 2014- p20; R U. Farooqui, S Azhar and M Umer- *Key Causes of Disputes in the Pakistani Construction Industry– Assessment of Trends from the Viewpoint of Contractors*- 50th ASC Annual

All of the above causes are various forms of *gharar* – or risk and uncertainty- as defined in Islamic law, and elaborated above. It can be said, therefore, that *gharar* –in its various forms- is a major cause of disputes in construction contracts.

Based on the above, it is possible to list some guidelines that assist in dispute prevention in projects, as follows:

- Ensure that a thorough investigation of ground conditions is carried out.
- Designs and specifications should be substantially complete before a project is tendered.
- If there are any items of work for which designs or specifications are not complete, they should not be placed in the bill to be priced by the Contractor. Instead, they should be placed in a provisional sum and the cost negotiated with the Contractor when designs are complete.
- Errors and ambiguities in specifications and bills of quantities should be avoided.
- Unforeseeable or unquantifiable risks should not be transferred to the Contractor. Only quantifiable risks should be transferred.
- An appropriate form of contract should be chosen.
- During construction, provide missing designs as early as possible.
- Variations should be restricted to minor items as much as possible. Large variations should be agreed with the Contractor.

International Conference Proceedings- available online at ascpro0.ascweb.org/archives/cd/2014/paper/CPRT262 Accessed on 18th December 2015.

7.0 CONCLUSIONS

The main conclusions of this paper may be summarized as follows:

1. The principle of *Gharar* – or risk and uncertainty-is an important and leading principle in the Islamic Law of Transactions. It occurs in Contracts of Exchange "where the consequences of the transaction are not apparent".
2. *Gharar* occurs in contracts in various forms, which may be classified into two categories. Only one of these categories is relevant to construction contracts, namely: contracts that contain " *jahala*", or some measure of the unknown.
3. *Jahala* may affect five different aspects of a contract, but only two have practical applications in construction contracts. Namely, these are: ambiguities in the description or specifications of the subject matter, and uncertainty in its quantity or cost.
4. Only excessive *gharar* is prohibited in contracts, minor *gharar* is tolerated. If excessive *gharar* occurs it renders the contract null and void.
5. Prohibition of *gharar* is mandatory. Even if the parties knowingly agree to it, the contract will still be void.
6. The reason that excessive *gharar* is prohibited is that it leads to an inequitable contract, where one party gains some benefit without giving any consideration in return. This is considered unjust enrichment that ultimately leads to disputes.
7. Excessive *gharar* is determined by custom, ie recognized good practice in the particular transaction. In the field of construction, it will be the construction professionals (engineers and construction lawyers) who determine if and

when excessive *gharar* is present in a particular contract.

8. *Gharar* is mostly to be found in the subject matter of the contract.The subject matter is one of three essentials of a valid contract in Islamic law, the other two are: Agreement (offer and acceptance), and the Parties.
9. To a lesser extent subject matter, *gharar* may also may be found in the Agreement. This will be through the occurrence of mistake, which can result in an invalid contract, if there is excessive discrepancy in value or benefit of the subject matter due to the mistake.
10. The subject matter in a construction contract consists of two parts: the work to be done by the Contractor, and the price to be paid by the Employer. Excessive risk and uncertainty in the work to be done and the price to be paid will result in an invalid contract.
11. Many civil codes in the Middle East stipulate- in the general rules of contract- that the subject matter shall be defined clearly. The standard of definition shall be such that excessive *jahala*- or lack of knowledge- is avoided.
12. Three separate documents in a typical construction contract define the subject matter. These are: the drawings; the specifications; and the bills of quantities. The first two jointly define the work to be done by the Contractor, and the latter document defines the price to be paid by the Employer. Applying the principles of *gharar*, these three technical documents must be prepared to a high level of definition in order for the contract to be valid.
13. Based on a study of the literature on the causes of disputes in construction and on a number of case studies, it can be said that *gharar* is a major cause of disputes in construction. Hence, it is possible to give guidelines that minimize disputes,

as follows:

- A thorough investigation of ground conditions should always be carried out.
- Designs and specifications should be substantially complete before a project is tendered.
- If there are any items of work for which designs or specifications are not complete, they should not be placed in the bill to be priced by the Contractor. Instead, they should be placed in a provisional sum and the cost negotiated with the Contractor when designs are complete.
- Errors, ambiguities and uncertainties in specifications and bills of quantities should be avoided.
- Unforeseeable or unquantifiable risks should not be transferred to the Contractor. Only quantifiable risks should be transferred.
- An appropriate form of contract should be chosen.
- During construction, missing designs should be provided as early as possible.
- Variations should be restricted to minor items as much as possible. Large variations should be agreed with the Contractor.

In conclusion, it can be said that the theory of *gharar* makes a major contribution to explaining disputes and dispute prevention in construction. In addition to prevention, it goes further and provides the cure. If excessive risks – of the type described above- do occur and a dispute ensues, the solution is to invalidate the contract. This invalidation may affect any of the following:

- the whole of the contract, such as where a major redesign is required,
- a part of the contract, where only one or a few items in the bill

are declared invalid due to excessive uncertainties.

- a term in the contract, which transferred unforeseeable or unquantifiable risk to the Contractor.

As mentioned in Sub-Section 2.2 above, the reason that *gharar* is prohibited is that it leads to an inequitable contract. Such a contract occurs where obligations or risks are not fairly balanced between the parties. Some obligations may be wholly or partially unknown, in either specification or quantity. Some risks that are transferred may be unforeseeable or unquantifiable. In such cases, the contract resembles a gamble more than a commercial venture.

The theory of *gharar* places a limit on the amount of risk and uncertainty that may present in contracts. Exceeding this limit converts a fairly predictable commercial venture into a gamble. Where this limit is located in any particular contract is determined by recognized good practice. This highlights the importance of this legal theory to construction professionals, as they will be the judge when this limit is exceeded.

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نظرية الغرر في الفقه الإسلامي:
سبب رئيس للنزاعات في عقود التشييد

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ملخص الورقة

هناك اهتمام على نطاق واسع بالدراسات الشرعية الخاصة بعقود البناء والتشييد، ويعزى هذا الاهتمام للتوسع الكبير في مشاريع البناء والتشييد في كثير من دول الشرق الأوسط، والتي تستمد قوانينها المدنية من الفقه الإسلامي. هذه الورقة – وهي بعنوان **" نظرية الغرر في الفقه الإسلامي: سبب رئيس للنزاعات في عقود التشييد"** – تتناول نظرية هامة من نظريات فقه المعاملات، وهي نظرية الغرر وتطبيقاتها في عقود البناء والتشييد، وهي تطبيقات كثيرة ومتعددة، وذات أهمية للمتعاملين بهذه العقود، ومن يعملون على تسوية منازعاتها، من مهندسين ومحامين وقضاة. تبدأ الورقة بتعريف الغرر وأحكامه الأساسية، وتبين العلاقة بين الغرر وأركان العقد في الفقه الإسلامي. ثم تتناول المستندات المختلفة التي يتكون منهاعقد التشييد عادة، وعلاقتها بأركان العقد. بناءً على ذلك تتناول الورقة خمس تطبيقات مختلفة للغرر في عقود البناء والتشييد، وتشرحها، بالاستعانة ببعض الحالات الدراسية. تخلص الورقة إلى أن الغرر يرِدُ كثيراً في عقود التشييد في صور مختلفة ومتنوعة، وذلك بسبب طبيعة هذه العقود، التي يكتنفها

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كثير من التعقيد والمخاطر. وورود الغرر الكثير في عقود التشييد هو سبب رئيس من أسباب النزاعات في هذه العقود، ويؤدي إلى بطلان العقد. وتفصل الورقة في بعض التوجيهات التي يمكن استخلاصها من نظرية الغرر لأجل تقليل النزاعات في عقود التشييد. وبما أن معرفة الحد الفاصل بين الغرر القليل والكثير مرده إلى العرف، وهذا العرف يختص بتحديده أصحاب الخبرة بهذه العقود من مهندسين وقانونيين مختصين، تخلص هذه النظرية إلى أهمية معرفة أصحاب الشأن بهذه العقود بنظرية الغرر وتطبيقاتها في هذه العقود.