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Research article

(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 transfer[1] 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 book[2] – 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

[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] Jaakko Husa, A New Introduction to Comparative Law 211 (2015).

investigation from committees and critics alike.[4] 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.[5] 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.[6] 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.[7]

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.[8] 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.[9]

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

[4] Melvin Aron Eisenberg, The Nature of the Common Law 146-54 (1991).

[5] Roman Tomasic, *The financial crisis and the haphazard pursuit of financial crime*, 18 J. Fin. Crime 7, 13 (2011).

[6] Roger McCormick, Legal Risk in the Financial Markets 441 (2d ed. 2010).

[7] *See generally* Thomas Cottier, John H. Jackson, & Rosa Lastra, International Law in Financial Regulation and Monetary Affairs (2012); John Raymond LaBrosse, Rodrigo Olivares-Caminal, & Dalvinder Singh, Managing Risk in the Financial System (2011); Ravi C. Tennekoon, The Law and Regulation of International Finance (1991).

[8] *See, e.g.*, Institute of Chartered Accountants in England and Wales (ICAEW), *Uncertainty: Risk or Opportunity*, Notes from the first meeting of the Blue Chip Finance Leaders Programme (Feb. 26, 2013), https://www.icaew.com/-/media/corporate/files/qualifications-and-programmes/leadership-development/blue-chip-finance-leaders/uncertainty-risk-or-opportunity.ashx.

[9] Iain MacNeil, *Uncertainty in Commercial Law*, 13 Edinburgh L. Rev. 68, 70 (2009).

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.[10] 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.[11] 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.[12]

Furthermore, recognising 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.[13] 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,[14] 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,[15] 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

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[10] *Id.* at 69.

[11] Please refer further to the concept of risk-sharing under *Shari'a* law discussed in paragraph 2.1, *infra*.

[12] In 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.

[13] MacNeil, *supra* note 9, at 69-99.

[14] *See* Hans Visser, Islamic Finance: Principles and Practice 12 (2d ed. 2014); Wael B. Hallaq, An Introduction to Islamic Law 16 (2009); Bernard G. Weiss, The Spirit of Islamic Law 15 (1998).

[15] Nima 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.[16] 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.[17]

The aspect of the law dealing with transactional matters, known as *Muamalat*, governs individuals' interactions, including those concerning their financial and commercial affairs.[18] 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,[19] and second, that by acting upon the rules of *Muamalat* in daily life, a greater bond is created with God.[20]

According to Dr. Patrick Sookhdeo, 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.[21] 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.[22] 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.[23]

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.[24] 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.[25] 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),[26] *Gharar* (uncertainty), and *Qimar* (gambling), as well as the encouragement of *Taa'won* (mutual co-operation).[27]

Gharar, literally translated, means uncertainty, hazard, chance, or risk,[28] 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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[16] Hallaq, *supra* note 14, at 19.

[17] Weiss, *supra* note 14, at 8.

[18] Brian 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 Dali, Introduction to Muamalat (2008).

[19] Edwina Pio, *et al.*, *Pipeline to the Future: Seeking Wisdom in Indigenous, Eastern, and Western Traditions*, *in* Handbook of Faith and Spirituality in the Workplace 207 (Judi Neal ed., 2013).

[20] Abdul Karim Aldohni, *The quest for a better legal and regulatory framework for Islamic banking*, 17 Ecclesiastical L. J. 15, 16 (2015).

[21] Patrick Sookhdeo, Understanding Shari'a Finance: The Muslim challenges to Western Economics 23 (2008).

[22] Aldohni, *supra* note 20, at 249.

[23] Sookhdeo, *supra* note 21, at 15.

[24] Qudeer Latif, *Introduction to Islamic Finance*, Clifford Chance Law Firm Website (Apr. 29, 2013), https://www.cliffordchance.com/briefings/2013/04/introduction_to_islamicfinance.html.

[25] Aldohni, *supra* note 20, at 7-8; Visser, *supra* note 14, at 12-26.

[26] Mohsin Khan & Abbas Mirakhor, *Islam and the economic system*, 2 Rev. Islamic Econ. 1, 1 (1992).

[27] Sookhdeo, *supra* note 21, at 249.

[28] Indeed, 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 ررغ, which means risk in its etymology. *See* Salman Bin

a contracting party's lack of knowledge.[29] 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.[30] 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.[31] 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.[32] In this context, it is important to clarify that *Shari'a* law, in reference to *Gharar*, usually does not go beyond the contract to ascertain what is in the minds of contracting parties. This means,

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Footnote continued

Lambak, *Shariah Juristical effect of* Gharar *in predetermining* Takaful *contribution*, 1 INT'L J. EDUC. & RES. 1, 1 (2013). 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: << وَلاَ تَأْكُلُواْ أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ وَتُدْلُواْ بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُواْ فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالإِثْمِ وَأَنتُمْ تَعْلَمُونَ >> . 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 آمَنُوا لاَ تَأْكُلُوا أَمْوَالَكُم بَيْنَكُم بِالْبَاطِلِ إِلاَّ أَن تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنكُمْ وَلاَ تَقْتُلُوا أَنفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا >> 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:

> [F]irst, *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.

[29] MAHA-HANAAN BALALA, ISLAMIC FINANCE AND LAW: THEORY AND PRACTICE IN A GLOBALIZED WORLD 29 (2010).

[30] Al-Saati, *supra* note 28, at 5.

[31] KNIGHT, *supra* note 2, at 233. In particular, the concepts of uncertainty and risk are extremely important in order to understand 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.

[32] Aldohni, *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.[33]

However, the reality is that with commercial contracts there will always be some element of risk and uncertainty.[34] Some *Gharar* is, therefore, acceptable as it will not always be possible to eliminate uncertainty totally from exchange contracts.[35] Due to the prohibition of *Gharar* and, therefore, of risk-taking, contracting parties look to find risk-sharing solutions[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.[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.[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).[39]

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* law, 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."[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.[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

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[33] Iqbal & Llewellyn, *supra* note 18, at 32-34.

[34] Aldohni, *supra* note 20, at 249.

[35] M. Kabir Hassan & Mervyn K. Lewis, Handbook of Islamic finance 241 (2007).

[36] Waheed Akhter, *Risk Management in* Takaful, 2 Enterprise Risk Mgmt. 128, 129 (2010).

[37] Adel Ahmed, *Global financial crisis: an Islamic finance perspective*, 3 Int'l J. Islamic & Middle Eastern Fin. & Mgmt. 306, 314 (2010).

[38] 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).

[39] 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).

[40] Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 303-04 (3d ed. 2008).

[41] Sookhdeo, *supra* note 21, at 15.

that implementing rules designed to promote legal certainty is a strategy that is doomed to failure.[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.[43]

On the other hand, there appears to be some common ground between English common law and *Shari'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,[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.[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'a law

Despite the different approaches to legal uncertainty of English common law and *Shari'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 *a priori* or from statistics of *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

[42]MacNeil, *supra* note 9, at 68-99.
[43]Balala, *supra* note 29, at 39.
[44]*See* Section 2 of this paper, *supra*.
[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 is delimited by legal uncertainty. Thus, risk is a form of 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.

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[46] Knight, *supra* note 2, at 233.

[47] Helen Pugh, *An implied term of good faith: a watershed or a damp squib?*, 28 J. Int'l Banking & Fin. L. 347, 348 (2013).

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.[48] 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.[49] 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.[50]

In this situation, Islamic scholars have endorsed the concept of *Takaful* as a permissible arrangement for the sharing of risk.[51] 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.[52]

Takaful[53] is, in principle, a charitable construct through which participants aim to help others who have suffered misfortune in the spirit of cooperation,[54] mutual benefit, and social protection.[55] 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.[56] 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

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[48]Antony Hainsworth, *Retakaful, regulation and risk: Developing the Islamic insurance market in the UK – Conventional reinsurance will give way to retakaful facilities*, 24 J. INT'L BANKING & FIN. L. 193, 195 (2009).

[49]*Id.* at 202.

[50]For a non-exhaustive overview of this topic, *see generally* ANTONY BLACK, HISTORY OF POLITICAL THOUGHT: FROM THE PROPHET TO THE PRESENT (2001); Tamir Moustafa, *Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt*, 32 INTL J. MIDDLE EAST STUD. 3 (2000); BASSAM TIBI, THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER (1998); ABDEL SALAM SIDAHMED & ANOUSHIRAVAN EHTESHAMI, ISLAMIC FUNDAMENTALISM (1996).

[51]Zuriah Abdul Rahman, Takaful*: Potential Demand and Growth*, 22 J. KING ABDULAZIZ U., ISLAMIC ECON. 171, 177 (2009).

[52]GÖNÜLAL O. SERAP, TAKAFUL AND MUTUAL INSURANCE: ALTERNATIVE APPROACHES TO MANAGING RISKS 16 (2013).

[53]The word *Takaful* in Arabic is التكافل (from the Arabic verb *Kafala*) which, according to the Malaysian *Takaful* Association, means to take care of one's need. Malaysian *Takaful* Association, *Takaful Definitions* http://www.malaysiantakaful.com.my/About-MTA/Takaful-Definitions.aspx.

[54]Ramin Cooper Maysami & W. Jean Kwon, *An analysis of Islamic Takaful insurance: A cooperative insurance mechanism*, 18 J. INS. REG. 109, 115 (1999). A later analysis can be found in W. Jean Kwon, *Islamic Principle and Takaful Insurance: Re-evaluation*, 26 J. INS. REG. 53 (2007).

[55]KEVIN LAZARUS & JULIAN BURLING, RESEARCH HANDBOOK ON INTERNATIONAL INSURANCE LAW AND REGULATION 533 (2011).

[56]Council of the International Islamic Fiqh Academy (IIFA), of the Organization of Islamic Cooperation (OIC), *Resolution No. 200 (6/10) of OIC Fiqh Academy: Bases of Cooperative Insurance In the light of Shari'a Rulings and Controls*, 24 ISLAMIC ECON. STUD. 117 (2016).

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.[57] 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*[58] or *Wakala*[59] 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.[60]

The principal difference between the *Mudaraba* and *Wakala* models is the manner in which the *Takaful* operators are remunerated. Under a *Mudaraba* structure,[61] 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,[62] 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.[63]

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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*.

[58]*See generally* Hussain Gulzar Rammal, Mudaraba *in Islamic Finance: Principles and Application*, 16 Bus. J. Entrepreneurs 105 (2003); Zubair Hasan, Mudaraba *as a mode of finance in Islamic banking: theory, practice and problems*, 14 J. Middle East Bus. & Econ. 41 (2002).

[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.

[61]Frank E. Vogel & Samuel L. Hayes, Islamic Law and Finance: Religion, Risk and Return 138 (1998). For a historical perspective on the origin of *Mudaraba*, *see* Murat Cizakca, A Comparative evolution of Business Partnerships: the Islamic World and Europe, with specific reference to the Ottoman Archives 4 (1996).

[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*[64] (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).[65] 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.[66] 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.[67] 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.[68] 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).

[65]Samy Nathan Garas, *The control of the Shari'a Supervisory Board in the Islamic financial institutions*, 5 Int'l J. Islamic & Middle Eastern Fin. & Mgmt. 8 (2012).

[66]Foreign & Commonwealth Office, et al., *Government launches first Islamic Finance Task Force*, GOV.UK (March 13, 2013), https://www.gov.uk/government/news/government-launches-first-islamic-finance-task-force.

[67]Foreign & Commonwealth Office, et al., *Britain set to become first western nation to issue a sovereign Islamic bond*, GOV.UK (June 12, 2014), https://www.gov.uk/government/news/britain-set-to-become-first-western-nation-to-issue-a-sovereign-islamic-bond.

[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 entrenching 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[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.[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.[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.[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

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Footnote continued
continues, http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf).

[69] In the UK, the Prudential Regulation Authority and the Financial Conduct Authority regulate financial institutions, including Islamic financial institutions. The greatest part of statutory regulation in the UK financial services sector relates to consumer protection to ensure that consumers can be confident in their dealings with financial institutions.

[70] Serap, *supra* note 57, at 537-538.

[71] Hainsworth, *supra* note 53, at 193.

[72] Serap, *supra* note 57, at 537-38.

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.[73] 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.[74] 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

[73] In 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.

[74] Hainsworth, *supra* note 53, at 193.

comport their decisions with *Shari'a* law is vital.[75] 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.[76]

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.[77]

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.[78]

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

[75]Jonathan Ercanbrack, The Transformation of Islamic law in Global Financial Markets 202 (2015) [hereinafter Ercanbrack, Transformation].
[76]David M. Boje, Organizational Change and Global Standardization: Solutions to Standards and Norms Overwhelming Organizations 88 (2015).
[77]Ercanbrack, Transformation, *supra* note 80, at 200.
[78]Ercanbrack, 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.[79] 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 *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 *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.[80] However, the Chief Executive Officer has suggested that going in to *Takaful* insurance might not be as easy as it seems.[81]

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 *Shari'a* law can be analysed consistently in the evaluation, implementation, and promotion of *Takaful*. Indeed, *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, *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, *Takaful* is a form of cooperative risk management and must be *Shari'a* law compliant, unlike conventional insurance in the UK. *Takaful* consumers effectively act as both the insurer and the insured. While the legal conception of uncertainty differs between English common law and *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 *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 *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 *Shari'a* law *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

[79] Zulkifli Hasan & Ahmad Fuad, *New Takaful Framework under the Malaysian Islamic Financial Services Act*, 52 J. Int.l Banking & Reg. 54 (2015).

[80] *See* Cobalt Underwriting Website, http://www.cobaltuw.com.

[81] C. Parra-Serrano, *UK insurance industry primed to target Takaful opportunities*, Insurance POST, http://www.postonline.co.uk/post/news/2304988/uk-insurance-industry-primed-to-target-takaful-opportunities.

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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