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# LEGAL ANALYSIS OF THE ELEMENT OF UNCERTAINTY IN ISLAMIC INSURANCE FROM A BUSINESS LAW PERSPECTIVE

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## *Abstract*

Islamic insurance is a rapidly developing financial instrument in Indonesia, but it still faces challenges related to elements of uncertainty in contracts. This uncertainty can affect the validity of agreements and public trust in Islamic insurance products. Therefore, it is important to analyze the legal regulations and their implementation in the context of business law. Uncertainty often arises in the practice of Islamic insurance, which can influence public trust and the validity of contracts. Islamic insurance, as an alternative to conventional insurance, must adhere to Islamic principles that emphasize justice, transparency, and mutual assistance. However, the element of uncertainty in its products and practices presents a unique challenge. This research aims to identify the legal regulations regarding elements of

uncertainty in Islamic insurance and analyze the implementation of these regulations in practice. This study uses a normative legal method, which focuses on the analysis of laws and regulations, legal documents, and related literature to understand the legal framework governing Islamic insurance, particularly concerning the elements of uncertainty from a business law perspective. The research findings indicate that the legal regulations regarding uncertainty in Islamic insurance still require refinement, particularly in terms of transparency and the clarity of contracts. The implementation of these regulations in the field is often hampered by a lack of understanding from the parties involved and challenges in applying Sharia principles. This research recommends the need for improved legal education and socialization regarding Islamic insurance to reduce uncertainty and enhance public trust.

Keywords: Islamic Insurance, Uncertainty, Business Law.

## I. INTRODUCTION

In the context of modern economic dynamics, insurance plays a very important role as a tool for managing risk. Its primary function is not only to provide financial protection against potential losses that may occur in the future but also to contribute to the stability of the broader financial system, which in turn supports social and economic stability. Nevertheless, conventional insurance practices contain a number of legal issues from an Islamic perspective, particularly concerning the element of uncertainty or *gharar*, which is strictly prohibited in the principles of *muamalah*. As a more Sharia-compliant solution, Islamic insurance, previously known as *ta'min*, has emerged. In this regard, *ta'min* can be interpreted as "guaranteeing something," meaning that a person pays a certain contribution with the aim of obtaining financial protection for themselves and their family, or as compensation for possible losses such as the loss of property. Thus, Islamic insurance not only offers financial protection but also ensures that all transactions are conducted based on the principles of justice, transparency, and mutual assistance as taught in Islam.

In the context of Sharia economic law, the elements of *gharar* (uncertainty), *maysir* (gambling), and *riba* (usury) are forms of economic activity strictly prohibited in the Qur'an and Hadith because they are considered harmful to one party, create injustice, and fail to reflect transparency, certainty, and fairness in transactions. The lack of clarity and imbalance of rights and obligations between insurance participants and insurance companies are crucial aspects that must be examined more deeply within the framework of *maqashid shariah* (Kautsar et al., 2025).

Therefore, to meet the need for a financial protection system that remains consistent with Sharia principles and avoids elements prohibited in Islam, scholars and Islamic finance practitioners developed an alternative concept not only based on justice and transparency but also prioritizing solidarity and cooperation among individuals in society.

This gave rise to the *takaful* system, a Sharia-based alternative form of insurance designed to avoid elements prohibited in Islam. In *takaful*, the basic principle used is not a contract of buying and selling risk, but rather *tabarru'* (donation) and *ta'awun* (mutual assistance) among participants (Kautsar et al., 2025). The emergence of *takaful* as a model of Islamic insurance became the answer to the fundamental problems inherent in conventional insurance. Based on the principles of mutual assistance (*ta'awun*) and donation (*tabarru'*), *takaful* inherently seeks to eliminate uncertainty (*gharar*), gambling (*maysir*), and usury (*riba*) (Ayub, 2009). Instead of making risk the object of trade, *takaful* builds a participatory ecosystem where participants collectively bear risks and provide financial protection for one another.

Nevertheless, in practice, Islamic insurance still faces various issues related to uncertainty that arise in contracts and product implementation, which may create doubts regarding the validity of contracts and reduce public trust. In addition, regulations governing Islamic insurance still require improvement, particularly in terms of transparency and contractual clarity, and their implementation is often hindered by a lack of understanding among practitioners and consumers of Islamic insurance. These obstacles are major challenges that must be overcome so that Sharia principles can be optimally applied in the Islamic insurance industry.

Previous studies indicate that legal protection for policyholders of Islamic insurance has been regulated through Law No. 40 of 2014 on Insurance, which provides legal certainty for participants' rights (Prayogo & Syufaat, 2023). Furthermore, (Parmujianto, 2021) emphasizes that the law serves as the main foundation for Sharia insurance entities,

including the obligation to separate Sharia business units from conventional parent companies. Moreover, research by (Ruhana et al., 2023), which compared Sharia governance in Malaysia and Brunei, found that the role of state authorities and the Sharia Supervisory Board is very important in ensuring that *takaful* companies operate in compliance with Sharia principles.

From these studies, it appears that the focus of research has largely been on legal protection, regulation, and governance, while studies that specifically discuss the element of uncertainty (*gharar*) and the effectiveness of regulatory implementation in Sharia insurance business practices in Indonesia remain relatively limited.

Based on the problems outlined above, this study aims to identify and analyze in depth the legal regulations relevant to Islamic insurance, particularly in the context of uncertainty, as well as to evaluate the practical implementation of these regulations and identify obstacles that may arise in the field. The strength of this study lies in its interdisciplinary approach, combining a business law perspective with Sharia principles. Thus, the results of this study not only provide theoretical insights into how Islamic insurance addresses uncertainty but also offer practical recommendations for regulators, practitioners, and society. This analysis is expected to contribute significantly to the development of Sharia economic law in Indonesia, creating a more transparent, fair, and trustworthy business ecosystem.

## II. METHOD

This study employs a **normative juridical method**, which is a legal research approach conducted by examining relevant primary and secondary legal materials. According to (Mahmud Marzuki, 2016), normative legal research is carried out by analyzing primary, secondary, and tertiary legal sources to discover legal rules, legal principles, and legal doctrines. This method is used in this study to analyze the element of uncertainty in Islamic insurance from a business law perspective, focusing on legal norms contained in legislation, legal doctrines, and Islamic legal principles.

The normative juridical approach is often referred to as library research because it relies primarily on secondary data such as legislation, literature, and legal doctrines (Soekanto, 2019). The purpose of this approach is to examine how prevailing legal regulations in Indonesia govern uncertainty (*gharar*) in Islamic insurance contracts and to what extent these regulations are applied in insurance business practices.

Furthermore, (Efendi & Rijadi, 2022) emphasizes that normative legal research is intended to examine the application of legal norms in practice. Therefore, this study also analyzes the compatibility of existing regulations with Sharia principles, which constitute the main foundation of Islamic insurance.

## III. RESULTS AND DISCUSSION

Insurance or coverage arises from human needs (Ganie, 2023). It provides protection and guarantees against unpredictable risks such as property loss, accidents, illness, or death, all of which can cause financial losses and uncertainty in daily life. Insurance is an agreement between two parties, where one party is obliged to pay contributions/premiums, and the other party has the obligation to provide full guarantees to the contributor if something happens to the first party or their property in accordance with the established agreement (Zainal, 2020).

Currently, Indonesia has adopted a **dual insurance system**, namely conventional insurance and Sharia insurance. Facts show that the insurance system operating in Indonesia consists not only of conventional insurance but also Sharia insurance (Muhamimin, 2016). The existence of these two systems reflects the dynamic needs of Indonesian society, which are increasingly diverse, both in terms of the economy and religious beliefs. Conventional insurance is based on the principle of risk transfer and commercial profit. Meanwhile, Sharia insurance is based on the principles of *ta'awun* (mutual assistance), *tabarru'* (donation), and collective risk management in accordance with Islamic Sharia values. Thus, society has alternatives in choosing an insurance system that suits their personal preferences and religious beliefs. This development also indicates increasing public awareness of the importance of financial protection in facing

life's risks, as well as the growing literacy of the community toward various forms of financial services based on ethical and religious values.

However, its implementation in the field still faces significant challenges, especially in terms of contract transparency, legal certainty, and public literacy. This affirms that even though syariah principles have been regulated normatively, the potential for gharar (uncertainty) still emerges due to the low understanding of participants regarding Syariah insurance contracts. (Fitriani, Desita & Nisa, 2024) In the context of business law in Indonesia, regulating the element of gharar in syariah insurance becomes very important so that the contract remains valid according to syariah principles and does not cause harm to any party. Therefore, it is important to further examine the legal regulation of the element of uncertainty in syariah insurance in Indonesia, particularly from a business law perspective, to ensure that the practice of syariah insurance runs in accordance with the principles of justice and legal certainty. Furthermore, it is also necessary to analyze how these regulations are implemented in practice, as well as the obstacles faced and efforts that can be made to minimize uncertainty in contracts, so that the goal of syariah insurance as a syariah-based protection instrument can be achieved optimally and sustainably. conceptually reviews various forms of uncertainty in syariah economic transactions and asserts the need for stronger regulatory standards to ensure contractual fairness, including in syariah insurance practices. (SRI, 2025)

## 1. Legal Regulation of Uncertainty in Sharia Insurance in Indonesia from a Business Law Perspective

The objective of syariah insurance is to eliminate the factor of uncertainty (gharar), the speculative factor also known as gambling (maisir), and the factor of interest in its commercial activities (riba). (Kusmawaningsih, 2024) In syariah insurance, the application of akad (contract) tabarru' (donation/hibah) and wakalah (agency) is considered a legal instrument to minimize uncertainty (gharar). Regulations such as Fatwa DSN-MUI No. 21/2001 serve as the normative legal reference, while supervision by the DPS (Syariah Supervisory Board) and OJK (Financial Services Authority) regulations are forms of formal regulation that protect consumers. (Rafsanjani, 2022) Therefore, syariah insurance regulation in Indonesia emphasizes the elimination of gharar as the foundation of its business law.

In positive law, the main basis is Law No. 40 of 2014 on Insurance, particularly Articles 87 to 91, which regulate the existence of Sharia insurance companies and Sharia business units. This law reinforces the legal position of Sharia insurance as part of the national financial system formally recognized. Furthermore, the Financial Services Authority (OJK) regulations, such as POJK No. 69/POJK.05/2016 on the Implementation of Insurance Business, regulate governance, types of contracts (*akad*), financial reporting, and participant protection mechanisms. From a business law perspective, these regulations aim to create legal certainty in every syariah insurance transaction so that it is equivalent to conventional insurance, yet remains in line with syariah principles. Although the regulations are adequate (Law No. 40 of 2014 and POJK 69/2016), implementation still faces constraints concerning information transparency, participant literacy, and DPS supervision. The legal regulation of gharar (uncertainty) is not sufficient merely at the normative level. There must be a strengthening of the audit system, syariah compliance, and consumer literacy enhancement so that business actors are not only formally compliant but also functionally fair in running the syariah business. (Fitriani, Desita & Nisa, 2024)

By upholding Sharia principles, Sharia insurance not only provides financial protection but also preserves the integrity of transactions so as not to harm one party and reflects the values of mutual assistance and social responsibility among participants. Explicitly, there is no verse in the Qur'an that mentions the term "insurance" as we know it today, whether "al-ta'min" or "al-takaful." However, there are Qur'anic verses that explain the concept of insurance and contain the fundamental values practiced in insurance (Mukhsinun & Fursotun, 2019). For instance, Surah Al-Maidah (2) states: "*Help one another in righteousness and piety, and do not help one another in sin and transgression.*" Based on this concept, the National Sharia Council of the Indonesian Ulema Council (DSN-MUI), in Article 1(1) of Fatwa No. 21/DSN-MUI/X/2001, defines Sharia insurance as: "*A mutual protection and assistance effort among a group of people/parties through investment in the form of assets and/or tabarru' that provides a return pattern to face certain risks through contracts (agreements) in accordance with Sharia.*" (Kusmawaningsih, 2024).

The legal regulation in Indonesia regarding the prohibition of gharar (uncertainty), *maysir* (speculation/gambling), and *riba* (usury) in sharia insurance can be considered quite strict. As previously mentioned, this is reflected in Law

Number 40 of 2014 on Insurance, which explicitly requires sharia insurance companies to operate in accordance with sharia principles. More detailed provisions are outlined in Minister of Finance Regulation Number 18/PMK.010/2010, which mandates that every contract must be free from *gharar*, *maysir*, and *riba*. Furthermore, the Financial Services Authority (OJK), through POJK Number 69/POJK.05/2016, regulates the obligation of information transparency, contract structures, and the role of the Sharia Supervisory Board (DPS), which is responsible for ensuring that sharia insurance products fully comply with sharia principles. In addition, DSN-MUI Fatwa Number 21/DSN-MUI/X/2001 explicitly emphasizes that sharia insurance contracts must be free from *gharar*, *maysir*, and *riba*, and recommends the use of *tabarru'*, *wakalah*, or *mudarabah* contracts to avoid uncertainty (Fatwa DSN N 21/DSN-MUI/X/2001, 2014).

Thus, formal regulations and sharia fatwas have established a fairly comprehensive legal framework, although the main challenge remains in the consistency of implementation and supervision in practice. Sharia insurance not only upholds spiritual values but also strengthens legal certainty and participant protection within a just economic system. From a business law perspective, it can therefore be concluded that Indonesia has sought to regulate sharia insurance through a combination of positive law, OJK regulations, and sharia fatwas in order to minimize elements of uncertainty.

## 2. The Implementation of These Regulations in Sharia Insurance Practices

Although normatively the legal regulation of uncertainty (*gharar*) in Sharia insurance is relatively clear through the combination of Law No. 40 of 2014 on Insurance, OJK regulations, and DSN-MUI fatwas, implementation in the field still faces significant challenges. According to (Suyanto, 2010), the development of Sharia insurance in Indonesia still relies heavily on DSN-MUI fatwas, so that from the perspective of positive law it does not yet have a solid operational standard as a reference. (Hapsari, 2025) add that although the fund management system in Sharia insurance is already transparent using *tabarru'* accounts, challenges remain in terms of legal certainty and public awareness.

Sharia insurance has a more transparent fund management system. All premiums collected are used for claims and investments in accordance with Sharia principles. In this case, Sharia insurance companies act only as fund managers (*mudharib*) and do not have full ownership of the collected funds. Thus, participants still retain control over the funds they contribute (Hapsari, 2025). However, although the management system implemented is already in accordance with Sharia principles and provides a fair position for participants, from the perspective of formal law, the development of Sharia insurance in Indonesia still faces challenges, particularly regarding the availability of a strong and comprehensive legal basis to support its operations. For example, Sharia insurance does not yet have positive law to serve as a reference for operational management. So far, the only guidelines have been DSN-MUI fatwas (Suyanto, 2010). Nevertheless, the basic principles applied continue to prioritize transparency and mutual assistance among participants, as reflected in the fund management mechanism. In practice, funds collected from Sharia insurance participants are managed in special *tabarru'* accounts, which are used to pay claims of other participants who experience misfortune. Profits derived from fund management are distributed according to Sharia principles, not merely as company profits.

The implementation of these legal frameworks also requires the existence of a Sharia Supervisory Board (DPS), which oversees all company activities to ensure compliance with Sharia principles. The role of DPS is crucial to ensure that all processes, from fund management, insurance products, to company operations, comply with applicable Sharia standards. In addition, Sharia insurance companies must comply with regulations from the Financial Services Authority (OJK) and DSN-MUI fatwas. This includes aspects of products, marketing, fund management, and financial reporting.

The implementation of Sharia law in Sharia insurance practices in Indonesia is also influenced by the level of understanding and awareness of society, as well as the readiness of companies in adopting these principles. One of the main challenges faced in implementing Sharia insurance is the low level of public literacy and understanding regarding the concept of Sharia insurance. Many people still consider insurance in general as something that involves speculation or usury, which discourages participation. Another challenge is regulations and policies that are not yet fully supportive (Obaidullah, 2005). Although OJK regulations and DSN-MUI fatwas exist, their implementation often faces obstacles, such as lack of harmonization between Sharia and conventional regulations, and complex licensing processes for Sharia insurance companies.

The success of implementing clear and comprehensive regulations, accompanied by transparent and accountable fund management, becomes a key factor in building public trust in Sharia insurance. Furthermore, continuous educational efforts are highly necessary to improve public understanding and awareness of Sharia insurance principles, thereby reducing uncertainty and doubts in insurance contracts. Support from regulators, insurance companies, and the active role of the Sharia Supervisory Board in ensuring compliance with Sharia principles are also important aspects that cannot be overlooked. With good synergy among all stakeholders, it is expected that the Sharia insurance industry in Indonesia can grow healthily, provide fair protection consistent with Islamic values, and contribute positively to the national economy in the long term.

#### IV. CONCLUSIONS

Islamic insurance in Indonesia has developed as an alternative to conventional insurance, based on the principles of mutual assistance and shared risk management in accordance with Islamic teachings. The regulation of uncertainty (gharar), speculation (maysir), and interest (riba) in Islamic insurance has been addressed in Law No. 40 of 2014 and OJK regulations, aimed at ensuring legal certainty and compliance with Islamic principles.

However, the implementation of these regulations still faces challenges, particularly regarding the low public understanding of Islamic insurance and the gap between the regulations for Islamic and conventional insurance. Therefore, supervision by the Sharia Supervisory Board (DPS) and OJK needs to be strengthened to ensure that Islamic insurance practices remain in line with Sharia principles and provide fair protection for participants.

The main legal implication from the analysis of uncertainty in syariah insurance is the need for regulatory refinement that focuses more on the transparency and clarity of the contract (akad) to ensure the validity of the agreement and prevent gharar (uncertainty) that may harm any party. Although Law No. 40 of 2014 and OJK regulations serve as the legal foundation, there is still an implication for adding more specific positive legal basis beyond the DSN-MUI fatwas, in order to create a robust operational standard that doesn't overlap with conventional regulations. Furthermore, legally, it implies the necessity of strengthening the supervision by the Syariah Supervisory Board (DPS) and the OJK to guarantee the company's operational compliance with syariah principles and provide fair legal protection for participants.

To improve the implementation of Islamic insurance in Indonesia, several important steps need to be taken. First, increasing public literacy about the concept and benefits of Islamic insurance so that more people understand and take advantage of it. Second, there needs to be harmonization between the regulations for Islamic and conventional insurance to avoid overlap in operational implementation. Third, strengthening supervision by the Sharia Supervisory Board (DPS) and OJK to ensure that Islamic insurance practices align with Sharia principles. Lastly, the addition of more specific legal frameworks is needed to provide clear guidance for Islamic insurance companies in their operations.

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