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# المؤتمر العالمي الحادي عشر لعلماء الشريعة في المالية الإسلامية

## سوق رأس المال الإسلامي والمصرفية الإسلامية: تقويم القضايا العالقة

**ISLAMIC CAPITAL MARKET & ISLAMIC BANKING: AN APPRAISAL OF UNRESOLVED ISSUES**

# CONTRA TRADING IN BURSA MALAYSIA SECURITIES BERHAD: A SHARIAH AND LEGAL APPRAISAL

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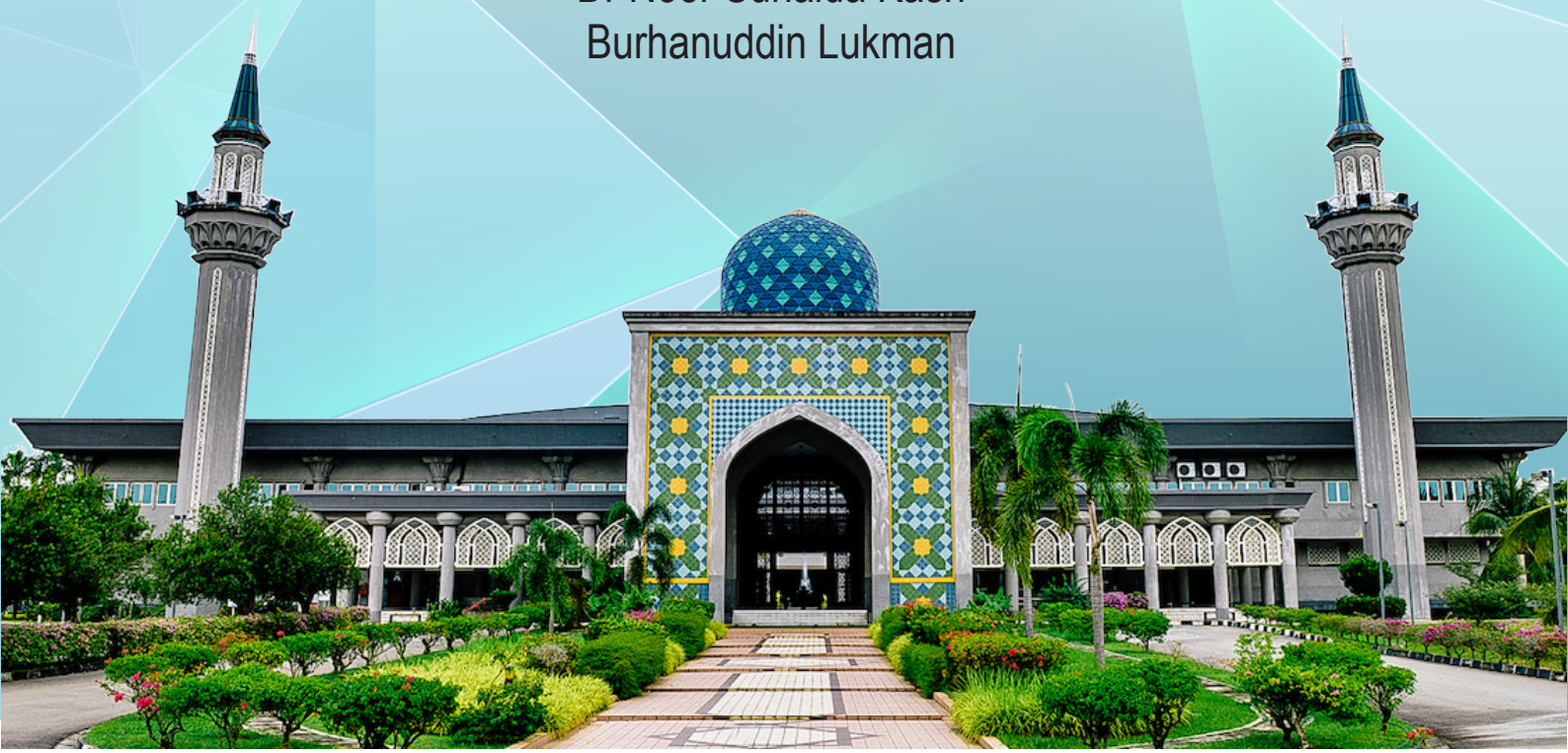

**Contra Trading in Bursa Malaysia Securities Berhad:**
**A Shariah and Legal Appraisal**

**By**

Dr Noor Suhaida Kasri
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## PART A
## Introduction

Contra trading is an important aspect in stock trading. It allows a buyer who bought the shares to sell them before paying for the price of the shares to the seller. However contra trading is only given to those buyers who meet the prerequisites set by the authorities thus making this trading a supervised and regulated trading on the Bursa Malaysia Securities Berhad ('the Exchange'). Having said that and despite the claim that contra trading facilitates the efficiency and liquidity of the market, the manner in which it is being carried out attracts Shariah scrutiny.

This paper examines Shariah issues relevant to the contra trading. Four issues have been identified in contract trading. They are:

i. Deferment of both counter-values (تأجيل البدلين)
ii. Selling something before taking it into possession (بيع الشيء قبل فبضه)
iii. Profiting without bearing liability (ربح ما لم يضمن)
iv. Gambling (الميسر / المقامرة)

These issues are analysed using documentary analysis approach. Classical Sharīʿah literature along with contemporary references like prevalent Sharīʿah resolutions and standards of the international Sharīʿah advisory bodies are referred to. The Shariah analysis is also supported by legal analysis that used Bursa Malaysia trading rules, Best Practices and other related legislation in its analysis.

This paper unearth two primary contentious issues, namely issues on constructive possession of shares which raise the question of whether it is on the contract day or the

registration day/settlement day. The second contentious issue relates to profiting without bearing liability, in which if the possession cannot be established, the profit generated through contra transaction is also not justified as it generated from selling an asset that the contra trader does not bear its liability.

The analysis of these critical issues leads to the finding of this paper that due to the provision of needs (الحاجة) and the maxim ما قارب الشيء يعطى حكمه – what is close to something applies its rule, contra trading may continue. Moving forward this paper suggests that the period for settlement be shorten as practiced in some jurisdiction.

This paper is divided into four Parts. Part A introduces the paper. Part B describes contra trading and its detail operation. Part C is the backbone of this research as it analyse the issues in contra trading from Shariah and legal perspective. Finally Part D concludes the paper.

## PART B
## Contra Trading

The definition of 'contra trading' is not explicitly mentioned anywhere in the statute and by-laws of security trading particularly the Capital Market Services Act 2007 (CMSA), the Rules of Bursa Malaysia Securities Berhad (Exchange Rules), the Rules of Bursa Malaysia Securities Clearing (Clearing Rules) and the Rules of Bursa Malaysia Depository Sdn Bhd (Depository Rules). However the term 'contra trading' is found to be defined in one Best Practices issued under Rule 7.16 of the Rules of Bursa Malaysia Securities Berhad. Under Para C(1) of the Best Practices in the Islamic Stockbroking Services undertaken by Participating Organisations (PO's Circular No. R/R 6/2016) (Best Practices),

> "'contra transaction' means 'a transaction where a Participating Organisation allows its client to settle outstanding purchase positions against outstanding sale

positions of the same securities where the orders in respect of the purchase and sale transactions are transacted within the period stipulated by the FDSS[1].'"

The Best Practices also defines 'contra losses' as,

> "all or any losses suffered by clients in the course of dealings in contra transactions and shall include all charges, costs and expenses."

Before going into the nature of contra trading, it is worth noting that the definition of contra trading in an Islamic stock broking Best Practices presupposes that contra transaction is an Islamic or Shariah-compliant trading activities. However the persuasiveness of such Best Practices can be gauge from the Key Objectives of the Best Practices, at Para B that states,

> "to pthirovide guidance to the Islamic Participating Organisations in respect of practices ***recommended to be observed*** in the carrying out of Shariah-compliant stockbroking services undertaken by the Islamic Participating Organisations whether on full fledged basis or 'window'-basis (emphasis own);"

As well as the "Background" section in Para A. Para A (3) and (4) of the Best Practices stipulates that,

> "(3) In this regard Bursa Securities is issuing a set of industry best practices with the objective of providing guidance and assistance to the Islamic Participating Organisation in observing the desired practices when carrying out its stockbroking business in accordance with the Shariah principles whether on a full-fledged basis or 'window' basis ("Best Practices"). Islamic Participating Organisations ***should adopt these Best Practices*** in carrying out the Islamic stockbroking services (emphasis own).
>
> (4) When implementing these Best Practices, the Islamic Participating Organisations should implement them flexibly and sensibly to suit their respective needs and circumstances. Therefore the Best Practices enumerated ***should not be read as prescriptive*** nor construed in a rigid or literal manner. Nevertheless the application of Shariah principles in

[1] Rule 1.01 of Rules of Bursa Malaysia Securities Berhad defines 'FDSS' as 'The fixed delivery and settlement system established by the Exchange that fixes and regulates the day and time for the delivery and settlement of securities traded or reported on the Exchange's stock market.

> the operations of the Islamic Participating Organisations must not be compromised in any circumstances. In this respect, the flexibility lies in the ingenuity of the respective Islamic Participating Organisations to apply the relevant Shariah principles and concepts in carrying out their business or services"

Taking into consideration that no Shariah resolution on contra trading been issued by the Shariah Advisory Council of the Securities Commission nor Shariah Advisory Council of the Bursa Malaysia; and the minimal level of persuasiveness of the Best Practices as shown in the above provisions, this study on contra trading is undertaken with special focus on its related Shariah issues.

**Requirements for Contra Trading**

Though the execution of order for contra trading is similar to stock trading, the period for its execution differs. Rules 9.09(3) of the Exchange Rules explains when a contra could take places. It states,

> "Notwithstanding Rule 9.09(2), a buying Client may sell securities for which he has not paid, at any time before 12.30 p.m. on the 3rd Market Day following the Contract Date (T+3) and such sale will be deemed to be a sale to close-off the buying Client's purchase position in respect of that securities and such close-off is referred to as "contra"."

In addition to that in contra, either the client or the broker, as the case may be will have to pay to the other, the difference between the price of the stock at the time when it first bought and the price at the time it got sold. Therefore if the buy cost is higher than the sell proceeds, it results in a contra loss which the client pays to the broker. On the other hand, if the sell proceeds are higher, it results in a contra profit which the broker pays to the client.[2] Unlike in stock trading, the seller will get full payment for the price of the stock from the purchaser, and the purchaser will in return get the stock.

[2] [Source: http://www.bursamalaysia.com/market/securities/equities/trading/contra-transactions/]

Besides the difference in the contra execution period and the payment of difference under the contra trading, the implementation of contra trading is subject to some other conditions precedent. Rule 9.10 of the Exchange Rules describes them as follows,

'(1) A Participating Organisation may permit a client to contra its buy contracts if:

(a) A Participating Organisation has guidelines on contra;
(b) A Participating Organisation notifies the clients of the guidelines prior to doing the contra;
(c) In allowing for a client to contra, a Participating Organisation takes into account the client's financial ability to pay for losses (if any) arising from the contra; and
(d) The contra is effected not later than the time and date stipulated under Rule 9.09(3).'[at any time before 12.30pm on the 3rd Market Day following the contract date (T+3).

(3) A Participating Organisation may impose charges on its Client for a "contra".
(4) Any difference resulting from a "contra" must be settled between the Participating Organisation and its Client not later than the 5th Market Day following the date of such "contra".

The above Rule 9.10 and Rules 9.09(3) are significant as they lay out the prerequisites for contra trading. These provisions clearly show that contra is not a right of the client but rather a privilege given at the discretion of the stock broker. Thus the client's financial credibility and credit worthiness is critical in deciding whether to facilitate or not to facilitate the client.[3] These provisions also indicate that contra trading is meant to facilitate buyers who are not ready with the payment for the purchase of stock, to sell-off its buying position. The contra is subject to some charges to be paid by the client to its broker, on top of differential payment if there is a contra loss to the client.

[3] Though the broker would automatically contra any outstanding open positions whenever its client defaulted in settling the payment for the stock at T+3.

The following Diagram A explains the process involves in stock trading as well as contra trading at the Bursa Malaysia Securities Berhad ('the Exchange').

Investor/Client

**By way of calling up the stock broking company**

Investor already open with the broker **trading account** as well as **Central Depository System (CDS) account**

Give buy/sell **order** to the stock broker/dealer's representative broker

The broker will execute the order by keying in the details of the order into the order book in the **Bursa Malaysia Automated Trading System (ATS)**

**By way of Direct Market Access (DMA)**

Investor already opened with the broker **trading account as well as Central Depository System (CDS) account**

Investor will execute the order by keying-in the details of the order into the **Bursa Malaysia Automated Trading System (ATS)**

**BURSA MALAYSIA SECURITIES BERHAD (the Exchange)**

When order is matched, the ATS will send out **match confirmation** to both broker house for the buyer and seller, providing details on:
1) the name of the stock
2) the quantity of the stock
3) the price of the stock
4) the time the order got matched
5) the counter-parties, i.e., the stock brokers. The brokers are identified by their given code numbers.

The buy/sell order are matched via the matching algorithm set in the ATS based on **time-price priority.**

HOW?
The priority in the matching of the order will be based on:
First – **Price**, the best price will be matched.
Second – **Time**, if there are several orders of the same price, the time that the orders are executed into the ATS will be considered.

Once the order is matched, it becomes a **trade**

Dealer's representative may **call** the investor to confirm the trade

Investor will receive the match confirmation **electronically** from the ATS

At the end of each trading day (T), the broker will provide a **contract note** to the investor

Contra

The buyer decides to **sell off** its buying position before 12.30pm on T+3 (**Contra**)

The contract note entails the:
1. Date of the transaction
2. The sell/buy position
3. The name of the stock and its code
4. The quantity of the stock
5. The price of the stock
6. The fees – brokerage, contract stamp duty, clearing
7. Date for Delivery and Payment, i.e., T+3

Share

**The buyer decides to hold the stocks until Clearing** and **Settlement** process at T+3

## Contra

On T+2 by 4.00 p.m., seller must ensure securities are available in the CDS Account

The buyer will inform its intention to contra to its broker. Upon the agreement by the broker to the contra request, the broker will execute the order to sell the buy position.

The sell order will be matched with a new buy order. A new contract note will be issued to the buyer (seller) and the new buyer.

In reference to delivery of securities, on T+3 by 10.00 a.m. seller CDS Account is debited with securities and buyer's CDS account is credited with securities.

In reference to financial settlement between Clearing House and Clearing Participant,

- Net Buying Clearing Participant (broker) to make payment to the Clearing House by 10.00 a.m. on T+3.
- Clearing House will make payment to net Selling Clearing Participant by 10.00 a.m. on T+3.

In reference to payment between broker and client,

- Payment to selling client on T+3, not later than 12.30 p.m.

In reference to the contra settlement, within 5 Market Days from the date of contra, the dealer for the original buyer will contra the payment flow by way of:

1. Calculating the net amount that the buyer needs to pay (for his buy position) and the net amount that the buyer will receive (for the sales of its buy position)

2. Based on this calculation, the broker will only give the buyer the difference payment (if there's any). Otherwise the buyer will have to pay the difference to its broker.

Contra Ends

## Share

On T+2 by 4.00 p.m., seller must ensure securities are available in the CDS Account

In reference to delivery of securities, on T+3 by 10.00 a.m. seller CDS Account is debited with securities and buyer's CDS account is credited with securities.

In reference to financial settlement between Clearing House and Clearing Participant,

- Net Buying Clearing Participant (broker) to make payment to the Clearing House by 10.00 a.m. on T+3.
- Clearing House will make payment to net Selling Clearing Participant by 10.00 a.m. on T+3.

In reference to payment between broker and client,

- Payment to selling client on T+3, not later than 12.30 p.m.
- Payment by buying client on T+3, not later than 12.30 p.m.

However, FOUR scenarios could happen

**FIRST**: **Have shares** in CDS account and money in trading account when processing

Success trade

**SECOND**: **Don't have shares** in CDS account when processing

Fail trade

**THIRD**:
**Insufficient shares** in CDS account when processing and considered fail trade *i.e.* the seller sells 10,000 shares, but only 9,000 shares in his CDS account

Buyer need to **pay** only for 9,000 shares as the shares is credited to his CDS account by 10am at T+3

The insufficient 1,000 shares are considered as fail trade. This fail trade will be settled through the buy-in board

**FOURTH:**
The buyer defaulted in its payment. The buyer broker shall institute a selling-out, forcing the sale of the purchased shares. The timing for the selling-out will be from 12.30 pm on T+3 until T+4

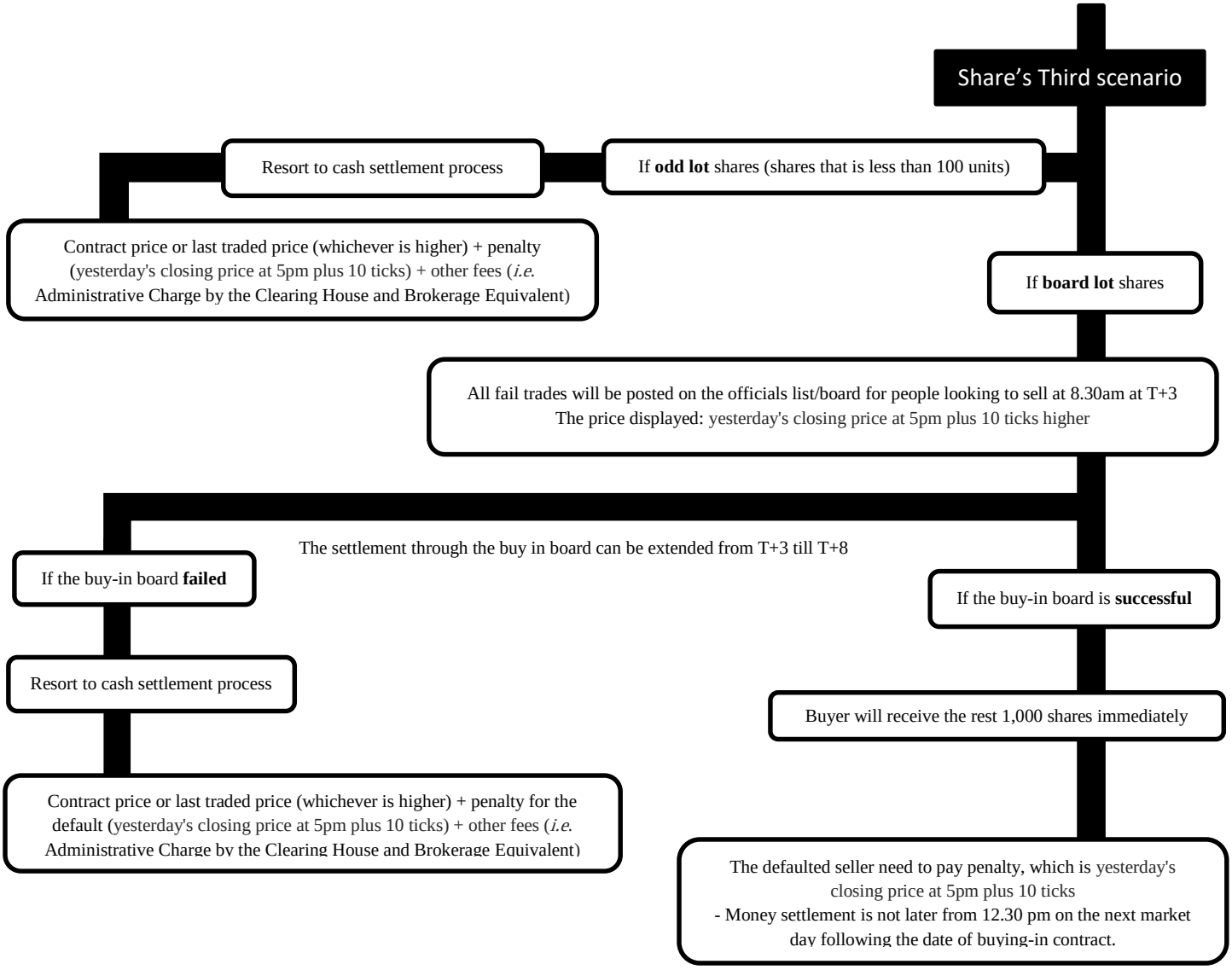


Diagram A

Before deliberating on the Shariah issues on contra trading, the following section sets out the history for the adoption of T+3 settlement period as well as its rationale.

## The History of T+3 Settlement Period

The adoption of the period for clearance and settlement of security trading at T+3 was led by the United States as early as the 90s. Prior to the adoption, the market practice for clearance and settlement was T+5. The event that triggered such adoption was the crash of the United States security market in October 1987. The crisis in the United States has systemically affected other markets in other parts of the region. The market then realized that despite the clearance and settlement system of the United States were

known to be the safest, it was still vulnerable. At the behest of the need to identify the cause and the panacea for the crash, the Group Thirty, an independent international non-profit organization that focuses on international financial system, took a formidable study on state of the clearance and settlement systems in the securities market. Based on this study, a report was issued in March 1989 (Group Thirty Report). The Report entitled "Clearance and Settlement Systems in the World's Securities Markets, recommended among others that,

> 'A "Rolling Settlement" should be adopted by all markets. Final settlement should occur on T+3 by 1992. As an interim target, final settlement should occur on T+5 by 1990 at the latest, save only where it hinders the achievement of T+3 by 1992."

The objective of this recommendation was primarily to shorten the delay between the trade date and settlement date; and secondly to standardize settlement time frames throughout international markets. In meeting these two objectives, the Report took into consideration the markets that operated at T+5 or on a shorter period; as well as the markets that operated longer than T+5. For markets that operated at T+5 or on a shorter period, they were strongly urged to consider moving to T+3 by 1990. While markets that operated longer than T+5, the standard of T+3 ought to be adopted by them by 1992.

The rationale for the adoption of T+3 settlement was due to the lessons that the market has learnt in the October 1989 market crash. During and after the week of October 19, 1987, over 50 introducing brokers failed, many as a result of the inability of customers to meet margin calls and pay settlement obligations. The failure to meet margin calls and/or transaction settlement obligations exposed some clearing firms to financial loss, thus threatening the entire financial system. The aftermath of the crisis has even led to the winding up of Drexel Burnham Lambert Group, a large broker-dealer company as well as three other clearing firms, Metropolitan Securities, H.B. Shaine and Co. and American Investors Group. The financial difficulties has also affected introducing firms where 50 of them has failed. The reason was similar to the other failing market players, the non-ability or unwillingness of their clients to meet margin calls and/or transaction settlement obligations.

The situation is exacerbated by the clearing and settlement structure where Clearing Corporation interpose themselves between the seller and the buyer of the security. However for clearing firms, they stand between the Clearing Corporation and stock broking companies. In the case of the United States market, trading, clearing and settlement in a day amounts to billions. The United States' National Securities Clearing Corporation processes at an average over USD22.5 billion in corporate equity and debt transaction in a day. The high volume and the interposition exposed the Clearing Corporation to considerable risks that includes market risk, credit risk on open contractual commitment and more importantly systemic risk. Thus in a volatile market, the value of security position can suddenly change causing a market participant to default on unsettled position. Due to the interwoven nature of the market, one default by one member members could trigger additional defaults to another counter-party in another transaction. Eventually these contagious defaults caused a detrimental domino effect to the national clearance and settlement system. This risk is more acute when one take into consideration the over-the-counter derivatives market. In this market, dealers shift risk exposure among major market participants – locally and internationally.

The release of the Group Thirty Report led several countries to study the viability of the Report's recommendation on their own turf. In this respect, the Securities and Exchange Commission of the United States (the SEC) form a task force headed by John W. Bachmann to evaluate independently this issue – the reform in the clearance and settlement system as well as to the suitable time table for the changes. In May 1992, the Bachmann task force issued their findings. In their report (Bachmann Report), the task force concluded among other things that "time equals risk" and that the settlement cycle for corporation and municipal securities should be compressed to T+3. The task force thus recommended that time line to be by July 1994. The Bachmann Report reinforced the proposition of the Group Thirty Report. They argued that a shorter settlement period will reduce market risk to a clearing corporation and to its members as well as to the market as a whole. The Bachmman Report showed via collected data that moving settlement from T+5 to T+3 reduced the risk to the National Securities Clearing Corporation by 58% in the event of the failure of an average large member during normal market conditions. The SEC concurred with the finding and recommendation of the Bachmann Report and argued further that the shorter settlement period would result to:

(i) reduced risk in credit and market as there are fewer unsettled trades;

(ii) less time between the trade execution and settlement for the value of those trades to deteriorate;

(iii) reduce financing costs by allowing market investors to obtain the proceeds of securities transaction sooner; and finally

(iv) encourage greater efficiency in clearing agency and broker-dealer operations.

**Adoption of T+3 Settlement Period by the Exchange**

In line with the internationally accepted market practice, Malaysia has now adopted the T+3 settlement period. The adoption was made official by the Kuala Lumpur Securities Exchange (KLSE) in December 2000 where settlement period was shorten to T+3 from T+5. The KLSE consulted industry participants prior to the implementation in order to educate and get them aware of the benefits of T+3. It was also for KLSE to get the industry feedbacks and concerns in the implementation of the T+3. By adopting the T+3 settlement period, KLSE has abled to reduce risk as shares and cash are settled earlier. The standardization of the settlement period has put KLSE at par with other major international exchanges thus facilitates its cross-border investment operations as well as enhance its competitiveness. This could be seen from the continuing growth of investors' interest and confidence in the Malaysian securities market. This is evidenced by the data shown in Table 1 which depicts the growth of investor activity a year after the T+3 adoption.

Table 1

Growth of Investor Activity

| | | Reporting Period 1 July 2000 to 30 June 2001 | Total as at 30 September 2001 |
|---|---|---|---|
| 1. | No. of new accounts opened | 77,336 | 2.8 million |
| 2. | No. of securities immobilised | 16.5 billion | 197.8 billion |
| 3. | No. of companies prescribed into CDS | 28 | 816 |
| 4. | Book entry settlement of traded securities | 34.9 billion | 362.7 billion |
| 5. | No. of ordinary transfer transactions | 578,293 | 8.1 million |
| 6. | No. of Record of Depositors (ROD) produced | 13,241 | 69,464 |

Source: Kuala Lumpur Stock Exchange Annual Report 2001.

The length of the period for clearing and settlement depends on the history, development, geographical and need of the market. The following Table 2 shows the variance of such practices in the respective countries

## Table 2: Settlement cycle of different countries

| No. | Country | Settlement Date | Comments |
|---|---|---|---|
| 1 | Bursa Malaysia[4] | T+3 | Malaysia's bursa has a dedicated tab for contra transaction under their trading |
| 2 | Tadawul (Saudi Exchange)[5] | T+0 for shares or exchange traded funds units<br><br>T+2 for debt instruments | They differentiate between the share types |
| 3 | Abu Dhabi Securities Exchange[6] | T+2 | Nil |
| 4 | Bahrain Bourse[7] | T+2 | Nil |
| 5 | NasdaqDubai[8] | T+2 | Nil |
| 6 | Japan Exchange Group[9] | T+3 | Nil |
| 7 | Hong Kong Exchanges and Clearing[10] | T+2 | Nil |
| 8 | Shanghai Stock Exchange (SSE) via China Securities Depository and Clearing Corporation Limited (CSDC)[11] | T+1 settlement cycle for A shares and T+3 for B shares. | A-shares are only available for purchase by mainland citizens due to restricted foreign investment<br><br>B-Shares are eligible for foreign investment provided the investment account is in the proper currency. |
| 9 | Nasdaq[12] | T+3 | They use D+3 instead of T+3 |

[4] http://www.bursamalaysia.com/market/securities/equities/trading/trading-procedures/
[5] https://www.tadawul.com.sa/wps/wcm/connect/561b1cd8-ad48-4d68-8a42-bcd2c0ff1b78/Securities+Depositry+Center+Regulations+-+Tadawul-English+-+12-05-2012.pdf?MOD=AJPERES
[6] https://www.adx.ae/English/Pages/AboutUs/Whoweare/Departments/CSD/default.aspx

[7] http://www.bahrainbourse.com/clearing
[8] http://www.nasdaqdubai.com/solutions/solutions-overview#csd
[9] http://www.jpx.co.jp/english/clearing-settlement/outline/03.html
[10] http://www.hkex.com.hk/eng/rulesreg/listrules/guidref/documents/d_ta.pdf
[11] http://english.sse.com.cn/tradmembership/tradingsystem/clearing/
[12] http://www.nasdaqomx.com/digitalAssets/102/102567_160425-joint-appendix-3---trading-and-clearing-schedulea.pdf

| | | | |
|---|---|---|---|
| 10 | New York Stock Exchange (NYSE)[13] | T+3 | They use the term crossing session |
| 11 | London Stock Exchange[14] | T+3 | Nil |
| 12 | Luxembourg Stock Exchange[15] | T+2 | Nil |
| 13 | Singapore Exchange[16] | T+3 | Nil |
| 14 | Indonesia Stock Exchange[17] | T+3 | Nil |

[13] https://www.nyse.com/markets/nyse/trading-info#Crossing_Session

[14] http://www.londonstockexchange.com/traders-and-brokers/rules-regulations/buying-in/buying-in-timetables.htm

[15]https://www.bourse.lu/v?_v_=hv6XkrJkCc9oiQkRLkHot7wL88ISMfR4vX5Ic7fi1Z2SWNySHabSJzogZL%2F0LBPDX7dChPFQ%2FPzs%0AtHXaKbg8Oubjk9dj46kpKkdSMutI8ZpycaRDBmk45Rxo1D%2FolZeUEivHsMoPzmS%2BaVDj8wTntCrk%0A0W9sClsRkSu4BhsiGBY6wPW8upFwxGvTForvrDLYRrC9ueKGQsoKqBTmKYx3nPCAALbq%2FUw%2FWSha%0AWkBCAQZ8hFenOM6xSWNaJ5Fg2aIdNbCvn%2B9pjK%2BWhbX5vKdYtrkZCH1EPB2AAp7lgC8XeEaj1zCl%0AG%2BGrZ4RXKWWi%2F4u6

[16] http://www.sgx.com/wps/portal/sgxweb/home/clearing/securities/securities_clearing

[17] http://www.idx.co.id/Portals/0/StaticData/Regulation/TradingRegulation/en-US/Regulation_II-C_ETF_Eng.zip

# PART C
# Analysis of Shariah Issues in the Contra Trading

As detailed in the first part of this paper, the contra trading is about selling shares that one has bought, before price settlement is made to the seller. There are mainly four Shariah issues that could be raised against the practice of the contra trading, as the following:

i. Deferment of both counter-values (تأجيل البدلين)
ii. Selling something before taking it into possession (بيع الشيء قبل فبضه)
iii. Profiting without bearing liability (ربح ما لم يضمن)
iv. Gambling (الميسر / المقامرة)

These issues will be discussed one by one in the next subchapters.

## First issue: Deferment of Both Counter-Values (تأجيل البدلين)

### Muslim Scholars' views

The deferment of both counter-values refers to a contract of exchange i.e. sale and purchase whereby the counter-values are not delivered in the contract session ( مجلس العقد). Some scholars especially the Malikis name it ibtida' al-dayn bi al-dayn ( ابتداء الدين بالدين) – initiating debt with debt, they also use another term for it, ta'mir al-dhimmatain (تعمير الذمتين) – engagement of financial liabilities of both the counter-parties.

Many scholars have generalised that the deferment of both counter-values is prohibited in Shariah. Some mentioned that it has been an ijma' and the scholars have unanimously agreed on the prohibition.

Besides the ijma', they also support the prohibition with a hadith, which has been narrated by al-Hakim and al-Baihaqi as follows:

عَنِ ابْنِ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا، أَنَّ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ "نَهَى عَنْ بَيْعِ الْكَالِئِ بِالْكَالِئِ"

Which means, "From Abdullah ibn Umar -may Allah be pleased with them both- he said that the Prophet ﷺ had prohibited the sale of deferred counter-value for another deferred counter-value".[18]

Ta'jil al-badalain is closely related to the rules of salam sale. In salam sale, delivery of the subject matter is deferred, but the price must be paid before the end of contract

[18] Al-Hakim, al-Mustadrak, v2 p65, Al-Baihaqi, al-Sunan al-Kubra v5 p474. Al-Hakim said: هَذَا حَدِيثٌ صَحِيحٌ عَلَى شَرْطِ مُسْلِمٍ وَلَمْ يُخَرِّجَاهُ, which means: "this is an authentic hadith that fulfils the conditions laid down by Imam Muslim even though he did not narrate it in his book". However, many scholars of hadith considered it weak, as we will see in this paper.

session. Besides the above hadith نهى عن بيع الكالئ بالكالئ, this rule is also deduced from a direct hadith about salam, where the Prophet ﷺ said:

" مَنْ أَسْلَفَ فَلْيُسْلِفْ فِي كَيْلٍ مَعْلُومٍ وَوَزْنٍ مَعْلُومٍ إِلَى أَجَلٍ مَعْلُومٍ "

Which means, "Whoever pay money for salam, must pay for [a subject matter] which has been described its specific measurement, specific weight and specific tenure."

They argue that the literal meaning of the word التسليف is التقديم which means: "to advance" and فَلْيُسْلِفْ is "must pay in advance", therefore, if a salam buyer does not give and pay the price before they part their ways from the contract session, he is not doing salam.

They also argue that the word "salam" (سَلَم) is derived from "islam" (إسلام المال) which in this context means "to deliver" i.e. deliver the price or capital. In this regard, al-Ramli from the Shafi'i school said: [19]

وَالسَّلَفُ التَّقْدِيمُ فَاقْتَضَى التَّعْجِيلَ وَلِأَنَّ السَّلَمَ مُشْتَقٌّ مِنْ اسْلَامِ رَأْسِ الْمَالِ أَيْ تَعْجِيلِهِ وَأَسْمَاءُ الْعُقُودِ الْمُشْتَقَّةِ مِنْ الْمَعَانِي لَا بُدَّ مِنْ تَحَقُّقِ تِلْكَ الْمَعَانِي فِيهَا

Which means, "and *al-salaf* means *al-taqdim* (to advance [the payment]) hence it requires acceleration (advancement and non-deferment), and because salam [sale] is derived from "delivery" of capital, i.e. to advance the capital, and the names of contracts which are derived from the meanings of the words should realise those meanings"

Another argument is about gharar – uncertainty. Non-delivery of counter-value in the contract session gives rise to uncertainty of delivery in future and it is allowed in salam sale even though one of the counter-values is deferred because of public need. This uncertainty has been lessened by stipulating the delivery of one of the counter-values i.e. the price.[20]

They also argue that engaging the liabilities (شغل الذمتين) of both parties makes both parties on demand to deliver, which could possibly lead to more disputes and quarrels.[21]

Another argument is that ta'jil al-badalain causes liabilities to the parties without a proper benefit to them. The objective of contract is to transfer the counter-values into one's possession. If both counter-values are deferred, both parties are now liable without achieving the objective of the contract.[22]

The prohibition of deferment of both counter-values has been adopted by many fatwa institutions, for example, International Fiqh Academy (مجمع الفقه الإسلامي الدولي) in its

[19] Al-Ramli, Hashiah al-Ramli ala Asna al-Matalib, v2 p122, also al-Damiri, al-Nahj al-Wahhaj fi Sharh al-Minhaj, v4 p239. Actually al-Damiri used the إسلام رأس المال and al-Ramli used استلام رأس المال

[20] See al-Ramli, v2 p122.

[21] Al-Qarafi, al-Furuq, v3 p290

[22] See: Ibn Taimiah, Nazariah al-Aqd, p235. He said: " فَإِنَّ ذَلِكَ مُنِعَ مِنْهُ لِئَلا تَبْقَى ذِمَّةُ كُلِّ مِنْهُمَا مَشْغُولَةً بِغَيْرِ فَائِدَةٍ حَصَلَتْ لا لَهُ وَلا لِلآخَرِ ، وَالْمَقْصُودُ مِنَ الْعُقُودِ الْقَبْضُ ، فَهُوَ عَقْدٌ لَمْ يَحْصُلْ بِهِ مَقْصُودٌ أَصْلا ، بَلْ هُوَ الْتِزَامٌ بِلا فَائِدَةٍ "

resolution about international commodities, no 147 issued in its 16th conference 2005[23], AAOIFI in many of its standards, for example in standard 20 about the sale of commodities in organised markets[24], and also Dallah al-Barakah in its ruling no. 91 issued in 1421H about the deferment of both counter-values, which says that ta'jil al-badalain is not allowed except in the state of necessities (حالة الضرورة).

## Analysing the arguments used against ta'jil al-badalain

Some scholars opine that the arguments used to establish the prohibition of ta'jil al-badalain are inconclusive and could still be refuted, as follows:

i. The claimed ijma' is true for some of examples of ta'jil al-badalain or bai al-kali' bi al-kali', but may not be true for some other examples[25].
   For instance, even though istisna' sale also falls under the category of ta'jil al-badalain, it is allowed by many and there are evidence that the Prophet ﷺ has done it during his life. Yes, the Hanafis try to justify the permissibility of istisna' by saying that istisna' is partially ijarah, and in the rules of ijarah the payment can be made at the end after the delivery of the service. However, it is merely an interpretation and not a concrete justification, as there is no clear distinction and difference between the effort in building or manufacturing in istisna', and the effort in planting or searching for goods in salam?

   Another example of ta'jil al-badalain that have been practised by the early muslims is the transaction of the people of Medina (بيعة أهل المدينة), it is a sale and purchase done for future delivery of goods and future settlement. Imam Malik narrated in his book al-Mudawwanah that Salim bin Abdullah said:

كُنَّا نَبْتَاعُ اللَّحْمَ كَذَا وَكَذَا رَطْلًا بِدِينَارٍ يَأْخُذُ كُلَّ يَوْمٍ كَذَا وَكَذَا، وَالثَّمَنُ إلَى الْعَطَاءِ فَلَمْ يَرَ أَحَدٌ ذَلِكَ دَيْنًا بِدَيْنٍ وَلَمْ يَرَوْا بِهِ بَأْسًا[٢٦]

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[23] It says: "وهذا العقد غير جائز لتأجيل البدلين، ويمكن أن يعدل ليستوفي شروط السلم المعروفة، فإذا استوفى شروط السلم جاز."

[24] AAOIFI Shariah Standard no 20 says:

٢/٢/٣ للعقود المؤجلة البدلين صورتان:

١/٢/٢/٣ أن تكون السلعة موصوفة في الذمة ، و يكون الثمن مؤجلا ، سواء تم العقد بلفظ البيع أو بلفظ السلم **وهي لا تجوز** لأنها عقد السلم لم يجعل فيه رأس مال السلم. وينظر المعيار الشرعي رقم (١٠) بشأن السلم و السلم الموازي.

٢/٢/٢/٣ أن تكون السلعة معينة ويشترط تأجيل تسليمها مع تأجيل الثمن، **وهي لا تجوز**.

[25] Ibn Bayyah, the comments given by Sheikh Abdullah ibn Bayyah about Taurid (Importation) contract during the conference of International Fiqh Academy, Majallah Majma' al-Fiqh al-Islami, v12-2, p554
see also: al-Shubaili, at: http://ar.islamway.net/fatwa/34038/عقد-التوريد

[26] Malik, al-Mudawwanah, v3 p315

Which means, "We used to purchase meat such and such pounds for a dinar and we will take the meat every day such and such amount, and the price will be settled on the day of bonus (salary), no one considered it as a debt for debt transaction and they did not see any problem with it". So the practice is an ijma' of the people of Medina.

The majority scholars actually allow the sale of ascertained asset whether the asset is present or absent from the contract session, with the deferment in its delivery and price settlement.[27]

Bai' al-kali' bi al-kali' can be used to refer to many types of transactions, and the type that has been unanimously prohibited is settling a previous debt by entering into a new debt transaction which has a longer tenure and higher amount, which the Malikis term as faskh al-dayn fi al-dayn (فسخ الدين في الدين).

The so-claimed ijma' is also questionable since there were scholars that allowed deferment of both counter values, the most significant is what has been narrated about the view of Saeed ibn al-Musayyib. Ibn Yunus of Maliki scholars mentioned in his book:

وأجازه ابن المسيب إلى أمد الأجل[٢٨]

Which means, "… and Ibn al-Musayyib allowed [deferment of payment in salam] till the end of the tenure."

Ibn al-Musayyib was no ordinary tabi'in, he was described by al-Imam Malik as the most knowledgeable tabi'in in Hijaz about financial transactions.[29]

Ibn Bayyah also concluded that: "from the various words of al-Imam Malik, it could be understood that he did not see any big issue in the deferment of both counter values"[30]

ii. Their second evidence is the hadith that prohibits bai al-kali' bi al-kali'

The hadith is weak. Al-Hakim was wrong when he said in his book that the hadith was authentic, he mistakenly mentioned Musa bin Uqbah as one of the narrators of the hadith, whereas his real name is Musa bin Ubaidah, and all the narrations of the hadith that reached us actually came through him. Imam Ahmad said about him and the hadith:

"لا تحل الرواية عنه ولا أعرف هذا الحديث عن غيره، قال: ليس في هذا حديث يصح"[٣١]

[27] See: Abdul Wahhab Abu Sulaiman, Fiqh al-Muamalat al-Hadithah, pp35-79, and also: al-Ayyashi Fadad, al-Bai' ala al-Sifah li al-Ain al-Ghaibah, p116

[28] Ibn Yunus, al-Jami' li Masail al-Mudawwanah, v11 p216. See also: the comments given by Sheikh Abdullah ibn Bayyah about Taurid contract during the conference of International Fiqh Academy, Majallah Majma' al-Fiqh al-Islami, v12-2, p554

[29] Ibn Yunus, op cit, v11 p397 , see also: Ibn Taimiah, Nazariah al-Aqd.

[30] Ibn Bayyah, op cit, v12-2, p554

[31] Al-Ghumari, al-Hidayah fi Takhrij Ahadith al-Bidayah, v7 p161

Which means, "any narration from him is not permissible, and I do not know this hadith from other than him," Imam Ahmad also said: "there is no authentic hadith about this topic"

iii. There is no issue about the literal meaning of "salam" or "salaf" sale. The question is whether there is any Shariah evidence to prove that any delay in delivering both the counter-values is not allowed.

The most that the hadith "..مَنْ أَسْلَفَ فَلْيُسْلِفْ" can prove is that the Prophet ﷺ orders **those who want** to advance the payment should do it for a subject matter which has been clearly described. This is because he said, "who advances the payment, must advance it for….", so the command cannot be generalised.

iv. The gharar – uncertainty attached to any deferment is undeniable. However, from the risk perspective of today, we can only reduce the risk borne by the seller in salam sale by stipulating the payment in advance, but the risk borne by the purchaser is now doubled; firstly, the risk of non-delivery of goods by the seller, and secondly the risk of loss and non-refund of the price paid. It is fairer for both parties to make the delivery and the settlement at the same time, and this is what is being practised by most jurisdictions in the world today in many of their regulated transactions, like shares trading, forex trading, international trading using letter of credits etc.

v. The claim that the deferment of both counter-values could lead to more disputes and quarrels is unsubstantiated. We have seen a lot of unresolved disputes arising from non-refund of the amount paid after non-delivery of goods by the seller.

If the possibilities of disputes could be removed, or at least reduced by regulating a proper mechanism to operate and control such transactions when there are needs[32], this argument of theirs will be no more relevant.

vi. The claim that ta'jil al-badalain brings no benefit to the parties is hard to digest. Unless we are able to say that the benefit has been disregarded by Shariah (مصلحة ملغاة), which is yet to be proven as discussed above, otherwise the practice by the whole world in their real economic activities (eg: import export of goods etc) is a clear proof of its benefits to both parties.

**Does contra trading involves the element of ta'jil badalain?**

Contra transaction involves the sale and purchase of shares, the shares and the price will be credited into the accounts of both parties on the third day after the day of

[32] Ibn Bayyah, in his foreword for the thesis titled "Ta'jil al-Badalain fi al-Uqud wa al-Muamalat", at: http://binbayyah.net/arabic/archives/403 , retrieved on 1/8/2016

transaction (T+3, it is actually the fourth day including the day of transaction), as practised in many jurisdictions including Malaysia.

As described in the earlier Diagram, a buyer who bought shares is given till 12.30pm at T+3 to settle the price for the said shares. However the buyer can opt to sell off its buying position anytime between T+0 till T+3 by 12.30pm. Whether there is contra or not, the time for the seller to deliver the shares to the Clearing House is by 4.00pm at T+2 and the shares will be delivered to the buyer not later than 10.00am at T+3. In the Malaysian practice, the delivery of shares and settlement of price will be done by the stock brokers and they will be liable to take delivery of the shares and settle the payment for the shares.

It is clear that the three day delay for the delivery of both counter-values is a given condition inherently embedded in shares trading.

From the description above, we could conclude that shares trading in Malaysia does involve ta'jil al-badalain.

Some writers reject the idea that contra trading involves the element of ta'jil al-badalain. They argue that the purchaser of shares has already had full ownership of the said shares after the sale contract on the first day of transaction (on T) though the shares will only be in their Central Depository System (CDS) account on T+3. The sale and purchase transaction has been captured by the Account Stock Detail Information System of Bursa Securities on a real-time basis[33], the transaction is evidenced by the Contract Note that will be issued on the transaction day.

The authors of this paper do not agree with the above proposition. It is true that the sale and purchase transaction has taken place on the first day, and the transaction has been captured by the automated system. However, ta'jil al-badalain is not about when the transaction takes place, but it is about when the subject matter is delivered and the price is settled, and this will only happen and appear in the accounts of both parties three days after the transaction.

**Nature of shares and shares trading**

AAOIFI in its Shariah Standards does not allow ta'jil al-badalain. In Shariah Standard no.20 "Sale of Commodities in Organized Markets" it mentions two forms of ta'jil al-badalain, depending on the type of asset being the subject matter of sale, as follows:

"3/2/2 There are two forms for contracts with both counter-values delayed:

> 3/2/2/1 That the commodity is a liability through description (موصوف في الذمة), while the price is deferred, irrespective of the contract being concluded with the word sale or with the word Salam. These contracts are not permitted, because

[33] ISRA, Islamic Capital Market Text Book, p181.

they amount to a Salam contract in which the capital of Salam (Ras al-Mal) is not paid promptly.

3/2/2/2 That the commodity is ascertained (معيّن) , but a delay in its delivery is stipulated along with a delay in the price. Such contracts are not permitted."

Contra transaction involves the sale of shares of corporations. A share represents an undivided share in the capital of a corporation, just as it represents an undivided share in its assets and the rights associated with it upon conversion of the capital into tangible things, benefits, debts and so on. The subject-matter of the contract at the time of trading of shares is this undivided share[34].

The shares being the subject of sale represent the ownership of the seller in the capital of a corporation. Hence, at the point of sale, the subject of sale is already in existence, ascertained[35] and owned by the seller[36]. The units of shares represent the volume of the capital of the corporation, and considered fungible (مثليات) as the units are interchangeable and identical to each other. Even though shares as financial papers may not be ascertainable, just like banknotes, but what matters here is the underlying asset of the shares.

Therefore, the sale of shares does not fall under the category of salam sale (بيع السلم), as the subject matter in salam sale is not an ascertained asset and does not necessarily exist during the contract session but rather established as a liability by description ( موصوف في الذمة).

**Allowable period of Deferment of payment**

In salam sale, the price must be delivered on the spot and the deferment of price is not allowed according to the majority of the classical scholars i.e. the Hanafis[37], Shafi'is[38] and Hanbalis[39]. To these views, the price must be delivered before the end of the contract session or the contract will be invalidated.

For the Malikis, they allow the delay in payment for three days. If the delay is more than three days and the delay is a condition of the contract, the contract is invalid. The Malikis have differing views if the delay is more than three days and the delay is not a condition of the contract, depending on the form of the price whether it is in monetary form or commodity; if the price is a commodity the contract is still valid though the

[34] AAOIFI Shariah Standards no.21 Financial Papers (Shares and Bonds), Clause 3/1.
[35] See: AAOIFI Shariah Standards no 21, Appendix B, Shariah Basis p575 (2015 English edition)
[36] This is in the normal situation, in securities borrowing and lending (SBL) the shares can borrowed to be sold by the borrower for the purpose of short-selling.
[37] Al-Kasani, Bada'i al-Sana'i, v5 p202
[38] Al-Sharbini, Mughni al-Muhtaj, v2 p102.
[39] Ibn Qudamah, al-Mughni, v4 p328. See also al-Mausuah al-Fiqhiyyah al-Kuwaitiyyah, v25 p202

delay is more than three days, if the price is monetary some of their scholars say the contract becomes invalid while others do not invalidate the contract[40].

The Malikis opine that three day delay is short hence tolerable. They apply the legal maxim that says ما قارب الشيء يعطى حكمه which means, "What is close to something is given its rule"[41]. Three days are not considered far from the day of transaction, therefore we can still take it as if it is done on the day of transaction.

### Conclusion for the issue of ta'jil al-badalain

In sum, it is correct to say that the shares trading in Malaysia involves the issue of ta'jil al-badalain. Even though shares are representing ownership in corporations and it is a type of ascertained asset and not a liability through description, but the deferment of both counter-values is inherently stipulated and made part of the trading process, hence it falls under the prohibited form of ta'jil al-badalain guidelines laid down by AAOIFI Shariah Standards.

Nevertheless, the three day deferment can be deemed minor and has a ground to be tolerable, following the ijtihad of Malikis in the allowable deferment period for price settlement in salam sale. Furthermore, three day deferment in shares trading has become an international industry convention (عرف أهل الصناعة) that can constitute a strong basis of needs (الحاجة) that justifies a relaxation from general prohibition of ta'jil al-badalain.

Last but not least, the ground of prohibition of ta'jil al-badalain itself is not robust thus challengeable by many arguments as earlier discussed.

## Second issue: Selling something before taking it into possession

### The issue

There are hadiths from the Prophet ﷺ stating the prohibition of selling something purchased before taking it into the possession of that purchaser, such as:

حَكِيم بْن حِزَامٍ قَالَ: قُلْتُ: يَا رَسُولَ اللهِ، إِنِّي أَشْتَرِي بُيُوعًا فَمَا يَحِلُّ لِي مِنْهَا، وَمَا يُحَرَّمُ عَلَيَّ قَالَ: " فَإِذَا اشْتَرَيْتَ بَيْعًا، فَلَا تَبِعْهُ حَتَّى تَقْبِضَهُ[42]"

[40] Ibn Rushd, al-Muqaddimat al-Mumahhidat p516, see also Ulaysh, Sharh Minah al-Jalil v3 p4.
[41] Al-Khirshi, Sharh Mukhtasar Khalil, v5 p202.
[42] The hadith has been narrated by Ahmad in his Musnad, v24 p32, hadith no. 15316. Shuib Arnaout says: the hadith is hasan lighairih (good status taking into account the other chains of narration). Al-Albani says the hadith is sahih (authentic), Sahih al-Jami' al-Saghir, v1 p123.

Which means, “Hakim bin Hizam mentioned that he said: O.. Messenger of Allah, I do purchase transactions, so what is permissible for me and what is forbidden? He said: When you buy something, do not sell it until you take it into your possession”

In the contra transaction, the buyer will sell the shares that he has bought, before the shares are credited into his CDS account on T+3. As mentioned earlier, the system at Bursa will capture the transaction on a real-time basis, and a contract note will be issued to both counter-parties on the same day (T), evidencing the sale and purchase transaction.

The question is whether the capture of sale transaction by the system and the issuance of the contract note are sufficient to constitute a possession.

To answer the question, we have to look into the meaning of possession in Shariah, and the views of Muslim jurists about selling thing before taking it into possession.

**Jurists’ views**

OIC Islamic Fiqh Academy in 1990 has resolved about the meaning of physical and constructive possession, it says:

**“**Just as the possession of commodities may be physical, by taking the commodity in one's hand or measuring or weighing the eatables, or by transferring or delivering the commodity to the premises of the possessor, similarly the possession may also be an implied or constructive possession which takes place by leaving the commodity at one's disposal and enabling him to deal with it as he wills. This will be deemed a valid possession, even though the physical possession has not taken place.”[43]

The classical Muslim scholars have five different views on the issue of selling before taking into possession, briefly as follows:[44]

i. It is not allowed to sell before taking into possession anything measured by its weight or mass, whether it is food or otherwise, it is the view of the Hanbalis.
ii. Only food that is sold by the measurement of its weight or mass is not allowed, this is the view of the Malikis, a narration from Ahmad, Abu Thaur, Auza’i and some others.
iii. All items are not allowed except lands, this is the view of Abu Hanifah, the second view of Abu Yusuf from the Hanafi school, and a narration among the Hanbalis.
iv. All items are not allowed. This is the view the Shaafi’is, some Hanbalis, Zufar and Muhammad from the Hanafi school, and some of the tabi’in.
v. All items are not allowed, except if it is to be sold back to the original seller.

[43] Translation from iFikr, ISRA. The original text in Arabic as follows:
"قبض الأموال كما يكون حسياً في حالة الأخذ باليد ، أو الكيل أو الوزن في الطعام ، أو النقل والتحويل إلى حوزة القابض ، يتحقق اعتباراً وحكماً بالتخلية مع التمكين من التصرف ولو لم يوجد القبض حساً "

[44] See: Abdullah bin Mubarak Alu Saif, the summary of his research titled: “Bai’ al-Mabi’ Qabla Qabdihi” available at: http://www.alukah.net/sharia/0/61384

From the views above, we can conclude that all the classical scholars agreed that food which is sold by the measurement of its weight or mass is not allowed to be resold to others until the purchaser has taken it into his possession, and those scholars differed on other goods, some had chosen more lenient approach to allow other goods, while some others had disallowed all other goods as well.

The reason behind this dispute is the variations of hadiths that have been narrated in this regard. For example, the very narrator of the hadith we mention above, the companion of the Prophet ﷺ - Hakim bin Hizam, in some other narrations he had explicitly mentioned that he had actually bought food and then sold it before receiving it, hence the prohibition from the Prophet, as depicted in the hadith below:

عَنْ حَكِيمِ بْنِ حِزَامٍ قَالَ حَكِيمٌ: " كُنَّا نَشْتَرِي الطَّعَامَ، فَنَهَانِي رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ أَنْ أَبِيعَ طَعَامًا حَتَّى أَقْبِضَهُ "

> Which means, from Hakim bin Hizam he said: "We were buying food, then the Messenger of Allah ﷺ prohibited me from selling food until I have taken it into possession."

This line of argument is also supported by other hadiths narrated by other companions, which carry the same meaning, for example a hadith that has been narrated by Ibn Umar and also Ibn Abbas that the Prophet ﷺ said:

«من ابتاع طعاما فلا يبعه حتى يقبضه[٤٥]»

> That means, "Whoever purchases food, must not sell it until he has taken it into his possession".

For those scholars who confine the prohibition to food only, they interpret the general hadiths in the light of these specific hadiths.

For the scholars who generalise the prohibition to include other goods, they explain that the specific hadiths came when the Prophet ﷺ was responding to the specific event, and he did not mean to limit the prohibition to food, that is why in other occasions he declared a general prohibition. This is what has been understood by the very companion who narrated the specific hadith himself, Ibn Abbas. It is stated in Sahih Muslim that:

عَنِ ابْنِ عَبَّاسٍ، قَالَ: قَالَ رَسُولُ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: «مَنِ ابْتَاعَ طَعَامًا فَلَا يَبِعْهُ حَتَّى يَقْبِضَهُ»، قَالَ ابْنُ عَبَّاسٍ: «وَأَحْسِبُ كُلَّ شَيْءٍ بِمَنْزِلَةِ الطَّعَامِ»[٤٦]

> Which means, from Ibn Abbas he said that the Messenger of Allah ﷺ said: "Whoever purchases food must not sell it until he has taken it into his possession", said Ibn Abbas: "and I consider everything else is like food"

[45] Sahih al-Bukhari, v3 p68, hadith no.٢١٣٣, and: Sahih Muslim, v3 p1160, hadith no.1525 and no. 1526

[46] Sahih Muslim, v3 p1160, hadith no.1525

Ibn Taimiah, the supporter of this view, provides the rationale behind this ruling. He says there is possibility that the purchaser will not be able to deliver to the next purchaser, because the original seller himself might not deliver, especially when he sees the purchaser has easily made profit, he could sabotage to cancel or deny the deal.[47]

**Legal Position**

As described in the Diagram (Appendix), a buyer who bought shares is given till 12.30pm at T+3 to settle the price for the said shares. However the buyer can opt to sell off its buying position anytime between T+0 till T+3 by 12.30pm. Whether there is contra or not, the time for the seller to deliver the shares to the Clearing House is by 4.00pm at T+2 and the shares will be delivered to the buyer not later than 10.00am at T+3 (if the buyer did not contra its buying position). However if the buyer did contra, the buyer's stock broker will be liable to take delivery of the shares and settle the payment for the shares. **Based on this premise, the question that requires legal and Shariah analysis is whether the buyer is allowed to contra or sell off its buying position/shares before the buyer actually get the shares in its CDS account. In other words, is the shares already owned by the buyer at the time when the buyer enters into the contra trading that entitles it to sell the shares?**

What is certain is that at the time when the order for contra is executed, the buyer has a Contract Note over the shares that it has bought (at T+0) which specifies that the shares will be delivered and paid at T+3.

According to Rule 1.01 of the Exchange Rules, 'contract' is defined as,

> '**a contact for a sale and purchase transaction of securities** entered into on the stock market of the Exchange as described in Rule 8.08(3)' (emphasis own)

While Rule 8.08(3) of the Exchange Rules stressed the bindingness of the contract when it states,

> 'A Participating Organization is deemed to have entered into a firm and **binding contract once the order is matched and executed in the ATS** in accordance with Rule 8.08(1).' (emphasis own)

The clarity on when ownership of the shares is transferred is shown in Para 5.3.10 of the Best Practices which stipulates that,

[47] Al-Ba'li, al-Akhbar al-Ilmiyyah min al-Ikhtiyarat al-Fiqhiyyah li Ibn Tamiah, p187. See also Alu Saif, op.cit.
On the contrary, see for example the rationale given by Shah Waliyullah al-Dahlawy for limiting the prohibition to food only, Hujjatullah al-Balighah, v2 p166, and also: Ibn Bayyah, op cit.

"**The transfer of securities ownership is confirmed via issuance of contract note by Participating Organisation to its clients.** In this instance, the Islamic Participating Organisation must issue Contract Notes to the clients and the Contract Notes must comply with the regulations issued under the CMSA on Contract Notes." (emphasis own).

Notwithstanding the transfer of ownership is explicitly confirmed to take place the moment the Contract Note is issued to the buyer, as mentioned by Para 5.3.10 of the Best Practices above, the following sections from CMSA and the Clearing Rules seem to state otherwise. Section 53(3) of the CMSA states that,

'Notwithstanding any other provision of law, where any transfer of securities is effected by the central depository to or from a securities account of a depositor pursuant to subsection (1), no title in such securities shall pass to a depositor except as provided under the rules of the approved clearing house.'

While Rule 5.7 of the Clearing Rules stipulates that,

"(a) **Until such time as the Clearing House is satisfied that it has received payment in full with respect to any Securities delivered by the Clearing House in settlement of a Novated Contract (*more or less the contract note*) to**, or in accordance with the instructions of, the relevant Trading Clearing Participant under the Novated Contract on any due settlement day, unless otherwise specifically agreed in writing by the Clearing House, **title and property in such Securities shall not pass on delivery to the Clearing Participant or to any recipient thereof** in accordance with the Clearing Participant's instructions.
(b) For the avoidance of doubt, title and property in any Securities which have been delivered in settlement of the Novated Contract and which have not been paid for by the Trading Clearing Participant due to receive the same, shall only pass when the Trading Clearing Participant or the recipient thereof on the Trading Clearing Participant's instructions, is expressly permitted by the Clearing House to utilise them, but at any time before then, the Clearing House shall be free to use or apply such Securities to limit its liability, resulting from such Trading Clearing Participant's failure to make payment to the Clearing House, in such manner as the Clearing House considers appropriate. **In the event that the Trading Clearing Participant purports to transfer such Securities from its securities account at the Central Depository prior to good payment to the Clearing House, no title shall pass to the recipient of such Securities following the transfer**." (emphasis own).

Reading these two sections specially Rule 5.7 of the Clearing Rules, the legal position is crystal clear in that the ownership of the stock is only transferred from the seller to the buyer when payment for the stock been met by the buyer and not otherwise. This

legal position is supported by an article published by the Federal Reserve Bank of Chicago which states that,

> "International guidelines prescribe that **the transfer of the ownership of a security is conditional on the simultaneous transfer of sufficient funds to pay for the security in full (the concept of Delivery versus Payment or DVP)**. Once title to the security has been changed, the clearing and settlement process ends and the custody process begins." (emphasis own) (McPartland, 2005)[48]

Having said the above, what is interesting is that Section 98 of CMSA may seem to facilitate the above conundrum when it states that,

> '(1) …a person shall not sell securities unless, at the time when he sells them-
> (a) he has or, where he is selling as agent, his principal has; or
> (b) **he believes on reasonable grounds that he has**, or where he is selling as agent, his principal has,
> **a presently exercisable and unconditional right to vest the securities in a purchaser of the securities**.
>
> (3) For the purpose of sub-section 1-
>
> (a) a person who, at any particular time, has a presently exercisable and unconditional right to have securities vested in him, or in accordance with the directions **shall be deemed to have at that time a presently exercisable and unconditional right to vest the securities in another person**;" (emphasis own).

What can be deduced from the above Section 98 is that while legal ownership has yet to be legally transferred to the buyer, the buyer may still be able to onward sell the shares as by virtue of the Contract Note, the buyer is deemed to have a presently exercisable and unconditional right to vest the shares in another person.

**Stand of AAOIFI**

AAOIFI has allowed the sale of shares right after they are bought, before the registration and settlement are made. AAOIFI Shariah Standard no.21 Financial papers (Shares and Bonds) clause 3/7 states:

> "It is permissible to the buyer of a share to undertake transactions in it by way of sale to another and the like after the completion of the formalities of the sale and the transfer of liability to him even though the final settlement in his favour has not been made"[49].

[48] file:///C:/Users/noor/Downloads/cfljanuary2005-210-pdf.pdf
[49] The original Arabic version is:

It is observed from the above text that AAOIFI has also mentioned "the transfer of liability" of shares to the purchaser. The question is whether this transfer of liability (انتقال الضمان) is mentioned here to explain the reason and justification for the permissibility, or it is mentioned as a condition for the permissibility i.e. the sale is permissible provided the liability has also transferred to the buyer.

AAOIFI does provide us with the answer to this question as stated in the Shariah basis given by AAOIFI for the clause above, as follows:

> "**The basis for the permissibility** of undertaking transactions in shares even though the final registration formalities have not been completed **is the transfer of the liability for loss** *(Daman)* to the buyer. This is attained through **constructive possession that is granted through the transacting in what he has purchased**."[50] (Authors believe this official translation needs improvement) [51]

From the given Shariah basis above we can conclude that AAOIFI agrees to the following:

- Liability (dhaman) has transferred to the buyer after the contract on T day
- Constructive possession has been attained by the buyer after the contract on T day
- Transfer of liability has been attained through the constructive possession
- Constructive possession grants the ability/right to the buyer to transact in the shares
- Therefore sale of shares to a third party (contra) before registration and settlement time on T+3 is permissible

## Conclusion

Muslim jurists agree that constructive possession is attained by leaving the commodity at one's disposal (takhliah) and enabling him to deal with it as he wills (tamkin). They also agree that generally, liability of loss of the asset will transfer to the person who has taken the asset into his constructive possession. So the transfer of liability is the result

" يجوز لمشتري السهم أن يتصرف فيه بالبيع ونحوه إلى طرف آخر بعد تمام عملية البيع وانتقال الضمان إليه ولو لم يتم التسجيل النهائي له (SETTLEMENT) ."

[50] AAOIFI Shariah Standard no.21 Financial papers (Shares and Bonds), Appendix (B) p574.

The original Arabic version is:
"مستند جواز التصرف في الأسهم ولم يتم التسجيل النهائي لها هو انتقال الضمان إلى المشتري وذلك بالقبض الحكمي الذي يخوله التصرف فيما اشتراه."

[51] We believe there is a disparity here between this official translation and the original Arabic version, which gives the opposite meaning. The original Arabic version is:
**وذلك بالقبض الحكمي الذي يخوله التصرف فيما اشتراه."**
It may be roughly translated as: "This is attained through constructive possession that grants him the ability/right to deal with what he has purchased"

of taking possession, and the constructive possession is a status a person has after having been enabled to deal.

So it starts with enabling, and then comes constructive possession, and the liability transfers.

In the shares trading practice at Bursa Malaysia, the sale contract on T will immediately enable the buyer to sell to a third party the shares he bought. If he sells the shares, he is entitled to benefit from the price gain and he will suffer the loss if the price drops. However, other rights, benefits, entitlements, and also liability of loss of the asset represented by the shares will remain with the first seller until the settlement day (record day) when the shares are credited into his account. The entitlements such as dividend and bonus issue will only be given to the registered shareholder. For instance, if the dividend is distributed on T+1 or T+2, it will be given to the seller as the registered shareholder, even though contractually he has sold his shares. Likewise, if the underlying corporation has collapsed and the shares cannot be delivered to the buyer or the subsequent buyers in the onward sales, the original seller will have to be responsible and pay the cash compensation to the ultimate buyer.[52]

So the question is, whether the legal right to sell the shares and to gain profit from the sale, which is given to the buyer, constitute a constructive possession for the buyer from the Shariah point of view, whereby the benefits and liabilities of the asset (underlying corporation) are still vested with the original seller.

A merely right to sell in the legal framework is not sufficient to constitute a recognised action and contract from the Shariah point of view. Even a sale of Shariah non-compliant asset may be legally permissible in a jurisdiction, but not recognisable in Shariah.

Therefore, our view is, taking the legal facts of transaction at Bursa Malaysia into consideration; the contract of sale on T day does not constitute a constructive possession.

However, shares are not food. Hence, we could say that in the view of the Malikis, a narration from Ahmad and some Hanbalis, Abu Thaur, Auza'i and some contemporary scholars, as earlier mentioned, selling shares before taking them into one's possession is not prohibited.

[52] See: Bursa Malaysia, Directives in Relation to Cash Settlement of Failed Contracts.

## The Third Issue:

## Profiting without bearing liability (ربح ما لم يضمن)

The prophet ﷺ has prohibited taking profit from something which one does not bear its liability, Ibnu Umar radhiallahu anhu has said:

"نهى رسول الله ﷺ عن سلف وبيع وعن شرطين في بيع واحد وعن بيع ما ليس عندك وعن ربح ما لم يضمن"[٥٣]

Which means, "The Messenger of Allah has prohibited loan and sale [joined together], two conditions stipulated in one sale, selling what you do not have with you, and the profit of what one does not bear its liability"

In the context of contra transaction, the buyer of shares will sell the shares to another party before the shares are credited into his CDS account on T+3. The reason for the sale could be because the price of the shares has increased so the buyer can make a profit, or could be because the price has decreased below the loss threshold that the buyer can afford.

We have discussed in the last subchapter about taking possession of the shares and transfer of liability of the shares. We have ended up saying that possession and transfer of liability actually take place on T+3. Hence, contra transaction actually involves the issue of selling before taking possession. However, it is not the real issue, because shares do not represent food, and some scholars like the Malikis and others allow selling before taking possession if the subject matter is not food. The issue is actually about making profit from the shares that the buyer has not bear their liability.

We will firstly look into the views of Muslim jurists about selling something without bearing its liability. We can summarise the views into two main views as follows[54]:

i. No sale is allowed without bearing the liability of the subject matter, whether the sale is with or without profit, or at loss. This is the view of the majority scholars; the Hanafis, Shafi'is, Hanbalis and Zahiris
ii. Any transaction that requires bearing liability, no profit is allowed to be gained. Hence, the sale is allowed at cost price or at loss only. This is the view of the Malikis and some Hanbalis, like Ibn Taimiah and others.

We opine that the evidence of the second opinion is rather stronger, and we will present it briefly as follows:

1. A hadith from the Prophet ﷺ where exclude sharikah, tauliah and iqalah from the prohibition of sale before taking possession:

[53] Abu Daud, Sunan Abi Daud, v3 p495 no. 3504. The hadith is also narrated by Ahmad, al-Tarmizi, al-Nasa'i, Ibnu Majah and others.
[54] Musa'id Abdullah, Ribh Ma Lam Yadman Dirasah Ta'siliyah Tatbiqiyah, pp113-121

عَنِ النَّبِيِّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ حَدِيثٌ مُسْتَفَاض بِالْمَدِينَةِ قَالَ: «مَنِ ابْتَاعَ طَعَامًا فَلَا يَبِعْهُ حَتَّى يَقْبِضَهُ وَيَسْتَوْفِيَهُ إِلَّا أَنْ يُشْرَكَ فِيهِ أَوْ يُوَلِّيَهُ أَوْ يُقِيلَهُ [55]

Which means, a widely spread hadith in Madinah from the Prophet ﷺ that he said: "Whoever purchases food must not sell it until he take it into possession, except if he share it with others (sharikah), or sells it at par (tauliah) or refund it back to the original seller (iqalah)

2. Another hadith:

يا رسول الله، رويدك أسألك، إنى أبيع الإبل بالبقيع، فأبيع بالدنانير وآخذ الدراهم، وأبيع بالدراهم وآخذ الدنانير، آخذ هذه من هذه، وأعطي هذه من هذه، فقال رسول الله صلى الله عليه وسلم: لا بأس أن تأخذها بسعر يومها، ما لم تفترقا وبينكما شيء

The Prophet ﷺ allowed the selling of debt which is still in the liability of other person but at the market price (بسعر يومها) so that the seller does not make any profit out of the money that he has not taken into his possession.

**Legal Position**

While the law allows the buyer to onward sell its shares to other third party by virtue of the buyer's Contract Note, **the question remains whether the law as well as Shariah would allow the buyer to enjoy the gain or be liable for the loss from the onward sell/contra. In other words, will the onward sale/contra entitles the buyer to any rights, benefits and liabilities due from the shares.**

From the legal perspective, for the buyer to be entitled to the rights, benefits or liable for any liabilities accruing under the shares, the buyer would have to have the title of 'the beneficial owner' of the shares. 'Beneficial owner' is defined in Rule 1.01 of the Depository Rules as,

> "**the ultimate owner of the deposited securities who is entitled to all rights, benefits, powers and privileges and is subject to all liabilities, duties and obligations in respect of, or arising from, the deposited securities** and does not include a nominee of any description;" (emphasis own)

The following provisions in the Companies Act 2016 describe the kind of rights, powers and privileges that a beneficial owner/shareholder/stockholder is conferred upon when owning such shares.

Section 71(1) of the Companies Act stipulates that,

> "A share in a company, other than preference shares, confers on the holder,
>
> (a) the right to attend, participate and speak at a meeting;

[55] Abdul Razzaq, al-Musannaf, v8 p49

(b) the right to vote on a show of hands on any resolution of the company;
(c) the right to one vote for each share on a poll on any resolution of the company;
(d) the right to an equal share in the distribution of the surplus assets of the company;
(e) the right to an equal share of dividends authorised by the Board."

Section 88(1) of the Companies Act further reinforces the above section where it states that,

> "The stockholders shall, according to the amount of the stock held by the stockholders, have the same rights, privileges, and advantages with regards to dividends, voting at meetings of the company and other matters as if the stockholders held the shares from which the stock arose."

In addition to the rights, privileges and powers that the shareholder enjoys, liabilities, responsibilities related to the shareholding will also be borne by the stockholder. Section 147(2) of the Companies Act 2016 stipulates that,

> "Notwithstanding Section 101, all rights, benefits, powers and privileges are subject to all liabilities, duties and obligations in respect of, or arising from, such securities, whether conferred or imposed by this Act or the constitution of the company"

Thus to become the stockholder of the company and having the rights, benefits, and privileges and subject to liabilities, Section 147(1) of the Companies Act 2016 requires for the name to be recorded in the record of the central depository where it states,

> "(1) A depositor whose name appears in the record of the depositor maintained by the central depository in accordance with Section 34 of the Securities Industries (Central Depositories) Act 1991 in respect of the securities of a company which has been deposited with the central depository shall be deemed to be a shareholder, debenture holder or option holder of the company, as the case may be … be entitled to the number of securities stated in the record of the depositors.

Rules 5.1B of the Clearing Rules clearly described the process involved in the delivery of the shares from the seller/seller Clearing Participant's CDS account to the buyer/buyer Clearing Participant's CDS account via Clearing House. It states,
"(a) The selling Clearing Participant must ensure that the Securities sold pursuant to a Novated Contract are available as Tradeable Balance in the relevant securities account of the selling Clearing Participant or its client by the time specified in the Exchange Rules. In order to fulfil its obligation to deliver the Securities to the Clearing House, the selling Clearing Participant irrevocably authorises the Clearing House to instruct

the Central Depository to debit the Securities from the relevant securities account of the selling Clearing Participant or its client.

(b) The Clearing House's right to receive Securities on any due settlement day from a selling Clearing Participant pursuant to a Novated Contract is satisfied by the debiting of such Securities from the relevant securities account of the selling Clearing Participant or its client before 10.00am on the due settlement day by the Central Depository, upon the instructions of the Clearing House.

(c) The buying Clearing Participant irrevocably authorises the Clearing House to deliver the Securities purchased pursuant to a Novated Contract, by instructing the Central Depository to credit the Securities into the relevant securities account of the buying Clearing Participant or its client.

(d) The Clearing House's obligation to deliver Securities to a buying Clearing Participant pursuant to a Novated Contract on any due settlement day is discharged by the crediting of such Securities to the relevant securities account of the buying Clearing Participant or its client by 10.00am on the due settlement day.

Therefore by 10am on T+3, the buyer will have the shares in its CDS account and he is deemed as the beneficial owner of the share. This is supported by Rule 6.05 (1B) of the Depository Rules that imposes on the authorised depository agent to ensure that,

> "…the entries for deposits are only made into the securities account of the beneficial owners or the authorised nominees of the deposited securities."

While under Rules 10.05 (3) of the Depository Rules, the Central Depository shall,

> "Upon verification of the account numbers pursuant to Rule 10.05(2) and provided however there are sufficient securities in the delivering/selling depositor's account during the processing for book entry delivery on the Settlement Date, the Depository shall proceed to transfer from the delivering/selling depositor's account to the receiving/purchasing depositor's account the appropriate amount of deposited securities."

Notwithstanding what have been mentioned above, there is exception on the entitlement of the stockholding. Rule 21.03 (1)(c) of the Depository Rules describes that,

(1) Subject to the Foreign Ownership Regulations, no depositor shall be entitled to any dividends or rights issues or bonus issues or any other rights or options by virtue of any deposited security standing to the credit of his securities account unless-

(c) such deposited security has been "bought cum entitlement" on the stock market of the Stock Exchange;"

According to Rule 21.03 (2) (c) of the Depository Rules, a security is "bought cum entitlement" if the date for delivery by way of book-entry process in respect of such security bought is on or before the books closing date".

While 'books closing date' is described in the Securities Rules as,

> "The specified time and date set by an Issuer for the purpose of determining entitlements to dividends, interest, new securities or other distributions or rights of holders of its securities traded on the stock market of the Exchange."

Therefore based on the above legal analysis, it is argued that the entitlement of the buyer to any rights, benefits and liabilities due from the shares is subject to the buyer being the beneficial owner of the shares and that the type of shares that it bought is a bought cum entitlement shares.

**Conclusion**

The legal clearly shows that the rights, entitlements and liabilities follow the registration record.

Vast majority of the Muslim jurists also agree that profiting from something that a buyer has not borne its liability is not allowed. Therefore, we are of the view that selling the shares through contra transaction with a profit does not comply with this position.

## The fourth issue: Speculation and Gambling

The Cambridge Dictionary defines speculation as: "the activity of guessing possible answers to a question without having enough information to be certain." While Investopedia defines speculation in trade as: "the act of trading in an asset or conducting a financial transaction that has a significant risk of losing most or all of the initial outlay with the expectation of a substantial gain"[56]

There is a thin line between investment and speculation. In Shariah, so long as the sale and purchase of the shares are done according to the rules of Shariah, it does not matter whether the trader has much or less information about the market. Whether he is guessing or feeling certain about his decision does not affect the permissibility of the

[56] See Investopedia Website at:
http://www.investopedia.com/terms/s/speculation.asp#ixzz4OdMWwAtI

trade. The volume of risk that the trader is willing to take is also not a factor. All of these are business decisions that Shariah leaves them to the individuals to decide.

AAOIFI in its Shariah standard no. 21 has clearly allows speculative trades, it states:

> "3/2 It is permissible to buy and sell shares of corporations, on a spot or deferred basis in which delay is permissible, if the activity of the corporation is permissible irrespective of its being an investment (that is, the share is acquired with the aim of profiting from it) or dealing in it (that is, with the intention of benefiting from the difference in prices)."

There is an element in contra transaction that might need to be given a thought. A contra trader can do the trades and make a lot of profits without a need to have capital.
A buyer has to make the payment for the shares he bought only on T+3, and he can sell the shares on T+1 or T+2 and make a profit. The payment to Bursa Clearing House on T+3 will be done by the buyer's stockbroker, and the payment done by the new buyer to the first buyer will be received by the same stockbroker on behalf of its client. The stockbroker may not require its client to make the full payment of the share price. Instead, the stockbroker or the client will pay only the price difference to each other. If the client has gained profit, the stockbroker will pay only the profit amount to the client, and if the client has experience a loss, he will pay the loss amount to the stockbroker. Perhaps this is how contra trading got its name.

Some people say that this resembles gambling in many ways; a contra trader does not need to take the shares into his possession, and it is not in his intention from the very beginning. His gain is by chance, if the share price increases he gains, if not he loses. If he gains, the other party will loses. Furthermore, this transaction does not contribute to the real economy.

We opine that even though the term speculation could be true for contra transaction, depending on how we define speculation, but it is certainly not a gambling by the definition of Shariah. For example, AAOIFI has labelled that options and swaps are types of gambling, it says:

> "[swaps include the characteristics of] gambling, as the purpose of these contracts is the acquisition of the difference between the two average returns on the shares and it is not the delivery of possession, which is the purpose of contracts, thus, one of the parties gains and the other inevitably loses, and this is truly gambling."[57]

A trader who purchases shares for the purpose of contra does not necessarily end up with doing contra, he can still keep the shares for how long as he wishes, but whenever he feels that he will make a profit, or in order to avoid loss he may sell as he wishes. Contra is not between two parties that are betting on a same bet, which will end up with

[57] AAOIFI, p575

one of them wins and the other loses. Contra is about selling your asset at the market price, and the other party may want to keep the shares for a long investment, it is not a zero sum game as both parties may gain, because the price may keep on increasing.

All types of trade will involve a certain amount of risk and chance, no one knows exactly what will happen to the prices in future, the Prophet ﷺ Allah is the price setter, and he makes the prices go up and down – by giving way to the demand and supply as the natural determinant. A good contra trader should not rely on his luck and chance, he should equip himself with all the complicated knowledge of trade and economy, keep himself abreast of all news updates of the world that will affect the policies and prices. The claim that a contra trader does not need to have capital to make money, even though this may be true for some stockbrokers which provide the facility to their client, it is a natural business feature for those who could benefit from the price deferment facility and this does not make it a gambling

**In sum**, we opine that claim is far from being true.

## PART D
## Conclusion

Two day or three day delivery of shares and price settlement are the custom of the industry almost all over the world, the period was much longer in the past and it has evolved to the current practice.

The practice of contra in shares trading has its pros and cons. However it undeniably contributes to promote the liquidity of the stock market and increase the market efficiency.

Bursa Malaysia is a well-regulated and efficient market for stocks and shares. For example, in the year 2015, out of a total number of 2,378,328 stock trades that have been registered, only 56 transactions whereby the seller failed to deliver the securities on settlement date and the Clearing House was also not able to deliver the securities via the buying-in mechanism, and thus had to go through the cash settlement mechanism. This is about 0.002354595% of the total transaction in 2015. It is also pertinent to note that, in terms of value, RM11,666.67 worth of securities ended up having to go through cash-settlement out of total transaction value of RM40,815,182,495 (monthly average). This represents 0.000028584% of the total trade value for 2015[58]. This shows that the level of gharar – uncertainty is minimal and the mechanism is in place to avoid misconducts or disputes.

[58] Data provided by Bursa Malaysia through email.

Four main Shariah issues raised against contra transaction have been discussed from the legal and Shariah perspectives. This paper finds that the contentious issues are about constructive possession of shares, whether it is on the contract day or the registration day/ settlement day. This paper has chosen to differ from the view adopted by AAOIFI. Subsequent to the preference made by this paper about constructive possession, this has led the paper to another contentious issue that is about profiting without bearing liability. Since the possession cannot be established, the profit generated through contra transaction is also not justified as it generated from selling an asset that the contra trader does not bear its liability.

Therefore, this paper suggests an alteration in the registration day to be as shorter as possible, for example Saudi Arabia that has its registration day on T day itself, or China that has its registration day on T+1.

In the meantime, the practice can still continue under the provision of needs (الحاجة) and the maxim ما قارب الشيء يعطى حكمه – what is close to something applies its rule.

والله تعالى أعلم
وصلى الله وسلم على رسول الله والحمد لله رب العالمين