



RESEARCH ARTICLE

REGULATED SHORT SELLING IN BURSA MALAYSIA: EVALUATING THE USURY ISSUE

Azlin Alisa Ahmad, Norhoneydayatie Abdul Manap and Nor Qamal Danial Mohd Safuan

Research Centre for Sharia, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, Bangi.

Manuscript Info

Manuscript History

Received: 25 November 2020

Final Accepted: 28 December 2020

Published: January 2021

Key words:-

Short Selling, Regulated Short Selling, Interest, Securities Borrowing And Lending

Abstract

Regulated short selling transactions is an alternative that was introduced by the Syariah Advisory Council (SAC), which is attached to the Securities Commission Malaysia, to implement short selling in Malaysia. Short selling is not permitted because it involves various Shariah-related issues, including usury, uncertainty (*ghārar*), gambling, speculation etc. Since short selling has advantageous in terms of liquidity and opportunities for investors to reap profit when the value of securities fall, hence, regulated short selling activities should be restructured so that it can be implemented without transgressing the boundaries of syarak. This qualitative study used the content analysis approach to examine and determine whether the element of usury still exists in regulated short selling. Findings show that regulated short selling transactions adopted by Bursa Malaysia is combined with the Securities Borrowing and Lending (SBL) mechanism. Therefore, implementing regulated short selling in Bursa Malaysia can solve the usury issue when short selling transactions are combined with SBL, which uses the *ijarah bi istihan* principle.

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Introduction:-

Short selling is the sale and purchase transaction of shares, including capital market activities that are famous throughout the world. However, the Islamic Capital Market must always remain free from activities that are prohibited in Islam, such as gambling, *gharar*, *bay' ma'dum*, speculation, usury etc. These prohibitions are intended to promote fairness and provide an equal playing field as a means of protection against elements that could jeopardise capital markets as well as achieve and protect *maqasid syariah*. In efforts to continue enhancing efficiency and competitiveness of capital markets in Malaysia, Securities Commission Malaysia has verified and permitted short selling transactions but it must be implemented according to strict regulations contained in the Securities Borrowing and Lending (SBL) mechanism.

Short selling refers to the activity of selling securities that are not owned by investor and later selling it on the expectation that the securities price will decline. Then, these securities are re-purchased and returned to the owners when the share prices fall. Hence, the investor receives short-term gains from the transaction. *Regulated Short Selling (RSS)* is the sale of securities before the seller has possession and rights to the securities when the sales transaction is being endorsed. However, the sale of securities should adhere to strict regulations based on Securities Borrowing and Lending (SBL) principles. This means that regulated short selling is short selling that is combined with Securities Borrowing and Lending (SBL) principles and implemented according to regulations laid down by Bursa Malaysia.

Corresponding Author:-Azlin Alisa Ahmad

Address:-Research Centre for Sharia, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, Bangi.

There are numerous studies on short selling conducted at the international level (Chapra, 1985 and 2015, Kennon, 2019 and Chen, 2020), while studies on short selling in Malaysia have been conducted by Khairul Anuar (1999), Mohamad Sabri (2009) and Nor Fahimah et al. (2017). Meanwhile, studies on short selling from an Islamic perspective have been carried out by Khairul Anuar (1999), Asyraf Wajdi & Abdelazeem (2008), Joni Tamkin & Mohd Yahya (2009), Mohamad Sabri (2009), Hamed Soltani (2009) and Azlin Alisa & Nurul Ilyana (2017).

Regulated short selling transactions are an alternative that was introduced by the Syariah Advisory Council (SAC) to facilitate short selling in Malaysia. Since short selling is an investment strategy that allows investors to obtain profits and benefits from the drop on security prices, hence, this activity should be carried out without transgressing the boundaries of syarak. Therefore, RSS is combined with SBL regulations to ensure that it adheres to Syariah principles. Besides the SAC's approval to allow RSS because it is Syariah compliant, there are several studies indicating that the issue of usury in short selling has not been settled by implementing RSS. Hence, this qualitative study, which adopted the content analysis approach, intended to discuss the position of usury in regulated short selling practiced in Bursa Malaysia. This study starts with discussions on the short selling concept, followed by regulated short selling, emerging Syariah issues, mainly the issue of usury and lastly, it closes with the conclusions.

Short Selling And Regulated Short Selling Concepts:

Short selling refers to the sale of shares that are "leased" with the hope that the share price will drop and when that happens the lessor buys the shares in the market to replace the shares that he leased to the shareholder (Fredrick Amling t.t); (Fabozzi et.al 2004). This transaction is facilitated with help from a broker (Mohd Sabri 2009). The securities should be returned three days after the transaction (T + 3) (Fabozzi et.al 2004). Some financial scholars have stated that short selling has the highest level of asset liquidity as well as the ability to move very expensive shares and generally, can enhance the market's efficiency. Hence, short selling applied conventionally is when investors actually do not absolutely own shares sold because it sells shares that are leased from other investors (Asyraf Wajdi & Abdelazeem 2008).

Regulated short selling (RSS) is the sale of securities before the seller has ownership and rights to the securities, while the sales transaction is being finalised. The seller then can borrow or buy those securities from the secondary market and pass it to the buyer when the transaction is finalised. RSS is the sale of securities that have been approved, whereby at the time of the securities sale the seller does not have the right-to-use and no conditions for transferring the securities' right to the buyer but has finalised an agreement to borrow before the sale, which would allow the transfer of approved securities to the buyer (Securities Commission, 2014)

Syariah Issues In Short Selling:-

There are several Syariah issues in short selling transactions that prohibits it in Islamic capital markets, not only in Malaysia but also in other countries that practice the Islamic financial system. Among the Syariah issues related to short selling are the elements of *gharar*, usury and gambling. Short selling involves the selling of unowned shares because the investor will borrow from other investors and sell the shares at the current price and then buy back the shares that are sold when prices drop and return the shares to the original owner. This shows that short selling transactions involve the *gharar* issue because there is extensive risk and uncertainty that could cause dispute among the parties concerned (Hamed Soltani, 2009; Mohamad Sabri t.t).

The next issue involves usury in short selling because in the loan contract, the lessor, i.e stock owner usually get profit when the investor returns the borrowed shares through broker (Asyraf Wajdi & Abdelazeem 2008). Chapra (1985) strongly resisted the practice and existence of short selling in Islamic markets because according to him short selling is purely speculative, which involves *gharar* in all of its transactions and fails to implement any useful economic function.

Short selling transactions at the international level are not encouraged because it is riskier compared to the sale of ordinary shares. Normal sales transactions could incur 100% losses if the company goes bankrupt but short selling has no limit to its losses if the share price rises just after a short selling transaction (Doorn 2015). Kennon (2019) stated that due to unlimited potential losses generated by short selling transactions, brokers usually limit short selling practices to margin accounts. The broker will prohibit short selling practices if a cash account is used without a margin account. The combination of unlimited losses that could occur from short selling practices and also the use of a margin account that requires unlimited personal guaranty will be catastrophic to the investor as well as a speculator

who is inexperienced and does not fully understand the risks involved in short selling. Therefore, short selling is limited to those who the experienced.

Besides that, short selling transactions also involve the issue of gambling because the investor makes assumptions about movements in future drop in share prices in order to reap profits based on the differences in price, which contains elements of gambling since reaping profits by the market player without involving any capital is similar to gambling (Azlin Alisa & Nurul Ilyana 2017). The element of speculation also exists since the investor sells securities when the value of the securities is high and then waits until the value drops. When the value drops, the investor will then buy it back and obtain short term profits. This means that the investor plays with the market hoping to reap huge profits (Hamed Soltani 2009). Nevertheless, short selling has its pros and cons. Among the benefits of short selling are obtaining profits when the market falls, small capital etc. Whereas its disadvantages are unlimited losses, need for a margin account as well as interest payable to the account and a short transaction period (Chapra 1984).

Implementing Regulated Short Selling in Malaysia:

Malaysia is among the countries in the forefront of the Islamic Capital Market for the past three decades. Malaysia has introduced several initiatives and global efforts in creating a competitive Islamic Capital Market that is capable of fulfilling the needs of all Muslims. Besides that, products and services available in the Islamic Capital Market are capable of attracting all levels of investors and also publishers without taking into consideration ethnic background or religion. The Islamic Capital Market plays an important role in contributing towards the growth and prosperity of the national economy, just like the conventional capital market.

The practice of short selling was basically prohibited in any transaction or form in Malaysia because it contains elements that contradict the syarak. However, in efforts to expand Malaysia's financial market, besides adhering to Syariah principles, regulated short selling was introduced to Bursa Malaysia on 30 September 1996 (Mohd Azri et al. 2016). Regulated short selling at that time was something unique in the capital markets, mainly in ASEAN (Association of South East Asian Nations) countries (Imtiaz & Azhar 2016).

It should be noted that not all shares are involved in regulated short selling, except shares that are approved by Bursa Malaysia are permitted in such transactions. Besides that, regulated short selling transactions must adhere to regulations and legislation established by the Securities Commission (Bursa Malaysia 2019). Most importantly, in order to implement regulated short selling, it must be protected and prohibited from implementing *naked* short selling.

During the Asian financial crisis in 1997, the SC, on 28 August 1997, had prohibited the use of regulated short selling in order to control security market prices that fluctuate sharply without any control. However, in February of 2001, the SC drew a plan known as the Capital Market Master Plan. Among the recommendations contained in the plan are the re-introduction of regulated short selling and security leasing activities. Nevertheless, the suggestions adduced in the plan could not be implemented until the SC again permitted regulated short selling transactions on 3 January 2007. According to Bursa Malaysia (2019), regulated short selling was re-introduced into Malaysia's capital market with the aim of accommodating the needs of publishers and investors. In addition, it is also intended for large scale liquidity in the capital market besides stimulating Malaysia's capital market.

Therefore, in efforts to continue improving efficiency and competitiveness in Malaysia's capital market, Securities Commission Malaysia had permitted short selling transactions but it must adhere to strict regulations and conditions stipulated by SBL. The SAC, in its 69th meeting held on 18 April 2006, had decided that regulated short selling is Syariah compliant when SBL principles are incorporated into it, which then eliminates the element of *ghārar*.

Diagram 1 illustrates how regulated short selling incorporated with SBL principles is implemented in Malaysia. The incorporation of SBL into regulated short selling is consistent with Regulation 704 by Bursa Malaysia Securities Limited, which is related to the implementation of short selling.

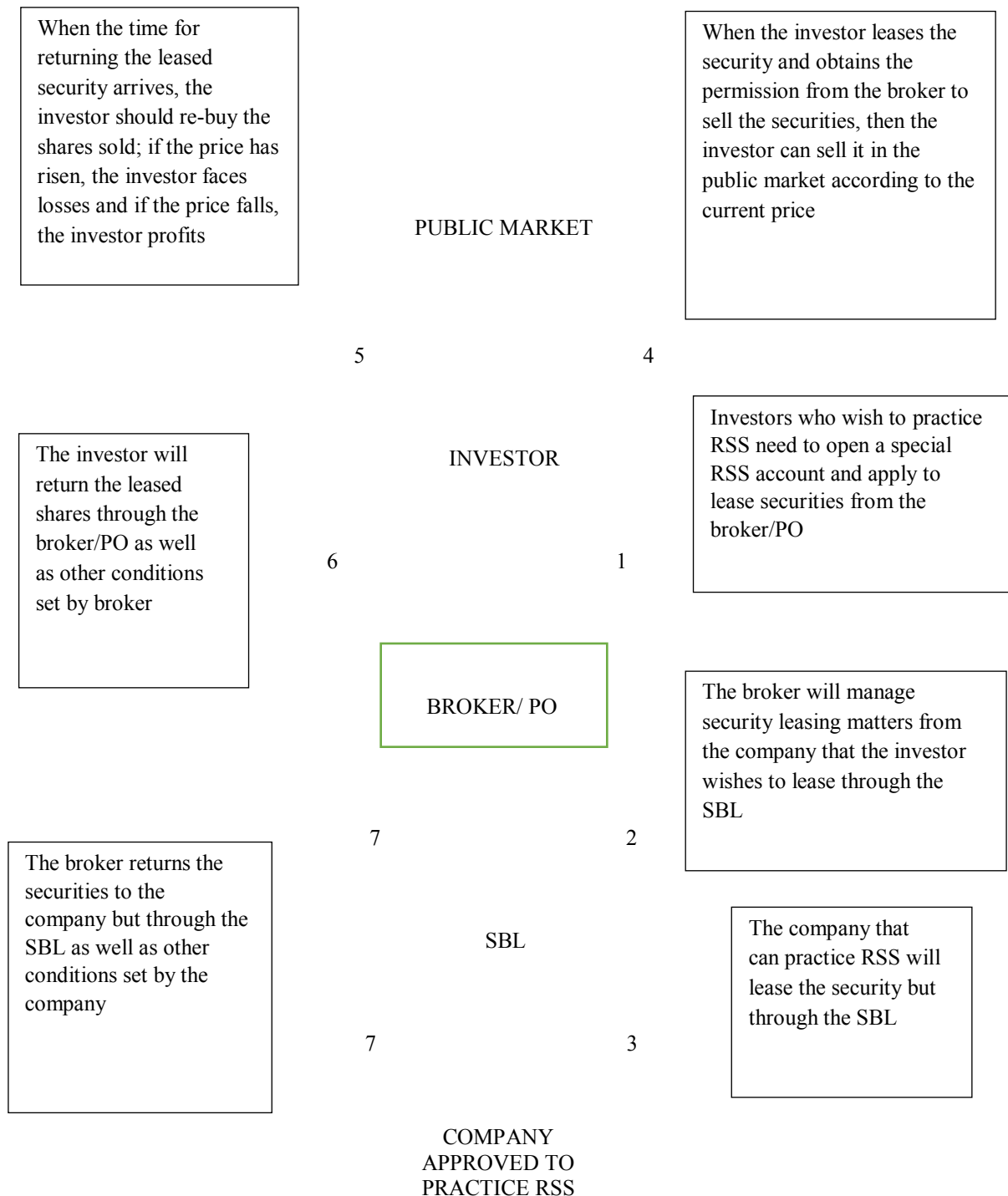


Diagram 1:- The Regulated Short Selling Process.

Regulated short selling:

Regulated short selling was introduced in Malaysia in 2007 after short selling was banned in 1997 (Teng 2018). There have been various studies on RSS (Khairul Anuar, 1999, Asyraf Wajdi & Abdelazeem, 2008, Osmani & Abdullah, 2009, Anon, 2011, Muhammad Azri et al., 2015, Imtiaz & Azhar, 2016, Tee, 2018 and Teng, 2018)

Khairul (1999) used the *maslahah mursalah* approach when applying the decree regarding religious practices in short selling. In other words, short selling transactions can be practiced with a condition whereby all elements leading to *gharar* are eliminated, such as creating commodities out of a transaction. Short selling transaction is the major factor of production in a country's economy, hence, if the transaction is prohibited then the country would lose its active and major source of production. Therefore, the *maslahah* (benefits) related to short selling is more significant compared to the *mafsadah* (negative impact), whereby the *mafsadah* must be avoided.

Tee (2018) explored the confusion between regulated short selling and *intraday short selling* (IDSS). Regulated short selling has been part of Malaysia's capital market system since 2007, hence, it is not something new. In line with Bursa Malaysia's vision to continue improving Malaysia's capital market, the Securities Commission has expanded short selling to a one-day period known as *intraday short selling* (IDSS). In addition, short selling in Malaysia is the regulated short selling or better known as monitored short selling, hence, it has a benchmark for a maximum fall in price as well as the total number traded each day.

Investors can again carry out short selling transactions after almost two decades as short selling was banned in 1997 due to the financial crisis faced by Asian countries. Before IDSS was introduced in 2018, Bursa Malaysia had introduced regulated short selling in 2007, which was limited to only 100 security shares. Presently, the total number of securities permitted for a short selling transaction is increasing and the list of securities will be reviewed every six months (Teng 2018). The permitted limit for regulated short selling is 10% of the shares offered by a company.

Asyraf Wajdi & Abdelazeem (2008) examined and further analysed the approval given by MPS to carry out regulated short selling in Malaysia. They opined that the incorporation of SBL principles in regulated short selling has eliminated the element of *gharar*, therefore, the SAC (Securities Commission) should reconsider the decision because it is closely related to the issue of profit and benefits from loans that are still related to usury.

In 19 March 1998, the SAC, in its 13th meeting, decided to accept the principle of borrowing securities that exist in the securities industry. In relation to this, SAC, in its 69th meeting on 18 April 2006, decided that regulated short selling was consistent with Syariah principles because the existence of SBL in regulated short selling had eliminated the element of *gharar* (Securities Commission, 2014). Nevertheless, the issue of usury had not been completely resolved by SAC. It is evident that share holders would receive returns of 2% on a minimum loan of 50,000 shares borrowed, as stipulated in the new regulations pertaining to short selling in Malaysia (Hsu Chuang Khoo 2007).

It can be said that share trading using the short selling method is prohibited in the Islamic economic system because there exist elements of usury, *gharar* and gambling. However, SAC had permitted monitored or supervised short selling in order to eliminate the element of *gharar*. However, the possibility of usury must be examined thoroughly in regulated short selling so that its operation is actually Syariah compliant (Asyraf Wajdi & Abdul Azeem 2008).

The Issue Of Interest In Regulated Short Selling:

Islam also prohibits the receipt of usury from any form of financial transaction. All four Islamic schools of thought (*mazhab*) have decided that any condition for the payment of any additional amount that is greater than the loan by the borrower is prohibited, either an additional property similar to the property borrowed or another type of property. The element of usury will emerge in margin-related transactions (trade) or in other forms to benefit the share purchaser. Financing a margin transaction involves usury, which is prohibited in Islam, but it is permitted if it is guaranteed with Islamic loan financing. For example, the share can still be bought using a margin account if the transaction is guaranteed according to the *musyarakah* or *murabah* method between the trader and the buyer (Abd Mumin 2007).

Usury is an exploitative activity and does not apply concepts and ethics permitted by Islam. Islam prohibits usury because it victimises others due to the existence of unfair elements, which results in the victimisation of one of the parties (Chair 2014; Muhammad 2014). Hence, Islamic principles do not permit the ownership of company shares that are either directly or indirectly involved in activities related to usury. Short selling contains elements of usury because the broker receives profits from activities involving the leasing of securities to investors (Soltani 2009). The jurists are

in consensus that any condition that requires the lessee to pay a debt or loan together with an additional amount or interest is not permitted, regardless of the amount of interest. According to Islamic law, it is prohibited to give a loan to a person with the hope of getting something in return, as it is compulsory to return what is borrowed or paid in the same condition or amount.

Short selling transactions, as generally understood, are transactions that involve borrowing securities between the security's owner and the investor, therefore it is presumed to be a type of debt (*qard*). The person who provides the loan receives an amount greater than the security provided in the form of products of investment. The amount is presumed to be usury culminating from a debt. Thus, if the transaction is presumed to be *qard*, as in the conventional financial system, then it cannot be equated as *qard*, which is applied in Islam (Soltani, 2009).

Normal short selling and *intraday* short selling use borrowing procedures that are familiar with a broker and an investor. Both these types of selling have no differences at the beginning of the transaction because the difference only lies at the end of the transaction, whereby normal short selling can occur during sales and purchase dealings at any time, while *intraday* short selling should carry out the sales and purchase dealing at the same time when the investor borrows the security (Frank J. Fabozzi et.al 2004). According to Asyraf Wajdi & Abdelazeem (2008), among the issues related to short selling transactions is whether a person can profit from a loan contract, such as a shareholder who lends his share to the seller to carry out short selling through a broker. Under the new short selling regulations in Malaysia, the shareholder will get 2% returns for giving a minimum loan of 50,000 shares to the lending centre, namely Bursa Malaysia, which as the authority that manages transactions.

All jurists have unanimously agreed that any condition that requires the borrower to pay the debt with additional amounts or benefits is not permitted, regardless of the value of the benefits. According to Ibn Hazm, usury related to loans or borrowings can involve goods that are *ribawi* (using gold or silver as a measure of value and medium of exchange or goods) or not *ribawi* in nature. This violates the principles of Islamic law, whereby one gives a loan to another with the hope of some returns although it is compulsory to repay the loan or return an item borrowed in its original condition or value (Bilqis Annisa2014)

The wisdom of prohibiting usury in loans or debts is because of its similarity to the principles of *tabarru'*, which refers to the practice of extending mutual help between the lender and borrower. Hence, any form of usury, additional payment or benefit does contravene the principles of borrowing, whereby *maqasid shariah* is not achieved due to the usury. Therefore, any profit determined by the lender is usury. The issue of the lender determining profits upon the return of borrowed shares is the main factor in verifying the whole transaction.

Another reason for prohibiting usury related to loans or debt is that it resembles *ta'arru'* principles, which refers to the practice of extending mutual help between borrower and lender. Hence, any form of usury, additional payments or benefits is something that is prohibited in loans or borrowing, in which the existence of usury prevents the achievement of *maqasid syariah*. Regulated short selling is a short selling transaction approved by SAC (Securities Commission Malaysia) for implementation in Malaysia. According to SAC, regulated short selling is a Shariah compliant transaction and it can eliminate Shariah-related issues in short selling. However, according to Asyraf Wajdi and Abdelazeem (2008), all other Shariah-related issues have been overcome but the usury issue related to the 2% return from security ownership when returning borrowed securities remains unresolved.

SAC has permitted regulated short selling transactions by incorporating SBL principles into short selling transactions. SBL principles refer to security borrowing activities that involve a borrower and lender in order to fulfil temporary needs and resolve share trading transactions according to established regulations and guidelines. SAC had explored and found Shariah methods that can become the basis for implementing SBL. The studies found that the *istihsan* principle should be incorporated into the *ijarah* method to become the basis for SBL after evaluating other methods, such as *si'arāh* (borrowing assets), *hawalah* (transfer of debt) and *bā'wafā'* (selling and re-buying), which are not consistent with the concept and implementation of SBL.

Istihsan is the preclusion of a decree (Islamic law), which is *juz'ie* in nature, from the general method. Use of the *istihsan* principle was popularised by the Hanafi sect ulama and adopted by the Maliki sect ulama and it has become a hot topic of discussion among ulama from other sects, especially the Shafie sect ulama. The Shafie sect ulama would have rejected *istihsan* if it was baseless. However, it is still a source of decree (Islamic law) for those who accept it. SAC had adopted the *ijarah bi istihsan* concept when using SBL in combination with short selling in order to

implement RSS in Malaysia. Originally, the *ijarah* decree would become void if the leased goods are not beneficial to the lessee. In regard to shares, leasing securities will not be beneficial because according to Chapra (1985), stocks or securities involved in short selling are not used in business by investors. Moreover, the investor will make speculations in order to obtain profits and not use security certificates, which will then cancel the *ijarah* agreement. Hence, from the *istihsan bi māsālāh* aspect, short selling provides many benefits to the shareholder and can also provide a high degree of liquidity to the capital market, which will then enhance the country's economy. Meanwhile, from the *istihsan bi ʿuruf khās* aspect, SAC is of the view that SBL is a normal economic practice in the financial sector (Imtiyaz & Azhar, 2016). This means that the practice of regulated short selling incorporated with SBL is based on the *ijarah* leasing principle, while the normal short selling and *intraday* short selling uses the borrowing principles. For example, the investor leases the security certificate from the broker and the broker can set the lease chargers for the security and this is how the broker makes his profit. The leasing chargers cannot be presumed to be usury because usury occurs in cases of borrowing and merchandise related to usury. Therefore, this clearly shows that the statements by Asyraf Wajdi and Abdelazeem concerning the position of usury in RSS transactions was resolved by SAC by using the *ojarah bi istihsan* concept and supported by *istihsan bi māsālāh* as well as *istihsan bi ʿuruf khās*.

Conclusion:-

It can be concluded that short selling transactions have various shariah issues pertaining to the non-adherence to Islamic commercial (*muamalat*) principles, such as *gharar*, gambling, speculation and usury. Hence, SAC had conducted an in-depth study to ensure short selling transactions can be applied in Malaysia while adhering to Islamic commercial (*muamalat*) principles. This means that short selling transactions can be applied in Malaysia but must be combined with SBL and called Regulated Short Selling (RSS). After considering the benefits (*maslalah*) accruing to the economy and country, regulated short selling transactions were permitted in order to avoid shariah issues that are inherent in short selling. Therefore, investors and any financial institution can practice regulated short selling transactions based on conditions set by the Securities Commission Malaysia. The implementation of regulated short selling does not contain the element of usury anymore because it has been combined with SBL by using the *ijarah bi istihsan* principle.

Acknowledgement:-

Heartfelt appreciation to the Ministry of Higher Education, Malaysia for providing the FRGS research grant entitled, "Pembinaan Parameter Islamic Swap dalam Pasaran Derivatif Islam di Malaysia". Project Code: FRGS/1/2018/SS01/UKM/02/5.

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