



Juridical Analysis of Build Operate Transfer Agreements at the Mataram Mall Building

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ABSTRACT

The purpose of this research is to identify and analyze the regulation of Build Operate Transfer (BOT) agreements in positive law in Indonesia and the legal issues in the BOT agreement between the Mataram City Government and PT Pacifik Cilinaya Fantasy. The research method used is normative legal research with a legislative approach and a conceptual approach. The types of data used include secondary and primary data. Secondary data consists of literature sourced from primary, secondary, and tertiary legal materials. The regulation of Build Operate Transfer is essentially the same as general contract regulations, which are governed by the third book of the Civil Code regarding obligations. Additionally, Build Operate Transfer is also regulated by several other regulations, including: Government Regulation No. 27 of 2014, Presidential Regulation No. 13 of 2010, Minister of Finance Regulation No. 78/PMK.06/2014, and Minister of Finance Regulation No. 02/PMK.06/2008 concerning the Appraisal of State-Owned Assets. The legal issue in this Build Operate Transfer agreement is that PT Pacifik Cilinaya Fantasy failed to comply with and PT Pacifik Cilinaya Fantasy regarding the management of the APHM Cilinaya Area. PT Pacifik Cilinaya Fantasy did not fulfill its obligation to pay royalties to the Mataram City Government from 2016 to 2019.

INTRODUCTION

The central and regional governments constantly strive to develop their areas. This regional development is carried out by building new infrastructure to support government business activities, such as commercial buildings. However, the government often faces financial constraints in building infrastructure due to limited funds from the government. Therefore, when the government intends to build infrastructure, it requires assistance from other parties.

Typically, the government planning to develop its area only possesses assets in the form of land. These assets have no utility value yet. If the government uses the State or Regional Budget to build infrastructure, several risks will be encountered, including high construction costs and other development risks. To avoid these risks, the government opens opportunities for the private sector to invest in building infrastructure on state assets (Salim & Budi Sutrisno, 2012).

On the other hand, for the private sector, the opportunity to invest in government assets presents a good opportunity. Investments categorized by their assets are investments from a capital or wealth perspective, where the private sector only needs to invest a certain amount of capital.

The opportunity for the private sector to invest in government assets requires the government to make efforts to establish a legal relationship between the government and the private sector, known as a public-private partnership. One of the government's efforts is through agreements, including build, operate, transfer (BOT) agreements. A BOT agreement is a business contract that serves as the primary source of obligations, rights, and responsibilities for the parties involved (Azharudin Lathif and Nahrowi, 2009). Thus, this legal relationship has two aspects: "bevoegdheid" (authority or rights) and its counterpart "plicht" or obligations (R. Soeroso, 2009).

When a government-private partnership occurs, the private sector will overcome obstacles in constructing commercial buildings, such as: a. Difficulty in finding a strategic location for the project. Even if there is unused land in a strategic location, the owner may not be willing to sell it; b. Additionally, developers face challenges in land acquisition, including licensing costs and others.

Initially, BOT agreements were only conducted by the government. However, over time, this agreement has also been implemented by state-owned enterprises, private entities, legal entities, or individuals. This development has changed the pattern of agreements from public-private to private-private. As a result, the regulation of BOT agreements has become different, initially limiting agreements between the government and the private sector and concerning the status of assets under agreement.

Regarding BOT agreements, the author will examine a case involving the Mataram Mall building, where a cooperation agreement took place between the Mataram City Government and PT. Pasific Cilinaya. The management contract of Mataram Mall by PT. Pacific Cilinaya Fantasi (PCF) is about to expire. Therefore, the Mataram City DPRD urges the Mataram City Government to consider the future management of Mataram Mall.

Several ideas have emerged, such as converting it into the Mataram Mayor's Office. However, this is deemed unethical, as Mataram Mall is one of the largest and first shopping centers in NTB. The Mataram City Government continues to receive input from the community to take over Mataram Mall and turn it into a government center. A study is being conducted, particularly on changes in spatial planning (RTRW). The cooperation contract could be terminated. The Regional Research Agency has been asked to study the utilization of assets owned by the Mataram City Government currently used by PT. Pasific Cilinaya Fantasi. The cooperation contract between Mataram Mall and the Mataram City Government is threatened with termination due to a lack of visitors and competition from the establishment of other shopping centers.

Based on these issues, the author believes that a study is necessary on the juridical analysis of the BOT agreement for the Mataram Mall building. Based on the background above, the author formulates two main problems, namely: 1) how is the regulation of the Build Operate Transfer (BOT) agreement in positive law in Indonesia? and 2) what are the legal issues in the BOT agreement between the Mataram City Government and PT. Pasific Cilinaya Fantasi?

The purpose of this research is to understand and analyze the regulation of the Build Operate Transfer (BOT) agreement in positive law in Indonesia and to understand and analyze the legal issues in the BOT agreement between the Mataram City Government and PT. Pasific Cilinaya Fantasi.

RESEARCH METHOD

The type of research used in this study is normative legal research, also known as doctrinal legal research. This type of legal research examines legislation (law in books) or law as conceived as rules or norms that serve as behavioral guidelines for what is considered appropriate for humans (Amiruddin, H. Zainal Asikin, 2018).

According to Muhaimin in his book "Legal Research Methodology," normative legal research (legal research) is typically "only" a document study, utilizing legal sources such as legislation, court decisions, contracts/agreements, legal theories, and the opinions of scholars (Muhaimin, 2020).

The research approach used in this study includes:

1. **Statutory Approach:** This approach examines legislation related to contractual issues, such as the Civil Code and the Minister of Home Affairs Regulation No. 19 of 2016 on Guidelines for the Management of Regional Property. This approach is used to analyze various legal regulations related to Build Operate Transfer (BOT) agreements.
2. **Conceptual Approach:** This approach is based on views and doctrines that have developed in legal science. By studying the views and doctrines in legal science related to the research problem, it is expected that the researcher will find ideas that lead to relevant legal concepts, principles, and understandings concerning the issue at hand.

The technique for collecting legal materials used in this study is the library research technique, as well as using electronic media, specifically the internet. To obtain legal materials from these sources, the researcher integrates, collects, and studies books and articles related to the research title.

All collected data or legal materials are then processed and analyzed using qualitative analysis methods, specifically by interpreting the processed legal materials concerning the Build Operate Transfer (BOT) Agreement Concept.

The interpretation used is grammatical interpretation, which gives meaning to a term within the legal language. The interpretation of the meaning of words in laws (authentic interpretation) is based on the meaning of the words within the law.

The conclusions drawn from this normative legal research use the deductive method, which involves drawing conclusions from general issues to address the specific concrete problems encountered.

ANALYSIS AND DISCUSSION

1. Regulation of Build Operate Transfer (BOT) Agreements in Indonesian Positive Law

a. Regulation of Build Operate Transfer (BOT) Agreements in the Indonesian Legal System

According to Article 5 of Presidential Regulation No. 13 of 2010, which amends Presidential Regulation No. 67 of 2005 on Government Cooperation with Business Entities in Infrastructure Provision, such cooperation can be executed through a cooperation agreement or a business license based on mutual agreement between the government and the business entity, as long as it does not conflict with the prevailing laws and regulations.

Forms of cooperation offered include joint ventures such as production sharing, management contracts, technical assistance, franchises, joint enterprises, portfolio investment, and Build Operate and Transfer (BOT) agreements. One of

the common methods of financing infrastructure projects is by involving the private sector in government projects through the Build Operate and Transfer (BOT) system. Financing through BOT/BGS agreements encompasses feasibility studies, procurement, financing, and operation (Bambang Pujianto et al., 2005).

According to Article 1 of Government Regulation No. 27 of 2014 on the Management of State/Regional Assets, a Build Operate and Transfer (BOT) agreement refers to the utilization of state/regional assets in the form of land by another party, who constructs buildings and/or facilities on the land and uses them for a specified period, after which the land and the buildings and/or facilities are returned to the government.

In accordance with Ministry of Finance Regulation No. 78/PMK.06/2014 on the Procedures for Utilizing State Assets, BOT is defined as the utilization of state assets in the form of land by another party who builds and operates facilities on the land for an agreed period, before returning it to the government. The BOT/BGS concept is one where the project is entirely financed by private companies, or in collaboration with state-owned enterprises, and upon completion of the operation phase, as specified in the BOT agreement, the project is transferred back to the government (Bambang Pujianto et al., 2005).

The public nature of BOT/BGS agreements necessitates that conventional contract law does not fully apply to the contractual relationship between the government and private companies or individuals. Although BOT/BGS agreements are still classified as contracts, there are differences from other contracts, primarily because the government is one of the parties, introducing aspects of public law into the agreement (Ridwan Soleh, 2009).

BOT agreements are governed by the following regulations: a) Government Regulation No. 27 of 2014 on the Management of State/Regional Assets. b) Presidential Regulation No. 13 of 2010, amending Presidential Regulation No. 67 of 2005 on Government Cooperation with Business Entities in Infrastructure Provision. c) Ministry of Finance Regulation No. 78/PMK.06/2014 on Procedures for Utilizing State Assets. d) Ministry of Finance Regulation No. 02/PMK.06/2008 on State Asset Valuation.

b. Procedures and Implementation of Build Operate Transfer (BOT) Agreements between Government and Business Entities in Infrastructure Provision

(1) Subjects and Objects of Build Operate Transfer

a) Article 103 of Ministry of Finance Regulation No. 78/PMK.06/2014 states that BOT/BGS can be conducted by asset managers, which include:

- State-Owned Enterprises (SOEs),
- Regional-Owned Enterprises (ROEs),
- Private entities (excluding individuals), and/or
- Other legal entities.

However, if the BOT/BGS partner forms a consortium, the partner must establish an Indonesian legal entity to act on behalf of the BOT/BGS partner in the agreement. The objects of BOT/BGS, according to Article 104 of the same regulation, include:

- State assets in the form of land managed by the asset manager, or
- State assets in the form of land managed by the asset user.

For BOT/BGS on state assets managed by the asset manager, it can be initiated by the asset manager or upon request from another party. The asset manager's initiative is expressed in the form of a BOT/BGS recommendation and can come from the needs plan submitted by the asset user/asset user proxy. If initiated by another party, the request must be submitted to the asset manager and include:

- Background of the request,
- Planned usage,
- Duration,
- Proposed annual contribution amount,
- Proposed percentage of BOT/BGS proceeds to be directly used for government functions.

This request must also include:

12. Data on the state asset proposed for BOT/BGS,
13. Data on the BOT/BGS applicant,
14. Proposal for the BOT/BGS business plan,
15. Other relevant information concerning the BOT/BGS proposal.

Procedures for Implementing BOT/BGS Agreements between the Government and Business Entities in Infrastructure Provision

Based on Presidential Regulation No. 13 of 2010 regarding Amendments to Presidential Regulation No. 67 of 2005 on Government and Business Entity Cooperation in Infrastructure Provision, before implementing BOT (Build-Operate-Transfer) or BGS (Bangun-Guna-Serah) agreements for infrastructure

provision, the Minister/Head of Agency/Head of Region must identify infrastructure projects to be cooperated on with business entities, considering at least:

1. Consistency with national/regional medium-term development plans and strategic infrastructure sector plans,
2. Compatibility of the project location with spatial planning regulations,
3. Interconnections between infrastructure sectors and regions,
4. Analysis of social costs and benefits.

Every proposed project to be cooperated on must be accompanied by:

1. Pre-feasibility study,
2. Cooperation form plan,
3. Project financing plan and sources of funds, and
4. Cooperation offer plan including schedule, process, and evaluation methods.

Based on project identification results and public consultations, the Minister/Head of Agency/Head of Region establishes a priority list of projects to be cooperated on. This priority list is made public and disseminated to the community.

Business entities can submit an initiative for Infrastructure Cooperation Projects to the Minister/Head of Agency/Head of Region with the following criteria: a) Not included in the master plan for the relevant sector, b) Technically integrated with the master plan for the relevant sector, c) Economically and financially viable, and d) Does not require government support in the form of fiscal contributions.

An initiative project from a business entity must be accompanied by: a) Feasibility study, b) Cooperation form plan, c) Project financing plan and sources of funds, and d) Cooperation offer plan including schedule, process, and evaluation methods.

The Minister/Head of Agency/Head of Region will evaluate the project based on the business entity's initiative. If the project meets the feasibility requirements, it will be processed through a public bidding process according to the provisions in this Presidential Regulation.

Furthermore, as explained in the Ministry of Finance Regulation No. 78/PMK.06/2014 on Procedures for Utilizing State-Owned Assets in Chapter VIII, BOT/BGS is used when the asset user needs buildings and facilities for the purpose of state government services but does not have sufficient funds available in the State Budget for such provision. Buildings and facilities resulting from BOT/BGS implementation must be equipped with a Building Permit (IMB) in the

name of the Government of the Republic of Indonesia. Costs for BOT/BGS preparation incurred by the Asset Manager or User until the appointment of the BOT/BGS partner are charged to the State Budget, while costs for BOT/BGS preparation occurring after the appointment of the BGS partner are charged to the BOT/BGS partner.

Termination of BOT Agreements

Termination of a BOT (Build-Operate-Transfer) agreement by the Asset Manager may be carried out unilaterally through the issuance of a written warning. The process is as follows:

1. **First Written Warning:** The Asset Manager issues the first written warning to the BOT partner. If the BOT partner fails to comply with the warning within 30 calendar days from the date of the first warning, the Asset Manager will issue a second written warning.
2. **Second Written Warning:** If the BOT partner does not comply with the second warning within 30 calendar days from the date of the second warning, the Asset Manager will issue a third written warning, which is the final warning.
3. **Termination Letter:** If the BOT partner still does not comply with the third warning, within 30 calendar days from the date of the third warning, the Asset Manager will issue a BOT/BGS termination letter.
4. **Surrender of the BOT/BGS Object:** Upon receiving the termination letter, the BOT partner is required to surrender the BOT/BGS object to the Asset Manager within a maximum of 30 calendar days. The Asset Manager will request government internal auditors to conduct an audit on the surrendered BOT/BGS object. The audit aims to verify:
 - The conformity of the quantity and condition of the BOT/BGS object being surrendered with the BOT/BGS agreement.
 - The conformity of the buildings and facilities resulting from the BOT/BGS with the BOT/BGS agreement.
 - The report on the implementation of the BOT/BGS.
5. **Audit Report:** The audit results from the government internal auditors are reported to the Asset Manager with a copy sent to the BOT partner. The BOT partner must respond to the audit report and report back to the Asset Manager. The handover of the BOT/BGS object must be completed no later than the end of the BOT/BGS term and documented in a handover report.

It is important to note that unilateral termination of the BOT/BGS agreement does not eliminate the BOT partner's obligation to fulfill its commitments as outlined in the BOT/BGS agreement.

However, the second party in the agreement, namely PT Pacifik Cilinaya Fantasy, has defaulted or failed to fulfill the clauses in Article 6 of the agreement

addendum. PT Pacifik Cilinaya Fantasy did not meet its obligation to pay royalties to the City Government of Mataram from 2016 to 2019. As a result, PT Pacifik Cilinaya Fantasy will incur a penalty of 24% per year, where the amount PT Pacifik Cilinaya Fantasy must pay includes royalties amounting to IDR 900,000,000 (nine hundred million rupiah) and a total penalty over 3 years amounting to IDR 216,000,000 (two hundred sixteen million rupiah).

Based on the Agreement between the City Government of Mataram and PT Pacifik Cilinaya Fantasy regarding the APHM Cilinaya Area, the default by the second party, PT Pacifik Cilinaya Fantasy, indicates that the second party failed to meet its obligations as stipulated in the agreement concerning the management of the APHM Cilinaya Area.

Contract law is a part of Civil Law applicable in Indonesia. Contractual obligations are a critical aspect of Civil Law, as Civil Law contains many legal rules based on a person's promises (M Yahya Harahap, 1986).

A contract is a legal relationship regarding property or assets between two or more parties that grants one party the right to demand performance and simultaneously obligates the other party to fulfill that performance.

Performance refers to the execution of the terms specified in a contract by the party committing to it, where the execution must align with the conditions outlined in the relevant contract. According to Article 1234 of the Indonesian Civil Code, some models of performance include:

1. Delivering something
2. Doing something
3. Not doing something

Legal Sources of Agreements According to Article 1233 of the Indonesian Civil Code

Article 1233 of the Indonesian Civil Code states that obligations arise from agreements or from the law. Book III of the Civil Code does not provide a formula for obligations, but according to legal science, obligations are relationships between two or more persons involving property rights, where one party has the right to performance and the other party is obligated to fulfill that performance (M Yahya Harahap, 1986).

Contract law is a complex field requiring careful application. This is closely related to the formulation in Article 1338 of the Civil Code, which states: "All agreements legally made have the force of law for those who make them" (BN. Marbun, 2009).

Legal consequences refer to the effects of actions taken to achieve a desired outcome by the actor and regulated by law. The actions performed are legal actions aimed at obtaining a result required by law.

The legal consequences of entering into an agreement generally arise from the legal relationship created by the obligation, in the form of rights and obligations held by both parties. This also applies to the management agreement of the APHM Cilinaya Area. If the agreement meets the required legal conditions, all obligations arising from it bind both parties, whether they are the plaintiff or the defendant. The legal consequences of an agreement are specified in Article 1338 of the Civil Code, which states (Salim HS, Op. Cit.):

Article 1338 states: "All agreements that are made legally have the force of law for those who make them."

In agreements, contract violations often occur when one party fails to perform as stipulated, such as in the case of default in the management of the APHM Cilinaya Area.

Default means failing to meet obligations as stipulated in the contract (Abdulkadir Muhammad, 2000). Default is a breach of promise where there was a prior agreement made between the parties involved, according to Articles 1320 and 1338 of the Civil Code. Default is covered under Article 1243 of the Civil Code, which states: "Compensation for costs, losses, and interest due to failure to meet an obligation is only required if the debtor, after being declared negligent, continues to neglect the obligation or if the obligation can only be fulfilled after the deadline has passed." In other words, default can also mean a breach of promise where one party does not fulfill the agreement or does so late or performs something that is actually prohibited.

According to Ahmad Miru, default can take the form of:

1. Completely failing to fulfill the obligation.
2. Performing the obligation imperfectly.
3. Delaying the fulfillment of the obligation.
4. Performing actions that are prohibited by the agreement.

According to A. Qirom Syamsuddin Meliala, default can include:

- a. Completely failing to fulfill the obligation. If a debtor does not fulfill the obligation at all, it is considered as a complete failure to perform.
- b. Fulfilling the obligation but not on time. If the performance of the debtor is still achievable but late, the debtor is considered to have performed the obligation late, thus considered default.

- c. Fulfilling the obligation but incorrectly or improperly.
- d. Performing the obligation incorrectly, if the incorrect performance cannot be corrected, the debtor is considered at fault.
- e. Force majeure (overmacht). This refers to circumstances beyond the debtor's control, which make it impossible for the debtor to perform their obligation, and for which they cannot be held responsible. Overmacht is an unforeseen event that prevents a debtor from fulfilling their obligation before negligence occurs, and such events cannot be attributed to the debtor (A. Qirom Syamsuddin Meliala, 1985). Overmacht is divided into two types

1. Absolute Force Majeure (Overmacht Mutlak): This occurs when performance is entirely impossible for anyone to achieve.

2. Non-Absolute Force Majeure (Overmacht yang Tidak Mutlak):

This refers to situations where performance is still possible but requires additional effort from the debtor. Intentional actions and negligence lead to different consequences; intentional actions result in the debtor having to compensate more than for negligence. A warning letter stating that the debtor has defaulted is called a "somasi." It is a notice from the creditor to the debtor that specifies the creditor's demand for immediate performance or within a specified period as indicated in the notice. According to Article 1238 of the Civil Code, a debtor is declared to be in default once a somasi has been issued (in grebeke stelling).

The consequences of an action can be foreseeable or unforeseeable. To measure or understand these consequences, we consider both "objective" and "subjective" factors. Objective refers to consequences that can be predicted under normal conditions, while subjective refers to consequences predicted based on an expert's evaluation. Mistake has two meanings: broadly, it includes both intent and negligence, and narrowly, it pertains only to negligence (M Yahya Harahap, 1986).

Intentionality refers to actions performed with full awareness and intention. Thus, when intentionality occurs, there is no need for the intent to cause harm to others; it is sufficient that the actor is aware of and proceeds with the action. In contrast, **negligence** involves a situation where the actor is aware of the potential for harm to others but fails to act accordingly (M Yahya Harahap, 1986).

In a contract, if the rights and obligations are not fulfilled, it can result in harm to one party. Therefore, the affected party may seek redress from the party responsible for the loss. Remedies may include demands for performance of the contract, compensation for damages, or cancellation of the contract.

Cancellation of a contract can lead to disputes or conflicts. Disputes generally arise from differences in opinions or discrepancies among the parties.

Based on the Agreement between the City Government of Mataram and PT. Pacifik Cilinaya Fantasy regarding the APHM Cilinaya Area, the default committed by the second party, PT. Pacifik Cilinaya Fantasy, involves the failure to meet its obligations as specified in the agreement concerning the management of the APHM Cilinaya Area.

CONCLUSION

The regulation of Build Operate Transfer (BOT) is fundamentally similar to general contract regulations, governed by the third book of the Civil Code, which deals with obligations. Additionally, BOT is regulated by several specific regulations, including: Government Regulation No. 27 of 2014, Presidential Regulation No. 13 of 2010, Minister of Finance Regulation No. 78/PMK.06/2014, and Minister of Finance Regulation No. 02/PMK.06/2008 concerning the Valuation of State Assets.

The legal issue in the BOT agreement is that PT. Pacifik Cilinaya Fantasy has defaulted or failed to meet the clauses specified in Article 6 of the addendum to the agreement between the City Government of Mataram and PT. Pacifik Cilinaya Fantasy regarding the management of the APHM Cilinaya Area. PT. Pacifik Cilinaya Fantasy has not fulfilled its obligation to pay royalties to the City Government of Mataram from 2016 to 2019.

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