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The Loss of Object Promised in Built Operate Transfer Scheme

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***Abstract*: Infrastructure development requires relatively large funds. The limited funding owned by the government encourages the government to cooperate with the private sector. The collaboration scheme is known as the collaboration of business entities (PPPs) or built operate transfer (BOT) schemes both concerning public and private law. Existing regulations encourage renegotiation as an effort to find points of interest for the parties.**

***Keywords* : Object, built operate transfer, Contracts, Building.**

I. INTRODUCTION

Until 2014, Rp.1,900 trillion in funds was needed for infrastructure development in Indonesia. But the government's ability through the APBN only ranges from Rp. 550 to Rp.600 trillion, from the expenditure of state-owned capital, funding can be increased by around Rp.1,300 to Rp.1,400 trillion, so private funds are very much needed. Seeing the limitations of the government through the APBN in the provision of funds for infrastructure development demanded new models or patterns as an alternative to financing development projects. At the regional level, funding for infrastructure development by relying on APBD funds is also felt to be increasingly limited, so new patterns are needed as an alternative funding that often involves private (national-foreign) parties in government projects. Private sector participation in the procurement of infrastructure projects is certainly a fairly new phenomenon in Indonesia. Patterns such as issuance of regional bonds, BOT (Build Operate Transfer), BOO (Build Operate Own), BROT (Build Rent Operate Transfer), KSO (Joint Operation), joint ventures, ruislag etc., are new phenomena not only for academics, but also practitioners, government agencies, lawyers, financial institutions, notaries etc. Clifford W. Garstang (1992), said that BOT is a variety of types of project financing known as contract provided financing. The contractor will not only provide the materials and services needed to provide the proposal for the construction contract, but will also not only provide the materials and services needed. will also need to operate the project and use its cash flows to repay the debt it has incurred.

Pekalongan City Government, Central Java Province, Indonesia, represented by Mayor of Pekalongan City, hereinafter referred to as the First Party, signed an agreement on Management of Atrium/Plaza of Pekalongan City with PT. Dian Insan Sarana Cipta, represented by the Managing Director, hereinafter referred to as the Second Party, as outlined in Agreement Number 050/02993 in 2011 Number 15/DU.DISC/VII.XI concerning the management of the Atrium/Plaza of Pekalongan City.

The objects promised in the contract are the management of buildings and buildings (places of sale) and other buildings contained in the atrium/plaza, utilization and development of buildings (places of sale) and other buildings contained in the atrium plaza. Management of buildings (places of sale) and other buildings located at the atrium plaza on an area of 3,900 m2 (three thousand nine hundred square meters) with a land value of Rp. 1,248,000,000 (one billion two hundred and forty eight million rupiahs) are carried out entirely by the second party. The concession period granted to the second party is in accordance with the agreement for 25 years, and ends on June 11, 2032.

The first party has the right to receive contributions from the second Party in the amount of $ 5,780 (five thousand seven hundred and eighty dollars) per year for 25 years until June 11, 2032. Payment of the contribution is based on the US dollar exchange rate to the rupiah at the end of the deposit April of the following year. Saturday, February 24, 2018, there was a fire that hit the entire Banjarsari market, including the Atrium building/plaza. Post fires that hit the entire Banjarsari market building, including atrium/plaza buildings, technical studies have been carried out in the form of investigations into the Banjarsari market in the post-fire city by Materials Laboratory Construction of the Department of Civil Engineering, Faculty of Engineering, University of Diponegoro Semarang by producing one conclusion that in accordance with Minister of Public Works Regulation Number 24/PRT/M/2008 included in the category of damage> weight of total repair costs> 65%. One of the recommendations given by the technical team in point 3 states that it needs to be considered in order to change the overall structure, because in accordance with Minister of Public Works Regulation Number 24/PRT/M/2008 the damage is categorized as heavy and the construction method is easier and faster.

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II. PROBLEM FORMULATION

By seeing that problems, this study aims to analyze the legal consequences of the destruction of the object promised, in this case the burning of the object promised. Furthermore, how is the status of the cooperation agreement between Pekalongan city government and PT.DISC, as stated in the agreement Number: 050/02993 of 2011 Number 15/DU.DISC/VIII.XI concerning the management of Atrium/Plaza in Pekalongan city after the Banjarsari Market including the Atrium/Banjarsari Plaza? In the event of termination of the agreement, how do you terminate the agreement? Can it be done unilaterally by one of the parties or it must be done on the basis of a mutual agreement?

III. RESULTS AND DISCUSSION

For governments at the regional level relying on state budget funds for financing development projects is also very limited. The economic crisis has resulted in limited capacity of the central or regional governments to realize infrastructure development projects. For this reason, it is necessary to look for alternative project financing other than relying on APBN or APBD funds. One alternative project financing that can be done is by inviting the private sector to participate in the procurement of government projects with the BOT (Build Operate and Transfer) system.

In essence the BOT concept applied to government infrastructure projects includes the following:

"To have any projects which really belong to the public, which is implemented by the state, the province, and the city providing any guarantees or accepting any liability. The projects that were intended to be self-financing" (Bunker, 1998).

This BOT model in the Minister of Home Affairs Regulation No. 19 of 2016 concerning the management of regional property is known as the Contract for Building Utilization (BGS).This model offers many advantages for the parties involved (government or contractor), in addition to other methods that are often done by way of Ruislag (Soebagyo, 1994, see also, Mubarok et al., 2017; Malik et al., 2017; Anjani & Santoso, 2018; Mahdi et al., 2016). Ruislag is generally a land exchange transaction with or without buildings (owned by the government) to be released, which is called "goods to be delivered", with a replacement in the form of just land or just a new building or land and new buildings substitute (usually called " substitute goods ") in other places that are worth the price of the goods delivered which will be received without prejudice to the state and no compensation in the form of money.

Project financing with this BOT model will include from feasibility studies, procurement of goods, financing, to operations. Instead, the contractor is granted concession rights for a certain period of time to take economic benefits and ultimately return all the assets to the government at the end of the concession period.

In addition to funding originating from debt financing or from equity financing, it is still possible to fund the BOT project obtained from several financial institutions, investment funds, insurance companies, collective investment schemes (mutual funds), pension funds, and this is usually called "institutional investors" (United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Privately Financed Infrastructure Projects, United Nations New York 2001, p. 16-17). In addition, it is possible to fund BOT projects by using capital market funding, financing by Islamic financial institutions, or using international financial institutions (eg World Bank, international finance corporations, or by regional development banks).

In reality, the BOT project is not as easy as in the presentation. Problems after problems can arise in the implementation of the project. For this reason it needs to be designed so that the BOT project can go according to plan and provide benefits to the parties concerned. Some problems around the calculation of profit and loss need to be prepared carefully, both for the project owner in this case the Government or the contractor as the project implementer. Moreover, the BOT project requires a contract (maybe more than one contract), so it needs to be carefully designed so that the interests of each can be well protected.

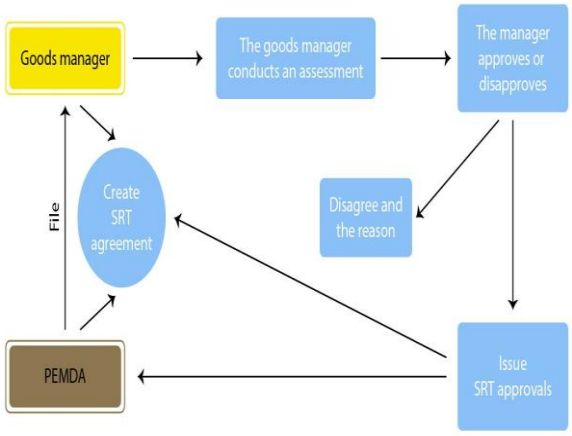

Figure 1. Flowchart of build operate transfer (BOT)
Source: https://slideplayer.info/slide/1915815/

Andrew Pickering, in the BOT project (mainly in the electricity BOT) can at least be classified as three risk classes, namely commercial risks, non-commercial risks, and casualty risks. Included in the category of commercial risks are: market risk, participant risk, construction risk, operational risk, technical risk, fuel supply risk. Meanwhile, those included in non-commercial risks are: legal risk, country risk, financial risk, environmental risk. Casualty risk is a risk associated with accidental damage or destruction of plan or equipment. Market risk is the exposure of the project to variations on process or demand for the product produced by the project. Participant risk is the risk that a project participant does not perform its financial or non-financial obligations. Construction risk is the risk that the project is not constructed on time or budged or fail to meet satisfactory performance standards for normal operation. Operational risk is the risk that a project does not meet revenue expectations under normal operating conditions. Technological risk is the risk associated with using unproven technology.

Fuel Supply risk is the risk that fuel cannot be delivered to the project site in the necessary quantities, of the right quality and at a determinable price throughout the life of the project. Meanwhile, Non-Commercial risks is FX risk which is the risk of movement in foreign exchange rates. Exchange control risk is the risk that limitation on the right to purchase foreign exchange or on the availability of foreign currency may prevent the timely conversion of domestic receipts into foreign currency. Interest risk is the risk of movements in interest rates. Economic risk is the risk of adverse economic changes in the host state. Environmental risk is the risk of changes in environmental laws.).

No less interesting is how to estimate the risks that will occur and be anticipated in the implementation of the project. What are the potential risks, how to secure them, who will bear them. A good BOT is not a BOT where all risks are borne by one party but a good BOT is BOT that can share risks equally among the parties. One of the risks that often occurs is fire risk which often makes the destruction of goods that are the object of cooperation agreements. As was the case with the BGS Object in the form of a market burning in Pekalongan city, Central Java.

The burning of the Banjarsari market in Pekalongan City, which occurred on Saturday 24 February 2018, including the Atrium/plaza building with a total damage of more than 65%, based on the final report of an independent technical review, based on the Ministry of Public Works regulations, as a result of the fire heavily damaged.

The legal issue is how the legal consequences of the destruction of the object promised are due to a fire incident? Did the BGS end with the fire that struck the object that was cooperated between the Pekalongan City government and the partners?

Article 236 Minister of Internal Affairs regulations Number 19 of 2016 states that BGS/BSG ends in terms of;

a. The expiration of the period of BGS/BSG as stated in the agreement;
b. Termination of the BGS/BSG agreement unilaterally by the Governor/Regent/Mayor;
c. End of BGS agreement;
d. Other provisions in accordance with the laws and regulations.

Referring to the provision, the destruction of the object promised was caused by fire, and could not be used as the basis for the end of the BGS agreement. Further provisions that can be used as a guide to assess whether the burning of the object promised makes the agreement expire or not is the phrase "other provisions in accordance with the laws and regulations"

Provisions that are relevant to the event are BW third book on engagement.

1. In Article 1381 it is stated that the engagement can end due to two things;
   a. Caused by law, namely consignment, destruction of goods owed, expiration.
   b. Due to the agreement, namely payment, novation, compensation, debt mixing, debt relief, cancellation or cancellation, the entry into force of the cancellation requirement.

   Based on the provisions of article 1381, the destruction of goods owed becomes one of the reasons for the termination of the agreement. The disappearance of the goods that were promised caused the agreement conditions not to be fulfilled because the items that were the object of the agreement no longer existed. The destruction of the object that is the object of the agreement has implications for the continued agreement. The choice that can be made towards the destruction of the object that is the object of the agreement is to continue the agreement with the new object or terminate the agreement
2. The provisions relating to the destruction of the object promised are Article 1444 BW. If certain items which are the material of the agreement, are destroyed, can no longer be traded, or are lost, so that it is completely unknown whether the item still exists, then delete the agreement, provided the item is destroyed or lost outside of the debt owed, and before he neglects to hand it over.

   Even if the debtor is negligent in giving up something while he has not borne the unexpected events, the agreement is deleted if the goods will be destroyed in the same way in the hands of the debtor, if it has been handed over to him.

   The debt owed is obliged to prove the unexpected event that was advanced.

   In any way something of an item, which has been stolen, destroyed or lost, the loss of this item does not ever free the person who stole the goods from his obligation to change the price.
3. Article 1445 BW mentions.

   If the goods are owed, beyond the fault of the debtor being destroyed, no longer able to be traded, or lost, then the debtor, if he has rights or claims for compensation for the goods, is obliged to give these rights and demands to the person who gave it to him.
4. When discussing the destruction of goods owed as a reason for removing an agreement, especially what is regulated in the provisions of article 1444 of the Civil Code, we cannot ignore the provisions stipulated in article 1237 of the Civil Code.
5. Article 1237 of the Civil Code, which reads:

   In the case of an agreement to provide a certain material, the material since the engagement was born, is at the expense of the debtor.

   If the debtor is negligent will submit it, then since the time of negligence, the material is at his expense. Article 1237 of the Civil Code contains an important principle that gave birth to article 1444 of the Civil Code. In accordance with the provisions of Article 1237 paragraph (2) of the Civil Code, then if the debtor is negligent to surrender, resulting from the time of negligence, the object concerned is at the expense of the debtor. The debtor until the time of submission, is obliged to care for the object (article 1235 of the Civil Code).

6. Article 1235 BW states that in each engagement to give something is included the obligation to submit the material concerned and to treat him as a good head of household until the time of delivery.

The destruction of the building that was the object of the BGS agreement resulted in the existence of a mutually agreed agreement. Primarily against the status of the agreement, whether it ends by itself or if it runs until the agreed time, or ends because of the agreement of the parties.

From the point of view of public law as stipulated in Article 236 Minister of Internal Affairs regulations Number 19 of 2016 states that BGS/BSG ends in terms of;

a. The expiration of the period of BGS/BSG as stated in the agreement;
b. Termination of the BGS/BSG agreement unilaterally by the Governor/Regent/Mayor;
c. End of BGS agreement;
d. Other provisions in accordance with the laws and regulations.

Based on the aforementioned provisions, the expiration of the BGS agreement that has not expired, which is not caused by unilateral termination by either party, is possible in other ways in accordance with the provisions of the legislation. Thus the provisions relating to the agreement as stipulated in Book III of BW can be implemented as a legal termination agreement.

Article 1381 states that the agreement can end due to the law, namely consignment, destruction of the goods owed, expiration.

Due to the agreement, namely payment, novation, compensation, debt mixing, debt relief, cancellation or cancellation, the validity of the conditions is canceled.

The choice that can be made towards the destruction of the object that is the object of the agreement is to continue the agreement with the new object or terminate the agreement. Thus, in the event of the destruction of goods which are the object of the agreement, if it is not possible to continue the agreement that has been agreed upon, then it should be followed by ending the agreement. The termination of the agreement is not the same as the old agreement, namely by making an agreement to end the agreement as outlined in a written agreement. If there is no agreement to terminate the agreement because each party has its own arguments, then the status of the agreement remains valid until the end of the agreed agreement or one party can request the determination of the Court to end the agreement due to not achieving a collective agreement, which is clear agreement not null and void due to the destruction of the agreed object.

IV. CONCLUSION

The study showed that the destruction of goods which are the object of the agreement results in the failure of the agreement. However, the destruction of goods which are the object of the agreement does not occur automatically, from a legal point of view it must be proven empirically. By basing on the provisions of public law, private law, both lead to one meeting point, namely a re-agreement between the two parties. The re-agreement can be in the form of an agreement to terminate the agreement or agreement to continue the agreed agreement.

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