

PROSPECTS FOR IMPLEMENTATION OF BUILD OPERATE AND TRANSFER IN INDONESIA

M. Adnan Lira

Faculty of Law, Indonesian Muslim University, Makassar, Indonesia
m.adnanlira@umi.ac.id

Received 20 Sept 2023 • Revised 29 Oct 2023 • Accepted 28 Nov 2023

Abstract

A form of cooperation between the government and business entities in providing infrastructure for the public interest by referring to specifications previously determined by the government or parties representing the government officially, where some or all of it uses resources owned by the business entity, taking into account the distribution of risks between the parties involved in the collaboration ^[1]. Government cooperation with business entities for infrastructure development is outlined in the *Build-Operate and Transfer* (BOT) model. The research method that the author uses in this research is normative juridical, namely research that examines written legal norms by referring to related legal provisions. The prospect of implementing BOT in Indonesia legally can be carried out based on freedom of contract and good faith, new regulations by the government, and the opening of Indonesia in the era of globalization to contracts that have been accepted internationally. Economically, BOT can support and facilitate development and business activities, whether carried out by individuals, companies, or the government. The obstacles encountered in implementing BOT include the inadequate substance of statutory regulations and law enforcement practices, including unsupportive jurisprudence. Convolutionary bureaucratic interference in the process of building public facilities, as well as the long BOT period, which allows for changes in the parties involved in the BOT, creates doubts for parties who have no experience as BOT recipients.

Keywords: *Build-Operate and Transfer; Cooperation; Contract*

INTRODUCTION

It seems that there are new financing institutions that are quite interesting and enrich global economic law and have recently become known in Indonesia. The institutions in question include: leasing, venture capital, build-own-operate transfer (BOOT), *build-open rate, and transfer* (BOT), which need to be studied carefully. To overcome the shortage in terms of financing, the government can involve the private sector in providing funds to finance the construction of infrastructure facilities. Infrastructure development is a dominant economic driver in a country. A form of cooperation between the government and business entities in providing infrastructure for the public interest by referring to specifications previously determined by the government or parties representing the government officially, where some or all of it uses resources owned by the business entity taking into account the distribution of risks between the parties involved in the collaboration. Government cooperation with business entities for infrastructure development is outlined in the BOT model.

As institutions that have only just been implemented in Indonesia, it is assumed that they still face problems in their implementation, both economically and juridically. In particular, BOT can be a very attractive alternative for financing the construction of public facilities, whether managed by the government or the private sector. This apparently attracted India to implement BOT for the construction of Bangalore Airport, but then failed due to the content of the agreement which was not agreed upon by the parties involved. BOT is an agreement between the government and the private sector as investors, where the investor is given the right to build infrastructure during the BOT agreement period, and transfers ownership of the infrastructure project to the government after the BOT period ends.

In Indonesia, Bots have also been applied in the construction of Sukarno Hatta International Airport, Cengkareng for several facilities, including escalators (automatic stairs that connect the waiting room to the aircraft), between PT. Angkasa Pura (BUMN) with PT. Bukaka. BOT is a promising and prospective institution, but in its implementation, it still faces legal problems because there are no specific regulations that are strong enough to regulate BOT, except for general provisions regarding agreements as regulated in the Civil Code. The BOT agreement is not specifically regulated in law, but it grows and develops in Indonesian economic activities, even the use of the term BOT is still varied, some still use the original term for the word BOT and some have been translated as BGS (Bangun Guna Serah). Other problems can arise due to economic calculations or bureaucratic obstacles in the practice of implementing BOT.

RESEARCH METHOD

The research method that the author uses in this research is normative juridical, namely research that examines written legal norms by referring to related legal provisions. Normative juridical is legal research carried out by examining secondary data. Normative research or also known as doctrinal research, provides an exploration of the applicable provisions regarding a specific matter.

RESULTS AND DISCUSSION

Prospects for implementing Build Openrate and Transfer

Before discussing the implementation of BOT, it is necessary to first understand what is meant by BOT. BOT is translated as construction for delivery according to the Minister of Finance's Decree Number 24B/KMK.04/1995, dated 02 June 1995 which first regulated the BOT Agreement. The decision letter provides the following meaning:

"Construction for transfer is a form of work carried out between the land rights holder and the investor which states that the land rights holder gives the investor the right to construct a building during the build-for-transfer agreement period (Build Operate and Transfer) and transfers ownership of the building to the owner. land rights after the build-to-handover period ends"

The basic consideration for implementing this bot is that on one side there are land owners who want to use their land for business activities but do not have the capital, while on the other side there are capital owners, both individuals and companies, who want to invest their capital and start a business but do not have land to build a building on. This definition is actually limited if it is only related to land, because the BOT could be carried out to build a building on or within an existing building/building so that it is not directly related to the land. Therefore, a more general understanding is appropriate to use to understand BOT. The most important characteristic of BOT is private funding. BOT is considered a solution that can help with development funding problems. After building the project, the private party

then has the right to manage or operate the project for a certain time, and with this operation the private party makes a profit.

Ownership of capital goods and technology in a BOT will definitely in time pass from the hands of the company that uses the BOT to the company that receives the BOT. So all the objects agreed upon in the BOT will be transferred (transferred) to the recipient of the BOT at a later time according to the agreement of the parties. Based on the description above, it can be seen that BOT is a type of agreement, especially a business agreement. Several parties in the BOT Agreement are two parties, namely the state and another party who is entrusted with the work to construct buildings or supporting facilities.

According to Agnes M Toar: "Agreement is a multifaceted legal act in the sense that for it to occur two statements of will are required. Included in this meaning. Both legal acts of marriage (marriage), adoption of children as well as legal acts for borrowing and borrowing money, renting and renting and legal acts for the formation of a national or international trading business (with foreign partners), in other words, both contracts in the field of life and the field of business or field anywhere."

In order to create a business contract, three things need to be considered, as follows:

1. Form of agreement: Oral, written or official for
2. Which party should prepare the script and financial consequences.
3. Detailed matters included in a contract, for example: clear identification of the parties, definition of the terms used, purpose and background of the contract, period of validity of the contract and conditions for the contract to come into force.

Thus, general matters in a business contract are important for BOT, in particular details regarding capital goods and technology, contract requirements and agreed time periods. Considering the large risks that arise and the complexity of the use of state property in infrastructure development through the BOT concept because its implementation consists of several stages starting from the development stage, the operation/implementation stage, and the delivery stage, as well as various regulations regarding infrastructure development through the BOT model still being spread, then its implementation must be based on the principles of the agreement.

For comparison, it seems that the government of Karnataka, India is taking a tough stance on using BOT; with the conditions desired for the construction of Bangalore airport not attractive to the consortium of private partners, neither for the Tata group India nor for as well as investors in the L & M Group from the Singapore consortium. Likewise, the contract term that is usually enforced in India, namely 30 years, did not attract the Singaporean consortium (The Straits Times, 12 May 1997).

Juridically, it can be said that the prospect of implementing BOT is quite potential because it opens up the possibility for parties to enter into contracts freely based on the provisions regarding agreements in the Civil Code and on the basis of good faith. That the agreement is valid as law for the party who makes it (article 1337 of the Civil Code), of course as long as it has been carried out in accordance with the conditions for the validity of an agreement (article 1320 of the Civil Code). The Indonesian government through the Minister of Finance has regulated BOT based on Minister of Finance Decree Number 248/KMK.04/1995, dated June 2, 1995. In addition, the pressure of globalization encourages companies/investors to implement forms of contracts that have been accepted internationally.

Economically, BOT as a financing institution can develop into an important alternative to meet capital, both for the government and the private sector, especially from foreign investors for countries that are developing and experiencing financial difficulties.

Viewed from the perspective of legal subjects or parties who can utilize BOT, the possibility is open for individuals, companies and governments (legal bodies). Thus, BOT has future prospects in facilitating business activities. BOT has been utilized by the Indonesian government through BUMN PT. Angkasa Pura with its partner PT. Bukaka to build several facilities at Sukarno Hatta International Airport, including escalators based on the BOT. PT. Bukaka built the escalator then used it by obtaining a lease from the company that used it and then after the agreed time expired it would be transferred to PT. Angkasa Pura.

Obstacles that parties can encounter in Build Operate and Transfer.

The first obstacle in implementing BOT is that there is no law that specifically regulates BOT so it still relies on freedom of contract and good ethics. Minister of Finance Decree number 248/KMK.04/1995 is not sufficient for implementing the BOT. Because the parties in a BOT usually consist of business consortiums involving various countries, it is inevitable that legal systems will clash with different practical approaches, as well as the use of different languages and terms. Until now, the Indonesian judiciary has no experience regarding BOT cases, so jurisprudence for this matter has not been formed. In this way, the juridical factor becomes an obstacle and also provides prospects, as explained in Chapter II, part A above.

Government intervention, especially in the process of building facilities for specific purposes, always involves complicated bureaucracy accompanied by conditions that are difficult for investors to accept. If discussions regarding these conditions take too long, the companies involved will withdraw. This is what happened to India in the BOT process for the construction of Bangalore Airport.

An extended period of time for a BOT can affect the understanding of the people or companies involved as parties in the BOT, so this creates doubts for parties who have no experience as potential BOT recipients. This is in line with what was stated by Sunarti Hartono, that Indonesia enters an open economic system so that the international economy and deliberately occurring economic events that occur in other modern countries directly or indirectly have an influence on Indonesia.

CONCLUSION

The prospect of implementing BOT in Indonesia legally can be carried out based on freedom of contract and good faith, new regulations by the government and the opening of Indonesia in the era of globalization to contracts that have been accepted internationally. Economically, BOT can support and facilitate development and business activities, whether carried out by individuals, companies or the government. The obstacles encountered in the implementation of BOT include the inadequate substance of statutory regulations and law enforcement practices, including unsupportive jurisprudence. Convoluting bureaucratic interference in the process of building public facilities, as well as the long BOT period, which allows for changes in the parties involved in the BOT, creates doubts for parties who have no experience as BOT recipients.

REFERENCES

- Agnes M. Tonar. 1997 *Negotiations and Business Agreements*. Writing on executive cadre training held by the Hasanuddin University student development study forum.
- Andjar Pachta Wirana. 1994. Research on the Legal Aspects of Build Operate and Transfer (BOT) Agreements, Jakarta: National Legal Development Agency, Ministry of Justice of the Republic of Indonesia.
- Anita Kamila. 2020. Application of the Principle of Proportionality in the Utilization of State Assets Through the Build Operate and Transfer/BOT Model, *Journal of Law & Development*, Vol. 50 No. 30.
- Anita Kamilah. 2013. Bagun Guna Serah (Build Operate and Transfer/BOT) Building Without Having to Own Land (Perspectives on Agrarian Law, Contract Law and Public Law), Bandung: Keni Media.
- Clara Sahati Astuti, "Government Build Operate Transfer (BOT) Cooperation with Business Entities in Infrastructure Development in Indonesia", *Kertha Semaya Journal*, Vol. 10 No. 8.
- Dahlia Dewi Apriani, Fadjarin Wira Perdana, H. Irwan, "Political and Legal Disharmony of Port Management in Shipping Legislation ", *Indonesian Journal of Social Science*, Vol. 2 No. 10.
- Dian Sera Bambang Utoyo Sutiyoso, Sasana Putra. 2019. "Public Private Partnership (KPS) as an Effort to Develop South Lampung's Radin Inten II Airport", *Lampung Balitbangda Journal*, Vol. 7 No. 1.
- Irawan Soerodjo. 2016. Contract and Defense Law; Build, Operate and Transfer (BOT) Land Agreement, Arrangements, Characteristics and Practices. Yogyakarta: Laksbang Pressindo.
- Likadja, FE. 1998. Economic Law-Lecture Materials II and III in the Hasanuddin University undergraduate program, edge of view.
- Muhammad Tang Abdullah. 2020. Public Private Partnership in Providing Public Service Infrastructure: Experiences of Indonesia and India, *Journal of Administrative Sciences*, Vol. 9 No. 2.
- Niken Ayu Istifani, Paramita Prananingtyas. 2022. Management and Benefits of Village Assets through Building, Operate, and Transfer (BOT) Agreements. *Notarius*, Vol. 15 No. 2.
- Peter Mahmud Marzuki. 2010. *Legal Research*, Jakarta: Prenada Kencana Media.
- Putu Samawati. 2021. Port Concessions Form the Delegation of Port Management to Port Business Entities, *Repertorium: Scientific Journal of Notarial Law*, Vol. 10 No. 2.

- Rahmat Ramadhani, Ramlan. 2019. The Build Operate and Transfer (BOT) Agreement at Merdeka Meda Field in View of State Administrative Law and Business Law, *De Lega Lata: Journal of Legal Studies, Faculty of Law, UMSU*, Vol. 4 No. 2.
- Ramadhan Try Adriansya, Raja Pangestu, Amrie Firmansyah. 2022. Application of ISAK 16 to Service Concession Agreements Case Study: PT Indonesia Power, *Journal of Law, Administration, and Social Science*, Vol. 2 No. 1.
- Sri Mamudji, *et al.* 2005. *Research Methods and Legal Writing*, (Jakarta: Publishing Agency, Faculty of Law, University of Indonesia).
- Sunaryati Hartono, CFG, 1998, *Indonesian Economic Development Law*. Binabuat, Bandung.
- Talitha Belvarini Candranigrum, Izzah Khalif Raihan Abidin, 2021, "Legal Aspects of the Establishment of Toll Road Business Entities by Aisng Investors in Indonesia", *Kawruh Abiyasa Journal: Multidisciplinary Periodical Scientific Journal*, Vol. 1 No. 1.
- Velloor Ravi. 1997. *Group Losing Internet in Bangalore Airport Project: Indian Govt's Build-Own-Transfer Conditions Cited*, The Straits Times.