

Termination of Agreements by the Government in the Agreement of Infrastructure Development with Build Operate Transfer Patterns

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Abstract— The agreement agreed upon by the parties applies as law for the parties. Termination of the agreed agreement can only be done because of the law or because of the agreement of the parties. In the case that an agreement is made between the government and a business entity (private) to build infrastructure in a build operate transfer (BOT) and the object promised is destroyed because of an unexpected event, can the government terminate the agreement unilaterally? Which legal rules are used as the basis, whether the rules are public or private? This article will explore various regulations which form the basis for the government to collaborate with (private) business entities in infrastructure development agreements with the BOT scheme along with regulations relating to the potential termination of agreements unilaterally by the government. This article in general will be able to provide adequate information about the legal problems of government cooperation with business entities (private) in infrastructure development with BOT schemes in the event of problems with the promised object.

Keywords— termination of agreement, government, BOT

I. INTRODUCTION

The district and city governments in Central Java have done a lot of collaboration with the private sector in relation to infrastructure development with a build operate transfer project. One of them is the Pekalongan City Government, represented by the Mayor of Pekalongan City, hereinafter referred to as the FIRST PARTY, signed the Pekalongan City Atrium/Plaza Management agreement with PT. Dian Insan Sarana Cipta, represented by the President Director, hereinafter referred to as the SECOND PARTY, as set forth in Agreement Number 050/02993 of 2011 Number 15/DU.DISC/VII.XI concerning the management of the Pekalongan City Atrium/Plaza.

The object agreed in the contract is the management of buildings and buildings (places for sale) and other buildings contained in the atrium/plaza, the utilization and development of buildings (places for sale) and other buildings contained in the atrium plaza. Management of buildings (selling places) and other buildings located in 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 forty eight million rupiah) is 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 is entitled to receive contributions from the SECOND PARTY in the amount of \$ 5,780 (five thousand seven hundred eighty dollars) per year for 25 years until June 11, 2032. Payment of these contributions is based on the US dollar to rupiah exchange rate at the time of deposit to the Regional Treasury no later than the end of the end April of the following year.

Saturday, February 24, 2018, a fire struck the entire banjarsari market in Pekalongan City, including the atrium/plaza building. The fire broke out on all the banjarsari market buildings, including the atrium/plaza building, a technical study in the form of the Banjarsari market investigation in the post-fire town of Pekalongan by Laboratory of Construction Materials, Department of Civil Engineering, Faculty of Engineering, Universitas Diponegoro, Semarang, by producing one of the conclusions that in accordance with Minister of Public Works Regulation Number 24/PRT/M/2008 included in the category of heavy damage, total repair costs > 65%. One of the recommendations given by the technical team in item 3 states that needs to be considered for replacing the entire structure, because according to the Minister of Public Works Regulation Number 24/PRT/M/2008 damage including weight categories and construction methods is easier and faster.

The destruction of the object promised in infrastructure development with the BOT pattern, certainly raises legal problems, both in terms of private law and public law. Private law concerns matters relating to the status of contracts that have been signed by the parties, does the contract automatically become null and void or should it be done by mutual agreement to terminate the agreement? Can the government, in this case the Pekalongan City, terminate the contract unilaterally without any agreement? In terms of public law, it implies a problem related to not obtaining an object in the form of a building that was promised at the end of the concession period. Whether it can be categorized as a state loss or not, what legal steps are taken to support the legal argument that the event is classified as force majeure or force majeure.

From year to year, the funds needed by the government for infrastructure development have increased. Seeing the limitations of the government through the State

Budget in the provision of funds for infrastructure development, new models or patterns as an alternative financing for development projects are required. At the regional level, funding for infrastructure development by relying on APBD funds is also felt to be increasingly limited, for this reason new patterns are needed as an alternative funding that often involves the private sector (national-foreign) 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 municipal bonds, BOT (Build Operate Transfer), BOO (Build Operate Own), BROT (Build Rent Operate Transfer), KSO (Joint Operation/Joint Operation), joint ventures, ruislags, etc., are not just new phenomena for academics, but also practitioners, government agencies, lawyers, financial institutions, notaries, etc.

Clifford W. Garstang, said that BOT is: is a variety of type of project financing known as contractor provided financing. In the standard contractor provided financing a project entity may request proposal for the construction of a project pursuant to which the contractor will not only provided the materials and services needed to complete the project but will also provide or at least arrange the necessary financing. The contractor will also need to operate the project and use its cash flows to repay the debt it has incurred [1].

II. PROBLEMS

1. Does the burning of the object agreed in the contract signed by the parties automatically result in the termination of the agreement?
2. If an agreement is terminated, how do you terminate the agreement? Can it be done unilaterally by one party, in this case the Pekalongan City government, or should it be done on the basis of mutual agreement?

III. RESULT AND DISCUSSION

A. THE PROBLEM OF THE DESTRUCTION OF THE OBJECT AGREED IN THE BOT CONTRACT

For the government at the regional level, relying on funds of local budget to finance development projects is also very limited. The economic crisis has resulted in the limited ability of the central or regional governments to realize infrastructure development projects. For this reason, it is necessary to find alternative project financing alternatives besides relying on fund of state budget or local budget. One alternative project financing that can be done is to invite the private sector to participate in the procurement of government projects with the BOT (Build Operate Transfer) system.

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

"To have any projects which really belong to the public sector implemented by the private organizations without the state, the province, the city or the community providing any guarantees or accepting any liability. The projects which were intended to be self financing" [2].

This BOT model in the Internal Affairs Minister Regulation Number 19 of 2016 concerning the management of regional property is known as the BOT contract.

This model offers many advantages for the parties involved (government or contractors), in addition to other ways that are often done by way of Ruislag [3].

Project funding under the BOT model will cover feasibility studies, procurement, financing, and operations. Instead, the contractor is given concession rights for a certain period of time in order to take advantage of its economy and ultimately return all assets to the government at the end of the concession period.

In addition to funding from debt financing or from equity financing, it is still possible for the BOT project funding to be obtained from several financial institutions (financing companies), investment funds, insurance companies, collective investment schemes (mutual funds), pension funds, and these are usually called "institutional investors" [4]. In addition, it is possible to fund BOT projects using capital market funding facilities, financing by Islamic financial institutions, or using International financial institutions (for example, world banks, the international finance corporation, or by regional development banks).

In reality, a BOT project is not as easy as it is in exposure. Problems for the sake of problems may arise in the implementation of the project. For that reason it needs to be designed in such a way that the BOT project can go according to plan and provide benefits to the parties concerned. Some issues 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. More than that a BOT project requires a contract (maybe more than one contract), for that it needs to be carefully designed so that each of their interests can be well protected.

Andrew Pickering, in BOT projects (mainly in electricity BOT) at least three risk classes can be classified, namely commercial risks, non-commercial risks, and casualty risks. Included in the commercial risk categories are: market risk, participant risk, construction risk, operational risk, technical risk, and fuel supply risk. While those included in non-commercial risks are: legal risk, country risk, financial risk, environmental risk. Casualty risk is the risk associated with accidental damage or destruction of plan or equipment [5].

No less interesting how to estimate the risks that will occur and anticipated in project implementation. What are the risks that occur, how to secure it, who is responsible for it. A good BOT is not a BOT where all risks are borne by one party but a good BOT is a BOT that can share risks equally among the parties.

One of the risks that often occurs is the risk of fire which often makes the destruction of goods that are the object of the cooperation agreement. As it happened to the BOT Object in the form of a burning market in the city of Pekalongan, Central Java.

The burning of the Banjarsari market in Pekalongan City, which occurred on Saturday 24 February 2018, including the atrium/plaza buildings with a total damage of more than 65%, based on the final technical independent study report,

based on The Ministry of Public Works Regulation, as a result of the fire was qualified as a heavily damaged.

The legal problem is how the legal effect on the destruction of the object promised is due to a fire? Did BGS end with a fire that struck the object of cooperation between the Pekalongan City government and the partners?

Article 236 The Internal Affairs Minister Regulations Number 19 of 2016 states that BOT ends in terms of:

1. The expiration of the BOT period as stated in the agreement;
2. Termination of the BOT agreement unilaterally by the Governor/Regent/Mayor;
3. Termination of the BOT agreement;
4. Other provisions in accordance with the laws and regulations.

Referring to the provisions, the destruction of the object which was promised was caused by fire, cannot be used as the basis for the termination of the BGS agreement. A further provision that can be used as a guideline for assessing whether the object being burned has made the agreement terminate or not is the sentence "other provisions in accordance with statutory regulations"

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

1. In Article 1381 it is stated that an agreement may end due to two reasons;
 - a. Caused by law, i.e. consignment, the destruction of goods owed, expired.
 - b. Caused by agreement, namely payment, innovation, compensation, debt mixing, debt relief, cancellation or cancellation, the termination of the validity of the terms.

Based on the provisions of article 1381, the destruction of the goods owed is one of the reasons for the termination of the agreement. The destruction of the promised goods results in non-fulfillment of the conditions of the agreement because the goods that are the object of the agreement no longer exist. The destruction of the object which was the object of the agreement has implications for the non-continuation of the agreement. The choice that can be made for 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 related to the destruction of the promised object 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 goods still exist, then delete the agreement, as long as the item is destroyed or lost beyond the offense of the debt, and before he neglects to hand it over.

Even if the debtor fails to surrender an item while he has not been liable for unforeseen events, the engagement is deleted if the item will be destroyed in the hands of the debtor if it has been handed over to him.

The debtor is obliged to prove the unexpected event, which was brought forward.

In any way something that has been stolen, destroyed or lost, the loss of this item does not free the person who stole the item from its obligation to replace the price.

3. Article 1445 BW mentions

If the goods owed, beyond the liability of the person owed, are destroyed, can no longer be traded, or are lost, then the debtor, if he has rights or claims for compensation regarding the goods, are required to provide these rights and demands to the person who cursed him.

4. When discussing the destruction of goods owed as a reason for the abolition of an agreement, specifically what is stipulated 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 Civil Code, which reads:
In the case of an engagement to provide a certain material, that object since the engagement was born, is at the debt's account.

If the debtor fails to give it up, then since his 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 Article 1237 paragraph (2) of the Civil Code, if the debtor fails to submit it, it will result from the moment of negligence, the object concerned is at the debtor's expense. The debtor until the time of handover is obliged to maintain the object (article 1235 of the Civil Code).

6. Article 1235 BW states that in each engagement to give something is a duty to give up the material concerned and to care for him as a good head of the household until the time of surrender.

B. TERMINATION OF THE AGREEMENT IS DUE TO THE DESTRUCTION OF THE OBJECT OF THE BOT AGREEMENT

The destruction of the building which was the object of the BOT agreement, resulted in the existence of the agreement that had been mutually agreed upon. Primarily on the status of the agreement, whether it ends on its own or is fixed until the agreed time, or ends due to the agreement of the parties.

From the point of public law as regulated in Article 236 Minister of Internal Affairs Regulations Number 19 of 2016 states that BOT ends in terms of;

1. The expiration of the BOT period as stated in the agreement;
2. Termination of the BOT agreement unilaterally by the Governor/Regent/Mayor;
3. Termination of the BOT agreement;
4. Other provisions in accordance with the laws and regulations.

Based on the aforementioned provisions, the termination of the BOT agreement that has not yet expired, is not caused by one party's unilateral termination, is possible in other ways in accordance with the provisions of the legislation. Thus the provisions relating to the agreement as regulated in Book III of BW can be enforced as a basis for the law terminating the agreement.

Article 1381 states that an agreement may be terminated due to the law, namely the consignment, the destruction of the item owed, has expired. Due to the agreement, namely payment, innovation, compensation, debt

mixing, debt relief, cancellation or cancellation, the terms of the cancellation are valid.

The choice that can be made for 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 the object of the object of the agreement, if it is not possible fatherly to continue the agreement that was agreed upon, then it is better to go the way to end the agreement. The termination of the agreement is not the same as the old agreement, namely the agreement to terminate the agreement as stated in the written agreement. If there is no agreement to terminate the agreement because each party has their own arguments, then the status of the agreement remains in effect until the end of the agreement agreed or one of the parties can ask for a court decision to terminate the agreement due to the absence of a mutual agreement, a clear agreement not null and void due to the destruction of the promised object.

IV. CONCLUSION

The paper concludes that the destruction of the goods which are the object of the agreement results in the inability to be implemented. However, the destruction of the goods which are the object of the agreement does not occur automatically, from a legal point of view must be proven empirically.

By basing on the provisions of public law, private law, both of them lead to a common ground, namely the re-agreement between the two parties. The re-agreement can be an agreement to terminate the agreement or an agreement to continue the agreement that has been agreed.

By regulation, the Pekalongan City government has the authority to terminate the agreement unilaterally as a result of the destruction of the promised object.

V. REFERENCE

- [1] Andrew Pickering Partner, Financing Power Sector Infrastructure, Blake Dawson Waldron 101 Collins Street Melbourne Vic 3000 Australia
- [2] Clifford W. Garstang, Sidley & Austin Singapore, BOT Arrangements, BOT & Project Finance Scheme Conference, 7 October 1992, Jakarta
- [3] Felix O. Soebagyo, Final review report on the legal aspects of the BOT agreement, BPHN. Department of Justice, 1993-1994
- [4] Heinz H. Bunker, Business Opportunities in the Pipeline Transmission System Through BOT, The Asian Conference on Planning, Packaging & Implementing BOT Projects, Hilton Singapore 1988
- [5] United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Privately Financed Infrastructure Projects, United Nations New York 2001