

LEGAL REVIEW OF HANDOVER CONTRACTS (BGS) AND IDEAL SOLUTIONS TO THE DESTRUCTION OF AGREED OBJECTS

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Abstract

The purpose of this study is to analyze: 1) What is the system of the Build-and-Handover Agreement in terms of law in Indonesia; 2) What is the ideal legal solution in the event of the destruction of the object agreed in the handover building contract (BGS)? The research method used is empirical juridical with a statutory approach, concept approach, and case studies. The results showed that: 1) Legal review of the Build Serah Agreement (BGS) has been regulated in Government Regulation Number 6 of 2006 concerning Management of State/Regional Property began to find the definition of Build Operate and Transfer in laws and regulations, namely in Article 1 number 13 of Government Regulation Number 6 of 2006 concerning Management of State/Regional Property, Jo. Article 1 number 14 of the Regulation of the Minister of Home Affairs Number 17 of 2007; 2) Ideal Soulsi Against the Destruction of the Agreed Object, it would be better if in the termination of the unilateral agreement by the Goods Manager, the opportunity is given to the Bangun Guna Serah Partner to prove that he did not make a mistake on the basis of intentionality. In addition, if the Bangun Guna Serah Partner who has not made a mistake is considered unable to carry out the Bangun Guna Serah Agreement, then the Agreement should be transferred to another party and not impose obligations on the Bangun Guna Serah Partner completely without giving him any rights.

Keywords: Legal Review, Handover Build Contract (BGS), Ideal Solution, Destruction of Agreed Objects.

INTRODUCTION

Background

Written approval Cooperation between the government and non-government owned companies is known as Build Operate Transfer (BOT), as a form of written approval of policies provided by the government with non-government owned parties is a legal event by TUN agencies or officials who make general policies as objects of written approval. TUN agencies or officials in carrying out written agreements with non-government parties always take action through two types of roles, one side takes action as public law (public actor), on the other hand takes action as civil law.¹

Related to written approval, BOT cannot be separated from problems related to written approval in general, namely unilateral cancellation or because of a written agreement extension clause, but in its implementation when it will be extended, it is rejected for various reasons.

The goal of national development is to create a just and prosperous society, equitable both materially and spiritually. A state based on Pancasila and the 1945 Constitution in the forum of the Unitary State of the Republic of Indonesia which is independent, united, sovereign, just and prosperous. Efforts to realize national goals, development in all aspects of life are very important. Development is not only carried out in certain fields, but in various fields that cover all aspects of life, namely development in the fields of politics, economy, natural resources, human resources, culture, defense and security. Natural resources are a very important element to support the economy in Indonesia. As an archipelagic country, Indonesia has diverse natural resources. But it is not enough just with the existing natural potential. The implementation of the economy to be achieved requires many things such as human resources, good management, good political stability and other important factors are sources of capital as support.²

The fulfillment of the above criteria will certainly be better for the growth and development of investors, both local and foreign, in their contribution to building integrated and quality national development. This can be characterized by the manifestations mentioned above, especially in conducting various business transactions, either using electronic media or electronic transactions. For this reason, in order to increase effectiveness and efficiency in business transactions, various kinds of contracts are made that have various civil characters and properties³. Looking back on its history, contracts that were vows and part of religion in Roman times continued to evolve, until they are used today in business transactions. Basically, the contract gives birth to a legal relationship between parties who bind themselves to each other in contracting, both orally and in writing. The contract that has been agreed will become law for those who bind themselves from the moment the contract is concluded.⁴ Seen in the application of the principle of *pacta sunt servanda* with respect to contracts, this principle states that, all contracts made and entered into validly apply as law to those who make them⁵. In essence, a contract is an agreement based on voluntary will, to achieve an economic *prospective* that is considered fair by the parties. A contract is not born because there is only an agreement, it cannot ignore the rules of law in force where it is made⁶. Government, business and society are three sectors that have a relationship in social life. These three sectors will always require contracts which are currently an important means of human life.

Basically, with the contract carried out between individuals as legal subjects, as well as individuals with groups, will be able to develop their quality of life towards a more prosperous direction. As a form of implementation of these goals, the Government of Indonesia carries out development in various aspects, one of which is the economic aspect. The government's efforts in facilitating the existence of good goods and services for the community are its responsibility. In addition to the government's obligations in infrastructure development, the government also has an interest in infrastructure development. The government's interests are as *public goods* and *economic goods*⁷. The economic development of a country demands the availability of adequate infrastructure. The infrastructure will contribute to the implementation of national development in order to improve the welfare of the people. However, this is hindered due to limited capital funds owned by the government, thus requiring investors to build and develop infrastructure as a concrete action from the government in meeting the increasingly diverse needs of the community. In order to realize the development of infrastructure and services that aim to prosper the community, the concept of *Public Private Partnership (PPP)* emerged.

Problem Statement

- 1) What is the legal system of the Build-and-Surrender Agreement in Indonesia?
- 2) What is the ideal legal solution in the event of destruction of the object agreed in the handover contract (BGS)?

THEORETICAL FRAMEWORK

According to Lawrence M. Friedman, a professor of law, historian, American legal historian, and prolific writer, there are three main elements of a *legal system*: 1) *Legal Structure*; 2) *Legal Substance*; and 3) *Legal Culture*. Lawrence M. Friedman suggests that the effectiveness and success of law enforcement depends on 3 elements of the legal system, namely: 1) *Legal structure*; 2) *Legal substance*; and 3) *Legal culture*.⁸ The legal structure concerns law enforcement officials, the substance of the law includes legislation and legal culture is a living law adopted in a society.

In Lawrence M. Friedman's theory, it is a substantial system that determines whether or not the law can be implemented. Substance also means products produced by people who are in the legal system that includes the decisions they issue or the new rules they draft. Substance also includes *living law*, not just rules in *law books*. Indonesia, as a country that still adheres to *the Civil Law System (Continental European system) even though some laws and regulations have also adopted the Common Law System or Anglo Saxon*, it is said that laws are written regulations, while unwritten regulations are not declared law. This system affects the legal system in Indonesia.⁹

The substance of the law according to Friedman is:

"Another aspect of the legal system is its substance. By this is meant the actual rules, norm, and behavioral patterns of people inside the system ... The stress here is on living law, not just rules in lawbooks".

Another aspect of a legal system is its substance, what is meant by its substance is the rules, norms, and patterns of real behavior of humans residing in that system. So the substance of the law concerns applicable laws and regulations that have binding force and become guidelines for law enforcement officials.¹⁰

The requirement for the law to run effectively is to look at the laws that apply in the community, the implementation of the law and the socio-economic conditions of the community. The laws made must be well drafted and the substance that covers the content of the regulations must be prohibitive, contain sanctions and contain morality.

Law enforcement is the enforcer who implements the law itself, such as the police, prosecutors and courts. The implementation of this law must be carried out properly. The effectiveness of the law must be seen from the socio-economic conditions of the community. The better the economy of the community, the more effective the applicable laws will be. This is due to the absence of people who violate the law. The lower the economy of the community, the more violations of the law, this can be seen the more theft for economic reasons.¹¹

In terms of legal material / substance, improvements need to be made not only including the possibility of adopting new legal institutions that arise within the framework of economic globalization that can lead to the tendency of legal globalization, but also adaptation to new paradigms in the government system, especially related to regional autonomy, for example the possibility of applying local customary law provisions to legal relations or legal events certain. The improvement of the material / substance of the law can be carried out through 3 alternatives,¹²

- 1) Formulate and establish new legal provisions for matters that have not been regulated at all;
- 2) Transforming from provisions of international law to provisions of national law through instruments of ratification / ratification of related international treaties;
- 3) Modify existing legal provisions to keep up with the growing awareness and legal needs in society.

In general, in order to make legal improvements, there are several things that must be done, including:

- a) Realignment of existing legal structures and institutions including qualified human resources;
- b) Reformulation of equitable laws;
- c) Increased law enforcement by resolving cases of law violations;
- d) People's participation in law enforcement;
- e) Public education to increase public understanding of the law; and
- f) Application of the concept of *Good Governance*.

The journey of law improvement is said to have not succeeded optimally seeing the reality of law enforcement that occurs to this day. Legal certainty is still enforced through a regulatory or legal approach or a legislative approach, not through law enforcement by the courts as the last bastion of the justice-seeking community or a law enforcement approach *and an independent judiciary*.

Although the rule of law is shouted out loud, but correspondingly respect for the law is only formalistic and procedural. Disrespect for the law becomes even more so when the law is only viewed textually and very positivist, denying the aspect of justice that is its spirit. Legal institutions and apparatuses only prioritize *formal justice* alone without caring about *substantial justice* so that everything is seen in black and white.¹³

In the field of legal substance, consistency is needed in strengthening law enforcement institutions in a balanced manner between law enforcers so that there are no differences in dominant authority between law enforcement institutions with one another, so that there is no systematic weakening of certain law enforcement institutions. Therefore, it is expected that a review of the provisions of laws and regulations, especially those regulating the issue of authority of each law enforcement institution, is expected.

RESEARCH METHODOLOGY

1. Types of Research

Normative juridical research refers to legal norms contained in laws and regulations and legal norms that exist in society. In addition, by seeing the synchronization of a rule with other rules in a hierarchical manner.¹⁴

The law that applies at a certain time and place, namely a written rules and norms officially formed and promulgated by the ruler, in addition to written laws that effectively regulate the behavior of community members, in¹⁵ this study is studied regarding the existence of individual business entity actors so that later the ideal form of legal protection of individual companies can be adopted.

2. Research Approach

This research uses *a statute approach* and *conceptual approach*.

- a) *Statue approach* or statutory approach is an approach used to review and analyze all laws and arrangements or regulations related to the legal issue being addressed.¹⁶
- b) *Conceptual Approach* or conceptual approach is to move from the views and doctrines that develop in legal science.

3. Research Data Sources

a) Data Type

The types of data used in this study are primary data and secondary data, namely:

1) Primary Data

Primary data is data obtained through field surveys. Primary data are obtained directly from primary sources such as citizen behavior seen through research.¹⁷ Primary data is a very important primary data. Primary data in legal research are data obtained mainly from the results of empirical research, namely research from the results of *interviews*, observations and documentation carried out directly in the community.

2) Secondary Data

Secondary data is data collected, processed and presented by other parties. Both the form and content of secondary data have been formed and filled in by previous researchers so that subsequent researchers do not have supervision over the collection, management, analysis or construction of data.¹⁸ This secondary data is obtained from a second source which is complementary. Secondary data includes official documents, books and research results that become the basis and reference material regarding individual business entities *sole proprietorship*.

b) Data Sources

The type of data used in this study is secondary data, while the primary data used is more supportive if needed. Secondary data are data obtained from document materials and wisdom in the form of legislation, court decisions, scientific articles and supporting scientific journals including data obtained from research objects.

4. Data Collection Techniques

The data collection taken in this study uses literature studies, namely data collection by searching, examining and reviewing secondary data.¹⁹ In this research, document studies will be carried out as a means of collecting data related to the problems raised, namely literature studies / document studies (documentary study), sourced from laws and regulations, books, official documents, publications and research results.²⁰

5. Data Analysis

Data analysis is the activity of breaking down the components and then examining the relationship of each of the entire contexts from various points of view. Qualitative data analysis by collecting words that are not processed into numerical data by using sentences that are described logically with added theories to give meaning and interpret each legal material that has been processed to then be described thoroughly so that a conclusion can be drawn and the results of the research are delivered descriptively.

RESEARCH RESULTS

Legal Review of Build Operate Transfer (BOT) Agreement

The term Build, Operate and Transfer, comes from English, which means "Build, Operate and Surrender". The definition of the Build Operate and Transfer agreement was originally not found a standard understanding, but since 2006, namely with the issuance of Government Regulation Number 6 of 2006 concerning the Management of State/Regional Property, the definition of Build Operate and Transfer began to be found in laws and regulations, namely in Article 1 number 13 of Government

Regulation Number 6 of 2006 concerning Property Management Country/Region, jo. Article 1 number 14 of the Regulation of the Minister of Home Affairs Number 17 of 2007 concerning Technical Guidelines for the Management of Regional Property, Build Handover is the use of regional property in the form of land by other parties by constructing buildings and / or facilities and facilities, and after completion of construction is handed over to the Regional Government, then by the Regional Government handed back to the other party to be utilized by the other party within a period of time certain agreed upon, after the period of completion of the land and buildings are handed over to the Regional Government²¹.

The definition of the Serah Guna Build agreement can also be found in the Regulation of the Minister of Home Affairs Number 22 of 2009 concerning Technical Guidelines for Regional Cooperation Procedures, in Annex II which regulates examples of forms / models of regional cooperation. In the annex to the Regulation of the Minister of Home Affairs Number 22 of 2009, it is explained about the Handover Build Contract, namely the Legal Entity is responsible for building infrastructure/facilities, including financing them and after the completion of the construction then the infrastructure/facilities are handed over control and ownership to the Regional Government, then the Regional Government hands back to the Legal Entity to be managed for a certain time for capital return investment and earn a reasonable profit. The National Legal Development Agency, in a study entitled "Legal Aspects of Build Operate and Transfer Agreements", revealed that what is meant by Build Operate and Transfer (BOT) agreement is a new agreement, where exclusive rights owners or land owners submit feasibility studies, procurement of goods and equipment, construction and operation of development results to investors, and these investors within a certain period of time (concession period) are given rights operate, maintain and take economic benefits from the building, with a view to reimbursing the costs that have been incurred by investors in building the project, then after a certain period of time is completed, the building and the facilities attached to it are handed over to the owner of exclusive rights or land owners. Meanwhile, Felix O. Soebagjo in his research entitled "Assessment of the Legal Aspects of Build Operate and Transfer Agreements", stated that what is meant by a BOT agreement is a large-scale financing system (usually applied to government projects) in feasibility studies, procurement of goods and equipment, financing and construction and operation, as well as receipts / revenues arising from it, submitted by other parties and these other parties within time Certain (concession periods) are given the right to operate, maintain them and to take their economic benefits in order to cover (in exchange) the costs of building the project concerned and obtain the expected profit.²² The understanding expressed by Felix O. Soebagjo above, if considered appears as an unfinished understanding, because in that sense there has not been seen any surrender action from the investor to the land owner. Meanwhile, Budi Santoso in his book entitled "Legal Aspects of Infrastructure Project Financing Model BOT (Build Operate Transfer)" suggests that basically BOT is a form of development project financing where the contractor must provide his own funding for the project also the contractor must bear the procurement of materials, equipment, other services needed for the completeness of the project, in exchange the contractor is given the right to operate and take its economic benefits in exchange for all expenses that have been incurred for a certain time.²³

From several understandings of the BOT agreement as described above, an understanding can be drawn that in the BOT agreement, there are three stages of action, namely the first stage in the form of project development actions carried out by investors, the second stage in the form of operating building projects which are the rights and authorities of investors, and the third stage in the form of handing over building projects from investors to land owners, which is carried out at the expiration of the previously agreed concession period.

From the various understandings above, it can also be seen that in the BOT agreement there are several elements as follows:

- a) There are parties to the agreement, in this case the investor and the land owner;
- b) The existence of BOT agreement objects, in the form of land and certain project buildings;
- c) There is a concession period, during which investors are given the right to operate the building and take the expected profit;
- d) There is a process of handing over the building and the facilities attached to it, from the investor to the land owner, at the end of the concession period.

In the previous description, it has been explained that the BOT agreement has only begun to find its regulation in laws and regulations since the enactment of Government Regulation Number 6 of 2006 concerning Management of State/Regional Property.²⁴

Prior to the issuance of the Government Regulation, there was no legislation that specifically regulated the practice of implementing BOT agreements. However, Article 1338 paragraph (1) explains that every agreement made validly applies as law to those who make it. Thus, Article 1338 can be used as a legal basis in the implementation of the BOT agreement.²⁵

Furthermore, regarding the legal conditions of the BOT agreement, with reference to Article 1320, it can be said that the BOT agreement is valid if in its implementation it meets the following four conditions:

- a) there is an agreement between investors and landowners;
- b) The ability of both investors and landowners
- c) the existence of clear objects, in the form of land and building projects agreed by the parties;
- d) The existence of *halal causa*, in the sense that the purpose of the agreement does not conflict with the law, decency and public order.

If the four conditions mentioned above have been fulfilled by the parties, then as confirmed in article 1338 paragraph (1), the BOT agreement has become binding as law for the parties.

In general, BOT agreements are made in written form and to avoid disputes in the future, BOT agreements are usually made authentically in the presence of authorized officials.²⁶

The ideal legal solution in the event of destruction of the object agreed in the Handover Build Contract (BGS)

Build operate transfer (BOT) from various explanations is explicitly as a model of infrastructure financing by charging development finance to investors through concessions granted by the government. The basis for the implementation of this BOT financing is firm and fair regulations with the aim of providing legal protection from both. In legal theory, building finance is primarily a system that provides certainty.

Certainty takes the form of choice in opting out of the legal system and forming their own, but this system must also be bound by general rules. The credibility and commensurate value of a financing contract depend on the support of definite rules. This provides an understanding that implicit delegation of rulemaking to different non-state actors, an understanding that in all respects also requires full legal protection, so as not to make these investors unregulated or less regulated or outside the law²⁷

In Indonesia, BOT is a non-procurement contract within the framework of public services carried out by the government with private parties. In Indonesia, BOT is regulated in Article 1 paragraph 12 PP.38/2008 and Article 1 paragraph 14 PP. 27/2014 in essence that BGS is definitively the use of state/local property in the form of immovable objects by other parties standing on it a building or facility and utilized within a certain period of time that has been determined and or agreed upon which then the land or facility is returned when that period has expired.

Referring to the PP mentioned above, one of the graphs of the utilization of state/regional property is build operate transfer (BOT). BOT can be implemented if users want facilities and buildings. The implementation can be carried out by both central and regional governments for public service needs. This is its task and function due to the absence of funding in the APBN / APBD platform in providing facilities and buildings for public services

The BGS period has been set to a maximum of 30 years at the time of signing the cooperation agreement. The operating period of the BGS results can be directly allocated for the implementation of the duties and functions of the central/local government at least 10%. BGS can at least be done when the cooperation agreement contains:²⁸

- a) The existence of the parties;
- b) The presence of objects;
- c) The specified time period; and
- d) Rights and obligations of the parties to the agreement.

Provisions of Article 1 paragraph 36 of Permendagri No. 19/2016 that BOT is the use of regional property in the form of land to construct buildings and/or facilities according to a certain agreed period, and return the use of land along with buildings or facilities after the expiration of the period. In general, cooperation in any form including BOT is initiated by an agreement that must be reached by the parties. The BOT Agreement provides a mechanism for cooperation, various provisions or guidelines, regulation of rights and division of obligations between the parties in a fair and balanced (proportional) manner.²⁹

One of the principles of agreement is the principle of proportionality. The principle obliges the parties to the agreement not to harm each other, so that the weight of the rights and obligations of the parties to the agreement is equal and not partial. This is also related to the abuse of circumstances based on the Jurisprudence of the Supreme Court of the Republic of Indonesia No. 3431 K / Pdt / 1985 dated March 4, 1987 and the Jurisprudence of the Supreme Court of the Republic of Indonesia Decision No. 1904 K / SIP / 1982 dated January 28, 1984 can cancel the agreement. So that in an agreement, each party cannot exert pressure and put the other party in a disadvantaged position.³⁰

As a government project, Bangun Guna Serah has its own appeal for investors and contractors. Investors and contractors are businesses that are always related to projects, where some projects that have the potential to benefit investors and contractors are projects held by the government. The Build Guna Agreement is also one of the projects that can provide benefits for investors or contractors.

This is what sometimes makes investors or contractors seem to have a different position where the bargaining power of investors or contractors is not the same as the government because basically the government makes agreements based on existing rules, because if the government makes agreements that are out of the provisions it will provide opportunities for administrative malls and / or state losses³¹.

Article 118 paragraph (9) of the Minister of Finance Procedures for the Utilization of State Property states that unilateral termination of the Build-and-Handover Agreement does not eliminate the obligation of the Build-to-Surrender Partner to fulfill its obligations as stated in the Build-and-Handover Agreement. The article mandates that Mitra Bangun Guna Serah continue to carry out its obligations as per the Bangun Guna Serah Agreement, even though the agreement has been unilaterally terminated by the Goods Manager. The obligations of investors during project construction are:³²

- a) Use all your power and effort to complete the project in question on time;
- b) Provide facilities and infrastructure to be used in the project in accordance with agreed standards;
- c) Ensure that the goods as a means and infrastructure device are obtained without violating the law;
- d) Insure all assets that are being built during the construction of the project concerned at the investor's expense;
- e) Execute/obey the agreement in the agreement;
- f) Hand over all assets resulting from the construction of the project concerned, after the concession period ends (as agreed).

This is certainly detrimental for Mitra Bangun Guna Serah, considering that Mitra Bangun Guna Serah's obligation is to build a building and/or facility needed by the government whose entire funds are spent by Mitra Bangun Guna Serah. On the other hand, there is no arrangement that with the unilateral termination of the Bangun Guna Serah Agreement by the Goods Manager, the Bangun Guna Serah Partner still gets its rights as long as the Bangun Guna Serah Partner performs its obligations. Thus, in the event of unilateral termination of the Build-Guna Handover Agreement by the Goods Manager, the Build-to-Hand Handover Partner will be in a very disadvantaged position.³³

That the losses experienced by Mitra Bangun Guna Serah will of course also affect the workforce employed by Mitra Bangun Guna Serah and other parties who cooperate with Mitra Bangun Guna Serah, or will even affect the economy of the country / a region itself. This loss, of course, is not something desired by both parties, especially Mitra Bangun Guna Serah which in fact cannot perform its obligations due to force majeure.³⁴

Based on these descriptions, it would really be better if in the termination of the unilateral agreement by the Goods Manager the opportunity is given to Mitra Bangun Guna Serah to prove that he has not made a mistake on the basis of intentionality. In addition, if the Bangun Guna Serah Partner who has not made a mistake is considered unable to carry out the Bangun Guna Serah Agreement, then the Agreement should be transferred to another party and not impose obligations on the Bangun Guna Serah Partner completely without giving him any rights.

CONCLUSION

The results showed that:

- 1) Legal review of the Build Serah Agreement (BGS) has been regulated in Government Regulation Number 6 of 2006 concerning Management of State/Regional Property began to find the definition of Build Operate and Transfer in laws and regulations, namely in Article 1 number 13 of Government Regulation Number 6 of 2006 concerning Management of State/Regional Property, jo. Article 1 number 14 of the Regulation of the Minister of Home Affairs Number 17 of 2007.
- 2) Soulsi Ideal Against the Destruction of the Agreed Object It would be better if in the termination of the unilateral agreement by the Goods Manager the opportunity was given to Mitra Bangun Guna Serah to prove that he had not made a mistake on the basis of intentionality. In addition, if

the Bangun Guna Serah Partner who has not made a mistake is considered unable to carry out the Bangun Guna Serah Agreement, then the Agreement should be transferred to another party and not impose obligations on the Bangun Guna Serah Partner completely without giving him any rights.

Foot Notes

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