

International Conference Proceedings of ICEHM

**International Conference on Economics, Education
and Humanities (ICEEH'14)**



Dec. 10-11, 2014 Bali (Indonesia)

Editor:

Prof. Khoren Albert Mkhitarian

Prof. Dr. Michel Plaisent

ISBN 978-93-84422-01-1

Published by:



ICEHM

International Centre of Economics, Humanities & Management

www.icehm.org

INDEX

International Conference on Economics, Education and Humanities (ICEEH'14) Dec. 10-11, 2014 Bali (Indonesia)

Section I

Paper ID	Title of the Paper and Authors	Page No.
ED1214048	<i>Impact of Technological Innovation on Delivery of Banking Services in Nigeria</i> Dr. Ilo, Joseph V.C, Dr. Ani Wilson U, and Chioke, Nnanyelugo Samuel	170
ED1214053	<i>Graduates in Malaysia: Is there a Brain waste?</i> Norehan Abdullah, Soon Jan Jan, Lim Hock Eam, and Siti Aznor Ahmad	177
ED1214136	<i>A Study on the Determinants of Shop Key Money</i> Jihye Han, Kabsung Kim, and Meenchel Jung	181
ED1214148	<i>Marketing communication</i> Dr. Abulgasem Bazina	185
ED1214152	<i>The Impact of Length of Tenure and Non-Audit Services on External Audit Quality in the Libyan Environment</i> Alhussien Elseraiti	189
ED1214166	<i>CAAR Estimations by Sectors of Sukuk Issuance</i> Nursilah Ahmad, and Syazwani Abd Rahim	195
ED1214171	<i>Knowledge Management Adoption and the role of HRM: Evidence from The Gambia Public Organizations</i> Awa Sillah, and Wei-Wen Chang	202
ED1214172	<i>Legal Aspect of Cooperation Agreement With Build Operate Transfer Principle</i> Daniel hendrawan, Christin Septina Basani, and Jeremiah	209

Section II

Paper ID	Title of the Paper and Authors	Page No.
ED1214076	<i>Incorporating Internet in the Formal Teaching of English Reading Comprehension in Engineering Class: A case study of Mehran UET Jamshoro</i> Sahib Khatoon Thaheem, and Quratulain Mirza	214
ED1214120	<i>Education and Society</i> Abdelmalek ADDA BOUDJELAL	219
ED1214142	<i>The Role and Contribution of Education and Upbringing in the process of Humanization of Human Society</i> Martin Droscak, and Jan Danek	222

Legal Aspect of Cooperation Agreement With Build Operate Transfer Principle

Daniel hendrawan, Christin Septina Basani, and Jeremiah

Abstract—Development in Indonesia is growing very rapidly. Things are built not only for housing but also a 2 storey buildings and more. This development led to the birth of many new types of contracts that are not named. The types of the new contract were not named this is one of them is the agreement with the principle of build operate transfer. The agreement made was to seek out the apartment made and constructed and handed over to the original owner for use.

The research method in this study using normative research methods. To analyze the implementation of the agreement in the construction of flats where finished also a problem with the alternative dispute resolution is mediation.

Exercising treaty not called more in line with the changing times. Many new agreements arise according to business needs, including an agreement with the principle of build operate transfer used by the parties to a construction services in the areas in conducting its business activities. If there is a problem to resolve the dispute, it can be used alternative dispute resolution outside the court that the mediation.

Keywords—Agreement, apartment, build operate transfer.

I. INTRODUCTION

INDONESIA is a developing country that is doing development with the goal of achieving a just and prosperous society as the purpose of the State of Indonesia is the fourth paragraph forth in the Preamble of the Constitution of the Republic of Indonesia (the 1945 NRI 1945). As a developing country, population density continues to grow and demand the addition of facilities and infrastructure in the public interest (infrastructure). To perform the procurement of the infrastructure needed huge funds, which would be hard if only charged to the State Budget and Local (national and regional budgets). See limitations of government through the state budget and the budget in the provision of funds for the construction of this infrastructure, the required availability of new models of financing the construction. In the provision of infrastructure in the area, often as an alternative funding, the government involve the private sector (foreign-national) in its projects. [4]

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One way of financing the project can be done by encouraging the private sector to participate in the procurement of government projects with a system of BOT (Build Operate and Transfer) or the Handover To Build Agreement (hereinafter abbreviated as BOT Agreement). BOT Project Financing Agreement includes feasibility studies, procurement, financing, up to the operation. After implementing project gets concession for a certain period in order to take advantage of economic and ultimately return these assets to the government at the time of expiration of the BOT Cooperation Agreement this kind has long been practiced by the developed countries, such as the Anglo-French project Channel Tunnel. Developing countries also began to implement the agreement on many models, such as bridges and airports projects in Hong Kong, energy and railway lines in China, highways and airports in Malaysia, Thailand, telecommunications, energy in the Philippines, thermal energy projects in Pakistan, and so on.[5] BOT agreement is a form of cooperation agreement made between the holders of land rights to the investors, which states that the holder of land rights entitles the investor to construct a building for the duration of the BOT agreement and transfer ownership of the building to holders of land rights after the term of the agreement expires. [6]

Construction of infrastructure requires a lot of investment because investors usually role is responsible for developing a residential or a particular region. One of them with the privatization of the project by involving both national and foreign private sector to get involved in these projects. Private participation in the procurement of infrastructure projects is certainly a new phenomenon in Indonesia, therefore the control of land by investors is very important because the soil is the main object of the development so that the resulting tendency that investors are trying to take control of land as wide as possible with a capital minimal, it is this which then led to new concepts such as BOT (Build Operate Transfer), BOO (Build Own Operate), BROT (Rent Build Operate Transfer), KSO (Cooperation operations / joint operations), joint ventures, and so forth, are new phenomena. BOT concept is then also be used by private companies to build but have a lack of capital in the development process as outlined in the form of a cooperation agreement. BOT concept is also used by the private sector both in the construction of hotels, apartments, shopping malls and others. At the time of construction of flats is very rife in urban areas. [7]

Housing and also flats are basic human needs that have a role in a very strategic as a place where character and national

identity formed. Therefore needs to be fostered and developed for the continuity and improved lives and livelihoods of Indonesian human to create independent and productive. To that end, the home can not be seen solely as a means of subsistence, but also more than it because it is a live person in the process of creating a space for the community and his life, in order to place identity.[8]

Housing and housing is a basic human need other than food and clothing. It is proper that every human being has a decent place to live so as to feel the comfort in life. In Indonesia, especially in the big cities, the problem of meeting the needs of housing and settlement issues arising in connection with residence. Population growth is increasing rapidly making the availability of land for housing on the wane. Construction of flats then become one of the alternative solutions to the problem of housing and residential needs, especially in urban areas, which have increased, because the construction of flats can reduce the use of land, open spaces make the city a more spacious and can be used as a means of rejuvenation city for slum areas.[9]

According to the Decree of the Minister of Finance Number, 248 / KMK.04 / 1995 regarding Income Tax Treatment Against Parties To Build Cooperation Agreement in the Form of transfer order (Build Operate And Transfer) Wake up in order to deliver or build operate and transfer is a form of cooperation agreement made between the holders of land rights with investors, stating that the holders of land rights entitles the investor to construct a building for the duration of the agreement in order to wake up transfer (BOT) and transfer ownership of the building to holders of land rights after the handover to an end.

Flat development is closely related to regional development strategy and the rare or the high price of land, especially in urban areas. For that reason the government deems it necessary to take policy measures for construction of flats with shared ownership is divided over the parts in the horizontal and vertical direction can be inhabited and owned separately built on land owned collectively.[10]

II. STATEMENT OF THE PROBLEM

In this article, the lead researcher seeks to answer the research problem: What is the legal aspect of the cooperation agreement based on the build operation transfer agreement on the construction of the apartment?

III. SIGNIFICANCE OF THE STUDY

To investigate the implementation of the agreement with the system build, operate and transfer (BOT) is applied in the construction of flats construction services and to know the legal aspects of mediation in the settlement agreement problem with the system build, operate and transfer (BOT) on construction of flats construction services.

IV. CONTRACT

According to Article 1313 Code of Civil Law, consent is defined as an act by which one person or more binding themselves to other people or more. This is basic as a treaty in

which the treaty is based on the existence of an agreement. According Wirjono Prodjodikoro that: "The agreement is as a legal relationship of the property wealth between two parties in which one party promises to do something or not to do something, while the other party the right to demand the implementation of the promise". According Abdulkadir Mohammed, the agreement is an agreement whereby two or more mutual undertaking to implement something in the field of wealth. M. Yahya Harahap give a definition of the agreement, namely: Agreement is a legal relationship between the property or property of two or more persons, which gives strength to the right of one party to gain achievements and at the same time require the other party to perform the feat.[11]

It can be concluded that in the agreement arise of more than one person and have the agreement between the parties where the parties are in this agreement mutually bind themselves. Terms of validity of a treaty or contained in Article 1320 Civil Law Act (Civil Code). Article 1320 Civil Law Act (Civil Code) reads as follows: for the validity of an engagement required four conditions:[12]

a. Agreed they are committed.

In the agreement, the first condition is agreed. Agree to berate the parties entered into a mutual agreement. This agreed in the agreement can be canceled if it can be proved that there is coercion, mistake, or deception. This is confirmed in Article 1449 of the Civil Code which states that agreements made with coercion, mistake or fraud, publishing rights for cancelling the demands.

b. Skills to make an engagement.

Skills to make an engagement, meaning that the parties make the agreement a person who has been qualified as the party deemed competent by law. Article 1330 of the Civil Code which provides that they are not included in the group of people who are insane, not including those who are spenders and determined by a judge under guardianship or a married woman "

c. One particular thing.

One particular thing that meant in terms of the three conditions validity of this agreement is the object of the agreement. The object of the agreement must be the items that can be traded

d. A lawful cause.

Definition of a lawful cause, namely, that the contents of the agreement must not be contrary to law, norms of religion, morality, and public order.

The elements listed in the law of contract can be categorized as follows:[13]

a. The existence of the rule of law

Rules in contract law can be divided into two kinds, namely the written and unwritten. Rule of law is the written agreement of legal principles contained in the legislation, treaties, and jurisprudence. While the unwritten rules of contract law is the legal norms that arise, grow, and live in the community, such as: selling off, the annual sale, and so forth. These legal concepts derived from customary law.

b. legal subjects

Other terms of the legal subject is *recht*person. *Recht*person interpreted as supporting the rights and obligations. Legal subjects in this agreement is the organizing body as an employer that is PT.Jamsostek and implementing workplace health services as the receiver is a health clinic.

c. The existence of achievement

Achievement is an obligation that must be met the parties to a contract. In general, a feat as set forth in Article 1234 of the Civil Code consists of several things: give something; do something; and do not do anything

d. agreement

Specified in Civil Code Article 1320 of four terms validity of the agreement, one of which is an agreement (consensus). The deal is an absolute element occurrence cooperation agreement. The deal can happen in various ways, but the most important is the offering and acceptance of the offer

e. due to legal

Any agreement made by the parties will lead to legal consequences. As a result of the law is the emergence of rights and obligations. Article 1338 paragraph (1) of the Civil Code confirms that all agreements made legally valid as the law for those who make it

V. LEGAL ASPECT OF APARTMENT

According to Article 1, paragraph 1 of Law No. 16 of 1985 Regarding the Flats. Flats is mentioned that the structure of the multi-storey buildings are built in an environment which is divided into functional sections structured horizontally and vertically and is composed of units that can be individually owned and can be used independently, especially for the shelter, which is equipped with a joint part, the nature of sharing, and share the land.

Setting according to Law No. 16 of 1985 on the Flats is in accordance with the principle of horizontal separation, as adopted by the Customary Law in Indonesia, which is the basis of our National Land Law. In the framework of these principles, each object according to the form and purpose can be used as a standalone entity, may be the object of private ownership.

Law No. 16 of 1985 on the Flats set explicitly that the ownership of the building parts are individually made possible in the form of Property Rights on Housing Unit (HMSRS) while other parts are shared, as well as land, belong together are not separate from all owners of apartment units, each of which is an integral part of the ownership of the apartment units are concerned.

According to the preamble part Considering Act No. 20 of 2011, Act No. 16 of 1985 on the Flats, promulgated on December 31, 1985 in the State Gazette number 75/1985. This Act may be called the condominium Indonesian law that a legal basis for a set of flats. Regulations implementation of Law No. 16 of 1985 published in Government Regulation No. 4 of 1988. Beginning on called legal issues regarding flats a definite answer. However, considering that the Act No. 16 of 1985 on the Flats are not in accordance with the legal developments, the needs of each person, and the community

participation and the responsibility and obligation of the State in the administration of flats that need to be replaced. In the new legislation, namely Law No. 20 of 2011 regarding the flats (UURS) are still using the same elements of the definition *dsari* flats by Act No. 16 of 1985 on Home. Article 1 paragraph 1 of Law No. 20 of 2011 on the Flats formulate that the flats are built multi-storey building in an environment that is divided into sections that are functionally structured, both in horizontally and vertically and the respective each units can be owned and used separately, especially for shelter equipped with parts together, shared objects, and land together.

In explanation of flats according to Article 1 point 1 and the explanation was observed, a better understanding of the following:[14]

a. Flats an Indonesian legal terminology to express story buildings containing individual ownership and collective rights. In this sense, the apartment is a translation of the words condominium, flat or apartment

b. Flats is a story buildings "functionally structured in horizontal or vertical direction" (Article 1 paragraph 1 UURS). In the above explanation UURS declared "functionally structured in horizontal and vertical direction". The word "or" and "and" to be seen by as a consequence the scope UURS. Its ownership arrangement space unit in multi-storey buildings in addition to flats may be subject to UURS. Urgency study of the word "or" and "and" the more significant, especially if associated with the elucidation of Article 79 of Government Regulation No. 4 of 1988 which exemplifies the "home shops, industrial facilities and other" built on the land together as a multi-storey buildings which are not included in the definition of flats. Furthermore, Article 79 PP Explanation No. 4 of 1988 mentions that the sample is not high rise buildings built on the ground together in an environment are vacation homes, town houses (town houses), and others

c. Flats containing a system of individual ownership (individual) and collective rights. We know there are three (3) forms of ownership system, namely:
1) The system of individual ownership
2) The system of collective ownership bound
3) The system of individual ownership which also comes with a free system of co-ownership (condominium)

According to AP Parlindungan, flats actually it is a term created by the legislation we are tangible as a housing that is owned by several persons / separate legal entity with all the fittings as a residential or non-residential space, for office, commercial businesses and etc. the other, with its own access to exit to the main road and with all the rights and obligations and have evidence of such rights, with horizontal and vertical dimensions.[15]

VI. COOPERATION AGREEMENT WITH THE BUILD OPERATE TRANSFER PRINCIPLE

According to Article 2 of Law No. 20 of 2011 on the flats, there are some principles in the flats, and explained well in these principles:

a. welfare

- The principle of welfare is the fulfillment of the conditions decent flats for people to be able to develop themselves so that they can perform their social function justice and equity.
- b. **justice and equity**
The principle of fairness and equity are the results of development in the field of flats that can be enjoyed in a proportionate and equitable for all people.
- c. **nationality**
The principle of nationality is providing a foundation that the ownership exploited in the national interest.
- d. **affordability and ease**
The principle of affordability and convenience are providing the foundation for the results of development of this can be reached by the whole society, and encourage the creation of a conducive climate to provide facilities for the MBR.
- e. **efficiency and expediency**
The principle of efficiency and expediency is providing the foundation implementation of flats is done by maximizing the potential of land resources, technology, design, and healthy building materials industry and provide maximum benefit to the people's welfare.
- f. **independence and togetherness**
The principle of independence and togetherness is providing the foundation flats implementation relies on the initiative, self-help, and the role of the community so as to build confidence, ability, and the strength of its own as well as the creation of cooperation between stakeholders
- g. **partnership**
The principle of partnership is to provide a foundation for the implementation of the apartment made by the Government and local authorities to involve businesses and people with the principle of mutual support.
- h. **harmony and balance**
The principle of harmony and balance is to provide foundation for the implementation of flats do with realizing the harmony and balance of space utilization patterns
- i. **integration**
The principle of integration is to provide a foundation for an integrated housing project organized in terms of policy planning, implementation, use, and control.
- j. **health**
The principle is to provide a foundation for the health of construction of flats to meet the standards of healthy homes, terms of environmental health, and health behavior
- k. **conservation and sustainability**
The principle of conservation and sustainability is to provide a foundation for flats held by balancing the environment and adapt to the ever-increasing needs in line with population growth and land constraints.
- l. **safety, comfort, and convenience**
The principle of safety, comfort, and convenience is to provide foundation for building flats meet safety requirements, namely the flats ability support load, fire safety, and the dangers of lightning; comfort requirements of space and movement between spaces, air conditioning, view, vibration, and noise; and requirements for ease of connection to, from, and within the building, complete infrastructure, and facilities flats including facilities and accessibility for the disabled and elderly.
- m. **security, order, and regularity**
The principle of security, order, and regularity is to provide foundation for the management and utilization of flats can guarantee the building, environment, and the occupants of all disturbances and security threats; order to carry out the life lived and social life; as well as in compliance with the provisions of administrative regularity.
- flat development objectives in Article 3 of Law No. 20 of 2011 on the flats:
- a. ensure the realization of flats are livable and affordable in an environment that is healthy, safe, harmonious, and sustainable and to create a unified settlement to build economic resilience, social, and cultural;
 - b. improve the efficiency and effectiveness of the use of space and land, as well as providing green open spaces in urban areas in creating a complete residential areas as well as harmonious and balanced with regard to the principle of sustainable development and environmentally sound;
 - c. reduce the area and prevent the housing and slums;
 - d. directing the development of urban areas are harmonious, balanced, efficient, and productive;
 - e. meet the needs of social and economic life of residents and community support while maintaining the goal fulfillment and settlement housing, especially for low-income;
 - f. empower stakeholders in the field of construction of flats;
 - g. ensure the fulfillment of flats decent and affordable, especially for low-income in a healthy environment, safe, harmonious, and sustainable in a system of governance that is integrated housing and settlements; and
 - h. provide legal certainty in the provision, tenancy, management, and ownership of flats.
- Decree of the Minister of Finance of the Republic of Indonesia Number: 248 / KMK.04 / 1995 Concerning the Income Tax Treatment Against Parties Doing Cooperation In The Form Of Agreement To Build Operate And Transfer Set that Build Operate And Transfer carried out by virtue of the agreement of at least the following:
- a. The parties are bound by the agreement.
 - b. Objects in the build operate transfer to the transfer build operate
 - c. Duration in the build operate transfer to the transfer build operate
 - d. The rights and obligations of the parties are bound by the agreement
 - e. Other requirements deemed necessary

VII. CONCLUSION

Flat development agreement executed with the principles of the build-operate-transfer is performed in accordance with the provisions of the legislation, although the principle of build operate transfer not the tradition of civil law system but take from Anglo-Saxon legal tradition, but in Indonesia has also set up on the build settings transfer operation.

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