

Differences Between Joint Operation and Public Private Partnership from Indonesian Legal Perspective

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Abstract— Nowadays the construction and development of infrastructures required a large capital. Huge funds, sophisticated equipment and capital goods, good management and expert labors are needed. It would be difficult for every country to develop its own infrastructure without assistance from third parties. Under current regulations in Indonesia, there were many models of cooperation that can be used by the government. Two among them are joint operation and public private partnership. The aim of this research is to distinguish the differences between joint operation and public private partnership. By understanding the differences, either the government and/or “the partner” can choose the best legal relations that can maximize the result of the cooperation. This is research normative legal research. Data used in this research were secondary data. obtained through literature review. All data obtained will be analyzed using a qualitative approach. Result and discussion prove that joint operation has many differences from public private partnership, even though in general both are built based on mutual benefit cooperation/ arrangement as regulated in Indonesian Civil Code. The joint operation has its own benefit for the government which cannot be found in public private partnership arrangement and vice versa. Researchers encourage that either government and/ or its potential partner need to understand the concept, both joint operation and public private partnership before they enter into a mutual benefit arrangement to achieve their ultimate goal.

Keywords: *joint operation, foreign direct investment, public private partnership*

I. INTRODUCTION

Infrastructure development shall continue since it will help economic to grow. Many businesses depend on the existence of good infrastructure. Macro economists believe that development of infrastructure may trigger developments in other area, that will enhance the reviving the economic sector and the prosperity of the nation.

However development of infrastructure will need huge of capital, which some time cannot be absorb by the government expenditure. Therefore in order to maintain the stability in developing infrastructure government needs the involvement of private sector.

The involvement of private sector in infrastructure development and construction can be made in several ways. Government can tender certain development of infrastructure to be constructed by private sector. Such tender may involve state owned enterprises (BUMN) which will allow the state owned enterprises to partner in the development of the infrastructure with private sector or not. Such kind of cooperation may take participations in form of assets, skills, operations and managements, human capital and or any other kinds that may benefit all parties.

In view of the cooperation, as mentioned before either by the government and/ or state owned enterprises with private sector, it could take many forms, depend on the input to be contributed and the expected output. Most of them, based on the characteristics of

cooperation, whereby there are inputs to be contributed and output in form of any kinds which will become the benefit for each party, can be categorized as partnerships. These kind of partnerships, in general, are regulated in Indonesian Civil Code Book III Chapter VIII article 1618 up to article 1652. There were many kinds of partnership that can be found in practices [1] [2].

In view that infrastructure development will need an expertise in construction, not only involving huge capital, but also sophisticated technologies. It cannot be avoided that some infrastructure construction and development will need the assistance from outside Indonesia. As either in form of Government to Government (G2G) cooperation or in form of foreign direct investment. Current practice in construction field and infrastructure development, there are two kinds of cooperations that widely being used. One in joint operation and the other is public private partnership. Those kinds of cooperations may involved public sectors and private sectors. These private sectors may include foreign parties.

The objective of the research is to find differences between the two kinds of cooperations, i.e. between joint operation and public private partnership, from Indonesian legal perspective. The result of the research will provide guidance for either public sectors and/ or private sectors to choose wisely their kinds of cooperations, that will most benefit to both parties.

II. DATA AND METHOD

A. *Data*

As a normative legal research, data used in this research are secondary data, that are collected through literature review. The main data are primary legal sources, that consisted of law and other prevailing governmental regulations, and secondary legal sources that consisted of text books. The main regulations used in this research are Indonesian Civil Code, Laws in relation to construction and development that involved private sectors, as well as foreign party, Government Regulations and Presidential Regulations that regulates cooperation between public and private sectors and others.

B. *Method*

Data obtained for literature research are analysed using qualitative method. Discussions are made to

understand the conception of joint operation and public private partnership in accordance with Indonesian laws and regulations in the context to partnership. Further the researchers discussed the differences between joint operation and public private partnership.

III. RESULTS AND DISCUSSION

A. *Joint Operation*

The regulation with respect to joint operation can be found at least since 1991 based on Regulation of the Ministry of Public Work No.50/PRI/1991 [2]. Until today, there had been many amendment took place. The latest regulation can be found in the Regulation of Ministry of Work and People Housing No.09/PRT/M/2019 regarding Guidance for Licensing Service for Foreign Construction Business Entity (RMW09/2019).

Based on the RMW09/2019, joint operation is a cooperation between Foreign Construction Business Entity (*Badan Usaha Jasa Konstruksi Asing* = BUJKA) with one or more national Construction Business Entity (*Badan Usaha Jasa Konstruksi Nasional* = BUJKN), for temporary purposes to handle one or several construction service activities, which does not constitute a new legal entity. Among BUJKN is state owned enterprises (BUMN).

Based on the definition given above it can be concluded that Joint Operation is a business that does not require to be a legal entity. However it must conduct business activities in the field of construction and/ or infrastructure development. From the above definition, it is also known that the Joint Operation is a business entity with a non- permanent time, which is determined based on the fulfilment of the purpose of the Joint Operation. Upon completion of the purpose, it will be dissolved by itself.

The nature of Joint Operations is in the form of a civil alliance/ partnership. It takes the conception as defined in article 1618 of the Indonesian Civil Code. Based on the article, partnership is an agreement between two or more people whereby all the parties contribute something with the aim of gaining profit. Under the conception of Indonesian Civil Code in connection to the definition as provided in RMW09/2019, it is clear that the benefit that may be sought by the parties shall be in the form of profit in

kind of money/ monetary value. The contributions by parties can be in the form of money, capital goods, human capital and expertises.

This means under the RMW09/2019, state owned enterprises that conduct the business in the field of construction can cooperate with foreign construction company, without the requirement to establish a legal entity, in form of cooperation/ partnership, with temporary time of existence. This cooperation requires both the state owned enterprises and the foreign construction company to contribute to the partnership. The profit gains during the partnership shall be distributed to all parties. The partnership will automatically dissolve when the job/ project/ construction activities have been completed.

B. Public Private Partnership

The regulations of Public-Private Partnership (PPP) in Indonesia have been amended several times since the first regulation, i.e. President Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR67/2005). This regulation was then amended by President Regulation No.13 Year 2010 (PR13/2010).

PR13/2010 was then amended by President Regulation No.56 Year 2011 (PR56/2011) and amended again with President Regulation No.66 Year 2013 (PR66/2013). The latest was total amendment of PR67/2005 with President Regulation No.38 Year 2015 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure (PR38/2015).

In Indonesian Language, the cooperation between government and business entities is named *Kerjasama Pemerintah dan Badan Usaha* abbreviated as KPBU. According to PP38/2015, government shall mean the Ministry, any government body, local government, state owned enterprises or local government owned enterprises. Meanwhile business entity can be any private owned enterprises, including foreign legal entity that will cooperate with the public sector.

Based on PP38/2015 public private partnership must be initiated by public who will become initiator the Person In Charge. Public private partnership for infrastructure must be initiated by government. In some event, state owned enterprises can start the initiation. Infrastructure itself is defined as technical, physical facility, system, hardware and software needed to

provide public services to community and to support structural networking so that the economic and social community can grow well. PP38/2015 provided certain infrastructure that can be cooperated with private sector. This means that not all infrastructure can be conducted in form of public private partnership.

In terms of contributions, government as public can contribute in many kinds, such as capital, tax advantages, transfer of assets, social responsibility, environmental awareness, advantaged in local knowledge, and an ability to mobilize political support. Private sector can contribute in form of capital, expertise, technical knowledges and assistance, business method, management, operations, innovations and patents, and many other forms of knowledge that public's sectors was lack off.

With respect to benefit in return, PR38/2015 states that private sector shall be able to to recover cost of capital, operational cost and obtain profit. Government itself can benefit from the utilization of the infrastructure for further development.

C. The Differences between Joint Operation and Public Private Partnership

From all the above explanation, it can be seen that the differences between the Joint Operation and Public Private Partnership is quite extensive, even both of them can take form as partnership. The differences are as follows:

1. Party who represent public in joint operation is state owned enterprise who has the capacity and capability to construct building; meanwhile party who represent public in public private partnership is government, with a possibility of state owned enterprises. Government cannot be party in joint operation. Private sector could be represented by any local or foreign company with the expertise in construction industry.
2. Object of cooperation in joint operation could be any kind of infrastructure; meanwhile in public private partnership has been determined in a shortlisted area.
3. Contribution of public sector in joint operation could be money, assets (capital goods), human capital and expertise; however in public private partnership could be in any kind that can support the development of infrastructure as well as return

- to private sector.
4. The operational activities in joint operation can be conducted by both private and public; however in public private partnership the operational activities mostly are taken care by the private sector with the public sector remain silent.
 5. Return or benefit for private sector in joint operation and in public private partnership will be in monetary basis. However for public sector, the return or benefit will be different. In joint operation, the benefit for state owned enterprises will be in monetary value, meanwhile in public private partnership could be in any kind, with the emphasis the utility of infrastructure for further development. In addition, it could also be said that government only benefits at the end of the construction period due to its connection with its capital structure. Private sector, either local or foreign parties will benefit from the existence of tax deferral and are given ease of licensing.

- And Business Entities In The Provision Of Infrastructure.
- [7]. President Regulation No.56 Year 2011 regarding Second Amendment to the Presidential
 - [8]. Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure.
 - [9]. President Regulation No.66 Year 2013 regarding Third Amendment to the Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure.
 - [10]. Regulation of Ministry of Work and People Housing No.09/PRT/M/2019 regarding Guidance for Licensing Service for Foreign Construction Business Entity.
 - [11]. Widjaja, Gunawan (2004). *Seri Aspek Hukum dalam Bisnis – Persekutuan Perdata, Persekutuan Firma dan Persekutuan Komanditer*. Jakarta: Prenada Media.
 - [12]. Widjaja, Gunawan. (2017) “Implementation of Public-Private Partnership in Indonesia.” *Journal of Economic Research*. 14(15), 235-245

IV. CONCLUSION

The above discussion proved that there were at least 5 main differences between Joint Operation and Public Private Partnership. There are Parties, Form of Cooperation, Capital Structure, Operational, and Distribution of Benefits in terms of technical relations and cooperative relations can also produce different risks, responsibilities, authorities, and acknowledgments

REFERENCES

- [1]. Widjaja, Gunawan (2004). “Merekonstruksi Persekutuan Perdata Untuk Memenuhi Kebutuhan Praktek Hukum Dan Bisnis Modern Bagian I”. *Law Review UPH*. IV(1), 18-30.
- [2]. Widjaja, Gunawan (2004). “Merekonstruksi Persekutuan Perdata Untuk Memenuhi Kebutuhan Praktek Hukum Dan Bisnis Modern Bagian II”. *Law Review UPH*. IV(2), 118-132.
- [3]. Indonesia (1847) *Civil Code*.
- [4]. President Regulation No.38 Year 2015 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure.
- [5]. President Regulation No.67 Year 2005 regarding The Cooperation Between Government And Business Entities In The Provision Of Infrastructure.
- [6]. President Regulation No.13 Year 2010 regarding Amendment to the Presidential Regulation No.67 Year 2005 regarding The Cooperation Between Government