



## The Use Of Mediation In The Settlement Of Public Private Partnerships Disputes

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### ABSTRACT

The aim of this study was to examine the government's role in collaborative agreements with business entities and the application of Alternative Dispute Resolution within the context of Public-Private Partnerships (PPPs). Utilizing a normative juridical approach, this research revealed that there is a lack of clear legal framework pertaining to the government's status as a legal entity. According to Article 1653 of the Civil Code, formal recognition of an association as a legal entity is mandated through legislative means. The PPP Presidential Regulation doesn't explicitly define the government's role, but it can be inferred that it refers to ministries, institutions, and regional authorities, represented by ministers, heads of institutions, and regional leaders. The appointment of ministers, heads of institutions, regional leaders, and state-owned and regional-owned enterprises (BUMN and BUMD) as Contracting Parties with Authority (PJKP) is based on sectoral legislation. The study also identified the foundational principles that govern the government's position as a party to PPP agreements. Consequently, in cases of disputes arising in PPP projects, mediation is presented as a natural alternative dispute resolution mechanism.

### INTRODUCTION

In essence, government involvement in infrastructure financing takes two primary forms: direct funding from the state budget (APBD) for public infrastructure and involvement through state-owned enterprises (BUMN) or regional-owned enterprises (BUMD), either through capital participation or the utilization of BUMD or BUMD capital to support government or local initiatives. BUMD and BUMD can participate in financing both semi-public and private infrastructure projects. However, a significant challenge faced by BUMN and BUMD is their inherent profit-driven nature. This means they are required to generate profits, which

can sometimes lead to inefficiency issues, as pointed out by Nsasira et al. (2013). One potential solution to this problem is to establish collaborative partnerships with private entities for financing, construction, operation, and maintenance of infrastructure or semi-public and private facilities, as suggested by Indra Gunawan (2024).

Presidential Regulation 38/2015 and VAT Regulation No. 4/2015 pertain to KPBU (cooperation between government and business entities). The term "PPP" is used interchangeably with KPBU (Public Private Partnership) in this context. However, numerous international research findings indicate varying degrees of success and failure in KPBU

projects. These outcomes are attributed to a multitude of factors and characteristics that differ among countries, ranging from technical and application aspects, as explained by Carbonara et al. (2013), to philosophical concerns, such as the fear of privatization and potential higher long-term costs incurred by the government when outsourcing PPP facilities. Consequently, this paper will focus on examining the success factors of KPBU implementation as a means of infrastructure financing in Indonesia. Specific topics to be addressed include the definition of KPBU, the types of infrastructure that can be developed using KPBU schemes in Indonesia, the various forms of KPBU schemes, and the key success factors in implementing KPBU in Indonesia, as outlined by Joubert (2018).

Although the Civil Code serves as the overarching legal framework for KPBU agreements, the KPBU Presidential Regulation governs the specifics of these agreements in its third section of Chapter XI, which guides the creation of KPBU agreements. However, in the hierarchy of legislation, the KPBU Presidential Regulation holds a lower status compared to the Civil Code, as highlighted by Muhammad Jibril (2021). Consequently, any provisions in the KPBU Presidential Regulation regarding KPBU agreements must not contradict the Civil Code. Hence, this paper examines the role of the Civil Code and the KPBU Presidential Regulation in resolving KPBU disputes. The author's particular interest lies in researching KPBU dispute resolution using a mediation approach, as proposed by Much. Nurachmad (2018).

## **METHOD**

Research can be defined as the systematic exploration aimed at addressing solvable problems. In the realm of research, there exist several distinct types, specifically, normative juridical research and empirical or sociological juridical research, as elucidated by Ariman Sitompul in 2023. Normative juridical research primarily relies on the examination of library materials or secondary data, earning it the designation of library law research. For the purposes of writing and research in this context, the chosen research approach is normative juridical research, encompassing the exploration of legal principles, the systematic analysis of legal systems, investigations into legal synchronization, delving into legal history, and engaging in comparative law research.

## **RESULTS AND DISCUSSION**

A dispute arises when one party feels aggrieved by another party and expresses this dissatisfaction to the second party. When differences of opinion occur, they are categorized as disputes. In the legal context, especially within contract law, a dispute refers to conflicts outlined in a contract, whether in part or in whole. In essence, it implies a breach of obligations by one or both parties, as described by Nurnamingsih Amriani in 2012.

Another perspective on disputes is presented by Takdir Rahmadi in 2011, who defines them as problems that occur between parties in an agreement due to breaches of promises or differences in interpretation. He suggests that disputes can sometimes be subjective, existing solely within the perceptions of the individuals involved.

The formal process of resolving disputes through the court system is known as litigation. In litigation, both parties engaged in the dispute participate in a court trial, which involves prosecutors, judges, record keepers, and registrars. The judge possesses the authority to render decisions based on established court procedures and techniques, and these decisions are mutually accepted by both parties.

Indonesia's governance model follows a welfare state pattern that prioritizes the interests of the entire populace. This principle is enshrined in Article 33 of the 1945 Constitution, where the well-being of the community takes precedence. Consequently, the government's responsibilities have become increasingly intricate. This development has led to the establishment of a welfare state, where the government not only undertakes its traditional regulatory functions but also actively works towards the general welfare goals (*Staatsdoel*).

The 1945 Constitution encapsulates the principles and nature of the National Economic Management System, primarily outlined in Article 33. These constitutional provisions related to the national economic system reflect the values of nationalism and the aspirations of the Indonesian nation, rooted in the spirit and culture of the indigenous Indonesian people, as articulated by Marwah M. Diah in 2003.

The provision of infrastructure through assignments to state-owned enterprises and government collaboration with business entities, known as KPBU, represents an alternative approach to infrastructure financing due to the state's limited financial capacity. This method of infrastructure financing, involving the assignment of tasks to state-owned enterprises, places certain obligations on the government. The government's support includes

increasing state capital participation, providing loan guarantees for state-owned enterprises involved in assignments, or ensuring the financial capacity of these enterprises to meet their obligations.

For a legal entity to be recognized as a subject of law, it must be capable of assuming rights and obligations. This concept implies two fundamental requirements: firstly, a clear distinction between the rights and obligations of the legal entity and those of its members, and secondly, the capacity for the legal entity's governing bodies to be altered while maintaining the entity's legal status. These elements are crucial for distinguishing when a member of a legal entity is acting on their own behalf or representing and managing the legal entity itself.

In accordance with Perpres 38/2015, Article 1 (6), the collaboration between the government and business entities, referred to as PPP (Public Private Partnership), involves the joint efforts of these parties to provide infrastructure for public interests. This cooperation follows predetermined specifications established by the Minister of the Regional Enterprise or regional-owned enterprise. It may involve the partial or complete utilization of the business entity's resources, with a focus on sharing risks between the involved parties. As outlined in Presidential Regulation 38/2015, Article 3, KPBU (Government and Business Entity Cooperation) is undertaken with the following objectives: a. Meeting continuous infrastructure funding requirements through private fund deployment, b. Achieving the delivery of high-quality, effective, efficient, targeted, and timely infrastructure, c. Cultivating an investment-friendly environment that encourages business entities to participate in infrastructure provision based on sound business principles, d. Promoting the principle of users paying for received services, or in certain cases, considering users' ability to pay, and e. Ensuring business entities' investment returns in infrastructure provision through periodic payments from the government to the business entity, as elucidated by M. Miftahul Huda Noor in 2016.

In accordance with Presidential Regulation 38/2015, Article 4, PPP is guided by the following principles: a. Partnership: This involves government-business entity collaboration based on established legal provisions and regulations, considering the needs and interests of both parties. b. Benefits: The government works in conjunction with business entities to provide infrastructure that yields social and economic advantages for the community. c. Competition: The selection of business entity

partners is conducted through fair, transparent, and open procedures, while also adhering to the principles of healthy competition. d. Risk Control and Management: Cooperation in infrastructure provision includes risk assessment, the development of management strategies, and the mitigation of risks. e. Effectiveness: Infrastructure cooperation aims to accelerate development while enhancing the quality of infrastructure management and maintenance services. f. Efficiency: Collaboration in infrastructure provision is designed to address sustainable funding needs through private fund support.

These principles, as stated in the regulations, serve as the foundation for the execution of PPP initiatives.

Types of infrastructure that can be KPBU, more details can be seen in the VAT Regulation No. 4 / 2015, Article 3, infrastructure that can be cooperated based on this general guide includes: a. Transport infrastructure, among others: 1. provision and/or management of airport facilities and / or services, including supporting facilities such as passenger and cargo terminals). 2. provision and/or management of facilities and / or port services; 3. and / or equipment; 4. transportation and transportation infrastructure; and / or 5. sea, river, and/or lake crossing facilities and infrastructure). b. road infrastructure, among others: (1. arterial roads, collector roads and local roads; 2. highway; and / or 3. toll bridge.). c. Water Resources and irrigation infrastructure, among others: (1. water supply; and / or 2. irrigation networks and water storage infrastructure and complementary buildings, including reservoirs, dams, and weirs).d. drinking water infrastructure, among others:(1. Raw Water unit; 2. production unit; and / or 3. distribution unit).e. infrastructure centralized wastewater management system, among others: 1. Service unit; 2. unit of measurement; 3. Control Unit; 4. the end unit; and / or 5. Sewerage, and sanitation). f. local wastewater management system infrastructure, among others: 1. local water supply; 2. Transport unit; 3. Fire extinguisher Unit; 4. the end unit; and / or 5. Sewerage, and sanitation). g. waste management system infrastructure, among others: 1. transport; 2. processing; and / or 3. final processing of garbage). h. telecommunications and information infrastructure, among others: 1. Telecommunication networks; 2. e-government infrastructure; and / or 3. passive infrastructure such as transmission media pipelines cable (ducting)). i. energy and electricity infrastructure, including renewable energy infrastructure, include: 1.

electricity infrastructure, including: a) power plants; electric power transmission; c ) substations; and/or D) Electric Power Distribution). 2. oil and gas infrastructure, including bioenergy, includes: (a) processing; b) Storage; c) transportation; and/or D) distribution. j. energy conservation infrastructure, among others: 1. street lighting; and / or 2. energy efficiency). k. economic infrastructure of urban facilities, among others: 1. utility line (tunnel); and/or 2. common market.). l. regional infrastructure, among others: 1. Development of Science, Technology and innovation areas including the construction of science and techno park; and / or 2. industrial area. m. tourism infrastructure, including Tourism information center. n. infrastructure of education, research and development facilities, among others: 1. the learning process; 2. laboratory; 3. Training Center; 4. Research Center; 5. research and development; 6. business incubator; 7. the art of learning; 8. student housing; 9. library; and / or 10. learning and training support facilities.) or. infrastructure of sports facilities, arts and culture, among others: 1. sports stadium; and / or 2. Arts and culture building). p. health infrastructure, among others: 1. hospitals, such as hospital buildings, hospital infrastructure, and medical equipment; 2. Basic health care facilities, such as buildings, infrastructure, and medical equipment for both health centers and clinics; and / or 3. Health Laboratory, such as health laboratory buildings, health laboratory infrastructure and laboratory equipment. q. infrastructure, among others: 1. correctional institutions; 2. Correctional Facility; 3. State Prison; 4. storage of confiscated and confiscated goods; 5. temporary housing for children; 6. children's educational institutions; and / or 7. Correctional hospital.) r. public housing infrastructure, among others: 1. housing for the poor; and / or 2. simple flats for rent) (Nurhayati, 2022)

In KPBU, there is a guarantee that serves to provide protection for creditors, namely certainty about the repayment of the debtor's debt or the implementation of an achievement by the debtor or the debtor's guarantor (articles 1131 and 1132 of the Civil Code). The guarantee of individuals in Book II of the Civil Code is the insurance agreement (*borgtocht*). Individual guarantee is a relative right that is a right that can only be maintained to certain people who are bound by the agreement (Lastuti Abubakar, 2003).

In the event of bankruptcy of the debtor, the principle of parity creditorum applies, in which the payment or repayment of the debt is carried out in a

balanced manner (as a concurrent creditor). Assurance in general is an effort made to obtain something quickly and easily. Infrastructure in general is everything related to the activities of the structure under a structural or management (Rifqani Nur Fauziah Hanif, 2020).

In the KPBU agreement describes the obligations of each party, including the obligation financial PJKP if PJKP do or do not do an act that can cause the emergence of these financial obligations. Action or inaction Such CHD is generally referred to as political risk. For example, in an agreement toll road concession (PPJT), PJKP can promise cash compensation to the business entity jalantol (BUJT) if there is a delay in the procurement of land or delay in tariff changes as agreed. Similarly, if there is a termination of the agreement (termination) caused by political risk, for example the action or inaction of the government, changes in law, broken promises government, or force majeure, PJKP compensates BUJT (hendry Irwanugroho, 2019).

For example, the delay in land acquisition or delay in tariff changes or termination of course can not be estimated at the time of the PJKP and the agency to sign a cooperation agreement. The emergence of PJKP obligation to provide financial compensation is due to other events in the future unpredictable. Thus, such financial obligations can be classified as contingency obligations.

There are three sources of contingency obligations, namely (1) support and/or government guarantees on infrastructure development projects, (2) National Social Security and civil servant Social Security programs, and (3) the obligation to maintain minimum capital in certain financial institutions. Contingency obligations on government support and / or guarantees on infrastructure development projects come from guarantees on projects to accelerate the construction of 10,000 MW power plants Phase II and II, guarantees on projects to accelerate the provision of drinking water, infrastructure guarantees on projects KPBU , guarantee on direct loans of state-owned enterprises to international financial institutions, guarantee on the Trans-Sumatra toll road project, and guarantee in provision of regional infrastructure financing through assignment to PT SMI (Persero).

Contingency obligations are one of the fiscal risks as everything that in the future can cause fiscal pressure on the state budget. Sources of risk fiscal risk in the state budget includes (1) the risk of basic macroeconomic assumptions, (2) the risk of state revenue, (3) the risk of state spending, (4) financing

risk, and (5) certain fiscal risks. Contingency liabilities are included in the financing risk.

## CONCLUSION

When it comes to resolving disputes related to KPBU (government and business entity cooperation), it is obligatory to employ civil law procedures. The primary and most crucial method of resolution is the utilization of mediation, which can be opted for either prior to or during legal proceedings. This dispute resolution process is intricately linked to the employment contract within the context of KPBU agreements.

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