

The Application of Build, Operate, Transfer (BOT) Contract as a Mode of Financing in Developing *Waqf* Land: Malaysian Experience

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Abstract

The Build, Operate and Transfer (BOT) contracts is widely applied in developing economy since the declining participation of private sectors in the reconstruction and funding of public infrastructure. It is a project of financing and operating approach which has been practiced primarily in the area of infrastructure privatization in the developing countries. Recently, the application of BOT contracts has been found in many waqf institutions especially Majlis Agama Islam Wilayah Persekutuan. The BOT approach gives a new direction in the field of waqf as it has capability to enhance waqf property for the public benefits. Enhancing the property is the major purpose of why waqf is enjoined by Islam. The involvement of waqf institution in developing its property and public infrastructures by way of build, operate and transfer contracts alternatively called BOT is proving to be a challenging exercise. The proposed study examines the current practice of this contract in waqf institutions generally and in Majlis Agama Islam Wilayah Persekutuan specifically with specific reference to the project of Menara Bank Islam which is also known as MAIWP on piece of waqf land situated at within the Golden Triangle between KLCC and Bukit Bintang . The study aims at identifying Shariah issues, problems and also the challenges that might be facing the waqf institution during the implementation of BOT.

Introduction

It is submitted that after a person's death, he or she will still gain benefits from his previous acts of charity (sadaqa Jaariya). The Prophet Muhammad (Peace be Upon Him) in a tradition narrated by Abu Hurayrah said:

“When a person dies, all his good deeds cease except for three: a continuous act of charity (Sadaqa Jaariya), beneficial knowledge and a righteous child who prays for him”¹.

Besides facing challenges in attracting people to contribute their money or property, the institutions of *waqf* face their biggest problem in managing property in the best possible way to maximize utilization and improve the institution's performance in providing good services and benefits to the beneficiaries. It is upheld that the conceptual understanding of waqf is to withhold the ownership of the estates and to channel to charity its usufructs. Unfortunately, not all waqf

¹ Al Tarmidhi, Muhammad bin Isa, al Jami' as sahih, (Beirut: Dar Ihya al Turath al 'Arabi, n.d), No. 3/660, and al Darimi, 'Abdullah b Abd Rahman, Sunan al Darimi, (Beirut: Dar al Kitab al 'Arabi, 1986) No.1/148

institutions have the chance to develop their estates because of management and financially related problems². The common problems may be due to lack of expertise, poor management of *waqf* funds and the shrinking role of service as a result from the bureaucratic management. This situation might burden all recipients and prevent them from enjoying great *waqf* benefits.

As an alternative in developing *waqf* estates, BOT can be a viable device for financing. This method allows the private sector to operate, finance and manage public projects on *waqf* land. Through this type of project, the usufructs from the *waqf* property can be continuously benefitted. In Malaysia, Majlis Agama Islam Wilayah Persekutuan (MAIWP), a *waqf* institution which is the authority in administering *waqf* for the federal territory introduced and utilized the BOT contract as one of the modes to develop *waqf* property. Although BOT is a new application tool in *waqf* and its practice is very challenging, it has proven to be a useful mechanism for the institution's progress. All *waqf* related issues and problems that are faced by the *waqf* will be identified and a probable solution will emerge to maintain the Shariah legitimacy and validity.

This new alternative (BOT Contract) can perhaps be an effective way to increase an institution's performance, and hence boost the great role of *waqf* institutions which has been ignored by many people. The general concept of the BOT scheme should be analyzed before heading to the main focus of this study which is the application of BOT in MAIWP, the transactional flow, the practical implementation, as well as the Shariah compliance issues and challenges.

Definition of BOT

BOT is an English abbreviation for the term 'Build', 'Operate' and 'Transfer'. As for the exact meaning of BOT, many scholars differ upon the definition depending on their opinion concerning some elements and conditions of BOT. However, none of the definitions deviates from the fact that BOT is a financing scheme entrusted by the government to private companies to set up a specific project using its own expenses where the beneficial ownership remains in the

² Based on information given by Mr. Hanif bin Hj Salim during the interview session held on 2nd April 2010. He is an Assistant Manager of Property Development Unit, Federal Territory Islamic Council (MAIWP), Kuala Lumpur.

possession of the project company for a fixed duration before the project is returned to the government³.

Concept of BOT

The BOT contract involves government assignment of a construction project to a company for a fixed duration. The assigned company is responsible for construction and operation of the public infrastructure project using its own expenses for the benefit of the public. The responsibility of operating and managing the project is borne by the company. It is given the right to conduct services for public users under the specified time (with a consideration to compensate its costs and expected profits) before the project is transferred to the government⁴.

The concept of BOT contract can be concluded as an acronym for the three words; 'Build' which carries the meaning of constructing or assessing a project, 'Operate', which reveals the sense of managing and running the project, and 'Transfer' which conveys the sense of returning the project to the authorized party at the end of the tenure. During the operation of the project, the company has the right to acquire all the benefits and profits to cover all the managing costs. The BOT contract since its emergence was specifically made for the government to reduce the budget needed in developing infrastructure projects. Nevertheless, currently, the application has been extensively expanded not only to the government but to the legal authorities, companies and various organizations such as *waqf* institutions⁵.

Maintaining Waqf Properties

Waqf is a righteous deed encouraged by Shariah. It is submitted that the general aims of *waqf* include helping the poor and needy, raising the standards of living for many people, facilitating the distribution of knowledge and technology and administering and constructing schools, mosques, libraries, hospitals, clinics and shops for the benefits of people in general and Muslims in specific. By recognizing these significant aims of *waqf* in the development of human life,

³ Ahmad Muhammad, Ahmad Bukhait, "*Tatbiq 'aqd al-bina wa al-tasyghil wa al-i'adah (BOT) fi ta'mir al-awqaf wa al-marafiq al-'ammah*", (paper presentation, Jami'atai Bani Suwaif wa al Bahrain), p14.

⁴ Al-Bahji, 'Isom Ahmad, '*Uqud al-BOT al-toriq li bina marafiq al-daulah al-hadithah*, (al Azaritoh: Dar al jami'ah al jadidah, 2008), p13.

⁵ Ahmad Muhammad, Ahmad Bukhait, "*Tatbiq 'aqd al-bina wa al-tasyghil wa al-i'adah (BOT) fi ta'mir al-awqaf wa al-marafiq al-'ammah*", p14.

there is a need to enlarge and develop the *waqf* properties to maintain and expand them without neglecting their ultimate purposes as outlined by the Shariah (Islamic law). This attempt is to ensure the assets of *waqf* are preserved and utilized at the maximum level so they will not be left idle or inactive which in turn would contradict the founder's main purposes and pious aims in assigning his or her properties as *waqf*.

There are many Quranic verses that generally encourage Muslims to maintain and increase properties. One of those verses is in *Surah Al-Mulk* which reads: "It is He who has made the earth tame for you, so walk along its slopes and eat of His provision and to Him is the Resurrection". (Quran, 67:15)

Another verse which indicates this encouragement is as follows: "And when the prayer has been concluded, disperse within the land and seek from the Bounty of Allah and remember Allah often that you may succeed." (Quran, 62:10).

These verses of Quran indicate the encouragement towards wealth creation and preservation. Upon this basis, it is important to conserve the *waqf* property and to avoid all misdeeds that will lead to eradication of its usufruct. The *waqf* should be suspended for the right of beneficiaries as well as for the ongoing charitable and the religious purposes whether it is required by the *wakif* (founder) or not. The ongoing charity will be increased only through developing *waqf* property thereby proving that the expansion of utilization of the *waqf* assets is certainly an obligation from the Shariah perspective. Enhancing and developing *waqf* assets is crucial to guarantee continuous benefits to the beneficiaries and for the founder to have continuous rewards from Allah.⁶ As for economic contributions, it will provide job opportunities and circulation of wealth among the members of the society.

Validity of BOT from Islamic Perspective

Since there is no specific Quranic verse or Prophetic tradition that clearly depicts and establishes the legitimacy of this contract, a brief study of the doctrine of freedom of contracts in Islamic law is necessary to establish its legality. Therefore, before proceeding with the evidences by the scholars for the legitimacy of the BOT contract, the theory of freedom in Islamic contracts needs to be discussed first.

⁶ Dibani, Abd al-Majid, *Muhadarat fi Fiqh al-mu'amalat*, 1st ed, (Banghazi: Manshurat Jami'ah Qaryunis, 1992), p43.

It is submitted that everything prohibited or allowed has been clearly prescribed in the Quran and the Sunnah of the Prophet Muhammad (Peace be upon Him). There is no explicit text in the Quran or Sunnah (Hadith) to establish the legality of a BOT contract. Similar to *istisna'*, its legality is not stated in Al Quran and Sunnah but it is based on the concept of *istihsan* which focuses on needs and necessities as advanced by many Muslim jurists. Yet this basis is not very convincing⁷.

In relation to the concept of freedom of contract, Islamic rulings illustrate that the contracting parties have full freedom to engage in whatever contract they desire as long as it is in line with the principles of Shariah. According to Ahmad Bukhait, adding a new contract is permissible under the freedom of contracts but it must be compliant with the principles of *Shariah*⁸. Therefore it can be clearly stated that any contract that is not consistent with Shariah is considered invalid even though the contracting parties have freedom to form whatever contract they wish. Thus, Muhammad al Bashir says: "...the will of contracting parties has played no role in forming a contract or in stipulating a condition which the Lawgiver has not allowed and explicitly authorized in the Quran and Sunnah"⁹.

Nevertheless, it is worth noting that in the natural state of things, there is a presumption of legality (*Al-asl fi al-ashya' al-ibahah*). Therefore all acts and deeds including the making of contracts are permissible (*mubah*) unless they have been particularly prohibited. To support this point, the Prophet Muhammad is reported to have said: "Every stipulation is lawful among the Muslims except one, which declares forbidden what is allowed or allows what is forbidden"¹⁰.

Thus, there should be clear principles of freedom of contract which can ease the transactions among the public to be applied in any new emerging contract to ensure the contract's validity and legality. The principle might be on behalf of contracting parties where mutual consent may be expressed among them and the contract must be free from any element of *gharar* (uncertainty) which will result in injustice among the parties, and consequently lead to dispute. Therefore, for the BOT contract to be valid, it should have certain elements. Firstly,

⁷ Al Amine, Muhammad al Bashir, *Istisna'* (Manufacturing contract) In *Islamic Banking and Finance Law and Practice*, (Kuala Lumpur: A.S NOORDEEN, 2006), p15.

⁸ Ahmad Bukhit, Ahmad Muhammad, *Tatbiq aqd al bina wa al tasyghil wa al i'adah (BOT) fi ta'mir al awqaf wa al marafiq al 'ammah*, p 15.

⁹ Al Amine, Muhammad al Bashir, *Istisna'* (Manufacturing contract) In *Islamic Banking and Finance Law and Practice*, p16.

¹⁰ Sahih Muslim, *Kitab al shurut*, Hadith No. 2876

mutual agreement between the contracting parties. Secondly, the nature and consequences of contract should not be contradictory to Shariah principles.

Another core principle supporting the validity of the BOT is *Mashalih al mursalah*¹¹ (public interest) which is based on the interest of the public. In general *al-Masalih al mursalah* is the derivation of a *hukm* (Islamic legal ruling) which is not stated in the Quran or Sunnah where its implementation is aimed to provide benefits to many people. This concept is applied primarily to promote a harmonious environment for people. In this case the BOT contract is applied in the financing of an infrastructure project to develop current public facilities and necessities which would meet the interest of the people. The long term result would be to ensure the sustainable convenience benefits and services for the life of today's *ummah*¹².

The BOT contract is similarly applied in the development of *waqf* property with the purpose to gain perpetual benefits and returns for the beneficiaries and other people. It also prevents the *waqf* property from idleness that might bring damages to the property itself. It is compatible with the saying of Imam al Ghazali regarding this concept. According to him, *maslahah* consists of considerations which secure benefit or prevent harm. Protection of life, religion, intellect, lineage and property is *maslahah*¹³. Realizing this consequence, the BOT contract is applied even though the *hukm* is not there in the primary sources of Islamic law. This signifies that the BOT contract is lawful to be applied for the *maslahah* of *ummah* as it will secure benefits and at the same time it will not harm the *waqf* estates. The BOT contract can be a breakthrough alternative to increase the utilization and benefits of *waqf* properties and it can perhaps be an efficient means to increase revenues of *waqf* property.

It is also possible to prove the legality of BOT by a legal maxim "harm must be eliminated" (*al-dararu yuzal*). This is because the application of BOT may eliminate the harms of *waqf* or other lands being left idle. Leaving a *waqf* property idle is harmful in a sense that benefits may not be utilized at maximum level since there is no yield from the property, while at the same time operational and maintenance costs may increase.

¹¹ The most important element of Imam al Syatibi's legacy in his *Muwafaqat*, a treatise that contribute "immensely towards the making of modernist", conception of Islamic law particularly the concept of *maslahah* which is its central ingredient".

¹² Zuhaili.Wahbah, *Usul al-Fiqh al-Islami*, (Beirut: Dar al Fikir, 2004), p756.

¹³ Omar, Ismail, *Manhaj aqidah ahl al Sunnah wa al-jama'ah*, (Selangor: Percetakan Hiza, 1999), p367.

BOT has a special nature of reliability as compared to the other Islamic financing methods such as *ijarah*, *istisna'* and *hukr* contract¹⁴. These contracts are known (nominated) contracts in Islamic jurisprudence. The Muslim jurists allow the application of all these contracts with certain conditions and terms¹⁵. In this regard, the application of BOT can be claimed as valid since it is a combination of those known contracts. For example, it only combines *ijarah* and *istisna'* which are previously known as valid and recognized contracts. In essence the contracts and instruments used are legal and valid.

In developing *waqf* property, the *hukr* mode is applied to avoid any ruin of the land but this approach is not entirely convincing since it involves utilization of the land for a long duration which would possibly damage the usufruct of the *waqf*. As an alternative, the BOT contract is applied with certain conditions. According to Khalid So'ud, BOT can be applied in developing *waqf* with a condition on the duration spent. The contract also should preserve the rights of the beneficiaries and the developer during the operation of the project¹⁶. The duration therefore should not be as long as *hukr* or otherwise it would not be applied as it may ruin the *waqf* property itself. This idea is to preserve the *manfaah* and maintain the ultimate purpose of assigning one's property to *waqf* as well as avoiding harm among the contracting parties. The legal maxim pronounces that the major harms may be replaced by lesser ones (*Yukhtaru ahwan al sharrain*) to preserve the *manfaah* and *maslahah* of public.

In view of the structure of the BOT contract, it is possible to make a clarification on its legality as a combining contract that comprises of more than one contract together. The permissibility or impermissibility of the combination would provide an idea on the validity of its application. Shariah permits the act of combining more than one contract. For example the BOT contract which comprises of many contracts namely *istisna'* and *ijarah* yet without imposing one contract as a condition on the other. The combination is also acceptable unless it involves a prohibited element as stated in the Al Quran and *Sunnah*¹⁷.

¹⁴ So'ud, Khalid, "*Tatbiq 'aqd al-bina' wa al-tasyghil wa al-ia'dah "BOT" fi ta'mir al-marafiq al-'ammah wa al-awqaf*", (paper presentation, United Arab Emirate), p26.

¹⁵ Umar, Muhammad Abduh, "*Tatbiq nizam al-bina wa al-tamlik BOT fi ta'mir al-waqf*", (paper presentation, United Arab Emirate), p35.

¹⁶ So'ud, Khalid, "*Tatbiq 'aqd al-bina' wa al-tasyghil wa al-ia'dah "BOT" fi ta'mir al-marafiq al-'ammah wa al-awqaf*", p 27.

¹⁷ Shari'a Standards, (Accounting and Auditing Organization for Islamic Financial Institution, 2003), p452.

It is suggested that the combination of contracts is permissible if all the contracts combined are legal upon any basis and there are no elements of *gharar*, no harmful conduct and behavior among contracting parties, and no dealing or practice of *riba*. This combined contract would be prohibited if its utilization or application is an excuse for dealing in *riba*¹⁸. In other words, the combined contract should not be a trick for committing *riba* or anything that is prohibited. With regards to *riba*, it has been reported that Prophet Muhammad s.a.w instructed one of his employees to sell low quality dates before buying those of the high quality to avoid *riba*¹⁹. The Prophet s.a.w forbids the act of exchange between the low and high quality dates which will cause injustice among the contracting parties. The Quran prohibits the demand and receipt of interest and this was mentioned in the following terms: “O ye who believe! Devour not usury²⁰, doubling and quadrupling (the sum lent). Observe your duty to Allah that you may be successful”. (Quran, 3:130)

The application of the BOT contract in the development of *waqf*, in our opinion is valid and permissible based on the discussion earlier since there is no restriction in Al Quran and Sunnah that entails its prohibition. Furthermore, the ultimate purpose of the contract is to develop the *waqf* property and to preserve the usufruct of the *waqf* assets from being misused and left idle, these points indicate its lawfulness in practice. The BOT contract could possibly be the financing mode which will protect the *waqf* from those *dharar* (harms) even though its application might be frequently reviewed. There are a number of possible issues pertaining to the BOT and *waqf* rules and regulations which would bring minor difficulties in practice. However, this is not a prudent reason to totally reject the application of BOT as this approach has the tendency to secure *waqf* properties. All the minor issues can be solved and readjusted as long as they are still under the Shariah limitations. The Shariah limitations will ensure that the BOT contract turns out to be an absolute Shariah compliant mechanism. More over, Prophet Muhammad s.a.w has said “What is good for Muslims is good in the sight of Allah”²¹. Therefore, the BOT contract should be considered as valid in practice.

¹⁸ Ibid., p459.

¹⁹ Ibid.

²⁰ The Quran uses the words *riba* in all places. This word is sometimes translated as usury and sometimes as interest. There is now a legal difference in the English language- usury being extravagant interest. But this difference is unknown to the Quran.

²¹ Musnad al Imam Ahmad, Hadith No 3660.

Background of MAIWP

The only *waqf* institution in Malaysia that is currently managing a BOT project to develop its property is Majlis Agama Islam Wilayah Persekutuan (MAIWP). MAIWP was incorporated on 1st February 1974 in commemoration of the enforcement of Federal Constitution for the federal territory. MAIWP is an organization responsible for all Islamic administration affairs in the Federal Territory. In addition, it is the policy maker and the Islamic religious advisor of Yang di Pertuan Agong. For this reason, it is worth noting that MAIWP is a statutory or legal unit established under the enactment of Islamic legislation which has the authority to create and amend the law.

MAIWP is currently undertaking a significant endeavor to develop this *waqf* land using the BOT contract on a project known as *Menara MAIWP* (MAIWP Tower) which is now under construction and is expected to be accomplished in May 2011. The construction is being conducted on the land of lots 168 and 169 at Jalan Perak, Kuala Lumpur. The total area of both the land lots is equivalent to 52,796 square feet or 1.2 acres. The land area of Lot 168 is 28,620 square feet while Lot 169 is 24,176 square feet. The land has been entrusted to MAIWP for 16 years starting from 14 May 1993 as endowed by Allahyarham Ahmad Dawjee for philanthropic purposes. As at the end of year 2006, the value of both lots 168 and 169 is approximately RM31.915 million which comprises of both lots' value of RM17.29 million and RM14.625 million respectively.

The development project has been agreed upon in a special meeting of the Islamic affairs council, federal territory held in 5th July 2005 where a decision was made to develop the particular *waqf* land. The *waqf* land development is carried out by *Lembaga Tabung Haji* with the construction of 'A' class office buildings consisting of 34 levels and thereafter, they will operate the project for 25 years after the project construction has been successfully completed²².

It is interesting to note that the development of this *waqf* land is utilizing the BOT contract which is the core subject of this study although this type of contract has never been used by the council before.

²² Mohd Hanif b Salim, interviewed by Saidatolakma bt Mohd Yunus, (Tingkat 7, Bangunan PERKIM, No. 150, Jalan Ipoh, Kuala Lumpur, 2nd April 2010).

The Application of BOT contract in Developing Waqf Land

The development of *Menara* MAIWP on the land of both lots contributed by Allahyarham Ahmad Dawjee is being developed by *Lembaga Tabung Haji* (LTH) through its subsidiary company TH Technologies Sdn Bhd. TH Technologies has the right to assess the project and LTH has assigned them to do the construction through *istisna'* and *wakala* concepts. Under *istisna'*, TH Technologies is to construct the building and obtain returns after the construction is complete. Under the *wakala* contract, TH Technologies will act as a representative of LTH to develop the *Menara* project. In this case LTH is considered to be the contractor as well as the financier of the total cost of the project.

The project is estimated to cost RM151 million and the estimated construction period is 46 months with equivalent 3 years and 10 months. In consideration of the LTH efforts to construct the office building, LTH is authorized to operate and manage the building operations for a period of 25 years upon completion of the building. Thus, the concession received by LTH is actually issued by the MAIWP itself as the concessionaire of the project.

It is worth noting that the ownership of the building still remains with MAIWP during the operation period since the ownership was never transferred to the LTH. The building will be leased by LTH from MAIWP under the concept of *Ijarah*. The *ijarah* fees are in the form of deferred payments and will be paid off at the end of the concession period. Most of the time, the payment is compensated by returning the project back to MAIWP after the operation segment. Mr Hanif who is the Deputy Director of Development and Investment Unit, Federal Territory Islamic Religious Council (MAIWP) said that Bank Islam Malaysia Berhad will be one of the tenants other than TH Technologies Sdn. Bhd. itself. All the total construction costs are being financed by LTH and thus, it is entitled to all the revenues and profits obtained during the initial operation phase.

The Structure of BOT Application

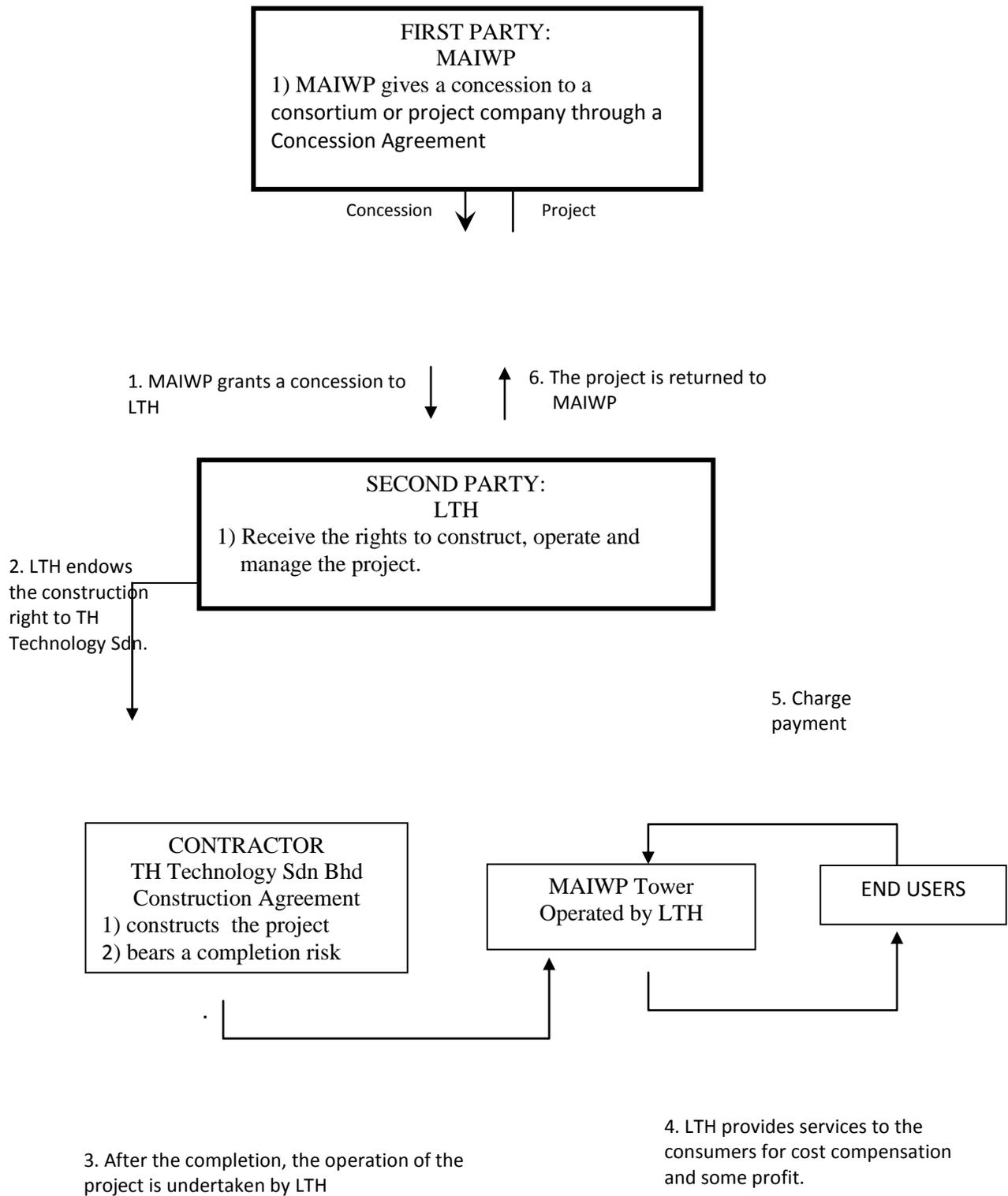


Diagram 1: Typical BOT Organisational Structure

The development of *waqf* land through the BOT contract involves several parties and each of them has their own responsibilities. The group of parties includes the MAIWP itself, *Lembaga Tabung Haji* (LTH) and TH Technologies Sdn. Bhd (LTH's subsidiary company). LTH is the only party that covers all the development costs and operates the project for revenues and profits while TH Technologies Sdn. Bhd is responsible for the project construction and thus, it bears the construction risks including having to complete the project on time. MAIWP is the primary party and it is also the issuer of the grant to allow LTH to construct the project through the concept of *istisna'* and operate it for a certain duration. Under this concept, MAIWP seeks financing from the financier, LTH to construct a building on *waqf* land for the expansion in accordance to the agreed specifications at a determined price and for a fixed date of delivery²³.

After the construction, LTH will subcontract the performance of the project work to the third party (TH Technologies Sdn. Bhd.) to construct the building through the concept of *istisna'* and *wakala*²⁴. *Istisna'* concept allows TH Technologies Sdn. Bhd. to be prepared for the construction. The estimated cost of RM151 million will be compensated at the end of the concession period. Under the *wakala* agreement, the financier (LTH) appoints the constructor (TH Technologies Sdn. Bhd.) as their agent to construct the project on their behalf. All responsibilities relating to the project completion are borne by the agent²⁵.

LTH leases the building from MAIWP and operates it for a 25 year concession period under an *ijarah* agreement. This duration is for LTH to operate the project and gain revenues to compensate themselves for the construction costs and also to derive some profits. Under the *ijarah* agreement, MAIWP as the owner of the project leases the building to LTH. LTH then, sub leases the building to the lessee for example Bank Islam Malaysia Bhd and TH Technologies Sdn. Bhd to run and operate their own business. LTH would earn rental payments which would in turn be used to pay MAIWP. As a result of the entire project, MAIWP will obtain approximately RM56.6 million in lease payments at the end of the concession period together

²³ Islamic Finance: A Practical Guide, edited by Rahail Ali, (Globe Business Publishing Ltd, 2008), 22.

²⁴ *Wakala* is the Islamic juridical concept of agency. It has a variety of different applications in Shariah-compliant financing arrangements, but it is fair to say that it has not been the product of choice in recent project financings.

²⁵ Islamic Finance: A Practical Guide, edited by Rahail Ali, (Globe Business Publishing Ltd, 2008), 73.

with the land and the project which will have a value then estimated to reach about RM600 million²⁶.

Strengths of the BOT Contract

The BOT contract reduces the burden on MAIWP's resources and budget since funding for the construction is not derived from MAIWP's budget and the utilization of assets is not restrained for the construction. MAIWP also does not have to bear the burden of debt because LTH will fund all the construction costs and this situation would result in avoidance of new tax imposition as well as maintaining the rates of existing taxes. Through BOT, LTH assumes the responsibility of funding and operating the project and thus, MAIWP is released from the burden and risks that otherwise would have to be carried by MAIWP itself. LTH will bring an investment into the development of MAIWP through its involvement in the construction and operation of the project²⁷.

Therefore, the application of BOT offers a solution to MAIWP for its financing problems. Through the BOT contract MAIWP would eventually acquire the project without increasing its expenditure or borrowing from other financial institutions or banks to accomplish the project.

Through this scheme, MAIWP will improve its performance through the new concepts instilled by LTH in terms of skills in operating and managing the project and its related assets. The United Nations Industrial Development Organization (UNIDO) aptly states that the involvement of private sponsors and experienced commercial lenders is an additional sign of project practicability which ensures technology transfer, enhanced training of local personnel and the advancement of the national capital market for the economic development of a nation. The project company that is assigned to construct an infrastructure project always seeks to achieve the greatest possible economic gains. This could be attained by the use of modern means and advanced techniques. This is because the modern tools and mechanisms assist the company to

²⁶ Mohd Hanif bin Salim, interviewed by Saidatolakma bt Mohd Yunus, (Tingkat 7, Bangunan PERKIM, No. 150, Jalan Ipoh, Kuala Lumpur, 2nd April 2010).

²⁷ Al Bahji, 'Isom Ahmad, *'Uqud al-BOT al-toriq li bina marafiq al-daulah al-hadithah*, (al Azarito: Dar al jami'ah al jadidah, 2008), p55.

gain the greatest possible profits. This type of situation would thus reduce the construction and operating costs to a minimum level²⁸.

The *Menara* MAIWP constructed under the BOT contract will become a milestone in improving MAIWP's image as an advanced Islamic agency that is able to move forward in tandem with other globally renowned agencies. Indirectly it shows the integrity and advancement of Islam to the world as a whole. Throughout the construction, the community will be acquainted with MAIWP's proactive effort in expanding *waqf* land which is in line with Malaysia's Ninth Plan that encourages the development of land for the benefits of public.

MAIWP will acquire a return of RM56.6 million after 25 years of leasing the land. This sum will be used by MAIWP to double its efforts to protect Muslims, especially those located in the federal territory. When the lease concession expires, the land and the building will be returned back to MAIWP with an estimated value of RM600 million²⁹.

Various Shariah Issues Related to BOT Contract

It is found that, there are several possible ambiguous Shariah issues related to the BOT contract. This however does not mean that the issues have not actually been addressed according to the Shariah regulations. Among the Shariah issues are as follows:

First Issue:

It is mentioned that the BOT contract is formed on the basis of *istisna'* and that the payment for it is the *manfaah* (usufruct) of the project which does not exist during the contract due to the subject matter (thing i.e building) not being constructed yet. Giving usufruct as compensation has been approved by the Islamic jurists in situations of selling and leasing³⁰. The issue is that in *istisna'* the usufruct of the item is non-existent and this is different from the the case of selling

²⁸ Solah, Hani, *al-Tanzim al-qanuni wa al-ta'qudi li mashru'at al-banniah al- asasih al-mamulah 'an toriq al-khas*, 1st edn (Dar al Nahdhah al 'Arabiah, 2001), p187.

²⁹ Mohd Hanif b Salim, interviewed by Saidatolakma bt Mohd Yunus, (Tingkat 7, Bangunan PERKIM, No. 150, Jalan Ipoh, Kuala Lumpur, 2nd April 2010).

³⁰ Al Usmani, Mohd Taqi, '*Uqud al-bina' wa al-tasyghil wa naql al-milkiah min an nahiah al-syar'iah* , (paper presentation, United Arab Emirate), p5.

and leasing where the usufruct is in existence during the contract. So, is it permissible to consider the non-existent usufruct as a compensation of the cost of *istisna*'?

According to Sheikh Muhammad Taqi Usman, it is permissible even though the *manfaah* (usufruct) is not present in the contract, because the development of *waqf* land is truly a need. Furthermore, there is no element of ambiguity, as the utilization of the usufruct is based on an amount of the time agreed upon. This is also valid in order to ensure construction work under the concept of *istisna*'³¹ is accomplished on time because the usufruct comes together with the construction. The contractor will not obtain the benefit until the construction is fully complete. In other words, the benefit depends on the contractor bringing it into existence.

Second Issue:

As mentioned earlier in the first issue the *thaman* (price) in *istisna*' is a *manfaah* (usufruct) of the subject matter (i.e building) that will be authorized to the developer for usage after the completion of the construction. Some argue that the price should be in *amwal* (a specific price and must be a valuable thing)³². In other words, is *manfaah* (usufruct) *amwal*?

The *Hanafī mazhab* does not consider the *manfaah* (usufruct) as *amwal* because according to them in order for something to be considered as *amwal*, it must be material, tangible and desired by people for purchase even though it may be deemed unlawful by Islam. However, according to Ahmad Farāj, the contemporary jurists from *Hanafī mazhab* consider *amwal* as things that can be possibly exchanged for currency be it an object, usufructs or rights³³.

According to *jumhur* (the majority of jurists), *manfaah* (usufruct) is deemed to be *amwal* as long as its source is an object that can be kept and possessed even though people do not spend money or effort to attain it. This is because the *jumhur* (the majority of jurists) view that an object is meant for the benefit it comprises, not the object itself³⁴. A thing is valuable if there is

³¹ Al Kasani said concerning the legality of *istisna*, in principle it would not be allowed on the basis of *Qiyas* because it is sale of what we do not have and the Prophet had prohibited the sale of what we do not have and it is allowed based on *istihsan* because people are unanimous about its need. See Al Amine, Muhammad al Bashir, *Istisna*' (Manufacturing contract) In *Islamic Banking and Finance Law and Practice*, p26.

³² Mansuri, Mohd Tahir, *Islamic Law of Contracts and Business Transaction*, (New Delhi: Adam Publishers and Distributors, 2007), p210.

³³ Husayn, Ahmad Farāj, *Al-milkiah wa nazariyyat al -'aqd fi al-Shari'ah al-Islamiyyah*, (Iskandariyyah: Dar al Jāma'iyyah, 1986), p13.

³⁴ *Ibid.*, p12.

benefit to be used³⁵. For example, a car or house is valuable due to its usefulness not the object itself. Since *manfaah* (usufruct) can be considered as *amwal*, the Islamic jurists allow it to be the *ujrah* (rental fee) in *ijarah* transactions³⁶.

From the researcher's point of view, opinions of the majority of Islamic jurists and the contemporary jurists from the *Hanafi mazhab* widen the scope of *amwal* to suit all the things that are unknown before especially in this era of globalization. For example, intellectual rights and the rights to invent something which are not discussed by the former jurists is deemed to be *amwal* as long as it can be estimated by money³⁷. Therefore, *manfaah* is considered as *amwal* and applicable to be a price of *istisna'* in a BOT contract.

Third Issue:

If the *manfaah* (usufruct) is permissible to be the price in a BOT transaction, how could one ensure the *manfaah* (usufruct) will be the same amount as the construction cost? Sometimes the return of usufruct utilization made by project company might exceed the cost of construction or it could be less. This will cause uncertainties and injustice which is among the reasons for a contract to be voided.

In the BOT contract, the project company is entitled the rights to build and operate the project. If the revenues obtained during the use of the building exceed the cost of construction it is deemed to be profit for the project company. Moreover, it is like an *ujrah* (wage) for the company for operating the project in the form of compensation paid by the landlord. Likewise, the period of operation and utilization is known and agreed upon by the contracting parties. As such, elements of uncertainty and injustice can be tolerated.

Fourth Issue:

In the practice of BOT, the contractor or manufacturer who is responsible for operating the project intends to receive the financial resources from the fees imposed on those tenants who use

³⁵ Zuhaili, Wahbah, *Al-Fiqh al-Islami wa adilatuhu*, 5th ed, (Damsyik: Dar al Fikr, 1989), p493.

³⁶ Ahmad, Ahmad Muhyiddin, “*Tatbiq nizom al-bina' al-tamlik (BOT) fi ta'mir al-awqaf wa al-marafiq al-'ammah*”, (paper presentation, Daulah al 'Imarat al Muttahidah), p13.

³⁷ Husayn, Ahmad Farāj, *Al milkiyah wa nazariyyat al 'aqd fi al-Shari'ah al-Islamiyyah*, (Iskandariyyah: Dar al Jāma'iyyah, 1986), p13.

or consume benefits from the project. However, the total amount of fees derived from the consumers is unknown during the contract³⁸. This situation will lead to ambiguity in the contract.

To counter this ambiguity, it is worth mentioning that the *thaman* (price) of *istisna'* is not the estimated financial resources, but it is the benefit from the project itself for a certain duration. The benefit is independent and it is not based on the payment imposed on the consumer. This situation can be clearly understood through the following example. A man buys a residential complex of rental apartments but he does not know the fare or rental payment that he is going to receive from his future tenants during his purchase. This unknown fare is not a major ambiguity because he only bought the usufruct of the complex. The usufruct of the second leg leasing/sublease is not the issue through which the financial resources are expected to be obtained.

Fifth Issue:

Normally, the construction of a project under the BOT scheme requires a huge amount of funds to cover all the costs and the contractor is unable to afford such huge expenses on his own. This situation will force the contractor to search for a financial support from any financial institution on the basis of *riba*-based loans. This is obviously forbidden in Islamic law.

In this case, the contractor could benefit from any Islamic financing contracts such as *Musarakah*, *Murabahah*, *ijarah* etc of which are Shariah compliant. The application of BOT in MAIWP perhaps does not engage in (cause) this kind of problem since the contractor (LTH) is the financier of the project who can afford all the expenses independently and does not require support from other financial institutions.

Another alternative means is financing through the *Musarakah bi toriq al -tawriq* (securitization) mode. This method permits the contractor to issue *sukuk* (Islamic bonds) to raise funds from the contributions of other companies³⁹. It is practically acceptable to issue *sukuk* before or after the construction of the project. This enables all contributing companies to put in efforts to develop and operate the project which finally would entitle them a share of the financial resources gained from the utility of the project development.

³⁸ Al Usmani, Muhd Taqi, '*Uqud al bina' wa al-tasyghil wa naql al-milkiah min an nahiah al-Syar'iah*', (paper presentation, United Arab Emirate), p10.

³⁹ *Ibid.*, p14.

Sixth Issue:

It is assumed that the concept of Build, Operate and Transfer (BOT) contract resembles *Bai' al inah* which is a type of trading where the seller sells his assets to the buyer at an agreed price to be paid by the buyer at a later date. After that, the buyer immediately sells back the assets to the seller at a cash price, lower than the agreed selling price. According to the majority of Islamic jurists (Maliki, Hambali and Hanafi), *Bai' al inah* is not permissible because it is the *zari'ah* (way) or *hiyal* (legal excuse) to legitimize the practice of *riba* (usury)⁴⁰.

First, it needs to be clarified that the BOT contract is not a form of selling where the seller sells his asset to a buyer. This is because the asset is non-existent during the agreement. It is nearer to the concept of *istisna'* where the seller has to bring the buyer's required item into existence under a specific description made by the buyer.

Second, the BOT contract does not have two separate contracts properly executed. In contrast *Bai' al inah* consists of both a contract of sale and a repurchase. For example, the contract of sale by person A to person B on deferred payment terms and the contract of repurchase by person A from person B on cash payment.

Third, the aim of BOT is to seek financial support for a costly construction project in order to reduce the financial burden of an organization. In return the financier will get profits. There is an exchange of money where it happens to be an exchange of money in unequal quantities with the asset acting only as a formality. The contracting parties are not interested in the transfer and acquisition of ownership but on the exchange of cash. In other words, the parties do not wish to own the asset but to own an amount of money in the form of cash.

Moreover, the BOT contract is not similar to *bai' al inah*, even though the owner of each contract will be getting back the asset at the end of the transaction. This is because BOT does not involve selling of the asset but leasing it, which maintains its ownership, whereas *Bai al inah*

⁴⁰ Abd Razak, Abd Mutalib, *'Uqud al- muamalat al-maliah wa tatbiqatiha al-mu'asarah fi al-Fiqh al-Islami*, (al Iskandariah: Dar al Fikr al Jami'ie, 2007), p75.

does involve selling and the transferring of the asset's ownership occurs⁴¹. It is important to know that the objective of sale is for the seller to transfer ownership (*tamlik*) and for the buyer to acquire ownership (*tamalluk*), this does not occur in BOT. In *bai' al inah*, both parties are uninterested in transferring and acquiring the ownership but rather cash as discussed earlier⁴². From the researcher's point of view it is invalid to have an asset that is not in one's ownership anymore by purchasing it back from the buyer with a lower cost hence opening a backdoor to *riba*.

Seventh Issue:

Other than *bai' al inah*, the BOT contract is considered to have a similarity with *bai' al wafa* in terms of the buyer not being allowed to sell the asset to other parties. In *bai' al wafa* the seller who is in need of cash sells his asset to the buyer with a promise that the seller can redeem the asset from the buyer at the same price he purchased it previously while the buyer does not have the right to sell it to other parties. Dr. Engku Rabiah Adawiyah Engku Ali said that it resembles like a *qard* (loan) with *rahn* (pledging)⁴³. Meaning that when there is *bai' al wafa*, the seller has the authority to claim the asset he has sold by paying the buyer the full price of the asset. It is known as *wafa* because it is a promise of returning back the asset sold when the seller claims it by paying the full amount.

BOT is not like *Bai' al wafa* which is prohibited by the Islamic jurists of *Maliki* and *Hanbali Mazhab* as well as the earlier generation (*mutaqaddimun*)⁴⁴. However, the jurists of *Hanafi* and *Shafie mazhab* consider *Bai' al wafa* as permissible on the basis that it is an effort of preventing one from committing *riba*. Permission for the sale would give relief to the people who were in need to borrow money without upsetting the prohibition of *riba*⁴⁵. For this reason, the Shafi'e scholars considered this contract as a type of pledge which they called *rahn al-mu'ad* (a pledge whose object will be given back)⁴⁶. Currently, Majlis Majma' al Fiqh al Islami in its 7th

⁴¹ Ibid., p81.

⁴² *Bai' al inah dan Tawaruq, Isu-isu dan penyelesaiannya dalam Konteks Kewangan Islam*, (Muzakarah Cendakawan Syariah Nusantara, 2006), p144.

⁴³ Ibid., p149.

⁴⁴ Buang, Ahmad Hidayat, *Studies in the Islamic Law of Contracts: The Prohibition of Gharar*, (Malaysia: Kuala Lumpur, 2000), p153.

⁴⁵ Ibid., p154.

⁴⁶ Ibid., p154.

Session has resolved that *bay' al wafa* is not permissible because it is considered as “a loan that generates benefit” and a “legal trick for committing *riba*”⁴⁷.

First, the BOT contract is not a form of *bay' al wafa* in which the seller is in need of cash but as mentioned it is a form of *istisna'* where the buyer really needs the asset not the cash.

Second, the asset in the BOT contract (i.e. building) is not considered as *rahn* (pledging) in which the seller pays back the asset sold and the buyer returns the asset to the seller, but it is more like *ijarah* (lease) where the asset will be returned back to the owner after the use of its usufruct upon completion of a fixed period upon, along with a certain payment. As it is under the *ijarah* concept, the party that uses the building is not allowed to transfer the ownership of the asset from the original owner to other parties.

Furthermore, the main features of *bay' al wafa'* do not suit the BOT contract. Those main features are:

- 1) In *Bay's al wafa'* the seller and buyer can terminate the contract at anytime. In contrast in the BOT contract full consideration must be taken before the contract can be terminated because it might bring burden to both parties. Since the BOT contract is an agreement mainly between two parties, the termination is only valid if there is consent by both parties. Most of the time, the termination that occurs does not happen because of the project company. This is because the company usually spends a huge amount of money for the project construction. A long term operation period granted by the government to the project company is the essential element to cover all the costs. If the termination happens on behalf the government for example, it will bear the burden of compensating all the costs of the project company⁴⁸. In order to avoid this burden, the termination is always strongly avoided.

⁴⁷ Engku Ali, Engku Rabiah, “Bai' al inah and Tawarruq: Mechanisms and Solutions”, in *Bai' al inah dan Tawarruq: Isu-isu dan Penyelesaiannya dalam Konteks Kewangan Islam*, (Muzakarah Cendekiawan Syariah Nusantara, 2006), p146.

⁴⁸ Al Bahji, 'Isom Ahmad, '*Uqud al-BOT al- toriq li bina marafiq al-daulah al -hadithah*, (al Azarito: Dar al jami'ah al jadidah, 2008), p237.

- 2) The buyer can utilize and benefit from the property bought through *wafa'*. This is similar to the BOT contract where the building constructed by the company can be used for some profits but it is under the other party's supervision. The utilization of the property is granted by one party (e.g government) to another (i.e project company) to pay off all the construction costs before the property is returned to the government. Under *bai' al wafa*, the buyer is allowed to take benefits from the property sold until it is redeemed by the seller. The property is considered as collateral for paying debt⁴⁹.

Eighth Issue:

As in the application of the BOT contract, the first company (i.e government) gives the ownership of *manfaah* (usufruct) to the project company after the completion of construction. However the question about its legality is raised. Is the ownership of usufruct (beneficial ownership) recognized by Shariah?

It is submitted that in Islam there are two kinds of ownership. Firstly, *milkiyah tam* (full ownership), it is when the owner has the absolute right to transfer or dispose the ownership to another person by selling it, giving it as a gift, or contributing it as charity as well as the right to give the *manfaah* without transferring the ownership by leasing it, etc. The other is *milkiyah nāqisah* (partial ownership) in which individuals have the right to the benefits only. This kind of ownership does not allow them to transfer the ownership, as the object is not theirs. They are permitted to use the usufruct for profits but they are not allowed to sell it, contribute it to *waqf* etc, as those practices cause the ownership to be transferred⁵⁰.

From the above discussion, it is clear to say that Shariah recognizes beneficial ownership. Among the transactions that are highlighted by the Shariah to be reasons for having that kind of ownership are *ijarah*: (leasing), *i'arah* (borrowing), *wasiyyah bi al manfaah* and *waqf* (on behalf the *Nazer*). The *Nazer* is only a trustee for *waqf* properties. He has the responsibility of looking after their benefits for the goodness of Muslims⁵¹.

⁴⁹ Niazi, Liaquat, Islamic Law of Contract, (Lahore: Research Cell, Dyal Sing Trust Library, n.d), p220.

⁵⁰ Husayn, Ahmad Farāj, *Al -milkiyyah wa nazariyyah al -'aqd fi al-Shari'ah al-Islamiah*, (Iskandariyyah: Dar al Jāma'iyyah, 1986), p80.

⁵¹ Umar, Muhammad Abduh, "*Tatbiq nizam al-bina' wa al-tamlik (BOT) fi ta'mir al-awqaf wa al-marafiq al-'ammah*", (paper presentation , United Arab Emirate), p3.

Ninth Issue:

What is the position of the construction in the case of default?

The property which is not completed in construction belongs to the landlord of the land which the construction is being conducted. *Hukum Kanun Tanah* (The Lands Laws) states that anything built or constructed on a land is deemed to be in the landlord's ownership even in the case of default⁵². In the case of default, the party that causes it and the possible effects on each party need to be clarified. Most of the time the default is due to natural disasters as well as termination on behalf the landlord (i.e. government) and very rarely happen on behalf of the project company since it has to cover all the construction cost and avoid loss⁵³. If a disaster causes the default, the contracting parties will sign a new contract terminating the project or renewing it. Usually, it needs the mutual consent of two parties to a conclusion. However, if the government causes the default, it has to compensate all the losses that burden the project company. The government shall also obtain compensation from the project company if the project company fails to accomplish the construction within the stipulated time or the project company breaches the 'aqd (contract) without the permission of the other party⁵⁴.

Tenth Issue :

The BOT contract is like combining two contracts in one i.e *istisna'* and *ijarah*. With regards to the BOT contract, the project company will construct a building according to the forms, designs and plans desired by the first party (i.e. government). The BOT contract is a kind of *istisna'* contract where a subject matter or object is requested by the so called buyer that does not exist at the time of the contract is concluded. It can also be a contract with a manufacturer to produce a specific commodity in a specific way⁵⁵. After the construction is complete, the government grants the project company with the right to utilize the project for a specified time through the

⁵² Mr Sanusi, Interview by Saidatolakma bt Mohd Yunus, (Tingkat 11, Bangunan PERKIM, No. 150, Jalan Ipoh, Kuala Lumpur, 2nd April 2010)

⁵³ Al Bahji, 'Isom Ahmad, 'Uqud al-BOT al-toriq li bina marafiq al- daulah al-hadithah, p237-238.

⁵⁴ Ibid., p234.

⁵⁵ Al Amine, Muhammad al Bashir, *Istisna'* (Manufacturing contract) In Islamic Banking and Finance Law and Practice , p7.

second contract which is *ijarah*. At the end of the period, the leased building will be given back to the government along with the lease payment. The question is: Is combining multiple contracts permissible from Shariah perspective?

The concept of combination of contracts means a process that involves two or more parties leading to the conclusion of more than one contract⁵⁶. The combination is permissible by Shariah unless it encounters the Islamic restriction which causes a prohibition in its practice⁵⁷. However there are certain rules and regulations imposed by Shariah to regulate its permissibility.

- 1) None of the cases that are prohibited by Shariah can be included in the combination of contracts. For example, combining sale and lending in a contract. It is based on the directives of Prophet Muhammad s.a.w which forbade combining lending with selling. Prophet s.a.w said “it is not permissible to give a loan and sell at the same time...”⁵⁸.
- 2) It should not be utilized as a trick for committing *riba* such as *bai'al inah* and *bai' al wafa* as discussed above.
- 3) It should not be used as an excuse for a means of practicing *riba*. For example when both parties conclude a lending contract, but at the same time impose excess repayment in terms of the quality and the quantity on the borrower, or stipulate other conditions on the borrowing such as giving something to the lender be it money, accommodations, car, etc . The *fuqaha* agree that when there is a stipulation in the loan contract that there should be a reward to the lenders, the contract becomes null and void. Therefore it is considered as *riba*.
- 4) The combined contracts must be free from the element of contradiction with regards to the ultimate goals and rulings. For example, granting a property to a person as a gift but selling it back to him simultaneously or combining *Mudaraba* with lending the *Mudaraba* capital to the *Mudarib*. The contracts that contradict each other in their rulings and effect cannot be combined in the same transaction⁵⁹.

From the above discussion, there is no element of dealing in *riba* as far as the BOT contract is concerned. It is a financing contract based on the concept of *istisna'* and *ijarah* which are both

⁵⁶ Shari'a Standards, (Accounting and Auditing Organization for Islamic Financial Institution, 2003), p451.

⁵⁷ Ibid.

⁵⁸ Al Tarmidhi, Muhammad bin Isa, *al Jami' as sahih*, (Beirut: Dar Ihya al Turath al 'Arabi, n.d), No. 3/526.

⁵⁹ Shari'a Standards, p452.

permissible in practice⁶⁰. It is observed that the above mentioned conditions are not violated in the implementation of BOT. Furthermore the purpose of the BOT contract in general is not in contradiction with the objectives of Shariah such as preservation of *mal* (property), transparency, justice and mutual concerns among the contracting parties where all are in a win-win situation.

Eleventh Issue:

The costs of delays during construction due to the force majeure should be covered by insurance otherwise it is borne by the project company. However, a large number of contemporary Muslim jurists regard modern commercial insurance invalid and incompatible with the injunctions of Islamic Law⁶¹. In insurance, the buyer of the insurance policy does not know what he has bought with his premium. The time of occurrence of events is also uncertain for the parties. As such, insurance is primarily a *gharar* contract.

Instead of insurance, the *takaful* scheme can be applied. *Takaful* or “mutual guarantee” is generally considered as an Islamic alternative to the modern insurance business. *Takaful* is also known as solidarity of *mudarabah* since the contributions in *takaful* are invested on the basis of *mudarabah*⁶². A participant, while entering *takaful*, concludes two contracts:

- (i) The contract of donation or *tabarru'* whereby a person undertakes to donate a portion of his contribution in a *tabarru'* fund established to provide *takaful* benefits to any participant who suffers some loss or damage.
- (ii) The contract of *mudarabah* whereby a person undertakes to pay a portion of his contribution to the company for the purpose of business on the basis of *mudarabah*.

Both Islamic concepts *mudarabah* and *tabarru'* give satisfactory from the *Shariah* point of view. Furthermore, *takaful* is free from the element of *riba* because the participant or the policyholder does not get a fixed return on the Participant's Account (P.A.), instead he gets a varied income. His capital is subjected to the principle of profit and loss sharing as enunciated in the Prophetic

⁶⁰ Mansuri, Muhammad Tahir, *Islamic Law of Contracts and Business Transaction*, (New Delhi: Adam Publisher and Distributors, 2007), p236.

⁶¹ *Ibid.*, p103.

⁶² Chaudry, Muhammad Sadiq, *Islamic Insurance (takaful) concept and practice*, *Encyclopedia of Islamic Banking and Insurance*, (London: Institute of Islamic Finance and Banking, 1995), p198.

tradition “profit goes side by side with the risk”. The amount accumulated in the P.A. is invested in various forms of business strictly in accordance with Islamic investment law⁶³.

It is submitted that *takaful* is not a contract of *gharar*⁶⁴. The element of uncertainty and lack of knowledge is not inherent in *takaful* yet it is inherent in insurance because the uncertainty relates to the occurrence of events of peril (i.e the subject matter of contract, the acquisition of amount of insurance, its quantity and time of payment).

Twelfth Issue:

BOT contracts must be supervised by Shariah Committee executive officers for Shariah compliance.

The application of BOT in developing *waqf* land by MAIWP has been discussed and approved in the meeting of the Federal Territory Shariah Laws Consultative Committee (*Jawatankuasa Perundangan Hukum Syarak Wilayah Persekutuan*) at Menara Pusat Islam, Kuala Lumpur⁶⁵. This committee was established on 19th February 1974 and among its jurisdictions is to make decisions on rules governing problems or issues which require an Islamic opinion. The committee consists of twelve members and among them are Dato’ Haji Wan Zahidi b Wan Teh (*Mufti* of Federal Territory) the chairman, Tan Sri Datuk Sheikh Ghazali bin Hj Abdul Rahman, Dato’ Haji Md. Salleh bin Haji Ahmad, Prof. Madya Dr. Muhammad bin Arifin, Tuan Haji Mohd Alwi bin Haji Yusoff and Tuan Haji Ghazali bin Mohd Taib⁶⁶.

Conclusion

The above discussion indicates that the method of Build, Operate and Transfer (BOT) in developing *waqf* assets is a viable Shariah compliant means. The BOT contract could be the solution for inadequate resources in financing the development of *waqf* properties. It may also be

⁶³ Mansuri, M. Tahir, *Islamic Law of Contracts and Business Transactions*, (New Delhi: Adam Publishers and Distributors, 2007), p114.

⁶⁴ *Ibid.*, p115.

⁶⁵ Eidey El Nemeiry, interviewed by Saidatolakma bt Mohd Yunus, (Tingkat 11, Bangunan PERKIM, No. 150, Jalan Ipoh, Kuala Lumpur, 14nd April 2010).

⁶⁶ 2008 Annual Report, *Majlis Agama Islam Wilayah Persekutuan*, p98.

a new and enhanced alternative for *waqf* institutions to expand the property for beneficial gains of revenues and profits. As a result, other development projects can be done through the revenues obtained for the continuous benefits of the people. Through the BOT scheme, many companies will collectively combine their efforts for development which will consequently ease the burden of *waqf* institutions and provide them with efficient skills to run projects until the end of their concession periods. It is worth noting that the combination of other contracts that are Shariah compliant such as *istisna'* and *ijarah* would contribute towards the success and validity of the BOT scheme although certain Shariah issues may arise during practice. There are a number of identified Shariah concerns for BOT transactions as discussed in this paper. Those issues and their solutions should be taken into consideration in order make sure there is no violation of Shariah principles.