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The Legal Nature of Build-Operate-Transfer (BOT) Contracts in Algerian legislation

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Abstract:

Partnership between the public and private sectors is regarded as one of the modern methods of managing various public services, as it is necessary to achieve economic growth and maintain the permanence and continuity of public service operations.

As a result, several types of contract have emerged to activate the role of the private sector, including the Build-Operate-Transfer (BOT) contract as one of the mechanisms enabling the State to establish and manage major projects and create an investment climate without burdening its budget.

In this perspective, this study aims to present Bot contracts and their associated characteristics and what distinguishes them from other partnership contracts, in addition to clarifying their legal adaptation while highlighting the most important advantages resulting from the application of this type of contract.

In this perspective, the aim of this study is to present Bot contracts and their associated features and what distinguishes them from other partnership contracts, as well as to clarify their legal adaptation, while highlighting the most important benefits of using this type of contract.

Keywords: Bot contract, concession contracts, infrastructure project.

Introduction

In recent times, there has been increasing competition among countries to improve their infrastructure projects and public utilities in general. This is to provide their citizens with a high level of various services and achieve a better life for them. Governments usually rely on their budgets to implement these large-scale projects. However, governments have recently begun to withdraw from these projects, which are a burden on their budgets, and to give the private sector the full opportunity to undertake the majority of these projects. In fact, they stand by the private sector to enable it to carry out these projects by granting it many incentives, advantages, and facilities to enable it to play this vital and primary role. On the other hand, they have set a set of controls to protect the public interest and to ensure the efficiency of the private sector and its ability to accomplish these huge works. This is because the economic power of the state has become one of the greatest powers in the present time. This power cannot come out of nowhere, but it is a positive reaction to the establishment of economic projects and public service projects to provide services to citizens at home and support the state's economic position abroad ¹

Countries have found that BOT contracts of various types are the best way to achieve this goal, because they avoid the need for countries to resort to borrowing or debt from the outside world while preserve their foreign currency. Through this type of contract, countries can provide basic services and meet the needs of citizens for public utilities, relieve the burden on the state and allow it to save its resources to spend on other expenses. Given the novelty of this type of

contract and the absence of a specific law for it in Algerian law, it was necessary to provide a general concept of it and highlight its various characteristics that distinguish it from other administrative contracts, in addition to determining the position of the Algerian legislator in defining this type of contract, as well as clarifying its legal adaptation, which makes our central question in this article revolve around **what is meant by the Build-Operate-Transfer contract? And what is the legal nature of this type of contract?**

The analytical method was used to collect information, analyze it, and discuss it to reach general concepts for these contracts. The descriptive method was also used to describe some contracts of various types.

Importance of the subject:

The importance of the research topic is evident from the fact that this type of contract is the ideal way to provide infrastructure services and the role it plays in economic development, whether domestically or internationally. This prompts us to search for its legal adaptation.

- The importance of the subject is also evident from the lack of legal or legislative texts governing this type of contract in Algerian law.

Research objectives

We aim through this study to try to give a concept of the BOT contract and to clarify its legal adaptation from other partnership contracts, highlighting the various characteristics that distinguish this type of contract, and to evaluate this approach as a means of private sector intervention in the establishment and exploitation of state facilities.

Accordingly, we divided the research topic according to its scope into two sections:

Section One: The Conceptual Framework of the BOT Contract

Section Two: The Legal Adaptation of Build-Operate-Transfer (BOT) Contracts

Section One: The Conceptual Framework of Build-Operate-Transfer (BOT) Contracts

BOT contracts, in their various forms, are modern methods that encourage the private sector by providing it with many advantages, incentives, and facilities to participate in financing infrastructure projects and service utilities that require large investments that may be difficult for the state's general budget to provide. This includes financing, establishing, operating, updating, and rehabilitating these projects. Therefore, this contract, by its nature, is subject to change and development in its various organizational, legislative, and economic aspects,

through its multiple forms and diverse activities under the free economic system and the mechanisms of competition in open markets locally and internationally ². In this section, we will try to clarify the nature of BOT contracts and address the position of the Algerian legislator on this definition (subsection one). Then, we will distinguish this type of contract from other similar contracts (subsection two).

Subsection One: The Nature of BOT Contracts

To have a clearer vision of the concept of this contract, especially in the context of Algerian law, we will discuss in this subsection the jurisprudential definition of the BOT contract and the legislative definition of it, highlighting the position of the Algerian legislator on these definitions.

Sub-subsection One: The Jurisprudential Definition of the BOT Contract

The French professor J.M. Loncle defined the BOT concession contract as "a contractual process through which a number of private companies come together under the name of the project company, which undertakes the financing, construction, and operation of a public utility granted by the state for a specific period, on the condition that the project company is committed to returning the project to the granting authority at the end of the contract period ³.

Professor J.B. Auby defined the BOT concession contract as "a contractual structure for the private financing of public sector projects, where the contractor undertakes to finance the construction of the project (construction) and then undertakes to operate or exploit the project for a specified period (operation) and at the end of the period is committed to returning the project to the granting authority (transfer) ⁴

Jurists of public and private law have different views on the definition of BOT contracts. Some public law jurists define it as a contractual process through which a number of private companies come together under the name of the project company, which undertakes the financing, construction, and operation of a public utility granted by the state for a specific period, on the condition that the project company is committed to returning the project to the granting authority at the end of the contract period ⁵.

Another group of jurists defines it as "a contract by which the state or one of its administrative bodies undertakes to a company, whether national or foreign, from the private sector called the project company, a concession to carry out a project, which is often one of the state's infrastructure projects related to one of its public utilities. If the state approves, the project company, according to the economic feasibility studies it presents for the project, designs, builds, owns, and commercially exploits it for a specific period specified in the contract. It is worth

noting that the state always seeks to shorten the concession period as much as possible, while the project company usually works to obtain the longest possible period, in order to be sufficient to recover the construction costs as well as achieve a reasonable profit from the project's operating and commercial exploitation. At the end of the specified period agreed upon between the state and the project company, the project company delivers the project to the state in an acceptable condition and with the possibility of regular and continuous operation without compensation ⁶.

Some private law jurists have defined BOT contracts (B.O.T) as: "**An agreement by which the state or one of its administrative units undertakes to a company, whether national, foreign, or joint, whether from the public or private sector, to establish a project to meet the general needs of individuals at the expense of the company, and it manages it to provide the service to the beneficiaries for a period and under specific conditions and under the supervision of the state or the contracting administrative body and its control, and then transfers the project to the state or the contracting administrative body in good condition at the end of the period** ⁷".

Sub-subsection Two: Legislative Definition of BOT Contracts

Definitions from various legislations:

French law: Article 1 of the French decree No. (599-2004) of July 17, 2004, as amended by law No. (735-2008) of July 28, 2008, and by law No. 179-2009 of February 17, 2009, defines a BOT contract as: "An administrative contract by which the state or a public institution of the state entrusts to a third party, for a fixed period, a function during the period of depreciation of the investments or the method of recovering the financing, in order to carry out a comprehensive task related to the construction, or conversion, maintenance, preservation, operation, management, equipment or intangible assets necessary for the public service, and to finance it all or in part, with the exception of a total contribution to the capital. Its subject must be based on all or some of these works, equipment or intangible assets, as well as on the performance of services to contribute to the direct operation of the public service by a public person in the performance of the public service that it carries out under its responsibility ⁸".

Chinese law: Article 2 of the Legal Rules on Foreign Investment in BOT Projects defines BOT projects as: "Infrastructure projects that are built, operated and transferred by foreign investors. The government usually grants the authority in a BOT project through a concession agreement for a fixed period. The project company is responsible for its financing, management and maintenance. After the expiration of the concession period, the project company transfers the BOT project facility to the government in good condition and without any burden ⁹".

Definitions from international organizations:

United Nations Commission on International Trade Law (UNCITRAL) defines the BOT system as a form of project finance in which a government grants a group of investors, referred to as the "project financial consortium", a concession to design, build, operate, manage and commercially exploit a specific project for a number of years sufficient to recover the construction costs and achieve a reasonable profit from the revenues generated by the operation and commercial exploitation of the project or any other benefits granted to them under the concession agreement. At the end of the concession period, the ownership of the project is transferred to the government without any cost or at a reasonable cost that has been agreed upon in advance during the negotiations for the granting of the project concession ¹⁰.

Sub-subsection Three: The Position of the Algerian Legislator on the Definition of BOT Contracts

Although Algeria does not use the term "BOT" in its laws, we can find this legal formula with its legislative and regulatory character in various texts. For example, Article 1 of Executive Decree 96-308 concerning the granting of motorway concessions states that: "The construction, operation, maintenance and development of motorways and their accessories are subject to the granting of a concession ¹¹ ... Article 29/1 of the Model Specifications adds: "At the end of the period resulting from the provisions of Article 28 above, and by virtue of this termination only, the grantor shall replace the concessionaire in all rights and obligations related to the concession, and shall immediately take over the equipment, devices and accessories..."

From this article, we can deduce the elements of a BOT contract: construction, operation and transfer.

The same meaning is found in Executive Decree 97-475 of December 8, 1997, concerning the granting of concessions for small and medium-scale agricultural irrigation facilities and infrastructure, in Articles 2 and 3, which grant public institutions and enterprises and any legal entity governed by private law that has the professional qualifications, the concession to build, operate, maintain and exploit small and medium-scale agricultural irrigation facilities and infrastructure.

Law 02-01 on electricity and gas distribution by pipelines also includes this formula in Article 2, which states: "A concession is a right granted by the State to an operator to use and develop a network, over a defined territory, for the purpose of selling electricity or gas distributed by pipelines." Article 7 adds that: "New electricity production facilities are built and operated by any natural or legal person governed by private or public law who holds an operating license ¹².

The Algerian legislator also opened the door to contracting in this way by issuing Law No. 05-12 of August 4, 2005, on water, which states in Article 17: "Artificial public water property also includes facilities and structures that are

considered to be the property of the State without compensation after the expiry of the concession or the authorization for construction and operation concluded with a natural or legal person governed by public or private law."

In application of Articles 76 and 78 of Law 05-12, Executive Decree 11-340 was issued, which defined the concession for the use of water resources to build structures on surface water barriers and lakes to develop sports and recreational navigation activities, in its Article 1.

Article 13 ads: "At the end of the concession, the structures built under this concession shall be handed over to the State free of charge in accordance with the legislation in force", the same meaning is found in Article 11 of Executive Decree 11-341 ¹³.

We can again see the formula of the build-operate-transfer contract in Order No. 08-04 defining the conditions and methods for granting concessions on land belonging to the State's private domain and intended for the realization of investment projects ¹⁴, in its Articles 1 and 4.

Article 19 of Law No. 08-14 of July 20, 2008, amending and supplementing Law No. 90-30 of December 1, 1990, containing the National Property Law, refers to this contract in a clear and comprehensive way, as Article 64 bis was amended to read as follows: "The granting of a concession for the use of public national property, as provided for in this law and the legislation in force, constitutes the contract by which the public authority owning the property, called the grantor, grants to a legal person or natural person, called the concessionaire, the right to exploit an accessory of the natural public domain, to finance or build and/or operate a public facility for the purpose of a public service for a fixed period, at the end of which the facility or equipment, the subject of the concession, shall revert to the grantor."

By reading the above texts, we can see that all the elements and stages involved in the implementation of a BOT contract are present: construction or building, operation, and then the return of the facilities to the State after the expiry of the concession contract.

From the above definitions of the BOT contract, we can deduce the characteristics that distinguish this contract:

1. A BOT contract is concluded between persons governed by public law and persons governed by private law, and its purpose is to create a public service and provide a public service to the public. In addition, the contracting administration has a right of control and supervision throughout the duration of the contract.
2. Private financing of the project is one of the most important elements in the BOT contract system.

3. Recovery of investment and profit maximization are the drivers of the operating period, motivating and encouraging private entities who are undoubtedly driven by profit and economic return.
4. A BOT contract is a middle ground between the privatization of a public service and its abandonment to private entities, while also allowing the state to maintain control over the service.
5. BOT contracts are typically associated with long-term infrastructure projects.

Subsection Two: Distinguishing BOT Contracts from Similar Contracts

This section will highlight the similarities and differences between BOT contracts and other contracts that involve private sector participation in public projects. These include:

Sub-Subsection One: Distinguishing BOT Contracts from Some Classical Contracts

First: Concession Contracts vs. BOT Contracts:

A concession contract is an agreement in which the administration entrusts a natural or legal person with the operation of a public service.

The Algerian legislator defines it in Article 21 of Law 83-17, as amended and supplemented by Order 96-13, concerning the Water Law, as follows: "A concession, within the meaning of this law, is a public law contract by which the administration entrusts a public or private legal person with the task of ensuring or providing a service of public utility. In this respect, it can be granted to public bodies and institutions, local authorities and legal persons governed by private law ¹⁵.

Instruction 394/842 of September 7, 1994, concerning the concession and leasing of local public services, defines the concession as follows: "...a contract by which the competent administrative body entrusts an individual or a private company with the management and operation of a public service for a specified period of time, using workers and funds provided by the concessionaire "the contractor" on its own responsibility, in return for fees paid by the users of its services, within the framework of the legal system governing this service ¹⁶.

From these definitions, we can conclude that both types of contracts share the following characteristics, the management and operation of the service is entrusted to the private sector, the concessionaire bears the burden and risk of operation throughout the specified contract period and ownership remains with the administration in both contracts.

Concession contracts and BOT contracts also agree that both types of contracts obtain their financial rights from the users of the service. This prevents the project company from receiving its financial rights from the administration in

BOT contracts if some contracts or laws stipulate that the state is obligated to purchase the service or product directly from the project company, especially in vital areas such as the purchase of the product of companies that build power or water plants, which then sell it to the public.

Although most jurists agree that BOT contracts are based on concession contracts, they differ from them in several fundamental aspects:

In BOT contracts, the investor designs, builds, and bears the costs of the project, purchases the equipment and machinery used in the project, and thus assumes a huge economic burden. Therefore, concession contracts are management contracts, while BOT contracts are financing contracts combined with management contracts.

BOT contracts also differ from commitment contracts in terms of risk-bearing. BOT projects are financed by financial institutions without recourse - or with limited recourse - to either the project company or the contracting authority, because the project's revenues are the guarantee. The risks are also usually distributed among the parties involved in the project, including contractors, operators and suppliers, unlike in commitment contracts where all risks associated with management are borne by the contractor.

In addition, the fees charged by the contractor directly from the users are symbolic compared to those charged by the project company in order to cover construction and operating costs as well as the substantial profits it earns

Second: Public Works Contracts vs. BOT Contracts:

Public works contracts occupy an important place in the methods of creating public projects and in the theory of administrative contracts.

Public works contracts or general contracting contracts are contracts by which the contractor undertakes to carry out construction, renovation or maintenance work on a property on behalf of a public legal entity in order to achieve a public interest, in return for a price agreed upon by the administration.

This is almost the same definition as that provided in Article 13 of the Public Procurement Code, which states that a public works contract is "the construction, maintenance, rehabilitation, renovation or demolition of a building or part thereof, including the common facilities necessary for its use...¹⁷.

The conditions of a public works contract are that the subject matter of the contract must be real estate, that the work must be carried out on behalf of a public legal entity, and that the work covered by the contract must be aimed at achieving a public benefit.

The BOT contract is similar to the public works contract in that both contracts are executed for the benefit of the relevant administrative authority for a specific agreed price.

However, the two contracts differ in several respects:

In a public works contract, the contractor constructs the project and hands it over to the administration to manage on its own. Therefore, the contractor's task ends with the construction of the project. In BOT contracts, however, the contractor builds and manages the public service¹⁸.

In addition, to the differences in contractual duration, B.O.T contracts have longer durations compared to public works contracts.

Sub-subsection Two: Distinguishing BOT Contracts from Some Modern Contracts

First: Privatization Contracts vs. BOT Contracts:

There are many definitions of privatization, some define it as the process of transferring ownership of public projects from the public sector to the private sector. Others define it as an administrative contract concluded by the administration as a first party with another party from the private sector as a second party. Under this contract, the first party disposes of the sale of a state-owned project by transferring its ownership to the second party in whole or in part, as a result of this contract, the second party is considered a shareholder in the capital and a partner in the management of the company in proportion to its ownership. In the case of a complete transfer of ownership of the project to the second party, the administration's relationship with the project ends completely¹⁹.

According to Order No. 01-04 of August 20, 2001, on the organization, management and privatization of public economic institutions, Article 13 defines privatization as: "Any transaction that involves the transfer of ownership to natural or legal persons governed by private law other than public institutions. This ownership includes:

- All or part of the capital of the institution held directly or indirectly by the state or legal persons governed by public law, through the transfer of shares or social shares or subscription for a capital increase.
- Assets that constitute an independent operating unit in state-owned institutions.

BOT contracts and privatization contracts are similar in that both public assets are owned by the private sector. However, they differ in that BOT contracts focus on the management of a public service for a specified period by the contractor, with the state retaining control over it by setting conditions and rules related to its establishment and operation, as well as the right to monitor and supervise it until its ownership is transferred to the state at the end of the concession period.

Second: Partnership Contracts vs. BOT Contracts:

A public-private partnership (PPP) contract is defined as a long-term contract between a public sector institution and a private sector institution, with or without financing, to build and operate a public facility. The contract can cover the provision of a public service and specify the expected results, responsibilities, investments, risks and profits. The aim of all this is to improve the quality of services provided to citizens.

The Algerian legislator has not defined the partnership contract, unlike the French legislator who defined it in Article 01/01 of Law 2008-735.

Although BOT contracts and PPP contracts agree on the tasks performed and the parties involved, which aim to finance and manage infrastructure projects, in addition to the long contractual period, some consider BOT contracts to be a model of PPP contracts. However, the two contracts differ in terms of bearing financial, operational and management risks. In BOT contracts, these risks are borne by the project company, which can manage all the revenues generated by the project throughout the contractual period in order to achieve profits and cover the costs of the project. In PPP contracts, the risks, investments and profits are shared ²⁰.

In addition, the financial consideration in PPP contracts is determined in the form of a fragmented price paid by the administration periodically, monthly or semi-annually, throughout the duration of the contract.

Subsection three: Forms of BOT Contracts

BOT contracts are not limited to a single form, but rather take on various forms depending on the project.

Sub-subsection one: Contractual Forms for New Projects:

1. Build-Operate-Own-Transfer (BOOT) Contracts:

The BOOT contract includes an additional "O" for "Own," indicating that the investor will own the project after its completion.

The investor is responsible for financing, maintaining, and operating the project for a period agreed upon in the contract, during this period, the investor collects fees from users of the project. At the end of the contract period, ownership of the project is transferred to the contracting party ²¹.

The BOOT contract differs from the BOT contract in that the private sector does not retain ownership of the project throughout the operating period, as is the case with the BOOT contract. Under the BOOT system, the project company does not own the facility or project itself, but rather the elements it created, such as tools, equipment, and machinery.

2. Build-Operate-Renewal (BOR) Contracts:

The term "Renewal" refers to the renewal of the project, under these contracts, the project is built and operated for an agreed-upon period of time, this often leads to increased project benefits, increased user numbers, and increased fees. The state then enters into renewed negotiations with the investor to obtain another period of time to renew the concession contract.

This is used in cases where it is not possible to increase the concession period due to legal or regulatory obstacles ²².

3. Build-Own-Operate (BOO) Contracts:

Under the BOO contract, the private entity is obligated to build and operate the public facility without transferring ownership of the project to the state at the end of the contract period. Instead, the concession is renewed or the project reaches its end of life. The state also has the right to contract with a new private entity to manage the project through a public tender or bidding process, in which the best bidder is selected. In all cases, the government receives a share of the project's revenues in exchange for granting the concession and supporting the project with various entities.

Some Legislators argue that this type of contract is a form of total privatization, but using the BOT approach.

4. Build-Lease-Transfer (BLT) Contracts:

The project company builds the project, then owns it for the duration of the contract, after which it leases it to the administrative entity, which operates it itself or through others. In return, the project company receives a share of a financial amount on a regular basis throughout the duration of the contract.

Mohamed El-Roubi argues that the correct term is "construction and leasing of exploitation, and delivery," as the project company does not own the facility until it can lease it to the management entity.

Sub-subsection two: Contractual Forms for Existing Projects:

1. Modernize-Own-Operate-Transfer (MOOT) Contracts:

In this type of contract, the private company undertakes to modernize and technologically upgrade the project according to international standards. It then operates the project for a specified period of time, after which it returns it to the owner at no cost ²³.

However, it requires the private entity to train public sector workers on the new equipment and programs before the transfer. This contract contributes to the transfer of modern technology to the public sector.

The Algerian legislator used this formula in Article 102 of Law 05-12 on Water, which states that "The holder of the public water and sanitation service

concession is responsible for the operation, maintenance, renovation, rehabilitation, and development of the facilities and structures of the artificial public water domain within the territorial limits of the concession."

This formula was also used to define the concession in Law 01-02 on Electricity and Gas Distribution.

2. Lease-Renewal-Operate-Transfer (LROT) Contracts:

This type of contract is characterized by the leasing of the project from the owner, followed by its renovation, operation, and return to the owner at no cost after the expiry of the specified lease period.

These are the most important forms of BOT contracts. There are other types that cannot be listed exhaustively, but they all share the goal of involving the private sector in the construction and management of public facilities. It is worth noting that the fundamental difference between BOT contracts and their derivatives lies in the extent of the rights enjoyed by the project company and the extent of its powers during the exploitation period. This is a point on which scholars agree²⁴.

Section Two: Legal Adaptation of BOT Contracts:

The legal adaptation of BOT contracts is essential to determine the legal system governing the contract and the judicial authority competent to resolve disputes. It requires defining its nature from both a jurisprudential and legal perspective.

Subsection one: Jurisprudential Adaptation of BOT Contracts:

Some consider BOT contracts as administrative contracts due to the state's privileges in public authorities. Others view them as civil law contracts considering the status of foreign companies. However, some argue for adapting each contract individually, rendering BOT contracts of a unique nature.

Sub-subsection one: Administrative Nature of BOT Contracts:

First, Internal Administrative Contract: Many legal scholars in administrative law tend to classify these contracts as administrative contracts. They cite the following evidence:

a. BOT contracts are an extension of concession contracts: The Egyptian Administrative Court ruled that " The public utility contract is nothing but an administrative contract in which an individual or company undertakes, at its own expense and under its responsibility, to perform a public service for the public, upon the order of the state or one of its administrative units, and according to the conditions set forth for it, for a specified period of time." Supporters of this view argue that the reasoning of the judgment applies perfectly to BOT contracts, which

confirms that BOT contracts are new in name only, but have been known for a long time.

b. BOT contracts are subject to the criteria of the administrative contract, which are:

- The presence of a public entity as a party to the contract.
- The connection of the contract to the public service and thus the realization of the public interest.
- The use of public law methods (*Les clauses exorbitantes*), such as the administration's right to supervise and monitor the implementation of the contract ²⁵.

Some argue that there are state privileges that must be considered non-negotiable matters and governmental duties necessary to achieve the welfare of the people. These can only be realized through the exercise of legislative and administrative powers by the state. In return, the project company or investor receives privileges not found in private law, such as the right to request financial rebalancing.

Supporters of this view also argue that the fact that the administration entrusts the project company with the creation and management of a public utility, which it could have created itself, is an exceptional matter that proves the administrative nature of the contract.

c. It is difficult to say that the general theory of contracts in private law applies to such contracts: Because this would lead to an unnatural result, which is the consecration of equality between the public interest and the private interest, which would lead to an imbalance between the two interests and thus the stoppage of the public service ²⁶. As a result, these views have several implications:

- The necessity for the administration to follow the public procurement law.
- If the contract does not contain a specific provision on arbitration, it is subject to the administrative courts and the Council of State, as they are the original body for resolving such disputes.

This makes the administrative nature of these contracts undeniable.

Sub-subsection two: BOT Contracts as Civil Contracts

Supporters of this view argue that BOT contracts are civil contracts. They cite the following evidence:

- BOT contracts do not meet the criteria of administrative contracts, especially the criterion of exceptional and unusual conditions in private law. The administration contracts with the project company as if it were an ordinary individual and is therefore subject to the provisions of civil or commercial law.

- The argument for the administrative nature of BOT contracts contradicts the ownership of the project company. When the state transfers ownership of the land to the project company, this transfer is the best evidence that it is not subject to public law.
- In addition, the arbitration provisions negate the administrative nature of these contracts. The arbitration provisions did not give BOT contracts an administrative character and considered them special contracts.
- The administrative nature of BOT contracts contradicts the policy of encouraging investment. The adoption of this classification by countries will scare away investors and discourage them from investing their money²⁷ in this type of contract.

Sub-subsection three: Special Nature of BOT Contracts

Contrary to the two previous approaches, a third school of thought takes a middle ground, considering BOT contracts to be contracts of a special nature. This group cites the following evidence:

- Although this contract has roots in concession contracts, there are many fundamental differences between them. BOT contracts are now concluded after tough negotiations between the parties, and they are a new concept in legal studies, based on the use of private sector financing to create joint ventures through special financial consortia called the project company.
- The proponents of this approach add that these contracts require the development of new laws to govern many matters, including the ownership of the land on which the project will be built, the extent to which the project's revenues can be transferred, the procedures for settling disputes amicably, and the procedures for returning the project to the state, and the fees that the contractor is entitled to receive.
- Some argue that the special nature does not stem from the fact that they are public law or private law contracts, but rather that this specificity is based on their subject matter and their link to the development plans of the host country²⁸.
- Therefore, it is difficult to develop a limited and fixed adaptation for these contracts, and it is necessary to review each contract on a case-by-case basis for the following reasons:
 - ✓ The absence of any reference to such contracts in the texts of the civil code.
 - ✓ The lack of legal regulation to deal with this type of contract.
 - ✓ These contracts come close to administrative contracts because they relate to a public service, and they require the state to appear as a public authority, in addition to the fact that they do not contain exceptional conditions and therefore fall outside the scope of administrative contracts.

Subsection two: The Algerian Legislative Position on Adapting BOT Contracts:

After reviewing the doctrinal differences regarding the legal adaptation of this contract and in the absence of a comprehensive and precise Algerian legal system specifically for it, along with a lack of judicial precedents to rely on, despite the presence of several provisions, whether decrees or scattered laws regulating this concession, the legislator has not adapted it. Considering that administrative contracts in Algeria are legally defined, either directly or indirectly:

In the first Case: Some legal texts consider such contracts to be administrative, such as Article 04 of Executive Decree No. 89-01 dated January 15, 1989, which regulates the procedures for determining the specifications related to the state's monopoly in foreign trade. It states: "The state monopoly concession for foreign trade is an administrative contract, whereby the state determines the consequences and conditions to which the concessionaires are subject, and clarifies their rights and obligations towards the state ²⁹."

This is further affirmed by Order No. 08-04 dated September 1, 2008, which defines the conditions and procedures for granting concessions on state-owned lands aimed at implementing investment projects. Article 10 of this order confirms the same adaptation: "The aforementioned concession is consecrated in the aforementioned Article 04 by an administrative contract prepared by the State Property Administration..." This is the same meaning conveyed by Article 17 of Executive Decree 19-152.

Additionally, the Algerian legislator considers this type of contract to be part of public law, especially in the field of water resource utilization. Article 76 of Law 05-12 stipulates: "The concession for the use of water resources belonging to public water properties, which is considered a contract of public law for every natural or legal person subject to public law or private law..."³⁰

It is noteworthy that all relevant legal texts consistently utilize the term (Concession) to refer to this type of contract.

In the second case, the legislator may grant jurisdiction over disputes related to administrative contracts to the administrative judiciary. This is the rule adopted by the Algerian legislator, who embraced the organic criterion in Article 7 of Ordinance 66-154, which contains the Civil Procedure Code. This is paralleled by Article 800 of Law 08-09 relating to the Civil and Administrative Procedure Code ³¹.

However, the Algerian legislator's reliance on the organic criterion raises several issues related to the nature of the activity regulated by this concession. The mere presence of a public entity as a party to the dispute does not always imply an administrative act, even though the administrative judge is competent to rule on the substance of the dispute. This raises the question of determining the applicable law.

Considering that B.O.T contracts are administrative contracts - concession contracts- this does not prevent them from being considered international contracts when concluded between the State or one of its entities and a foreign project company, according to the legal criterion. If we apply the economic criterion, they are considered international contracts because they involve the movement and transfer of capital, goods, and services across borders.

In this context, we note that the Algerian legislator has not explicitly defined the international contract. However, we can rely on some of the foundations included in the Algerian legal system, such as Article 02 of Legislative Decree 93-09, which amends and supplements Article 458 bis of Ordinance 66-154: "Arbitration is considered international, within the meaning of this chapter, when it concerns disputes relating to an international commercial interest and when the seat or domicile of at least one of the parties is abroad." This article indicates that the Algerian legislator combined the legal and economic criteria to confer international status on the contract ³².

However, this changed under Law 08-09, which contains the Civil and Administrative Procedure Code. Article 1039 of this law states: "Arbitration is considered international, within the meaning of this law, when it concerns disputes relating to the economic interests of at least two states."

It is noteworthy from this text that the Algerian legislator, under this law, adopted the economic criterion without the legal criterion. This is because it required that the dispute be related to the economic interests of two states. This was perhaps inspired by the French legislator and the European Convention on International Commercial Arbitration ³³.

Conclusion:

In conclusion, the B.O.T contract is an administrative contract concluded between the State or one of its administrative bodies and a private party (local or foreign), whether it is a public or private sector company, referred to as the project company. The purpose of this contract is to build or operate a public utility, as well as to carry out maintenance work for a specified period. At the end of that period, the company is required to hand over the facility to the granting authority free of charge, in good condition and free of all encumbrances. Thus, this contract is considered a form of delegation of the public service.

It is important to note that the Algerian legislator has not defined the B.O.T contract in its laws. However, its formula can be inferred by referring to the laws governing the concession, which covers several areas, including highways, water, electricity distribution, gas, and transportation.+

Based on the foregoing presentation and analysis, our study has yielded several results and recommendations:

Results:

Through our study of this type of contract, we can summarize the advantages and disadvantages it achieves as follows:

Advantages:

1. The B.O.T contract is a successful means of attracting foreign investment and involving the private sector in development plans.
2. This type of contract provides new job opportunities and thus reduces unemployment.

Disadvantages:

1. The state's control over the facilities decreases due to the long duration of the B.O.T contract, which affects the proper functioning of the public service.
2. The lack of a comprehensive legal system governing the conclusion and implementation of these contracts, which may lead to constitutional and legal violations as a result of resorting to this approach.

Recommendations:

- The need to issue a specific legislation for B.O.T contracts that defines them precisely and covers their legal aspects.
- The need to review the legislative systems that affect this contract, such as the Investment and Promotion Law.
- Adapting B.O.T contracts as contracts of a general nature, administrative contracts, in order to show the privileges of the public authority.
- Avoiding the dominance of the foreign investor over the infrastructure project by including clauses in the B.O.T contract that allow the transfer of technical expertise and high technology to the public sector to manage the project after the expiration of the concession period.
- Working to raise public awareness of the economic and social dimensions of this type of contract through the media.
- Increasing the number of conferences, seminars, and study days that work to introduce this contract and its related developments and innovations.

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