Damages in International Commercial Arbitration: Methods of Calculation

Andrea Saldarriaga
Consultant on arbitration
New York, New York, USA

Mark Kantor
Independent arbitrator
Washington D.C., USA

When arbitrators assess claims for compensation, their analysis includes the determination of the applicable law and an analysis of the evidence, finishing with the quantification of compensation. When it comes to determining the methods for quantifying compensation, however, many national laws, as well as international law, provide little guidance. This is, in fact, unsurprising, as quantification is an exercise of appraisal, financial analysis, accounting, and forensics—fields in which lawyers are often reluctant to tread. In this regard, arbitrators in both investment and commercial cases find themselves facing similar questions regarding available methods and their suitability for the case at hand.

To review these methods and examine their aptness in the case of breaches of contract submitted to commercial arbitration, this article will reappraise the awards issued in *Himpurna v. PLN*¹ and *Karaha Bodas v. PLN and Pertamina*.² We will follow the tribunals’ reasoning, which resulted in

---

¹ Himpurna California Energy Ltd. (Bermuda) v. PT. Persero Perusahaan Listruik Negara (Indonesia), Final Award, 14 *Mealey’s Int’l Arb. Rep.* A-1 (Dec, 1999) [hereinafter Himpurna]. A parallel arbitration was conducted before the same tribunal referring to a similar geothermal transaction involving virtually identical contract documents, the same sponsor, and the same Indonesian parties (Pathua Power Ltd. (Bermuda) v. Persero Perusahaan Listruik Negara (Indonesia), Final Award, 14 *Mealey’s Int. Arb. Rep.* B-1 (1999)). Given the similarity in the analysis presented in both awards, this article will only refer to the decision in the *Himpurna* case.

² Karaha Bodas Company LLC (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Bumi Negara and PT. PLN Persero (Indonesia), Final Award, Dec. 18,
the application (or non-application) of a given method of valuation, and we
discuss contract-related means of calculating damages.

AN INTRODUCTION TO HIMPURNA AND KBC

In the years 1994-1996, Indonesia embarked on the development of its geo-
thermal resources with the participation of foreign contractors, including
Karaha Bodas Company (KBC), Patuha Power (Patuha) and Himpurna
California Energy (Himpurna). Each of these companies entered into two
core contracts: a “Joint Operations Contract” (JOC) for the construction and
operation of geothermal plants with the State-owned corporation Perusahaan
Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and a tripartite
“Energy Sales Contract” (ESC) with Pertamina and the State-owned utility
PT (Persero) Perusahaan Listruik Negara (PLN). Under the ESC, PLN com-
mitted to purchase the energy produced by the geothermal plants directly
from the foreign contractors in U.S. dollars and for a period of 30 years.
Pursuant to the JOC, Pertamina in effect guaranteed PLN’s obligations under
the ESC. This long-term commitment formed a premise of the finance raised
by the foreign contractors. The project contracts specifically allocated to the
Indonesian side the risks arising from force majeure such as acts or failures to
act by any Indonesian government instrumentality without justifiable cause
and compliance with Indonesian legal requirements. As the Himpurna tribu-
nal noted, “the Parties expressly stipulated that only the Claimant can claim
that an act of the Government of Indonesia constitutes an event of force
majeure.”

In the context of the Asian financial crisis commencing in mid to late
1997, many power project contracts were suspended pursuant to governmen-
tal decree. In the case of the Himpurna project, out of the “up to 400MW
[megawatts]” of generating capacity contemplated under the ESC and JOC,
the tribunal determined that the first 60 MW unit had been fully constructed,
the second 80 MW unit had been 30 percent constructed, and the remain-
ing scheduled units were still in the process of seeking finance. In the case
of the KBC project, the facts are less clear from the award. Like Himpurna,
the KBC project company had the contractual ability to develop “up to” 400
MW, but the award does not state how far along in construction activities
the project had proceeded. A flurry of governmental decrees eventually led

KBC].

3 See Himpurna, supra note 1, at ¶ 153.