



MILAN  
CHAMBER OF  
ARBITRATION

*CAM Annual Conference - 14th edition*

# THE COLOR OF MONEY

## Economics in arbitration

# Report

*Laura Coriddi*



# THE COLOR OF MONEY

## Economics in Arbitration

*Laura Coriddi\**

On 24 November 2023, I attended the 14th Annual Conference of the Milan Chamber of Arbitration (“CAM”). I had the opportunity to participate to this event thanks to a joint initiative by its organizers and **International Arbitrator Juniors**, offering to a young practitioner, who won an online **contest**, a seat to the conference.

This year, the topic of the conference was **“The color of money: economics in arbitration”**. The event tackled several economic considerations to be made in the context of international arbitration: from expectations of inhouse counsels, to counsel’s roles in the quantum phases; from the treatment of tax and currency to considerations to be made during the enforcement phase.

**Stefano Azzali** (General Director, CAM) chaired the event. In his opening remarks, he stressed that the topic of economics of arbitration, despite being often overlooked, is extremely important for arbitration users.

**Michelangelo Cicogna** (Partner, De Berti Jacchia Franchini Forlani), who moderated the event, introduced the theme of the conference. In so doing, he reinforced the idea that damages play a central role in arbitration, stressing out how counsel’s ability to claim, quantify and convincingly substantiate and prove damages may influence the outcome of arbitral awards.

**Franz T. Schwarz** (Vice-Chair International Arbitration Group, Wilmer Hale) kicked-off the discussion with a keynote speech titled “Damages in International Arbitration: A Changing Landscape?”. Starting by recalling the Latin maxim “iudex non calculat”, Mr. Schwarz concluded that, actually, recent case law shows increasing appreciation for the nuances of economics and, therefore, called for legal counsels with a solid background in the field. In fact, as Mr. Schwarz underlined, in assessing damages, arbitral tribunals have been increasingly accepting the discounting cash flow (“DCF”) method, regardless of its inherent risks.

The first session saw **Joann Kahn** (Group Head of Litigation, ArrowResources AG) and **Dora Grunwald** (Partner, Osborne Partners) as speakers.

**Ms. Kahn** provided insight on a preliminary and fundamental question, tackled from an inhouse counsel’s perspective: “Why commence an arbitration? How to navigate the economic considerations of your clients”. She made it clear that inhouse counsels mainly look for one thing: winning. However, this does not necessarily entail being the prevailing party in the arbitration, but rather obtaining the most efficient and advantageous result for the company. In so doing, Ms. Kahn focused on the importance of considering and evaluating the costs related to an arbitration as soon as possible. In Ms. Kahn’s experience, this entails, inter alia, assessing whether initiating enforcement proceedings would be “worth the chase” and discussing the so-called “midnight clauses” at depth.

**Ms. Grunwald** closed the first session by discussing “What drives damages awards in international arbitration and what impact do damages experts have?”. Ms. Grunwald pointed out that, while the claimed amount is medially higher in international investment arbitrations than in international commercial arbitrations, the ratio between the amount claimed and the amount awarded is superior in awards issued in commercial arbitrations (53%, against a ratio of 36% in investment arbitrations). Significantly, however, the ratio lowered when an expert was involved. In this context, Ms. Grunwald also illustrated the mathematic formula for calculating the DCF, as well as different methods to evaluate damages.

**Patrick Taylor** (Partner, Debevoise & Plimpton) and Meloria Meschi (Senior Managing Director, FTI Consulting) walked us through the second session.

Patrick Taylor's presentation focused on the "Counsel's role in the quantum phases: effective advocacy, how to claim, prove and substantiate damages". Mr. Taylor stressed out the importance of addressing the issue of the quantum of damages on an early stage, starting with an initial damages analysis, leading to hiring appropriate experts, working with them, sharpening the argument and, finally, to the hearing. In so doing, Mr. Taylor provided practical lists of dos and don'ts for each phase and key takeaways.

**Meloria Meschi** talked about causation in her presentation titled "Connecting cause and effect: the view of the economist". As factual causation severely impacts on how to quantify compensatory damages, Ms. Meschi focused on the challenge of measuring the "cause and effect". Among the various methods that can be adopted to assess causation, Ms. Meschi depicted a "randomized control trial" as the gold standard and stressed out the distinction between the notion of "causation" and of "correlation" and the importance not to mistake one for the other.

After the lunch break, the third and final session was introduced by **Roula Harfouche** (Partner, HKA), discussing: "Taxation, currency, and pre-award interest in damages awards". In addition to stressing out the importance of the impact of taxation, Ms. Harfouche suggested that arbitral tribunals should be assisted by experts in choosing the currency of the damages, as said choice could impact on the final amount of the liquidated sum. Finally, Ms. Harfouche explained that pre-award interests have either a compensatory or a restitutionary function which, although not mutually exclusive, should not result in overcompensation.

**Jurriaan Braat** (Managing Director, Omni Bridgeway) was the following speaker and his presentation concerned "How to get the money: enforcement funding and asset tracing". Mr. Braat preliminary made a distinction between "merit funding" and "enforcement funding", the latter consisting of the funding provided to sustain costs concerning the enforcement phase (including recovery and collection of the amount issued in the award). Mr. Braat explained that, in return, the funder gets either: i) a multiple of the funded costs plus a percentage of the net recovered amount; or ii) the highest between a multiple of the funds invested or the net recovered amount.

Finally, **Rosanna Grosso** (Senior Legal Counsel, Siemens AG) and **Giovanni Foti** (Partner, Accuracy) were interviewed by Mr. Cicogna on the topic "Is arbitration in Italy different? the economics of "Italian" arbitrations".

**Ms. Grosso's** answers highlighted the main characteristics, in her view, of the Italian arbitration system: according to Ms. Grosso, from a substantive point of view, specific kind of damages (such as reputational damages) are more likely to be awarded if an arbitral tribunal is seated in Italy. In addition, from a procedural standpoint, in Ms. Grosso's experience it is common to have experts appointed by the arbitral tribunal, in addition to party-appointed experts.

**Mr. Foti** pointed out that, while in Italy there is a tendency to request that damages be liquidated pursuant to an equitable assessment, such a request may lead to unwanted outcomes, as it leaves room to uncertainties and might, therefore, lead arbitral tribunals to rule that the party claiming damages failed to demonstrate them. In so doing, Mr. Foti delved into the role and importance of an expert in quantifying damages.

I am extremely grateful for having been given the opportunity to participate to this edition of the Annual Conference. The stellar quality of all the speakers and of their contributions (also providing practical examples coming from their professional experience) definitely contributed to making the whole event enriching and captivating for a young professional, willing to make their way in the fascinating world of international arbitration. I look forward to discovering what the CAM holds for next year's Annual Conference!

*\* Laura Coriddi is an Italian lawyer, Associate at De Berti Jacchia Franchini Forlani where she provides assistance in domestic and international commercial Arbitration and Litigation.*