

# Kluwer Arbitration Blog

## Countdown to RIDW25: Reconstruction and Bespoke ADR Mechanisms

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To emerge from a fragile post-conflict situation, a state must undergo a process of reconstruction. Such a process begins with a peace agreement, a ceasefire agreement, or other cessation of hostilities. Those circumstances provide a window of opportunity for a peace-dividend.

Reconstruction in post-conflict societies is a complex undertaking with an array of urgent and challenging needs, including the re-establishment of systems and services (e.g., judicial, financial, healthcare, and educational) and the restoration and/or re-building of infrastructure (e.g., roads, bridges, ports and airports)—all with the goal of reestablishing the basis for the activities of daily life.

An urgent need for reconstruction does not only arise in the context of fragile and conflict-affected states (“FCAS”); climate vulnerable states (“CVS”) also experience catastrophic destruction wreaked in minutes. In an increasingly strife-torn and weather-ravaged world, the need for reconstruction is becoming ever more widespread and ever more pressing.

The window for reconstruction is finite. Hence, the process of reconstruction must be (relatively) quick. Failed or fragile states have very limited resources. The process must, therefore, be (relatively) cost-effective. If peace is to be lasting, the reconstruction must be (relatively) robust and resilient.

In short, the process of reconstruction must be quick, cheap, and effective.

### The Scope of Reconstruction

The reconstruction of a state’s infrastructure is a substantial undertaking. It involves restoring the ‘hard’ infrastructure of bomb-damaged buildings and repairing roads, railways, seaports, and airports. Such reconstruction and re-building efforts do not restore the social fabric and functionality of a state. It is a sine qua non, but it is far from a complete answer. The functionality of a state also depends on business, both domestic and those driven through foreign investment.

### Reconstruction Disputes and Dispute Resolution

As night follows day, state reconstruction on the necessary scale will generate disputes. Like the process itself, the imperative for reconstruction dispute resolution is that it be quick, cheap, and effective. The ‘default’ method for resolving such disputes has been arbitration—usually through (international) commercial arbitration; sometimes through investor-State arbitration.

Given the wide range and variety of disputes that can arise, this Procrustean approach to commercial dispute resolution seems odd. The drivers of this one-size-fits-all uniformity are easy to identify: (1) the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958](#) (“New York Convention”), (2) the [UNCITRAL Model Law on International Commercial Arbitration 1985](#), (3) the [ICSID Convention 1956](#), and (4) broadly standardized rules and procedures published by international arbitration centres such as the [ICC](#), [ICDR](#), and [LCIA](#) have all played a part.

The real question is whether this stretch-able onesie is still the romper-suit *de jour*?

### **Arbitration**

Arbitration has not outgrown its usefulness. It will remain an appropriate, valued, and widely used means of resolving commercial disputes. Its problem is that it has picked up some barnacles over the decades. Challenges to jurisdiction, elaborate document disclosure schedules, procedural guerilla tactics, and general judicialization have all taken a toll.

Arbitration is now too often cumbersome, expensive, and, because of challenges to the recognition and enforcement of awards, ineffective—particularly as the default first step in the management and resolution of commercial disputes.

### **The Business Imperative**

Business seeks certainty, security, predictability. Particularly in the context of FCASs, business looks for reassurance that the causes of fragility or failure will not recur. The best way to avoid a relapse is through the economic well-being that a peace dividend provides. This holds good across the board. Large (transnational) business will only come back with foreign direct investment if it has confidence in the stability of a new regime. Micro, small, and medium-sized enterprises (MSMEs), which account for well over 90% of all businesses in any jurisdiction, will only venture forth again if there are people to buy their stock or services and their premises are not under constant threat of looting.

### **Time for a Rethink: The Coming of Mediation**

Parties at the senior management and/or General Counsel level have grown increasingly frustrated by the pitfalls of arbitration.

Mediation empowers each party to find its own solution. Mediation is “facilitated negotiation.” The operative process—the negotiation—is between the parties. The mediator provides support by facilitating that process.

Businesses understand that time and cost-inefficiency is a double whammy. Dispute resolution costs escalate with time. The time spent resolving disputes is also time away from the business’s stock-in-trade: the ‘outlay’ cost is compounded by the ‘lost opportunity’ cost.

For MSMEs, litigation or arbitration costs are prohibitive. In the late 19th century, a judge observed drily that “like the doors of the Ritz, the courts are open to all.” The only change is that the doors of the arbitral tribunal have now, for many, been added to the doors of the court.

It must also be remembered that arbitration (and litigation) is confrontational—often bruisingly so. Mediation, on the other hand, tends to (re-)build bridges rather than burn them. There is also deep irony in using a forensically destructive process in the context of reconstruction.

Mediation—properly understood and knowledgeably undertaken—offers a fully viable, and often better, alternative means of dispute resolution. It is quick, flexible, and usually occurs early in the dispute resolution cycle. It promotes real party autonomy. In combination, those attributes also contribute to (re-)building mutual trust between the parties.

### Conclusion

Disputes arising during reconstruction must be dealt with quickly and effectively to avoid jeopardising the whole reconstruction process and peace dividend. Mediation must be added to arbitration as a vital, first-step tool to achieve the goal of sustainable reconstruction.



We look forward to attending the SCCA 25 Conference!

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