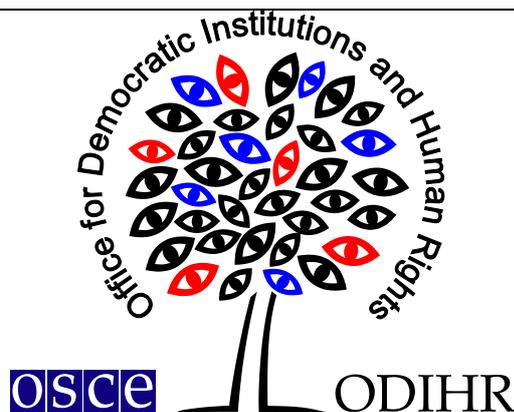


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OPINION

ON THE LAW ON MEDIATION OF

MONGOLIA

**based on an unofficial English translation of the Law commissioned by the
OSCE Office for Democratic Institutions and Human Rights**

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*This Opinion is also available in Mongolian.
However, the English version remains the only official version of the document.*

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ODIHR Opinion on Law on Mediation of Mongolia**I. INTRODUCTION**

1. *On 3 September 2019, the Judicial General Council of Mongolia sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the Law on Mediation of Mongolia (hereinafter “the Mediation Law”) and four other laws pertaining to the judiciary.*
2. *After consulting with the requestor, it was agreed to provide three separate opinions on the submitted laws, according to the legal aspects they cover. This opinion will only cover the Mediation Law and should be read together with the Opinion on the Laws on Courts, on Judicial Administration and on the Legal Status of Judges and the Opinion on the Law on the Legal Status of Citizen Representatives.¹*
3. *On 11 September 2019, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the Mediation Law’s and the other laws’ compliance with OSCE human dimension commitments and international human rights standards.*
4. *This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.²*

II. SCOPE OF REVIEW

5. The scope of this Opinion covers only the Mediation Law submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing mediation in Mongolia.
6. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Mediation Law. The ensuing recommendations are based on international standards and practices related to mediation. The Opinion will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.
7. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women³ (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion analyses the potentially different impact of the Law on women and men.⁴

¹ All legal reviews on draft and existing laws of Mongolia are available at: <<https://www.legislationline.org/odihr-documents/page/legal-reviews/country/60/Mongolia/show>>.

² See *OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area* (2008), point 4, where the Ministerial Council “[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention [...]”.

³ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Mongolia acceded to this Convention on 20 July 1981.

⁴ See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

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8. This Opinion is based on an unofficial English translation of the Mediation Law, which is attached to this document as an Annex. Errors from translation may result. This Opinion is also available in Mongolian. However, the English version remains the only official version of the document.
9. In view of the above, ODIHR would like to make mention that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of Mongolia that ODIHR may wish to make in the future.

III. EXECUTIVE SUMMARY

10. The OSCE/ODIHR welcomes the initiative to review the Mediation Law of Mongolia in order to ensure its compatibility with international obligations and good standards. There is significant legal development in this area and the efforts to seek advice and to strengthen the legal framework for mediation are commendable. This initiative provides an opportunity to pass a coherent law as, for instance, the rules on the rights and obligations of the participants in the mediation process are scattered throughout the Mediation Law.
11. It is positive that, according to article 3.1 of the Law mediation can be used to settle a wide range of disputes (civil, labour and family). Furthermore, the door is open to the use of mediation in other areas if allowed by applicable law. This should be clarified with more references to relevant laws, than the one in Article 6.1 of the Mediation Law [par ...31].
12. Additionally, it should be clarified whether the Mediation Law only applies to mediation without court referral, as Article 30.1 of the Mediation Law may indicate. Private mediation should be covered to maximise the opportunities for mediation in Mongolia [par 34...].
13. More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following recommendations to further enhance the Draft Amendments:
 - A. Clarify the meaning of the “support from the mediator” in Article 1.1 of the Mediation Law, defining the role of mediator more precisely. ; [par 28...]
 - B. Article 32.1 of the Mediation Law does not preclude the possibility of mediation in family disputes after filing the case to court even if parties unsuccessfully tried mediation before. It is recommended not to limit such possibility to family disputes only; [par 35...]
 - C. Article 4.1.1 of the Mediation Law that defines mediation is unclear and it is recommended to adopt a revised definition possibly following the Singapore Convention on Mediation, which describes it as a process *whereby parties attempt to reach an amicable settlement of the dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute*; [par 37...]
 - D. Replace the term “citizen” in Article 4.1.2 of the Mediation law with “individual” to ensure that foreigners are not excluded from mediation. Furthermore, it is recommended to use a consistent terminology for “parties” in Article 4, as “participant(s)” is also used in several articles of the Mediation Law. This should be streamlined throughout the law; [par 38...];

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- E. The principle of “voluntarism” in Article 5.2 of the Mediation Law should be clarified to comprise the voluntary decision making of the parties ; [par 48...]
- F. Clarify that the list of participants in Article 12.1 is not exhaustive, allowing other participants to attend if parties in the mediation process and mediators agree. As well as to ensure that parties have appropriate assistance from advocates, translators, interpreters and others as agreed upon by parties in consultation with the mediator; [par 51...]
- G. It is recommended that Article 12.3 be changed so that parties must attend personally, and not only through their representative. Participation through technological means should be allowed; [par 52...]
- H. It is recommended to include a timeframe for the selection of a mediator in Articles 22.1 and 22.3 of the Mediation Law. Additionally, it should be clarified to whom the request is made; [par 67...]; and
- I. To clarify the meaning of the requirement for the mediators in Article 9.1.1 to be “legally eligible”, as it is unclear whether mediators must have legal capacity, have a law degree or other similar qualification. It is recommended that there be no requirement for a mediator to possess a law degree. [par 70...]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards on Mediation

- 14. Mediation is commonly understood to be a process in which a neutral third person facilitates the resolution of a dispute between two or more parties. There is no common or exact definition of which elements are required in order for mediation to proceed, and what sets mediation apart from other types of alternative dispute resolution, which is why this Opinion applies a broad definition of the mediation process. As a relatively new topic on the agendas of domestic and international law-makers, the number of documents setting out a framework of international standards tailored specifically to the processes and conduct of mediation is still relatively limited.
- 15. However, certain universal conventions and other documents setting standards in the area of international human rights, to which Mongolia is a party, do have bearing on the conduct and modalities of mediation procedures. In particular, fair trial rights and the right of access to and equality before courts may also be affected by laws regulating mediation. Thus, Article 14 of the International Covenant on Civil and Political Rights⁵ (ICCPR) on the right to a fair trial becomes relevant in this respect. Article 14 guarantees equality before courts and tribunals and the right to be considered innocent until proven guilty according to the law; this aspect of the right could be violated by the admission or use in court of information gathered throughout the mediation process.

⁵ *UN International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. Mongolia ratified the ICCPR on 18 November 1974.

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16. In cases of mediation touching upon the rights of women and the rights of children, particularly in criminal and family matters, the UN Convention on the Rights of the Child⁶ (CRC) and the UN Convention on the Elimination of All Forms of Discrimination against Women⁷ (CEDAW) set international standards which must be adhered to in relevant legislation and its implementation. Because of the nature of the mediation process and its aim to conserve amicable relations between the participants, mediation is particularly well-suited for family matters, including questions of custody. Hence, the European Convention on the Exercise of Children's Rights explicitly mentions mediation as a preferred way to resolve disputes affecting children, where appropriate.⁸ While Mongolia is not bound by this regional instrument, it may serve as useful guidance in this context.
17. At the OSCE level, OSCE commitments have framed access to mediation as one of the modalities of access to effective remedies and therefore access to justice, together with judicial, administrative and conciliation procedures.⁹
18. The Mediation Law specifically mentions international treaty obligations in Article 2.2. With this in mind, reference should be made to the UN Convention on International Settlement Agreements Resulting from Mediation¹⁰ (hereinafter the Singapore Convention on Mediation). It is noted that while Mongolia has not signed nor ratified this Convention, which is therefore not binding on Mongolia,¹¹ In any case, it may be advisable to consider the provisions of the Singapore Convention during any future reform process, as they may serve as a useful reference document when reviewing this Law.
19. The UN Commission on International Trade Law (hereinafter "UNCITRAL") has recently amended its Model Law relating to mediation and conciliation, the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (hereinafter "UNCITRAL Model Law"), which may serve as a standard guideline for States seeking to adopt legislation in this domain.¹² The Model Law uses a broad definition of the term "mediation" in Article 1.3. " as it refers to the use of a third party to reach an amicable settlement of a dispute relating to a contractual or other legal relationship.¹³ The Model Law can also be used in domestic cases.¹⁴ It may therefore prove helpful to law-makers in this respect.
20. While Mongolia is not a Member State of the Council of Europe (hereinafter "the CoE"), references are made to CoE sources which may be useful from a comparative perspective, also due to the limited international sources on the subject. The CoE's European Commission for the Efficiency of Justice (CEPEJ) has issued four recommendations setting out important minimum standards for mediation in different

⁶ [UN Convention on the Rights of the Child](#) (CRC), adopted on 20 November 1989, entered into force on 2 September 1990, 1577 UNTS 3. Mongolia acceded to this Convention on 5 July 1990.

⁷ [UN Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW), adopted on 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13. Mongolia acceded to this Convention on 20 July 1981.

⁸ [CoE European Convention on the Exercise of Children's Rights](#), adopted on 25 June 1996, entered into force on 1 July 2000, CETS No. 160.

⁹ See e.g., Annex to Decision No. 3/03 Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area at III. 9).

¹⁰ The [UN Convention on International Settlement Agreements Resulting from Mediation](#), Resolution adopted by the General Assembly on 20 December 2018. Mongolia has not yet signed nor ratified this Convention.

¹¹ Mongolia sent a delegation to observe the signing ceremony on 7 August 2019 in Singapore: <https://www.montsame.mn/en/read/197778>

¹² [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf

¹³ [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#). *Op. cit.* footnote 12, footnote 3 in the document. (Annex II UNCITRAL Model Law on International Commercial Conciliation).

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areas of law, namely in family, civil and penal matters and disputes between administrative authorities and private parties.¹⁵ These standards are accompanied by three sets of guidelines which interpret the issued recommendations.¹⁶ In its Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters (hereinafter “CEPEJ Guidelines on family and civil mediation”), the CEPEJ also recommended the use of the European Code of Conduct for Mediators (of the European Union) as a minimum standard for civil and family mediation, while also taking into account the specific nature of family mediation.¹⁷ The CEPEJ also recently developed the European Code of Conduct for Mediation Providers (December 2018), which may also serve as a useful reference document.

21. Within the European Union, Directive 2008/52/EC¹⁸ (hereinafter “European Directive on Mediation”) also sets standards regarding mediation in civil and commercial matters in its Member States. Even though Mongolia is not bound by this directive, it sets standards for mediation, particularly in the areas of confidentiality and the use of mediation-related information as evidence, and might hence be a valuable tool for law-makers and other stakeholders.
22. In criminal matters, mediation is also mentioned or recommended as an alternative means of conflict resolution in several other international standard-setting documents addressing the position of victims in the context of criminal procedures.¹⁹
23. Finally, as regards the peaceful resolution of conflict, at the UN level, mediation is a tool that is often used in connection to peace processes and/or the resolution or prevention of ethnic conflicts. The relevant standard-setting manual is the UN Guidance for Effective Mediation (2012),²⁰ which emphasizes, *inter alia*, the importance of the inclusiveness of mediation processes, in particular in an ethnically diverse environment.²¹ At the OSCE level, the peaceful settlement of disputes is also one of the ten guiding principles of the Helsinki Final Act of the Conference on Security and Co-operation in Europe, which explicitly mentions mediation as one means to peacefully

¹⁵ These are the CoE Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation, adopted by the Committee of Ministers at the 616th meeting of the Ministers’ Deputies on 21 January 1998; Recommendation No. R (99) 19 on the Committee of Ministers to Member States concerning mediation in penal matters, adopted by the Committee of Ministers at the 679th meeting of the Ministers’ Deputies on 15 September 1999; Recommendation Rec(2001)9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties, adopted by the Committee of Ministers at the 762nd meeting of the Ministers’ Deputies on 5 September 2001; and Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Committee of Ministers at the 808th meeting of the Ministers’ Deputies on 18 September 2002. The four recommendations are available at http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf.

¹⁶ European Commission for the Efficiency of Justice (hereinafter “CEPEJ”), [Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters](#), CEPEJ(2007)14, adopted on 7 December 2007; [Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters](#), CEPEJ(2007)13; [Guidelines for a better implementation of the existing recommendation on alternatives to litigation between administrative authorities and private parties](#), CEPEJ(2007)15.

¹⁷ *Op. cit.* footnote 16 at 1.8. (CEPEJ Guidelines on family mediation and mediation in civil matters); see also CoE, [Opinion of the Directorate General of Human Rights and Rule of Law, Justice and Legal Co-operation Department, on the Serbian Draft Law on Mediation](#), 23 April 2013, page 14; and the [European Code of Conduct for Mediators](#) (2004).

¹⁸ [Directive 2008/52/EC](#) of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

¹⁹ CoE, [Recommendation Rec\(2006\)8 on assistance to crime victims](#), 14 June 2006; [Recommendation No. \(85\)11 on the position of the victim in the framework of criminal law and procedure](#), 28 June 1985; [Recommendation No. R\(87\) 21 on assistance to victims and the prevention of victimization](#), 17 September 1987; UN General Assembly Resolution 40/34, [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (29 November 1985), GAOR 40th Session Supp 53, 213; [EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime](#), and replacing Council Framework Decision 2001/220/JHA.

²⁰ [UN Guidance for Effective Mediation](#) (New York, 2012).

²¹ See also the speech of Ambassador Fred Tanner (Swiss OSCE Chairmanship) on the [“Inclusivity of mediation processes”](#) at the 3rd meeting of Regional, Subregional and other International Organizations on Preventive Diplomacy and Mediation (5 February 2014).

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resolve conflicts.²² As such, mediation has a special status within the OSCE area as a commitment which OSCE participating States adhere to in order to prevent or end local, regional or international conflicts. This commitment has been reiterated and further developed by other OSCE documents, particularly the Guidance Note on Enhancing Gender-Responsive Mediation²³ and the OSCE Ministerial Decision No. 3/11 on Elements of the Conflict Cycle Related to Enhancing the OSCE's Capabilities in Early Warning, Early Action, Dialogue Facilitation and Mediation Support, and Post-Conflict Rehabilitation,²⁴ among others.²⁵

2. Purpose and Scope of the Law

2.1. General Comments

24. The Mediation Law contains 35 articles divided in six chapters. According to Article 5.2.1 entering into a mediation process is voluntary, but if mediation is chosen the provisions of the Law seem to become mandatory unless otherwise specified. Generally, mediation laws can be differentiated in terms of whether they operate as default (“unless the parties otherwise agree”) or mandatory provisions.²⁶ Default rules support the notion of party autonomy and operate only in the absence of express agreement to the contrary by the parties. The principle of party autonomy, which constitutes a key pillar of mediation, is reflected in parties’ ability to help shape the process and determine its outcome. Therefore rules dealing with procedural aspects of mediation often take the form of default rules so that the parties can opt out of them. Conversely, where regulatory provisions provide an interface between mediation and the legal system (e.g., obligations of those involved in mediation), there is a strong argument that they should take the form of mandatory rather than default regulation, in order to ensure consistency. **It is therefore recommended that the provisions of the Mediation Law on duties and obligations be formulated as clearly, not only seemingly, mandatory provisions** (see also Sub-Section 7 *infra*).
25. The Mediation Law deals with five major themes. First, it outlines the scope and purpose of the Law. Second, it contains provisions dealing with how the mediation is triggered or initiated. Third, it details the mediation procedure and how the mediation process is conducted. Fourth, the Law sets out provisions explaining who can act as a mediator. Fifth, it stipulates the rights and obligations of participants in the mediation process. At the same time, certain of these themes, for instance relating to the rights and obligations to participants in the mediation process, are scattered throughout the Law and would be more clearly articulated if included under the main provisions on rights and obligations. It is therefore recommended **to revise the overall structure of the Law to ensure that the different themes are addressed in a more coherent and comprehensive manner**.
26. From an international comparison of mediation systems worldwide, there are various mediation models, which may be considered by the policy- and law-makers. If several

²² CSCE, *Final Act of the Conference for Security and Cooperation in Europe* (1 August 1975) 14 ILM 1292.

²³ OSCE Secretariat, OSG/Gender Section, Vienna, October 2013, available at <<http://www.osce.org/gender/107533?download=true>>.

²⁴ OSCE MC.DEC/3/11 (27 December 2011), available at <<http://www.osce.org/mc/86621?download=true>>.

²⁵ See also the OSCE-UN, *Report on Perspectives of the UN and Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation: Common Challenges and Good Practices* developed in co-operation with the United Nations (February 2011).

²⁶ See H Eidenmüller, ‘A Legal Framework for National and International Mediation Proceedings’ (2002) 12 *Journal of International Dispute Resolution Beilage* 14 at 15.

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of these models are applied cumulatively, this tends to maximise opportunities for people to access mediation. From a reading of the Mediation Law, it seems that both court-related mediation (i.e., a centralized approach to mediation with the court as the central access point for mediation services)²⁷ and private sector/market mediation are envisaged in Mongolia, which is overall positive, though the Mediation Law appears only to cover court-related mediation (see also pars. 31 and 32 *infra*). It is unclear as to whether other forms of mediation²⁸ are envisaged by the Law. Article 8 of the Mediation Law may possibly be indicating to that, however more clarity is required. Further, as access to, and attractiveness of, cross-border mediation e.g. in relation to investment disputes, resources disputes and the like becomes increasingly important supplementing the Law in that respect may be considered (see also comments in par 83 *infra*). And finally, further recommendations may be developed on the basis of information and analysis of how mediation is actually practised in Mongolia. It would be thus helpful to have this information to suggest other revisions to the Mediation Law.

27. It is worth emphasizing that mediation is a flexible process and this feature creates challenges when regulating the mediation process. Generally, to accommodate such flexibility, mediation should be regulated through a diversity of hard (legislation) and soft regulation such as codes of conduct for mediators, institutional mediation rules and other industry standards, alternative dispute resolution pledges and clauses, etc. While the Mediation Law refers to codes of conduct for mediators (Article 9.2), it is important to emphasize that formal mediation legislation should not operate in isolation and good practice at the international level often indicates that a non-legislative regulatory form might be more suitable to complement the Mediation Law. In that respect, it is welcome that the Mediator's Council (Articles 10 and 11) seem to envisage soft and more responsive regulation to complement the Mediation Law.

2.2. Purpose of the Law

28. The purpose of the Law is stated in Article 1.1 as the provision of a “legal basis for settling the legal disputes through non-judicial methods *with a support from the mediators*”. It is not clear, however, what is meant by the “support”. **It is recommended to clarify the role of mediators more precisely.**
29. Moreover, the purpose of the Law is rather succinctly stated, and could further elaborate on the benefits of mediation for the workload of the judiciary, business relations but also and more importantly, on the potential benefits of mediation for individuals; moreover, the reasons for promoting mediation and regulating it in Law should be further explained.²⁹ In this way, both the courts and the affected individuals would perhaps better understand the advantages, but also the limitations of mediation, and how it compares to other remedies accessible to individuals.

²⁷ The court-related mediation can itself be divided into (1) a justice model, whereby mediation services is considered to be an integral part of the justice system and therefore a function of the court, with court-based mediation practitioners drawn from the judiciary, court personnel, panels of mediators attached to the court and where the mediators are chosen and appointed by the court and the costs of the mediation are borne by the justice system (examples of the justice model of court-related mediation can be found in Slovenia, Germany, parts of Scandinavia and other (mainly civil law) jurisdictions, though some common law jurisdictions such as Singapore also feature this model); and (2) a market model representing a privatized form of court-related mediation, in which the court outsources mediation services to external mediators who are members of a panel of court-approved mediation service providers, who set their own fees payable by the disputants (generally used in common law jurisdictions such as in Canada, Australia, England, Hong Kong and the United States, though this model can also be found in some civil law jurisdictions such as Germany).

²⁸ i.e., where mediation is widely accessible through community-based mediation organizations and other community organizations such as refugee and women's shelters, government sponsored legal centres, legal aid and the police, etc.

²⁹ See e.g., ODIHR, [Opinion on the Draft Law on Resolution of Disputes through Mediation and Amendments to Related Legislation of the Kyrgyz Republic](#), 5 August 2015, par 20.

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30. It is worth noting that Article 5.1 of the Mediation Law further elaborates the purpose of mediation activity and highlights in particular the goal of cost effectiveness, speediness and resolution through amicable procedure. It is unclear why such a purpose is not listed under Article 1 and it is **therefore suggested that these goals be packaged as part of the objective of the legislation defined under Article 1 in the context of achieving more cost-effective resolution of disputes and preservation of business, workplace and family relations.**

2.3. Scope of the Law

31. According to Article 3.1, the Law primarily applies to civil mediation as well as mediation of labour and family matters. At the same time, Article 3.2 provides that “[m]ediation may be used for resolving the disputes other than those specified in Article 3.1 of this Law only to the extent otherwise allowed by applicable law”. It is thus unclear, as it is, to what extent mediation may also be used in other fields. **It is advisable to clarify this in the Law or include a cross-reference to specific legislation instead of a vague and over-broad reference to applicable law.** For instance, Article 6.1 of the Law refers to Articles 14-16 of the Code of Civil Procedure while establishing the right of parties to make a request for mediation.
32. Especially, it is not clear whether mediation would also be applicable, even if subject to some special rules, in criminal matters. In this context, it should be noted that, in principle, given their different aims, rules of mediation in civil, administrative and criminal matters fundamentally differ from one another.³⁰ In particular, certain principles applicable to mediation in non-criminal matters, will not apply in criminal mediation, which is guided by unique aims and should be governed by a special set of rules. In particular, in cases involving victim-offender mediation, it is crucial that the victim and the offender both wish to mediate and that they agree on the facts of the event/the crime or misdemeanour committed. In order to adequately address all specific aspects of criminal mediation, including the impact it may have on the victim, while safeguarding the rights of the offender, it is recommended to ensure that **criminal matters are dealt with in a separate section of the law or an entirely different law.**
33. Article 3.4 states that mediation will not be used if the legal interests of the parties or public interest are affected. It is unclear what this provision entails. **It would be better to identify the criteria, including third party rights and public interest, that courts should take into account when deciding on whether to refer a matter to mediation.**
34. Article 3.5 states that the Law is not applicable if parties voluntarily resolve the dispute in the absence of the mediator or judge’s ruling for amicable resolution. Unless an issue of translation, this provision is unclear though it seems to mean that the Mediation Law does not seem to cover mediation outside of the courts, where there is not a court referral to mediation, thereby excluding private mediation. This interpretation seems to be supported by Article 30.1 which indicates that the scope of the Mediation Law is limited to post-filing civil disputes and not applicable to private mediation outside the court that may occur pre-filing. **If this is the case, it is recommended that the legal drafters consider revising the Law to ensure that it regulates private mediation as well,** as this would maximise the opportunities for individuals to resort to mediation and promote consistent regulation of mediation in Mongolia (see also par 26 *supra*).

³⁰ *Ibid.* par 23 (2015 ODIHR [Opinion on the Draft Law on Resolution of Disputes through Mediation of the Kyrgyz Republic](#)).

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35. In relation to family disputes, Article 32.1 makes it clear that merely because parties have tried mediation before getting to the family court, does not bar them from referring to mediation after bringing the case to court. **This is a useful principle and should not be limited to family disputes and could apply more generally to other fields in the Mediation Law.** Stipulating this possibility specifically with respect to family disputes suggest the same principle will not apply to other fields.
36. Article 3.6 of the Mediation Law deals with the issue of whether a matter can be dealt with through mediation once arbitration proceedings have commenced. **The provision should be clarified in terms of what law should apply to mediation that takes places within arbitration. There should also be clear rules (created by arbitration and mediation institutions) to regulate mediation within arbitration settings.**

2.4. Definitions of Mediation and other terms in the Mediation Law

37. The definition of mediation can be found in Article 4.1.1 of the Mediation Law, which states that mediation amounts to “*the activity of the mediator who attempts to settle a legal dispute arose between parties outside of the court pursuant to the rules specified in this law*”. The definition is circular as it refers to the activity of the “mediator”, itself defined as a professional person who provides assistance to “mediate” disputes (Article 4.1.3). **It is recommended to adopt a revised definition that further elaborates the process of mediation, along the lines of that which is provided in Article 2.3 of the Singapore Convention i.e., “a process [...] whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the mediator) lacking the authority to impose a solution upon the parties to the dispute”.**³¹
38. Article 4.1.2 defines “parties” as “*a citizen and legal entity initiated legal action or legal entity who has no legal rights but allowed to participate to the action by court’s order as the mediator*”. **First, the term citizen may imply that foreigners would be excluded from such processes and should therefore be replaced by “individual”.** Second, it seems that unless an error of translation, the terms “participants” and “parties” are not used consistently throughout this Law (see par 54 *infra*). Also, Article 32.4 further defines “parties” in the context of family mediation as including “*psychologist, relatives, friends and co-workers*”. **Overall, it is recommended to clarify under Article 4 the meaning of “parties” (those in dispute) as opposed to “participants” (i.e., non-party participants including lawyers, translators, experts, professional and non-professional (unpaid) support people) to mediation and ensure the consistent use of these terms throughout the Law.**
39. The term “Mediation Agreement” is defined by Article 4.1.4 as “*a written agreement parties reached as a result of the mediation with respect to the dispute and controversy*”, thus referring to the mediated outcome or settlement. This may lead to some confusion since the term “*mediation agreement*” is commonly used, especially in the international arena, to refer to post-dispute agreements to enter mediation that are signed by the mediator, parties and legal representatives. **Hence, to avoid such confusion, it is recommended to use the term “Mediated Settlement Agreement” or MSA instead.**

³¹ See also e.g., the definition of “mediation” in Section 3 of the [Mediation Act](#) of Singapore (2017); and Section 4 of the [Mediation Ordinance](#) of Hong Kong (2013).

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40. It is worth noting that Article 12.3 includes the term “reconciliation mediation activity”, which is unclear since it is the first time the term is used and it is not included in the definition section.

3. Initiation of Mediation Procedure and Triggering Mechanisms

3.1. General Comments

41. Triggering mechanisms address how demand for mediation is encouraged and initiated. Research shows that many parties would never find their way to mediation without direction from a third party or a regulatory incentive.³² Furthermore experience in numerous jurisdictions around the world suggests that court-referred alternative dispute resolution (ADR) only begins to develop as a real alternative to court proceedings when it is subject to some degree of mandating.³³ There is also some evidence to support the view that as experience with mediation increases, so the need for mandating the process decreases.³⁴ For these reasons, good practice mediation regulation includes a range of incentives or “triggering mechanisms”. Such “triggering mechanisms” include, for instance, court referrals to mediation (voluntary, routine mandatory, discretionary mandatory and other), mediation information sessions, enforcing mediation clauses, legislation or court practice directions that require parties to mediate before litigating. By way of example, Article 5 of the European Directive on Mediation sets out different mediation triggering mechanisms that member states may consider in their regulation policy, including court information sessions on mediation and voluntary and mandatory referrals by courts and other competent authorities.
42. Further, illustrations of various forms of incentive, including requirements to attempt mediation and cost sanctions imposed against parties who unreasonably refuse to participate in mediation, are found in different regulatory forms, including legislation and practice directions, in England,³⁵ Singapore,³⁶ Hong Kong,³⁷ Australia,³⁸ Germany,³⁹ the United States,⁴⁰ and other jurisdictions. Court referral schemes are varied and include referrals to mediation only with all parties’ consent,⁴¹ referrals to

³² See e.g., M Pel, *Referral To Mediation: A Practical Guide For An Effective Mediation Proposal* (2008). Netherlands Project on Court-Connected Mediation, <www.mediationnaastrechtspraak.nl>..

³³ See N Alexander, ‘*Global Trends in Mediation: Riding the Third Wave*’ in N Alexander (ed), *Global Trends in Mediation* (2nd ed, Alphen aan den Rijn: Kluwer Law International 2006) 1 at 25.

³⁴ See N Alexander, ‘*Mediation on Trial: 10 Verdicts in Court-related ADR*’ (2004) 22 *Law in Context Special Issue: Alternative Dispute Resolution and the Courts* 8.

³⁵ See, for example, *Practice Direction to the Pre-action Protocols* (UK), at par 8; *Civil Procedure Rules (UK) (1998)*, r 1.4; and the case of *Halsey v. Milton Keynes General NHS Trust and Steel v Joy and Halliday* [2004] EWCA Civ 576. See also Civil Procedure Rules (UK), r 44.3 providing that, in imposing costs orders, courts “*must have regard to all the circumstances, including (a) the conduct of all the parties*” before and during the proceedings and especially in relation to pre-action protocols.

³⁶ See, for example, *Singapore Rules of Court (Chapter 322, R 5), O59 r 5(1)(c)*, which provides: “*The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account – [...] the parties’ conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution.*”

³⁷ See, for example, *Hong Kong Practice Direction – 31 (on Mediation)*, see <https://mediation.judiciary.hk/en/doc/GeneralGuide_PD31-Eng.pdf>. See also Nadja Alexander, *Hong Kong Mediation Manual*, Lexis Nexis (2014), chapter 9.

³⁸ See, for example, *Australia Civil Dispute Resolution Act 2011*, ss 6-11. Consider, for instance, that pre-litigation mediation is mandated (under s 86B) for disputes in relation to the Native Title Act 1993 (No. 110, 1993).

³⁹ See Kristina Osswald and Gustav Flecke-Giammarco, *Germany*, in Nadja Alexander et al (eds), *EU Mediation Law Handbook – Regulatory Robustness Ratings for Mediation Regimes*, Wolters Kluwer (2017), at 381.

⁴⁰ See, for example, the mandatory consideration ADR rule in Minnesota: *Minnesota General Rules of Practice 114*.

⁴¹ Illustrations of this approach can be found in *France: Code of Civil Procedure C pr civ, Art. 131-1*; in *Germany: Code of Civil Procedure, § 278a*; and in Australia: Federal Court Rules (Amendment) 1991 N° 461, r 4(1).

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mediation at the request of at least one of the parties,⁴² and mandatory referral to mediation at the discretion of a referring body irrespective of the parties' wishes.⁴³

3.2. Triggering Mechanism

43. Article 6 of the Mediation Law deals with the authority to resolve disputes on the basis of mediation and specifically deals with how mediation is triggered. It permits mediation at the request of the parties and allows parties to select court mediators or external mediators (Article 6.1. referring to Article 8). However, read together with Article 30.1, this provision creates some uncertainty given that Article 30.1 seems to suggest that courts may order mediation, even when the parties do not request mediation. This means that Article 30.1 would allow courts to mandate mediation. **If this is the case, this should also be clarified in Article 6.** It is worth noting that there have been ample debates as to whether mandatory mediation constitutes an unacceptable restraint on the right of access to the court and therefore a violation of Article 14 of the ICCPR (or Article 6 of the ECHR).⁴⁴ In that respect, it must be emphasized that compulsion to mediate *is not* a violation of Article 14 of the ICCPR/Article 6 of the ECHR because it is simply a requirement to attempt mediation, and not to achieve an outcome through mediation and if the parties are unable to reach a solution through mediation, the traditional paths of justice are still open to them. In that respect, the European Directive on Mediation, while defining mediation as a voluntary process, acknowledges that Member States may have laws mandating mediation.⁴⁵ It may also be noted that according to the GC 32 on article 14 of the ICCPR specifically advises to consider mediation, ... “*where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, counselling or community service or educational programmes*”.⁴⁶
44. Article 6.4 states that “where parties have agreed to use mediation, mediation will be deemed the non-court method of dispute resolution” while Article 6.5 provides that “the court will deny accepting claims filed in violation of Articles 6.3 and 6.4”. The meaning of such provisions is unclear, though this may mean that the court will not hear a claim while mediation is ongoing. **If this is the case, then this should be clarified.**
45. Finally, the Mediation Law is currently silent on the issue of mediation clauses. It is recommended that the Law recognized and regulates such *mediation clauses as they are being increasingly used in (international) commercial contracts and they constitute*

⁴² Illustrations of this approach can be found in [United States: Florida Statutes 2008, s 44.102\(2\)\(a\)](#); and in [Australia: Farm Debt Mediation Act \(2018\), s 9\(1\)](#).

⁴³ Illustrations of this approach can be found in the United States: California Rules of Court – Civil Rules in relation to disputes not over USD50 000, r 3.891; Florida Statutes 2008, § 44.102, and in relation to appellate mediation § 44.1011(2)(a); Texas Civil Practice and Remedies Code, § 154.021 and § 154.022. In Queensland, Australia for example, where a mandatory referral model exists, it is also possible for litigating parties to obtain a consent order for mediation: Supreme Court of Queensland Act 1991 (Qld), s 102; and r 320 of the Uniform Civil Procedure Rules 1999, allows the court to refer the party to mediation where a party asks court for an Order. Additionally, consider the mandatory court mediation referrals regime in the courts of New South Wales, Australia: see David Spencer, [Mandatory Mediation Litigation Begins in NSW](#), 4(4) ADR Bulletin 52 (2001).

⁴⁴ See, for example, T Naughton, ‘Mediation and the land and environment court of New South Wales’ (1992) 9 *Environment and Planning Law Journal* 219 at 223. See also [Halsey v. Milton Keynes NHS Trust and Steel v. Joy and Halliday](#) [2004] EWCA Civ 576. See also the comments of Laws J in *Ex parte Witham*, who concluded that it was not lawful to set fees at a non-affordable level in order to encourage mediation, as this would effectively diminish the right to sue in a practical sense: *R v. Lord Chancellor, Ex parte Witham* [1998] QB 575 Div Ct. See, for example, S Fielding, ‘Mediation post-Halsey’ (2004) 154 *New Law Journal* 1394, T Allen, ‘A closer look at Halsey and Steel’ (2004) available at www.cedr.com and ‘What happens now? The impact of Halsey’ (2004) available at www.cedr.com.

⁴⁵ *Op Cit. footnote 18, Art 12 (Directive 2008/52/EC)*

⁴⁶ United Nations Human Rights Committee, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, par 44.

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important triggers for mediation procedures. If this option is retained by the legal drafters, it would be important to specify the court's right to stay proceedings pending the fulfilment of the mediation clause and define more specifically the content of such clause,⁴⁷ so that they can be recognized and enforced. Similarly, the Mediation Law would also benefit from regulating mediation agreements (i.e., post-dispute agreements to enter into mediation typically signed by the mediator, the parties and the legal representatives). In addition to recognising mediation clauses and agreements, and granting courts power to stay proceedings, additional guidelines and rules as to requirements for the drafting of mediation clauses and mediation agreements would be helpful. These can be developed through a variety of regulatory mechanisms, including non-legislative codes, model mediation agreements⁴⁸ as well as legislation. The trend in many countries, including Australia,⁴⁹ Singapore,⁵⁰ Hong Kong,⁵¹ the United States,⁵² England,⁵³ Germany⁵⁴ and France⁵⁵ is to recognise and enforce mediation clauses provided certain conditions are met, though different jurisdictions practice different standards when enforcing mediation clauses. For instance, in common law jurisdictions, the following characteristics for an adequately-drafted mediation clause are generally considered i.e., (i) whether it is a sufficiently certain and unequivocal commitment to commence a process; (ii) from which may be discerned what steps each party is required to take to put the process in place; and (iii) which is sufficiently clearly defined to enable the court to determine objectively (a) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (b) when or how the process will be exhausted or properly terminable without breach.⁵⁶ **These criteria could be used as guidance for the drafting of mediation clauses, either in the legislation or in other binding or non-binding documents.**

⁴⁷ See e.g., Sections 4 and 8 of the [Mediation Act of Singapore](#) (set out below) offers an illustration.

⁴⁸ Take for example, the model [mediation clause offered by the Singapore International Mediation Centre \(SIMC\)](#) is as such:

For use before a dispute arises:

All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be first referred to mediation in Singapore in accordance with the Mediation Rules of the Singapore International Mediation Centre for the time being in force.

For use after a dispute has arisen:

*All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, may, notwithstanding the commencement of any other proceedings, be referred to mediation in Singapore in accordance with the Mediation Rules of the Singapore International Mediation Centre for the time being in force.*⁷

(accessed on November 25, 2018)).

⁴⁹ See, for example, [Computershare Ltd v Perpetual Registrars Ltd \(No 2\) \[2000\] VSC 233](#), at para 6.

⁵⁰ See [International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another \[2014\] 1 SLR 130](#).

⁵¹ See, for example, [Hyundai Engineering and Construction Co Ltd v Vigour Ltd \[2005\] HKEC 258](#), at para 29.

⁵² However this was not always the case. See, for example, a number of US cases where the courts refused to enforce mediation and other non-binding dispute resolution clauses on the basis that it would be a futile exercise: *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F 3d 539 (9th Cir 1996), citing *Virginian Ry Co v System Fed'n N° 40*, 300 US 515, 550, 57 S Ct 592, 601 (1937). Other courts refused to issue what they referred to as a 'vain order' to enforce such clauses: *Lorch Inc. v Bessemer Hall Shopping Center Inc*, 294 Ala 17, 310 So 2d 872 (1975) and *Livoti v Elston*, 52 AD 2d 444, 384 NYS 2d 484 (App Div 1976). The breakthrough was made with [AMF Inc v Brunswick Corp. 621 F Supp 456, 462 \(EDNY 1985\)](#) where an advisory dispute resolution clause was recognised and enforced. For an overview of the development of US case law on this topic see Peter Tochtermann, *Agreements to Negotiate in the Transnational Context – Issues of Contract Law and Effective Dispute Resolution*, Uniform Law Review 685 (2008), at 696-706.

⁵³ See, for example, [Wah \(aka Alan Tang\) and another v Grant Thornton International Ltd and others \[2012\] EWHC 3198](#).

⁵⁴ Peter Tochtermann, *Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads*, in Klaus J. Hopt & Felix Steffek (eds), *Mediation – Principles and Regulation in Comparative Perspective*, OUP (2013), at 549. Tochtermann has reported that in Germany, whilst mediation clauses '[d]epending on its particular wording, ... may be binding on the parties in the sense that a claim may not be brought before a mediation session has been conducted', § 307 of the *Bürgerliches Gesetzbuch* (BGB) could render mediation clauses null and void 'where the clause does not sufficiently clarify that mediation is a non-binding procedure and may be broken off at every stage of the negotiations'.

⁵⁵ In France, the courts take the view that mediation clauses are legally binding and *prima facie* enforceable.

⁵⁶ See e.g., [Wah \(aka Alan Tang\) and another v Grant Thornton International Ltd and others \[2012\] EWHC 3198](#); and [Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA \[2012\] EWCA Civ 638](#), at [35]. By way of comparison, the Singapore Court of Appeal has indicated that Mediation Clauses should be worded clearly, and establish in definitive and mandatory fashion (and with sufficient specificity) the personnel who are required to attend the dispute resolution process and the purpose of each meeting at different stages of the process.

ODIHR Opinion on Law on Mediation of Mongolia**4. Provisions on Mediation Procedure****4.1. General Comments**

46. Procedural issues deal with how the mediation process is conducted and what procedures are used for appointment of mediators, payment and other administrative matters. Especially, procedural regulation manages aspects of the mediation process such as commencement, termination and mediation protocols and the selection and appointment of mediators. A global review of mediation regulatory practice has shown that most jurisdictions prefer to use non-legislative regulatory forms in relation to internal process issues.⁵⁷
47. The Mediation Law contains provisions dealing with all the above-mentioned aspects, especially procedural administrative matters such as selection and appointment of mediators, venue, timeframes, costs, commencement, termination etc. It also contains provisions relating to privacy and participation, joint and separate sessions (caucus), role of the mediator (see Sub-Section 7.2 *infra*) and mediation protocols. Therefore, the Mediation Law already has a relatively high number of provisions on procedure. However, most of them do not regulate the details of the mediation in a rigid or mandatory way, leaving them to the Mediation Agreement or the applicable code of mediator conduct. In terms of revision, in addition to the specific points identified below, it is recommended not to include additional procedural provisions in this legislation, so as to leave as much flexibility and autonomy to the parties to the mediation process. If additional regulation is desired, it can be best incorporated into soft law such as codes or in Mediation Agreements.

4.2. Principles of Mediation

48. Article 5.2 of the Mediation Law sets out the principles of mediation, which include the principle of voluntarism of the parties, confidentiality of participants involved in the mediation, unbiased mediator and equality of the parties to the mediation. The term “voluntarism” is confusing as it is unclear whether it refers to the participation in mediation, in which case this may hamper incentives to mediate such as court orders requiring parties to attend, or whether it refers to the voluntary nature of decision-making of the parties to the process. It should be the latter and the Law should be clarified in this respect. **Generally, the reference to party autonomy, which is generally used in mediation legislation and would encompass voluntarism (understood as the voluntary nature of decision making of parties in the mediation process), should be preferred and reflected under Article 5.2.**
49. The reference to confidentiality is overall welcome though the provision refers to the “confidentiality of participants involved in the mediation” which is a rather limited understanding of the concept. There are three dimensions of confidentiality and it is important that all are considered when regulating mediation, though they do not all need to be addressed in the legislation. First, insider/outsider confidentiality refers to a general duty of confidentiality *vis-à-vis* outside parties. It entails that parties to a mediation cannot make prohibited disclosures to outside parties. The duty can apply to the various participants in mediation such as parties, advisers, experts, interpreters, witnesses, the mediator and relevant support staff and prohibits them from disclosing

⁵⁷ See F Steffek, ‘Mediation in Europa und der Welt’ (2009) 1 *Zeitschrift für Konfliktmanagement* 21 at 23.

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information from the mediation to outsiders or non-participants.⁵⁸ Second, insider/insider confidentiality⁵⁹ regulates flows of information within mediation, especially in relation to private sessions (also known as caucus sessions) in some jurisdictions, though this aspect is generally not regulated by law but left to the mediator and parties. When insider/outsider confidentiality rules do exist in legislation, they generally take the form of default laws. Third, the insider/court confidentiality as the possibility that something said or done in, or for the purposes of, mediation might be used to their disadvantage in subsequent civil or criminal proceedings is one of the major concerns for mediation parties/their lawyers. This means that a wide range of behaviours and communication (including e.g., information, documents, recordings or other communications created or shared in joint or private mediation sessions, observations about party behaviour and reasons for inability to settle and the fact that a party has made an offer to settle) should be protected from being legally discovered or admitted in evidence in subsequent court and arbitral proceedings. Insider/court confidentiality is essentially about the admissibility or non-admissibility of evidence from a mediation process in subsequent proceedings (see Sub-Section 8 *infra*).⁶⁰ **The legal drafters should consider these three dimensions of confidentiality and see to what extent they should be addressed in the Mediation Law if at all, and Article 5.2 should then be clarified as appropriate.**

50. Another aspect which could be better highlighted as a key principle of mediation is the fair treatment of the parties by the mediator.⁶¹ **It is recommended to supplement Article 5.2 accordingly.**

4.3. Participants in Mediation

51. Article 12 deals with participants in mediation. Article 12.1 sets out that participants can include parties, legal representatives, guardians, supporters, interested third parties and other legal entities. **It is suggested that this provision be widened to include other participants who the parties and mediators agree can attend.** In Article 12.4, it is

⁵⁸ See e.g., § 18 of the Austrian Law on Mediation in Civil Cases 2001 provides: “*The mediator is obliged to secrecy about the facts which he has become aware of in the course of the mediation or which have otherwise become known. He shall deal with documents provided or delivered to him in the course of the mediation confidentially. The same applies to the supporting staff of the mediator as well as to persons who act for a mediator, under his direction in the course of a practical training*” (translation from the German Original by Maria Theresa Trofaier MA (KCL) DipICarb, Solicitor (England and Wales), Registered with the Vienna Rechtsanwaltskammer, Accredited Mediators in Austria (Ministry of Justice List)). Duties of confidentiality can also be found in Articles 9 and 10 of the [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#), Article 4 of the [European Code of Conduct for Mediators](#) and Article 24 of the [Law of 1995](#) in France.

⁵⁹ Generally, mediators manage insider/insider confidentiality in one of two ways, the open communication approach or the in-confidence approach. (1) In the [open communication approach](#), information passed to mediators in private sessions is not treated as confidential unless specifically requested by relevant parties. It is based on the principle that a free flow of information in mediation is essential for building trust and rapport and encouraging full and frank negotiations among the parties. At the same time this approach recognises that parties may wish to be able to communicate with the mediator on a confidential basis. In practice such an approach is used in a variety of commercial contexts and also in some family mediation practices and transformative mediation programmes, and has been adopted e.g., by the JAMS International ADR Center (<<https://www.jamsadr.com/>>), Article 9 of the [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#), the [UNCITRAL Conciliation Rules](#)⁵⁹ and the [Optional Conciliation Rules of the Permanent Court of Arbitration](#) (1996).⁵⁹ (2) The [in-confidence approach](#) operates conversely by treating all information disclosed privately as confidential unless indicated otherwise by the disclosing party. This means the mediator is unable to disclose such information without the express consent of the party providing it. The in-confidence approach is based on a belief that participants are more likely to feel comfortable disclosing information to the mediator if they know that it is disclosed on a confidential basis. It is the preferred practice in the following sets of rules: the London Court of International Arbitration (LCIA) Mediation Procedure 1999, the Rules of the Mediation Institute of the Stockholm Chamber of Commerce 1999, the Netherlands Mediation Institute (NMI) Mediation Rules 2008, the World Intellectual Property Organisation (WIPO) Mediation Rules 2002 and the International Centre for Dispute Resolution (ICDR) International Mediation Rules 2008.

⁶⁰ This is the only aspect of confidentiality to be dealt with by the European [Directive 2008/52/EC](#) on Mediation as well as by the [Uniform Mediation Act](#) (2001) in the United States (UMA) and it is addressed in Article 11 of the [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#).

⁶¹ Article 7(3) of the [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#).

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unclear what the phrase “unless otherwise specified in the law” in relation to the participation of advocates, translators and interpreters, refers to. Parties should be able to have appropriate assistance from advocates, translators, interpreters and others and this should be a general right of parties in mediation and be agreed upon by parties in consultation with the mediator. **This should be reflected under Article 12.1.** There may also be experts who may be attending mediation as well and this should be also mentioned.

52. Article 12.3 states that parties may participate personally or through their representation. **It is recommended that the provision be revised to state that the parties must participate in mediation in person.** It would also be recommended to define “in person” as including attendance via online or other technological or telephonic means. The requirement to participate in person is based on parties’ ability to self-determine in mediation. It is consistent with democratic principles of self-determination and autonomy, and cannot be compromised. Further mediation is a client-centred dispute resolution process where parties’ extra-legal interests play a critical role and parties’ ability to express such interests and needs. Whereas parties have largely lost their voice in litigation and arbitration processes where lawyers arguing legal points is the norm, mediation represents a process that gives voice back to the clients/parties themselves. Where parties engage lawyers to speak for them in a dispute resolution process, it is usually an advisory process such as neutral evaluation or a determinative process such as arbitration and litigation.
53. Article 21.2 seems to contradict previous provisions dealing with diverse participants at mediation. This provision states that mediation will take place in private and include the parties involved. It is clear that mediation should also include the participants (not just the parties) as agreed by the mediator in consultation with the parties. **Unless an issue of translation, the provision should be reconsidered.**
54. Article 32.4 states that in family disputes, psychologists, relatives, friends and co-workers can be parties to mediation for marriage reconciliation. First, as mentioned above, the term “party” seems to be incorrectly used here and should be replaced by “participant”. Secondly, the provision should possibly not be limited to marriage reconciliation, but should rather be applicable to all sorts of family mediation. **Accordingly, it is recommended that the term “for marriage reconciliation” be deleted.**

4.4. Procedural Administrative Matters (Venue, Timeframes and Costs)

55. Article 19 concerns the issue of venue. **This is not necessary and could be deleted.** Typically, these matters are dealt with by the mediators in consultation with the parties and terms may be included in a Mediation Agreement (Agreement to Mediate).
56. Article 20.1 states that mediation should take place within 30 days. However, the provision is not clear as to the rules regarding computation of time, especially the starting date. Article 20.2 seems to suggest that the 30-day period runs from the time of the court referral (see Article 31) but **it would be preferable to clarify this aspect.** Moreover, the timeframe may be rather short and an **extension of the period from 30 days to 45 days is recommended.** Article 20.2 also states that the period can be extended only once if the parties so request. **It is strongly advised to allow for the possibility of multiple extensions if all the parties to the mediation process agree to this.**

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57. Article 29.1 concerns fees. It indicates that certain fees will be provided by the court. However, the second sentence indicates that a party requesting mediation will pay a fee in advance. This seems to contradict the first statement unless different fees are meant, which **should be clarified**. It is also not clear how much of the fee is paid by the party who requests mediation and whether the other party will ultimately need to pay something. Such a requirement might deter parties from requesting mediation if they are the only one bearing the costs. **The Law should therefore clarify that the other party will also be paying a fee.**
58. Article 29.2 states that the court's mediator will be funded by the state budget. Again, it is not clear what fees the parties will pay if any. Non-court mediator fees are addressed in Article 29.3 and parties must agree upon and pay them. Overall, it appears that court staff / judge mediators are funded through their salaries, adjunct mediators have a fixed fee set by the General Council of Courts (Article 29.4) and Article 8 mediators can charge what they like as long as the parties agree. If this is correct, it is a reasonable approach to promote both justice and market models of mediation (see par 26 *supra*).

4.5. Commencement of Mediation

59. Article 21 deals with commencement of mediation. **It is suggested that the title should reflect this and that the provision be revised to be more precise also to state that the earliest one of the different commencement times shall be the valid commencement time of the mediation.** Typically, commencement of mediation is relevant for dealing with the statute of limitations and for confidentiality provisions. Insofar as this law deals with post-filing matters, the statute of limitations does not seem to be relevant. In relation to confidentiality, both the Hong Kong and Singapore provisions deal with confidentiality in a way that does not require a definition of commencement or termination of the mediation. **This is worthy of review for the purposes of the Mongolian Law. It is discussed below in the section on confidentiality relating to Article 21.3 to 21.6.**

4.6. Mediation Process

60. Article 24 deals with the mediation procedure. Article 24.1 sets out expectations for the first mediation meeting. While this is a useful provision generally, **it is recommended that this issue be dealt with in a code of conduct or set of practice standards for mediators and not in legislation.** Mediations can take many different forms and there may be many mediation processes where this provision may not be suitable, for instance in investor-State disputes. Similarly, **Articles 24.2**, which states that the mediation process will include all parties unless it is necessary for the mediator to meet with one party, **and 24.3 on the duration of mediation meetings, would be better incorporated into codes of conduct or practice standards.**
61. Article 30.4 states that if a civil action has more than one allegation, parties can use the mediator for one or all allegations. This seems to me a provision which confirms the view that if the parties agree, the mediation procedure can deal with a number of related disputes that belong to the same factual conflict. In other words, parties are not limited to the legal parameters of a dispute once they are in mediation. This is a key principle of mediation and seems to be implied by Article 30.4. **However, this should be more clearly stated in the Mediation Law and this principle may actually warrant a separate provision.**

ODIHR Opinion on Law on Mediation of Mongolia***4.7. Termination of Mediation***

62. Article 28 deals with the termination of the mediation and is to be read in conjunction with Article 21 dealing with the commencement of the mediation process. The termination of mediation can occur in a number of different ways, which are set out in Article 28. In Article 28.1 refers to the termination at the request of the parties *and* mediator(s). **This should be reworded to emphasize that termination may happen at the request of the parties *or* of the mediator(s).**
63. Also, it is suggested that Article 28.1.3 be deleted because it is unclear who would determine if either party acted in bad faith, and this should not be the mediator's role as this may otherwise potentially compromise the mediator's neutrality. In any case, where there is a situation where a mediator may consider that a party is not acting in good faith; this would presumably result in a situation that s/he would consider to be unlikely to lead to a settlement, which is covered under Article 28.1.2 anyway.
64. Regarding Mediated Settlement Agreements (MSAs), Article 26.2 requires them to be drafted in Mongolian or with an official translation into Mongolian. While this may be necessary for court-approved or notarised agreements, this may not necessarily be the case in the context of ordinary contracts, especially those involving a foreign party, where having them drafted in a relevant foreign language may be enough. In the event that one of the parties subsequently wishes to enforce such agreement before a court, an official Mongolian translation may then be required, however this could be arranged at the time of court proceedings.
65. Article 26.3 elaborates on the content of the MSA, which includes details of the parties disputes, positions, and "other issues" etc. This may actually breach confidentiality in many cases. Also, the parties to the mediation procedure, knowing that they will be required to document their positions and issues in the MSA, may be less open in the mediation. All these elements are not necessary for the MSA, which only needs to be a clear and enforceable contract and if it resolves a legal dispute, such a dispute and mention that it is now resolved needs to be identified and stated, but not necessarily more information. It is also worth emphasizing that MSAs may also have confidentiality clauses.
66. Article 26.3 requires a mediator to sign the MSA. This should not be understood as having the mediator indirectly endorsing the contents of the MSA, which would go against the mediator's impartial role. The legal drafters could consider instead **requiring the mediator to sign a certificate to say that the settlement agreement resulted from a mediation which s/he conducted.** Alternatively (or additionally), if it is an institutional mediation, then the **mediation institute could issue a certificate confirming that the settlement agreement resulted from mediation.** These revisions would be in line with Article 4 of the Singapore Convention on Mediation and the corresponding provisions in the UNCITRAL Model Law. **In addition, it is recommended to include in the Mediation Law provisions to recognise MSAs resulting from electronic communications in line with Article 4(2) and 2(2) of the Singapore Convention on Mediation and the corresponding provisions in the UNCITRAL Model Law.**

ODIHR Opinion on Law on Mediation of Mongolia**5. Selection of a Mediator**

67. Article 22.1 to 22.3 deals with requests by parties to select a mediator. There seems to be no timeframe in this section and **it is suggested that such be included**. It is also not clear to whom the requests are made. This may depend on whether parties are seeking a court mediator or a private mediator. **It is recommended that this issue be clarified**.
68. Article 23 deals with the selection of the mediator. Labour-mediation and civil-mediation, including cross-border mediations, are typically conducted by one mediator — although it is possible to have two or even three mediators. Family matters are frequently dealt by two co-mediators. Article 23.2 provides that where there is more than one mediator, the mediators will elect their leader. Unlike arbitration, co-mediators work together and without a leader or a chairperson. **Consequently, it is suggested that this provision be deleted**.
69. Article 23.3 seems to be relating to the situation where there is a court mediator and where an adjunct mediator will be employed. It is unclear whether the adjunct mediator would then work as a co-mediator. It is also not clear if the parties may choose the adjunct mediator or not, and **this should be clarified**. It is recommended that, as far as possible, parties have choice of mediators although it is clear that in court mediation settings, where parties are not paying for mediation services, it is unusual for parties to be able to choose their mediators.

5.1. Eligibility Requirements of Mediators

70. Article 9.1 sets out requirements for the qualifications of mediators whether they are court-employed mediators or mediators appointed by other organisations (i.e. Articles 7 and 8 of the Mediation Law). Article 9.1.1 requires mediators to be “*legally eligible*”. Unless an issue of translation, it is not clear **whether this requires the mediator to be a lawyer or that s/he must have legal capacity**. **It is recommended this be clarified. It is further recommended that there be no requirement for mediators to be legally qualified**. As confirmed by international trends, mediators come from diverse professional backgrounds.
71. Finally, *it is unclear from the Mediation Law whether judges may be appointed as mediators. There seems to be an implication that court-appointed mediators are likely to be externals (adjunct) or court-employees (full time). Insofar as judges are appointed as mediators, this may raise concerns in terms of compliance of the mediation with constitutional and human rights principles, especially procedural fairness, independence and impartiality issues. Hence, if in the Mongolian context, judges may be, at times, conducting mediation processes, it is vital to have a proper mechanism set out in the law to separate these judges from the trial process of the same matter in order to preserve the integrity and impartiality (and the public perception of such) of the courts.*

5.2. Standards for Mediators

72. Mongolia seems to have adopted the framework approach (i.e., in which a legislative framework is established within which non-legislative industry solutions are designed) with Articles 10 and 11 setting up the Mediators’ Council which is tasked with developing a training credentialing system with standards (codes of conduct) and training and credentialing instruments. Article 10.1 and other provisions of the

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Mediation Law at times refer to “licensing” and uses this terminology in a rather inconsistent manner, unless this is an issue of translation. It is worth noting that from an international perspective various terms can be used in relation to the professionalization of mediators including licensing, accreditation, certification and qualification. Credentialing is an umbrella term that covers all these terms. By using the term “credentialing” in the Mediation Law, as opposed to “licensing”, it preserves flexibility in terms of the kind of professional recognition that the Mediators’ Council may choose to establish for mediators. **It is therefore recommended that the term “credentialing” be used instead of “licensing” throughout the Mediation Law.**

73. In the absence of information on Mongolian standards and credentialing, the following good practice overview may be useful for the Mediators’ Council to determine which path to follow. Mediator credentialing requirements are usefully categorized in terms of the following three elements: (i) threshold or eligibility requirements (*e.g., in terms of age, level of education, field of education specialization, work experience, no criminal conviction or good character requirements*); (ii) qualification requirements/standards (*e.g., requirements in terms of training to become a competent mediator and be certified – in terms of training hours, content of training, practical and/or written assessment, etc.*);⁶² and (iii) maintaining the standard (*e.g., requirements in terms of continuing professional education, practice and other requirements*).⁶³ The Mediation Law does not specify requirements for training and leaves this to the Mediators’ Council (Article 11) and refers to continuing education in Article 10, though it falls short of specifying a standard and leaves this to the Mediator’s Council also. **It is recommended that the Mediators’ Council consider the issue of credentialing taking the above-mentioned elements into account.**
74. Overall, attention should be paid to ensuring the representation of all segments of society in the recruitment and training of new mediators.⁶⁴ Indeed, to make a positive outcome of mediation processes more likely, mediators should possess a good understanding of local cultures and communities. Equal numbers of men and women and a fair representation of minorities should be ensured.⁶⁵

5.3. Refusal or Dismissal of Mediators

75. Article 17.4 deals with the rights of parties to refuse/dismiss mediators where mediators have breached ethical rules or confidentiality. Parties have the right to refuse (Article

⁶² In most common law jurisdictions including **Hong Kong, Australia, Canada, the US, Singapore** and **New Zealand**, mediation training consists of 40 hours of specialized, interactive skills training followed by role play assessment and in some cases a small written assessment. In most civil law jurisdictions, training ranges from between 90 to 400 hours conducted in three day blocks over one to two years e.g. **France** (400) **Austria** (365), **Germany** (200), **Belgium** (c. 90). Assessment includes theoretical and practical components and usually a number of live cases and reports on those cases. In both civil and common law countries, once training and assessment has been completed, mediator candidates can apply for mediator certification (also called accreditation or credentialing). Some countries such as **Australia** and **Austria** require mediators to take out professional indemnity insurance in order to secure a place on the panel.

⁶³ Most civil and common law countries have continual professional development (CPD) requirements for mediators to retain their certification. Some jurisdictions also have practice requirements. See e.g., **Australia**: CPD 25 hours over 2 years plus mediation practice hours; **Belgium**: CPD 18 hours over 2 years; and **Austria**: CPD 50 hours over 5 years.

⁶⁴ Appendix V2 par 22 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters)

⁶⁵ This is in line with Article 7 of the CEDAW op. cit. footnote 11, pursuant to which State Parties to “shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country”; Article 4 CEDAW clarifies that this includes special measures to ensure equal opportunities and equal access for men and women to participation in public life; this position has been reaffirmed in General Comments Numbers 23 and 25 of the CEDAW Committee. At the OSCE level, paragraph 40 of the OSCE Moscow Document, available at <http://www.osce.org/odihr/elections/14310?download=true>, calls on participating States to consider gender balance and equal opportunity of men and women in public and social life, as well as in employment; further commitments of UN member States in the area of promotion and equal participation of women in areas of public life and in conflict resolution can be found at the Beijing Declaration and Platform for Action (in particular pars 144, 183) as well as in par 23 “Further actions and initiatives to implement the Beijing Declaration and Platform for Action” available at http://www.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf

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13) and dismiss (Article 17.1) in any event and do not need to provide a reason. Where mediators breach rules and standards, they should be open to disciplinary action (Mediators' Council) and even civil action.

6. Mediators' Council***6.1. Role and Composition of Mediator's Council***

76. In Article 10.1, reference is made to selection; licensing and organising continuing education for mediators (see the comments in par 72 *supra* concerning the term "licensing" to be replaced by "credentialing"). In relation to the term "selecting", this wording seems inappropriate in this provision as the Mediators' Council would not really be selecting mediators, but rather credentialing them.
77. In terms of organising continuing education for mediators, it may be more appropriate not to require the Council to organise continuing education but rather to determine continuing education requirements for mediators as the organisation of continuing education should or would probably be delegated.
78. Article 10.2 refers to judges, attorneys, and analysts. The meaning of "analysts" in this provision is unclear. This could be a translation issue, but it is recommended that the wording for this provision remain as broad as possible so that, should the Council change its mind about the type of representatives it wishes to include, it has the capacity to do this. The current wording which states "...including" would be sufficient in this regard.
79. In Article 10.3, references are made to mediator's petition, agreement and notice. It is advisable that forms be developed and placed in a schedule to the Mediation Law.
80. In relation to the use of the term "agreement" in Article 10.3, It is not clear whether this refers to "the Mediation Agreement" (see section on Mediation Agreements above) or "the Mediated Settlement Agreement" or something else. There is nothing to indicate this and no relevant definitions. **In any event, the wording is unclear and should be revised. It may also be useful in Article 10.3 to cross reference to other provisions in the law which refer to the petition, the agreement and the notice.**

6.2. The Powers of Council (Article 11)

81. Article 11.1.1 refers to workplace standards. The term is not explained in this context and **it necessary this be clarified, as it could lead to uncertainty, especially in relation to labour disputes.**
82. Article 11.1.1 provides that the Council can determine the cost, payment and promotion for mediators. In relation to cost, this seems to refer to both court-appointed mediators (Article 7) and external mediators (Article 8). It is not clear whether this mean that the Council regulates payment of mediators and in that case how this is conducted. Furthermore, it should be clarified whether it is permissible for parties to use an external mediator in a dispute and agree to pay a particular fee higher than the fees set by the Council. **There is also no information about on whether the Council can place a cap on payments. This should be clarified.**
83. Rules on *external mediator fees* could have implications on the profession of mediators. If, fees are kept low for private, external mediators, it may discourage talented

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professionals from entering the mediation profession. It may also mean that two parties in a large commercial or investment dispute who wish to appoint a specific external mediator on a “user pays” basis – and this mediator charges a different (higher) fee --- are unable to appoint the mediator of their choice. This could interfere with the principle of party autonomy in the choice of external mediators. **It is recommended to avoid regulating fees for mediators not appointed by a court.** In relation to court appointed mediators it is common practice to regulate fees as these mediators are paid by the State and not the parties to the dispute.

84. Article 11.1.2 refers to developing training programmes. It is recommended that a cross reference be made to Article 9.1.3. It would also be useful to have a cross reference to Article 11 in provision 9.1 of the Mediation Law. Additionally, in Article 11.1.2, there is no reference to assessment, but only to training. It is recommended that a provision be inserted in 11.1.2 that reflects that the Council’s right to develop a competency-based system to determine the competency of mediator candidates.
85. In Article 11.1.3, there is reference to selecting mediators and certifying them. **It is already referred to above that the term “credentialing” is recommended used. It is also recommended that the reference to selecting mediators be deleted,** as it is unnecessary and potentially misleading.
86. In Article 11.1.4, reference is made to “registering” mediators. It is advisable that this term not be used and instead that the provision be reworded along the lines of “to establish a list of mediators” or “to establish an approved list of mediators”. The word “register” may have a legal implication in the sense of licensing mediators. Please also see previous comments on keeping the credentialing system broad at this stage of the development of mediation so that the Council has the opportunity to explore the type of credentialing system it wishes to develop for mediators in Mongolia. Furthermore, in Article 11.1.4, the term “certified” is also used; also here it is recommended employing the term “approved list”. This use of different terminology suggests different credentialing systems and is confusing. With the signing of the Singapore Convention on Mediation and its expected ratification by states, the role of mediator standards and credentialing will be increasingly under the spotlight. This means that it is important to have clarity in this area. Further, soft law credentialing (e.g. through the Council) is recommended as this approach offers regulatory responsiveness – this will be critical as the professionalization of mediators develops and changes internationally in the coming years.
87. In relation to Article 11.1.5, references to suspending a mediator’s license are made, and later to revoking certificates. **The use of more general language such as “removing mediators’ credentials” or “removing names from the mediator list” or “revoking the validity of mediator certificates/credentials” is recommended.**
88. Article 11.2 states that the Council shall offer the list of mediator names to governmental and non-governmental organisations and professional associations referred to in Article 8. This could imply that these organisations mentioned in Article 8 are required only to use mediators from the Council’s list. It makes good sense to have a set of uniform standards for mediators in Mongolia. However, if there is a cross border dispute in a Mongolian court which is referred to mediation, the parties may wish to appoint a foreign mediator who may not be credentialed according to the Mongolian system and not on the Council’s list. **If there is a wish to allow foreign or other mediators to mediate in situations such as this, then it might be useful for the Council to establish an additional alternative path to credentialing.** For example,

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the typical path to credentialing might involve mediator training and competency assessments while the additional alternative path to credentialing might be based on experience of the mediator and their ability to demonstrate equivalent credentialing in another country. Foreign mediators may apply to the Council for recognition as a mediator under Mongolian law either for the purposes of this one mediation only; alternatively the foreign mediator might apply to be recognised in Mongolia as a mediator and be listed as such. Most mediation systems that wish to encourage the development of mediation practice have a mechanism to allow foreign or other experienced mediators to apply for recognition within their systems.

89. Article 11.3 states that an “Article 8 organisation” and the Mediators’ Council shall select and register a mediator from the list and provide an opportunity to work. The meaning is unclear, but the provision may be saying that “Article 8 organisations” and courts will provide opportunities for mediators on the approved list to work according to the procedure set by the Council. It seems the Council will not offer work directly to mediators but will be identifying those candidates who can be credentialed as mediators. The court and the “Article 8 organisations”, however, will be in a position to help parties select mediators and to provide mediators on the list with work. **Clarification of this provision is recommended.**

7. Rights and Obligations of Mediators, Parties and Participants in Mediation

7.1. Rights and Duties of Parties to the Mediation Procedure

90. Rights and obligations may be regulated by legislation, common law principles, court rules, codes of conduct and private contractual arrangements.

Depending on the jurisdiction, parties may have the following duties and rights:

- a) A duty to engage in mediation if it is reasonable to do so;
 - b) A duty to participate in mediation in good faith;
 - c) The right to commence court proceedings after a mediation which failed to achieve a settlement;
 - d) The right to enforce a mediated settlement agreement; and
 - e) Duties related to confidentiality.
91. The Mediation law has equivalent to point b) above in Article 13.2.3 and to point d) in Article 13.2.1, although this is framed as a duty to comply rather than a right to enforce. It is recommended Article 13.2.1 be reframed as a right to enforce. Article 13.1.9 corresponds to point c) above. It is suggested “refuse” be reframed in 13.1.7 to “withdraw” as parties can withdraw from mediation at any time – it is different from refusing mediation. The other rights in Article 13.1 are acceptable.
92. Point a) is not contained in the Mediation Law – it is a triggering mechanism used in England, Australia, Singapore, Hong Kong SAR of China and other jurisdictions and it is effective to get parties to the mediation table without a court referral. See Practice Direction 31 in Hong Kong and s 11 of the Civil Dispute Resolution Act (Australia). See discussion on triggering provisions – earlier.
93. Rights and obligations, mentioned in Articles 18.2 and 18.3 relating to confidentiality have been elaborated on in section 4 *supra*.

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94. In relation to Article 18, Article 18.1 seems to be a provision requiring the parties to act in good faith and be supportive of the mediation procedure. It is also a provision, which supports procedural transparency. It is recommended this be reworded as an obligation or duty on parties to act in good faith and to ensure procedural transparency. This provision could be bundled together with the other provisions that deal with parties' rights and duties (see Article 13 of the Mediation Law).
95. Article 21.3 seems, even if not specifically mentioned, to place a duty on lawyers and the mediator not to coerce parties. It is recommended this be redrafted to render it clear who has the duty and the provisions should be placed elsewhere in the Mediation Law.
96. Article 21.4 refers to a duty of confidentiality and seems misplaced here. See discussion on confidentiality below in section 8.
97. Article 26.5 is unclear. It is not the role of the mediator to help with implementation of the MSAs. The reference to "withdraw their claim" is also confusing. **If an MSA is reached there should be a provision in the MSA stating that the claim is withdrawn in return for the MSA terms.**
98. Article 27 spells out that that an MSA can be enforced in court according to the code of civil procedure. **In case of international MSAs, it is recommended to take into consideration the terms of the Singapore Convention on Mediation and UNCITRAL Model Law** which provide for an expedited enforcement mechanism for cross-border commercial MSAs. Empirical research indicates that users of international mediation wish to have an option of expedited enforceability⁶⁶. Amendments to the Mediation Law may adopt terms from the UNCITRAL Model Law (Article 16 onwards) which set up this mechanism for cross-border commercial MSAs – and still leave the current system for all other MSAs. This can be done whether or not Mongolia signs the Singapore Convention on Mediation; however if it does sign on, then the UNCITRAL Model Law provisions will be in place and mirror the Singapore Convention on Mediation requirements.
99. Should a revision of the Mediation Law extend the scope of the Law to cover pre-filing disputes (i.e. where there is no litigation), then this novel provision in Singapore (s12 of the Mediation Act) may be of interest. It provides that parties to private mediation (where no legal proceedings have commenced) may request court to record their MSA as a court order.
100. See above for elaboration on Article 29.1. It seems to impose a duty on parties to pay mediation fees in advance in some circumstances.
101. Article 30.4 seems to mean that parties can determine the scope of mediation – this aligns with party autonomy and perhaps could be made clearer.

⁶⁶ Eunice Chua, 'Enforcement of International Mediated Settlements without the Singapore Convention on Mediation', Singapore Academy of Law Journal 2019 31 p. 572: <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/Current-Issue/ctl/eFirstSALPDFJournalView/mid/503/ArticleId/1472/Citation/JournalsOnlinePDF>

ODIHR Opinion on Law on Mediation of Mongolia***7.2. Rights and Duties of Mediators***

102. Article 14 of the Mediation Law deals with mediators' rights and obligations. Some general recommendations regarding the structure and nature of these rules are listed below:
103. In Article 14.1.1 it is recommended "depending on the nature of the dispute" be deleted as this is not an indicator of the amount of the fee.
104. In Article 14.1.2, "to inform the public about its activity" seems to relate to promoting mediation generally. If this is the case, it is suggested this be a separate provision.
105. Article 14.1.5 seems to permit mediators to make suggestions i.e. an advisory or evaluative approach. It is suggested this provision be deleted as it will encourage evaluative mediation over other models. If the suggested definition of mediation is adopted, then it is broad enough to cover a variety of mediation models including evaluative. **Provisions such as Article 14.1.5 are better placed in institutional rules and not legislation.** For comparison: Article 14.2.7 – mediators cannot give legal advice. It seems that making substantive suggestions may involve legal recommendations and it will be hard to differentiate legal advice from offering options in 14.1.5.
106. Article 17.2 is unclear "affected by circumstances". If there is no clear meaning, it is recommended this be deleted.
107. Articles 21.5 and 21.6 deal with mediators contacting parties, which is unproblematic. However, the translation uses language which suggests that mediators can compel or must "chase" parties to attend – this may impact the mediator's impartiality and should not be a requirement.
108. Mediators' duties in relation to the Protocol are set out in Article 25. Here the term "Mediation Agreement" should be used as discussed previously.
109. Article 26.1 provides that mediators may draft MSAs if parties request. It is suggested this provision be removed as it potentially jeopardises a mediator's impartiality. While some mediators do this, there is a risk for abuse, and this practice should not be promoted in the Mediation Law.⁶⁷
110. There should be consideration given to a provision which prevents a mediator acting as an arbitrator in the same matter except with the express written agreement of the parties. Such a provision will minimise claims of bias against mediators and arbitrators in hybrid processes.

7.3. Rights and Duties of Lawyers

111. Lawyers may be subject to the following duties:
- to act in the best interests of the client;
 - to advise client to go to mediation, if reasonable to do so in the circumstances.

⁶⁷ See for instance [Tapoohi v Lewenberg No. 2 \(2003\) VSC 410 \(Australia\)](#)

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- to advise client to consider settlement if it may be in the client's best interests;
- to advise client in relation to confidentiality and other duties and rights;
- duty to act in good faith towards other parties and lawyers; and
- duties associated with confidentiality.

112. The Mediation Law contains lawyers' rights and duties in Article 15 does not contain the following duties, which are **recommended to include**:

- **to act in the best interests of the client;**
- **to advise client to seek mediation, if reasonable to do so in the circumstances (see *para 90 supra* regarding a corresponding duty on parties);**
- **to advise client to consider settlement if it may be in the client's best interests.**

Furthermore, Article 15.3 could be framed positively as a duty of good faith to support the mediation procedure.

7.4. Rights and Duties of Third Parties and Courts

113. Third parties can participate in mediation with the agreement of the parties – this is generally accepted. However they cannot join a mediation process without the parties' agreement or permission. Article 16.1 should be clearer in this regard.

114. Article 27.2 states that the courts will affirm the MSA with the assistance of mediator. It is unclear whether this a provision adopting MSAs as court orders – to allow for expedited enforceability. Furthermore, it is also unclear what the role of the mediator is here. Mediators must stay impartial and their role ends with the mediation. This provision may also refer to courts upholding an MSA where there is non-compliance as per Article 27.1. If the latter, it is important to include exceptions to enforcement (grounds to refuse to enforce) such as those in Article 5 of the Singapore Convention on Mediation and Article 19 of the UNICTRAL Model Law. Similar considerations apply to Article 30.2. There may be reasons for the court to refuse to enforce an MSA.

8. Confidentiality and Non-admissibility of Mediation Evidence***8.1. Confidentiality Obligations***

115. Overall, confidentiality is dealt rather inadequately in this law. The relevant provisions are primarily found in Articles 18.2, 18.3, 18.4, and 18.6 which deal with various aspects of confidentiality and non-admissibility of mediation communications in court or arbitration proceedings (see also the reference to confidentiality as a key principle of mediation and related comments in Sub-Section 4.2. *supra*). **These provisions would be better bundled together in a separate article or a series of articles dealing with confidentiality and non-admissibility.**

116. The Mediation Law sets out confidentiality obligations for mediators but not for parties, lawyers and other participants. Furthermore, the provisions are bundled with other types of obligations in Article 18. **It is recommended to rewrite these provisions in a series of articles that deal with confidentiality for mediators, parties, lawyers and other participants** (see also Sub-Section 4.2. *supra*). In that

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respect, the UNCITRAL Model Law,⁶⁸ the Singapore Mediation Act and the Hong Kong Mediation Ordinance (sections 8, 9 and 10) may provide useful guidance to the legal drafters. At the same time, while it is generally recommended to regulate insider/outsider and insider/court confidentiality in the legislation, it is not generally advisable to regulate insider/insider confidentiality, which is typically dealt with by institutional rules of codes of conduct and Article 9 of the UNCITRAL Model Law is rather unusual in this regard.

8.2. Exceptions to Confidentiality

117. Exceptions to confidentiality are important. Blanket confidentiality in mediation would undermine the integrity of the process as there would be no accountability of mediators, parties, lawyers, and others. An international comparative overview of confidentiality laws reveals the following main categories of exceptions:

- *Pre-existing information* otherwise subject to discovery or equivalent procedures. The principle behind this exception is that evidence otherwise admissible does not become inadmissible just because it is disclosed in mediation.⁶⁹ In other words, parties should not be able to use mediation to conceal otherwise discoverable information as this would amount to an abuse of the mediation process.⁷⁰
- *Information open to the public.* This exception refers to information generally available, or accessible under freedom of information⁷¹ and privacy laws.⁷² It also applies to information created during a phase of the mediation that the parties agreed would be public or was required by law to be public.
- *Breach of duty/professional misconduct.* An exception is also appropriate to allow disclosure of mediation information if a dispute arises between the mediator and any of the parties, or if the professional conduct of the mediator or other participants in mediation such as legal representatives is challenged.⁷³
- *Threat of future violence or harm to others and communications to plan or attempt crimes or to conceal ongoing criminal activity.*⁷⁴ However many statutes in many countries are silent on this point, leaving it to courts to rely on general principles to imply the exception on public interest and policy grounds. As with other exceptions, the aim of such provisions is to protect the integrity of the

⁶⁸ See especially Articles 9 (on insider/insider confidentiality), 10 (on insider/outsider confidentiality) and 11 (on insider/court confidentiality) of [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#)

⁶⁹ See, for example, s 5 of the [UMA](#), art 11(5) of the [UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation \(2018\)](#) and the cases *AWA v Daniels* (1992) 7 ASCR 436 and *Aird and Aird v Prime Meridian* [2006] EWCA Civ 1886.

⁷⁰ S Hughes, 'The Uniform Mediation Act: To the Spoiled Go the Privileges' (2001) 85 *Marquette Law Review* 9.

⁷¹ See s 7(a)(2) of the [UMA](#). At the US Federal level see the Freedom of Information Act 1966 and at state level the various Open Records Acts or Open Public Records Acts such as [Washington's Open Records Act \(Revised Code of Washington \(RCW\) s 42.56\)](#) and [California Public Records Act \(California Government Code §§ 6250 – 6276.48\)](#). In England see the [Freedom of Information Act 2000](#) and in Australia the [Freedom of Information Act 1982 \(Cth\)](#) at federal level and various FOI Acts at state levels.

⁷² See, for example, the [Privacy Act 1988 \(Cth\)](#) in Australia.

⁷³ For instance, these exceptions are illustrated by ss 6(a)(5) and 6(a)(6) of the [UMA](#). Similarly under Florida's [Mediation Confidentiality and Privilege Act](#) disclosure is permitted for the defence or assertion of mediator misconduct (see [Mediation Confidentiality and Privilege Act \[FS 44.405\]](#); contrast the Californian confidentiality provisions which contain no such exception as discussed in *Morgan Phillips v JAMS/Endispute LLC* (2006) Cal App 4th 795, 44 Cal Rptr 3d 782). The Slovakian mediation legislation provides that mediators are not bound by the obligation of confidentiality to the extent required for the assessment of breach of their professional obligations (See § 6 of the [Slovakian Act of 25 June 2004 on Mediation and Amendment of Certain Acts](#)). Despite making provision for the exception, the UMA specifically prevents mediators from being called to give evidence in relation to professional misconduct claims against representatives or others in mediation (s 6(c)).

⁷⁴ Provisions to this effect can be found, e.g., in s 5(c) and s 6(a)(3) and (4) of the [UMA](#), art 7(1)(a) of the [European Directive](#) and the [German Criminal Code](#), as indicated previously

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mediation process and not leave it open to abuse by those contemplating or involved in criminal activity. The prevention of physical or psychological harm to a person is also an important public interest here. However, the approach taken to this issue will depend very much on national legal culture and public policy. It is sometimes thought that where a mediating party admits to criminal offences this should not provide an exception to privilege because it may discourage parties to engage in the process. However, there are provisions in some jurisdictions that might require mediators to report certain types of crimes to police upon becoming aware of them.⁷⁵

- *Abuse of a child or vulnerable party.*⁷⁶ Protection of children and other vulnerable members of society has long been a public policy exception to confidential communications in many situations such as those between doctor and patient. Similarly mediation communications that shows the abuse, neglect or abandonment of a child or vulnerable party may not be subject to confidentiality provisions.
- *To prove the existence of a settlement agreement.* Exceptions to confidentiality are often invoked by post-mediation actions seeking to prove or set aside mediated settlements, or make a case for sanctions against another party.⁷⁷
- *Costs determinations.* In certain jurisdictions courts have been willing to admit limited evidence from mediations in applications for costs of the mediation or proceedings to which the mediation relates. Here evidence may be adduced relating to participants' behaviour to show lack of good faith or unreasonable behaviour in relation to the mediation.⁷⁸

118. **It is recommended that the Mediation Law includes appropriate exceptions to the confidentiality provisions, and consider the leave of court provisions in relation to insider/court confidentiality, as illustrated above.**

⁷⁵ See, for example, s 316 of the Crimes Act in Australia which provides that a person who becomes aware that a serious indictable offence has been committed must inform the police or face a jail sentence. At the time of writing mediators were not included in the occupations – such as doctor and solicitor – excepted from this provision.

⁷⁶ Examples can be found in s 6(a)(7) of the *UMA* and Art 7(1)(a) of the European *Directive 2008/52/EC* on Mediation

⁷⁷ For example, Article 11(3) of the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)* provides for disclosure and admission of evidence “for the purposes of implementation or enforcement of a settlement agreement”. Article 7(1)(b) of the European *Directive 2008/52/EC* on Mediation contains a similar exception to the prohibition on mediator testimony which is more narrowly worded,⁷⁷ and reads: “where disclosure of the *content of the agreement* resulting from mediation is necessary in order to implement or enforce that agreement” [*emphasis added*]. Such exceptions are also often found in domestic legislation or practice. For instance, in the United States this exception is expressly included in the public interest provision, s 6(b) of the *UMA*. However, the *UMA* does not go so far as to permit courts to compel mediators to provide evidence of mediation communications in relation to such claims (s 6(c)). In other words, mediators cannot be required to provide testimony about the conduct of parties or other participants in relation to enforcing settlement agreements, but evidence from other sources may be adduced. Thus, the terms of this particular *UMA* exception are distinctly narrower than equivalent exceptions in other legal instruments granting mediators greater – albeit not absolute – security in relation to their confidentiality obligations. Cases dealing with these situations are considered in detail in the next chapter on post-mediation issues. However, the English case of *Brown v Rice and Patel* [2007] EWHC 625 (Ch) is mentioned here because it shows how broadly this exception can be interpreted. In this case the agreement to mediate provided that a mediated settlement would not be binding until and unless it was recorded in writing and signed, which had not occurred. Nonetheless the party seeking to enforce the settlement sought to admit evidence of mediation communications to prove the existence of an agreement between the parties to settle. Despite opposition from the mediation provider (ADR Group) and the other party, the court admitted evidence from the mediation on the basis that it fell within an exception to the without prejudice rule, namely to prove the existence of a concluded settlement. In justification for his view the judge reasoned that it was conceivable that parties might vary, waive or even be estopped from asserting the writing requirement in the agreement to mediate. However, in situations where parties agree that only a written and signed agreement is to be recognised as legally binding, they send a signal that they do not wish a court to delve into confidential mediation communications to establish the existence of a settlement not meeting these criteria. The wide interpretation of this exception by the court in *Brown v Rice and Patel* does not encourage confidence in the protection and privacy that confidentiality is said to offer parties and other participants.

⁷⁸ See section 7.1 of this Review on duties of parties.

[END OF TEXT]

ANNEX: Law on Mediation of Mongolia (22 May 2012)



LAW OF MONGOLIA

May 22, 2012

Ulaanbaatar city

MEDIATION LAW

**CHAPTER ONE
GENERAL PROVISIONS**

Article 1. Purpose of the Law

1.1. The purpose of this law shall be to determine a legal basis for settling the legal disputes through non-judicial methods with a support from the mediators and to regulate the relations concerning the implementation of mediation and conciliation.

[/This paragraph was amended by the law of January 17,2013 /](#)

Article 2. Legislation on Mediation

2.1. The legislation on **mediation** shall consist of the Constitution of Mongolia, Civil Code of Mongolia, Code of civil procedure, Family Law, Law on Labor, Law on Arbitration, Law on Courts, Law on Judicial Administration, this Law and other legislative acts enacted in conformity therewith.

2.2. If an international treaty to which Mongolia is a party to, provides otherwise than this law, then the provisions of the international treaty shall prevail.

ODIHR Opinion on Law on Mediation of Mongolia**Article 3. Scope of the Law**

3.1. Mediation shall be used for resolving the disputes arising out of civil relations as well as the disputes arising out of labor and family relations.

3.2. Mediation may be used for resolving the disputes other than those specified in the provision 3.1 of this Law only to the extent otherwise allowed by applicable law.

3.3. Mediation may be used to investigate and resolve disputes even after a civil action has been filed or referred to arbitration.

3.4. Mediation shall not be used for resolving disputes specified in the provision 3.1 if applying the provision adverse legal interest of a third party not involved in the mediation or the public interest.

3.5. Unless otherwise specified in the laws, the regulation of this Law is not applicable if parties voluntarily resolve the dispute in the absent of the mediator or judge's ruling for amicable resolution.

3.6. Arbitrator will determine by its rule if the mediator should participate pursuant to applicable provision of law.

Article 4. Definitions of Terms

4.1. The following terms used in this Law shall be interpreted as follows:

4.1.1. "Mediation" means the activity of the mediator who attempts to settle a legal dispute arose between parties outside of the court pursuant to the rules specified in this law;

4.1.2. Pursuant to the provision 3.1 of this law, "Parties" means a citizen and legal entity initiated legal action or legal entity who has no legal rights but allowed to participate to the action by court's order as the mediator;

[/This paragraph was amended by the law of January 17, 2013 /](#)

4.1.3. "Mediator" means a professional person have chosen and/or agreed by the Parties to provide assistance to mediate to resolve the dispute;

4.1.4. "Mediation agreement" means a written agreement parties reached as a result of the mediation with respect to the dispute and controversy.

CHAPTER TWO

ODIHR Opinion on Law on Mediation of Mongolia**MEDIATION ACTIVITY****Article 5. Purpose and Basic Principles of Mediation Activity**

5.1. The purpose of mediation activity is to find a solution consistent to the interests of the parties and to regulate a conflict of relations or a dispute between the parties in an amicable, immediate and cost-effective way.

5.2. Mediation shall be carried out on the basis of the following principles:

5.2.1. implement on the basis of voluntarism of Parties;

5.2.2. keep confidentiality of participants involved in the mediation;

5.2.3. the mediator will not be biased;

5.2.4. ensure equality of parties to participate in the mediation

Article 6. Authority Resolving dispute on Mediation Basis

6.1. The parties shall make a request a mediation pursuant to Articles 14-16 of the Code of Civil Procedure with trial court mediator according to the jurisdiction specified or shall make request to the mediator pursuant to the provision 8 of this Law.

6.2. A court is under obligation to provide information about the mediation to the disputed parties in pre-litigation phase and provide an opportunity for mediation for all stages of litigation.

6.3. The mediation will be considered primary means to dispute resolution outside of the court for family relations disputes other than specified in Code of Civil Procedure 132.4.

6.4. If parties have agreed to use the mediation to the dispute resolution, it will be deemed that non-court method to dispute resolution has established.

6.5. Pursuant to the provision 65.1.3 of the Code of Civil Procedure, the Court will deny to accept any claims filed in violation of the provisions 6.3 and 6.4 of this Law.

Article 7. Mediator with the Court

7.1. The first instance court will employ full time or adjunct mediator.

[/This paragraph was amended by the law of January 17, 2013 /](#)

7.2. General Council of Courts and office of a court of first instance shall be responsible for its budget, operation and human resource management pursuant to the provision 7.1 specified of this Law.

ODIHR Opinion on Law on Mediation of Mongolia**Article 8. Mediator for Governmental and Non-governmental Organizations**

8.1. The governmental or non-governmental organizations and professional associations may employ the mediator to resolve legal disputes arise among their branches.

8.2. To comply with the provision 8.1, a professional mediator shall possess a higher education, trained in the mediator training course, certified and listed among the professional mediators' list.

Article 9. Requirements of Mediator

9.1. Mediator specified in the provisions 7 and 8 of this law shall meet the following requirements:

- 9.1.1. be a legally eligible;
- 9.1.2. have a higher education;
- 9.1.3. completed the training and certified;
- 9.1.4. listed on the approved registered mediator's list;
- 9.1.5. have no criminal record.

9.2. A mediator shall follow professional codes of conduct and other regulations accordance with the provision 10.1 of this Law.

Article 10. Mediators' Council

10.1. The General Council of Courts shall establish an adjunct "Council" (hereinafter referred to as "Council") to select, license mediators and organize continual education for mediators.

10.2. The Council shall consist of five individuals including judges, attorneys and analysts.

10.3. The General Council of Courts shall approve the design of forms for mediator's petition, agreement and notice.

Article 11. The Powers of Council

11.1. The Council shall exercise the following rights:

11.1.1. to govern codes and conducts of mediators, workplace standards, determine cost, payment and promotion for mediators and oversea the implementation of the rules;

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11.1.2. to develop training program for preparing and retraining of mediators and to organize training;

11.1.3. to select mediators and certify them;

11.1.4. to register mediators and announce certified list with the names to the public;

11.1.5. to suspend license, remove from the name list and to revoke certificates; and

11.1.6. to establish procedures of the Council meeting.

11.2. the Council shall offer mediator's name list to governmental and non-governmental organizations, and professional associations.

11.3. An organization specified in the provision 8 of this Law and the General Council of Courts shall select and register a mediator from the name list offered by the Council and provide an opportunity to work according to the relevant procedure.

CHAPTER THREE PARTICIPANT OF MEDIATION

Article 12. Participant of Mediation

12.1. Participants of mediation activity are disputed parties and their legal representatives, guardian, supporter, third party whose interest has been affected by the dispute and other legal entity.

[/This paragraph was amended by the law of January 17, 2013 /](#)

12.2. Two or more parties can be participated in the mediation with one or more mediators.

12.3. The parties may participate in reconciliation mediation activity personally or through their representative.

12.4. Unless otherwise specified in the law, the parties may get assistance of advocates, translators, interpreters and other persons during the mediation based on mutual agreement.

Article 13. Rights and obligations of the parties participating in reconciliation mediation activity

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13.1. The Parties participating in reconciliation mediation activity shall have the following rights:

- 13.1.1. to express their opinions without any pressure and exercise their rights to agree and/or refuse to use mediation;
- 13.1.2. to have broad scope of issues in order to agree, deny, accept and comply;
- 13.1.3. to make a request to select, accept or refuse the mediator;
- 13.1.4. to select method and form 13.1.4. to select the methods of mediation, present and protect their positions, obtain information and provide additional documents and assess the conditions of agreement;
- 13.1.5. to monitor the mediation results and calculate the consequences of signing the mediation agreement;
- 13.1.6. to obtain information concerning the consequences of voluntary incompliance with the agreement;
- 13.1.7. to refuse to have mediation anytime during such activity;
- 13.1.8. to sign in the mediation agreement;
- 13.1.9. rights to assert claim with respect to the mediation agreement pursuant to the Article 8 if the mediation is not successful;
- 13.1.10. the other rights specified in the laws.

13.2. The Parties participating in mediation activity shall have the following obligations:

- 13.2.1. to comply with the agreement voluntarily in fairness If signed the mediation agreement,
- 13.2.2. to be responsible for fees and costs for the mediation and other necessary expenses according to the rules specified in this Law;
- 13.2.3. to participate the mediation in good faith and be present when the mediator schedules the appointment;
- 13.2.4. the other obligations specified in the laws.

Article 14. Rights and Obligations of Mediator

14.1. A mediator shall have the following rights:

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14.1.1 to accept fees for the mediator agreed by the parties and get reimbursement for the mediation pursuant to the provision 8 depending on the nature of the dispute.

14.1.2 to inform public about its activity and protect confidentiality;

14.1.3 to advise parties verbally and/or written form about the chosen method to resolve the dispute pursuant of this law;

14.1.4 to appeal parties individually or jointly to participate the mediation;

14.1.5. to offer alternative options to resolve the dispute to the parties;

14.1.6. all other rights specified in the law.

14.2. A mediator shall have the following obligations:

14.2.1. to refuse to provide a mediation service if the mediation is not an option pursuant to the laws;

14.2.2. to conduct the mediation pursuant to the rules and procedure and protect the interests of the parties and provide an opportunity for equal participation of parties;

14.2.3. to inform about the purpose and process of the mediation and potential outcome;

14.2.4. to lead the mediation in neutral manner without any personal interest;

14.2.5. to comply with code of ethics of the mediator;

14.2.6. to return the documents and affidavits back to the parties;

14.2.7. not to give legal recommendations and assistance to any of the parties;

14.2.8. to maintain settings where the parties can address every issue and create condition where parties can compromise;

14.2.9. to maintain protocol of the mediation, ask questions from the parties and explain the rules and procedures of the mediation;

14.2.10. all other obligations specified in the law.

Article 15. Participation of an Attorney in the Mediation Activity

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15.1. If an attorney participates in the mediation with request of his or her client, the attorney has duty to explain conditions and consequences of an agreement during mediation.

15.2. If an attorney is a professional mediator, he or she will be barred to give legal advice to the disputed issue addressed to involved party any time after the mediation. If an attorney has been represented any of the parties previously, he or she will be barred to be the mediator.

15.3. If an attorney is present at the mediation by the request of the parties, he or she will not hinder the mediation in anyways.

Article 16. Participation of Third Party in Mediation Activity

16.1. If third party's interest could be affected by the mediation outcome, a third party may be allowed to participate in the mediation with its own request and/or request by the parties.

16.2. Family members, relatives of the parties and other persons may be allowed to participate in reconciliation mediation activity at the request of the parties.

Article 17. Dismissal of Mediator

17.1. The parties individually or jointly can dismiss the mediator based on the mutual agreement. If the mediator is dismissed after a civil action had filed, the dismissal shall be notified with the Court.

17.2. In the event that the mediation procedure is affected by with circumstances, the mediator will withdraw.

17.3. In addition to the specified in the provision 17.4 of this law, the mediator has right to refuse and/or to terminate it service if the mediator believes he or she cannot bring a resolution with his or her effort, or according to the opinion and consent of the parties.

17.4. The parties have rights to refuse to have the mediator if the mediator breached code of ethics, has any relationship with family and relatives or the mediator has disclosed confidential information to the one of the parties.

**CHAPTER FOUR
RULES OF RECONCILIATION MEDIATION ACTIVITY****Article 18. Common Grounds for the Mediation Activity**

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18.1. The parties will be forbidden to meet the mediator without notifying the other party and initiate any action or non-action which affects the mediator to be neutral or request the mediator to be an attorney for the disputed matter.

18.2. The mediator shall not disclose any information obtained in the course of his/her involvement in the mediation and after being released from the work.

18.3. The mediator shall take measures to prevent from illegal use of documents obtained during the course of mediation process.

18.4. Unless otherwise specified in the law, the mediator will not be called to be a witness or give a deposition. If the privileged information is disclosed, the responsible party will be liable accordance with this law.

18.5. If parties have chosen and participated in the meditation pursuant to the Civil Law 79.1, 82.4, then it can be basis determine the statute of limitations.

18.6. Any statements made by the parties during the mediation will not be basis for the Court's judgment.

[/This paragraph was added by the law of January 17, 2013 /](#)

Article 19. Venue of Conducting Mediation Activity

19.1. The mediation will take place at a designed hall in private settings or any place where the parties have agreed to.

Article 20. Duration of Mediation Activity

20.1. The mediation will take place within 30 days and it can be extended once if parties request.

20.2. The mediation will take place within the time frame pursuant to the provision 30.1 of this law and the provision 71.1 of the Code of Civil Procedure.

Article 21. Conditions of Mediation Activity

21.1. Mediation activity shall commence from the time when the parties addressed to the mediator pursuant to provisions 7, 8 of this law, or the parties have agreed to use the mediation since a civil case is opened at a court, or if the judge ordered the mediation.

21.2. The mediation will take place in private including only the parties involved.

21.3. No parties will be influenced, coerced and intimidated any ways during the mediation.

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21.4. Participants of reconciliation activity shall be forbidden to disclose any information received during the process of the activity without written consent of the information giver.

21.5. Pursuant to the article 8, the mediator will summon the party with their home address, mailing address or via phone.

21.6. A mediator specified in the Article 7 of this law shall call any of the parties or related persons by written notification of court accordance with the Code of Civil Procedure the Article 77.

Article 22. Petition to Request the Mediator

22.1. A person who wishes to use the mediation will make written request for the mediator.

22.2. The mediator will inform the parties about the receipt of the request and provide possible dates.

22.3. Parties may make a special request concerning the issues such as age, sex, professional background, experience of the mediator.

Article 23. Selection of the Mediator

23.1. The parties may choose one or more mediators for one case.

23.2. If more than one mediator has chosen, the mediators will elect their leader pursuant to the provision 23.1 of this law.

23.3. If Court's mediator has heavy load or needed special mediator or the parties have chosen the different mediator then adjunct mediator will be used.

Article 24. Form of Mediation

24.1. The parties shall be present at the first meeting when the mediator explains the rules and procedures and rights and obligations and hears the demands and explanations of the parties and anticipate the direction.

24.2. The mediation process will include all parties unless it is necessary for the mediator to meet with the one party.

24.3. The duration of the mediation meeting will be determined by the time sufficient for the parties to make statements and to reach a mutual agreement.

Article 25. Protocol

25.1. The mediator or a designated staff by the mediator will make a protocol in timely manner.

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25.2. Protocol shall be prepared in Mongolian language including dates, place, start and end time, mediator's and party's full names, addresses, questions and answers, mutual agreement and methods, forms and dates of the next action.

25.2. Protocol shall be prepared in Mongolian language or any other language as agreed by the Parties and include full names of the Parties, subject and duration of the activity, form and date of next activity.

25.3. A mediator and the parties shall sign in the protocol.

25.4. The mediator shall return the documents and affidavits provided by the parties by their request.

25.5. Parties will agree the scope and time of keeping the documents obtained during the mediation.

25.6. The mediator will be responsible for keeping and protection of the protocols and documents and disclose it if parties agreed to.

Article 26. Mediation Agreement

26.1. The parties can create a content of the mediation agreement or the mediator can prepare a draft with party's request.

26.2. The mediation agreement will be created in Mongolian but if it is in other language, official translation will be attached as an integrated part of the agreement.

26.3. The mediation agreement will include date, the mediator's full name, disputed parties' full name, address, and commencement day of the mediation, date, content of the dispute, each party's position and other issues and will be valid with parties and mediator's signature.

26.4. The mediation agreement will comply with the Civil Code and shall not infringe the interest of the third party.

26.5. The parties may accept, implement the mediation agreement with assistance of the mediator or can withdraw their claim.

Article 27. Implementation of Mediation Agreement

27.1. If a party fails to comply with the mediation agreement pursuant to the Article 8 of this law, the other party has right to appeal to the Civil Court pursuant to the Code of Civil Procedure Article 3.1.

27.2. The Court pursuant to Code of Civil Procedure 74.2, 74.06 and Article 75, the appropriate court judge will affirm through the degree the mediation agreement created with the assistance of the mediator.

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/This paragraph was changed by the law of January 17, 2013/

27.3. If the Court affirms the mediation agreement and dismissed the case accordance to the provision 30.2 of this Law, legal fees will be determined pursuant to the Code of Civil Procedure 74.5.

/This paragraph was added by the law of January 17,2013/

Article 28. Termination of Mediation Activity

28.1. By the request of the parties and the mediator, the mediation process may be terminated on the following grounds:

28.1.1. absence of one parties at the mediation

28.1.2. the mediation meetings failed to reach an agreement numerous times and foreseeable to fail; or mediation has failed;

28.1.3. the parties failed to have good faith attempt to reach an agreement;

28.1.4. the parties requested to terminate the mediation;

28.1.5. the mediation duration has expired and unable to extend;

28.1.6. the parties have dismissed the mediator and unable to continue the mediation.

Article 29. Fees and Charge of Mediation

29.1. Stamp fees will be for the mediation service provided by the Court to resolve the dispute. A party who requested the mediation will pay fee in advance.

29.2. A mediation cost will be related to the expense for the mediator to resolve the dispute. The court's mediator will be funded by the state budget.

29.3. The Parties shall agree on the fee and expenses of the mediator specified in the Article 8 of this Law.

29.4. General Council of Courts shall establish the fees of adjunct mediator at the court.

**CHAPTER FIVE
SCOPE OF RULES FOR MEDIATION**

Article 30 Mediation for Civil Cases

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30.1. The mediation will be used if the parties have requested the mediator after the parties have initiated a civil action or will be used if the judge orders the mediation as an appropriate means of dispute resolution.

30.2. If an agreement is reached during the mediation conference, the Court will accept the agreement and dismiss the case pursuant to the rules of civil procedure.

30.3. If the mediation completed without an agreement, the Court will continue the case according to its normal procedure.

30.4. If a civil action has more than one allegation, parties can use the mediator for one or all allegations.

30.5. If the mediator assisted to reach a partial agreement as to some allegations, the Court will include issues resolved during a mediation as a final judgment in Court's ruling.

30.6. A judge will determine the duration of mediation after a civil action has been filed.

Article 31. Mediation for Labor Disputes

31.1. The Mediation for labor law will govern issues arise between an employer and an employee solely for labor disputes

31.2. The decision rendered by the Commission of Labor Disputes specified in the provision 126.1 of Labor Law after parties presented their disputes will not bar to request the mediation pursuant to the provision 127.1 of Labor Law.

Article 32. Mediation for Family Disputes

32.1. As specified in the provision 6.3 of this Law, the failure to reach an agreement during the mediation outside of the Court will be not be a ground for refusal to use the mediation after a civil action has filed with the Court for family disputes.

32.2. Pursuant to the Civil Procedure 132.1, all the measures for reconciliation of marriage will be mediated through the Court's mediator or the mediator parties have agreed to.

32.3. If the parties failed to reconcile during the time ordered by the Court, all disputes related with dividing pensions, benefits, allowances and mutual funds except dissolution of marriage will be mediated through the Court's mediator or the mediator where parties have chosen.

32.4. A psychologist, relatives, friends and co- workers can be party to the mediation for marriage reconciliation.

CHAPTER SIX

ODIHR Opinion on Law on Mediation of Mongolia

MISCELLANEOUS

Article 33. Advocacy of Mediation Activity

33.1. The Office of the Court, judicial entity and mediators will implement to promote alternative dispute resolution methods to the public.

Article 34. Liability for Breach of Law

34.1. A person or legal entity who violated this Law shall be subject to the liability specified in the Law on Violation or the Law on Legal Status of Lawyers.

34.2. Any loss or damage caused by violation of the Law on Mediation shall be reimbursed by responsible party according to the Civil Code.

/This Article was revised by the law as of December 04, 2015/

Article 35. Come into Effect

35.1. This law shall come into effect from April 15, 2013.

/This paragraph was amended by the law as of January 17, 2013 /

D. DEMBEREL

CHAIRMAN OF THE STATE GREAT HURAL