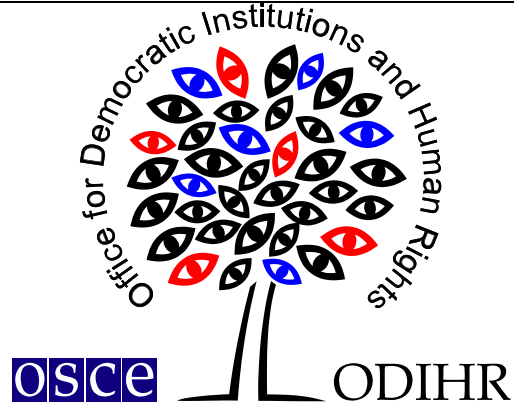


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OPINION

ON THE DRAFT LAW ON RESOLUTION OF DISPUTES THROUGH MEDIATION AND AMENDMENTS TO RELATED LEGISLATION OF THE KYRGYZ REPUBLIC

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

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I. INTRODUCTION

1. *On 13 May 2015, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a letter from the Chairperson of the Parliamentary Committee on Judiciary Issues and Legality of the Kyrgyz Republic, requesting a legal opinion on draft legal acts regulating the resolution of disputes through mediation of the Kyrgyz Republic. In particular, the request sought an analysis of the Draft Law on Resolution of Disputes through Mediation (hereinafter “the Draft Mediation Law”) and of the Draft Law on Amendments and Additions to Some Legislative Acts of the Kyrgyz Republic (hereinafter “the Draft Amendments”). The latter contains amendments to six different legal acts of the Kyrgyz Republic, namely the Civil Code;¹ the Code of Civil Procedure;² the Criminal Code;³ the Criminal Procedure Code;⁴ the Code of Administrative Liability;⁵ and the Law on Judicial Enforcement Proceedings and Status of Court Enforcement Officers in the Kyrgyz Republic.⁶*
2. *This Opinion is provided in response to the above-mentioned request.*

II. SCOPE OF REVIEW

3. The scope of the Opinion covers only the Draft Mediation Law and Draft Amendments, submitted for review, and the legislation that they are amending, as far as available and relevant. Thus limited, the Opinion does not constitute a full and comprehensive review of the six legal acts which the Draft Amendments seek to amend nor of the entire legal and institutional framework governing alternative modes of dispute resolution in the Kyrgyz Republic.⁷
4. The Opinion raises key issues and indicates areas of concern. In the interests of conciseness, the Opinion focuses on those provisions that require improvements rather than on the positive aspects of the respective acts. The ensuing recommendations are based on international human rights and rule of law standards as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
5. This Opinion is based on unofficial English translations of the respective draft legislation, which are attached to this document as Annexes. Errors from translation may result.
6. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that the OSCE/ODIHR may make in the future.

¹ Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1996, issue #6, page 80 (amended by the Laws of the Kyrgyz Republic of April 29, 1997 # 29; last available English version, as amended: October 15, 1997 # 76).

² Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 2000, issue #3, p. 158 (no English translation available).

³ Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1998, issue #7, p. 229 (last available English version as amended: February 13, 2006, No. 57)).

⁴ Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1999, issue #10, p. 442 (last available English version as amended: 5 August 2008, No. 193).

⁵ Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1999, issue #2, p. 77 (no English translation available).

⁶ Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 2002, issue #4, p. 160 (no English translation available).

⁷ For several of the six amended acts, no updated and/or translated versions were available to OSCE/ODIHR (see footnotes 1-6). These laws were included into the scope of the Opinion only through the review of the Draft Amendments. In these cases, the original legislation was not consulted.

III. EXECUTIVE SUMMARY

7. At the outset, the analyzed legal acts reveal a mostly coherent legal framework pertaining to mediation which in many ways is compatible with international standards. This Opinion's main recommendation is to restructure the Draft Mediation Law to make sure that it includes sufficient safeguards required with respect to criminal mediation in line with international standards, to ensure the quality of mediation and guarantee procedural rights in the course of mediation processes.⁸ Additionally, the provisions of the Draft Mediation Law on the confidentiality of mediation proceedings and the admissibility of mediation-related information as evidence in subsequent court proceedings should be amended to ensure that exceptions to the confidentiality of the process are clearly outlined in the law.
8. Based on the above, and in order to further improve the compliance of the reviewed draft legislation with international standards, OSCE/ODIHR has the following key recommendations:
 - A. to draft a separate section for the Draft Mediation Law, or a separate law, dealing with victim-offender mediation in order to adequately address all specific aspects and unique goals of criminal mediation in accordance with international standards; [pars 23 and 80-91]
 - B. to either broaden the scope of the Draft Mediation Law to include other forms of alternative dispute resolution or to provide a more detailed definition of mediation that would also include the neutrality, impartiality and independence of the mediator in a process driven by the parties; [par 24]
 - C. to amend Article 18 par 2 of the Draft Mediation Law to specify that the mediated settlement agreement, meaning an agreement on dispute (conflict) resolution, shall only be concluded in the official or state language in cases of court-approved or notarized agreements, while including a provision that ensures that translators and translations are provided upon request and if necessary free of charge; [par 46]
 - D. to include in the Draft Mediation Law a strong confidentiality clause subject to an exhaustive list of clearly outlined exceptions in line with international standards; [pars 59-65]
 - E. to provide for a specific accreditation body for mediation organizations and include the main elements of an accreditation procedure in the Draft Mediation Law, with a by-law setting out more detailed rules on mediator accreditation as a means of quality control, including the standards to ensure the quality of mediators, and the content and types of training that a prospective mediator shall receive, in particular in victim-offender mediation; [pars 69-70, 82]
 - F. to draft a detailed provision in the Draft Mediation Law specifying the kind of crimes which are suitable for victim offender mediation; this list should

⁸ For the purposes of this Opinion, the terms "mediation in penal matters", "penal mediation", "mediation in criminal matters", "criminal mediation" and "victim-offender mediation" are used interchangeably. They refer to a process facilitated by a mediator whereby a victim and an offender meet to settle a dispute and can be applied to a variety of circumstances, ranging from minor misdemeanours to more serious crimes.

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exclude cases of domestic violence and similar crimes involving particularly vulnerable victims; [par 85] and

- G. to see to it that a comprehensive impact assessment is conducted to assess the funding required to ensure the implementation of all aspects of the Draft Mediation Law and related amendments, in terms of financial and human resources, as well as training [par 100].

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards Related to Mediation

9. 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.
10. However, certain universal conventions and other documents setting standards in the area of international human rights, to which the Kyrgyz Republic 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 Rights⁹ (hereinafter “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.
11. 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 Child¹⁰ (hereinafter “CRC”) and the UN Convention on the Elimination of All Forms of Discrimination against Women¹¹ 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

⁹ UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Kyrgyz Republic acceded to the ICCPR on 7 October 1994.

¹⁰ UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. The Kyrgyz Republic acceded to this Convention on 7 October 1994.

¹¹ UN Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. The Kyrgyz Republic acceded to this Convention on 10 February 1997.

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children, where appropriate.¹² While the Kyrgyz Republic is not bound by this regional instrument, it may serve as useful guidance in this context.

12. 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.¹³
13. In relation to commercial disputes, the United Nations Commission on International Trade Law (hereinafter “UNCITRAL”) developed the UNCITRAL Model Law on International Commercial Conciliations (hereinafter “UNCITRAL Model Law”), which is a standard guideline for States seeking to adopt legislation in this domain.¹⁴ The Model Law uses a broad definition of the term ‘conciliation’ which includes, *inter alia*, mediation.¹⁵ The Guide to Enactment and Use of the Model Law, also developed by UNCITRAL, clarifies that, while nominally limited to international conciliation, the Model Law can also be used in domestic cases.¹⁶ It may therefore prove helpful to law-makers in this respect.
14. While the Kyrgyz Republic is not a Member State of the Council of Europe (hereinafter “the CoE”), the Kyrgyz *Jogorku Kenesh* (Parliament) was granted the special status of “partner for democracy” by the CoE Parliamentary Assembly and as such committed to work towards ensuring compliance with the basic values and principles of the Council of Europe. The CoE’s European Commission for the Efficiency of Justice (CEPEJ) has issued four recommendations setting out important minimum standards for mediation in different areas of law, namely in family, civil and penal matters and disputes between administrative authorities and private parties¹⁷; these standards are accompanied by three sets of guidelines which interpret the issued recommendations.¹⁸ 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

¹² CoE European Convention on the Exercise of Children’s Rights (adopted 25 June 1996, entered into force 1 July 2000) CETS No. 160.

¹³ 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).

¹⁴ UNCITRAL Model Law on International Commercial Conciliation (17–28 June 2002) GAOR 57th Session Supp 17 Annex I, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

¹⁵ See the Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Arbitration (2002), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf, page 11.

¹⁶ *Op. cit.* footnote 14, pages 22-23 (UNCITRAL Model Law on International Commercial Conciliation).

¹⁷ These are the Council of Europe 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.

¹⁸ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters CEPEJ(2007)14 adopted by the European Commission for the Efficiency of Justice (hereinafter “CEPEJ”) on 7 December 2007, available at <https://wcd.coe.int/ViewDoc.jsp?id=1223897&Site=DG1-CEPEJ>; Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters of the European Commission for the Efficiency of Justice CEPEJ(2007)13, available at <https://wcd.coe.int/ViewDoc.jsp?id=1223865&Site=DG1-CEPEJ>; Guidelines for a better implementation of the existing recommendation on alternatives to litigation between administrative authorities and private parties CEPEJ(2007)15, available at http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes5Ameliorer_en.pdf.

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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.¹⁹

15. Within the European Union, Directive 2008/52/EC²⁰ also sets standards regarding mediation in civil and commercial matters in its Member States. Even though the Kyrgyz Republic 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 lawmakers and other stakeholders.
16. 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.²¹
17. 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),²² which emphasizes, *inter alia*, the importance of the inclusiveness of mediation processes, in particular in an ethnically diverse environment.²³ 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 resolve conflicts.²⁴ 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 Mediation²⁵ and the OSCE Ministerial Decision 3/11 on Elements of the Conflict Cycle Related to Enhancing the OSCE's

¹⁹ *Op. cit.* footnote 18 at 1.8. (CEPEJ Guidelines for a Better Implementation of Recommendations concerning family mediation and mediation in civil matters); see also Council of Europe 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 of 23 April 2013, available at <http://www.coe.int/t/dgi/hr-natimplement/Source/expertises/Final%20CoE%20Legal%20opinion%20on%20Serbian%20draft%20Law%20on%20Mediation.pdf>, page 14. The European Code of Conduct for Mediators (2004) is available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

²⁰ 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, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0052>.

²¹ Recommendation No. (85)11 of the Committee of Ministers of the Council of Europe on the position of the victim in the framework of criminal law and procedure of 28 June 1985, adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies; Recommendation No. R(87) 21 of the Committee of Ministers of the Council of Europe on assistance to victims and the prevention of victimization of 17 September 1987, adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies; 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 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 082.

²² UN Guidance for Effective Mediation (New York, 2012) available at <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf>.

²³ 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), available at <http://www.osce.org/cio/111520?download=true>.

²⁴ CSCE Final Act of the Conference for Security and Cooperation in Europe (1 August 1975) 14 ILM 1292.

²⁵ OSCE Secretariat OSG/Gender Section Vienna, October 2013, available at <http://www.osce.org/gender/107533?download=true>.

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Capabilities in Early Warning, Early Action, Dialogue Facilitation and Mediation Support, and Post-Conflict Rehabilitation,²⁶ among others.²⁷

2. Analysis of the Draft Mediation Law and the Draft Amendments

2.1 General Provisions

2.1.1 Major Themes of the Draft Mediation Law

18. The Draft Mediation Law deals with four major themes. First, it outlines how and under which circumstances mediation is or may be initiated. Second, it contains provisions pertaining to the process of mediation, i.e., how the mediation process is set up and conducted. Third, it sets out provisions explaining who can act as a mediator and what qualification/training mediators require. Fourth, it stipulates the rights and obligations of participants in the mediation process.
19. Throughout the Draft Mediation Law, there are numerous provisions on the mediation process which outline basic principles, but leave the procedural details to the mediation agreement.²⁸ This is generally consistent with other domestic legislation on mediation and international good practice. However, the overall structure of the Draft Mediation Law is unclear as the provisions are not clearly organized along the four themes mentioned in par 18 *supra*, and provisions relating to any of the four themes indicated above can be found throughout the Draft Mediation Law. This makes the law more difficult to understand and less accessible to the general public. It is therefore recommended **to restructure existing provisions to reflect more clearly the four main themes which are covered by the legislation.**²⁹

2.1.2 Objectives and Principles of Mediation

20. The Draft Mediation Law contains a short preamble outlining the aims and objectives of the law. The objectives mentioned therein are largely limited to the benefits of mediation for the workload of the judiciary or for business relations. However, particularly in the area of alternative dispute resolution mechanisms, the potential benefits of mediation for individuals and the reasons for promoting mediation and regulating it in law should be further explained. In this way, both the courts and the affected individuals would perhaps better understand the advantages, but also the

²⁶ OSCE MC.DEC/3/11 (27 December 2011), available at <http://www.osce.org/mc/86621?download=true>.

²⁷ See also the 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 cooperation with the United Nations (February 2011), available at <http://www.osce.org/secretariat/76015?download=true>.

²⁸ See Articles 2 par 1 (definition of mediation), 3 (Goal of mediation), 4-8 (Principles of mediation), 9 pars 5-6 and 8-9 (Role of mediator), 11 par 1 (Joint and private sessions) 11 pars 3-4 and 29 (Termination of mediation), 17 (Time, venue), 18 (Language), 19 (Duration), 20 par 7 (Commencement of mediation), 22 (Selection and appointment of mediator), 23 par 1 (Mediation agreement), 23 pars 3-4 (Party autonomy), and 24 (Costs of mediation).

²⁹ Provisions pertaining to the initiation of mediation can be found e.g., in Articles 5, 9 pars 6 and 10, 20 pars 1-6, 21, 23 and 25 of the Draft Mediation Law; procedural aspects of the mediation process are outlined e.g., in Articles 2 par 1, 3, 4-8 9 pars 5-6, 9 pars 8-9, 11 par 1 and pars 3-4, 17-10, 20 par 7, 22, 23 par 1 and pars 3-4, 24, 26 par 9 (1) and 29 of the Draft Mediation Law; the qualification and training of mediators is dealt with e.g., in Articles 10, 14 and 15 of the Draft Mediation Law; provisions regarding the rights and obligations of participants in mediation can be found in Articles 7 par 7, 9 pars 2-8, 11, 12, 16, 18, 20 par 8, 22 par 3, 25 par 3, 26, 28 and 29 of the Draft Mediation Law.

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limitations of mediation, and how it compares to other remedies accessible to individuals. For instance, the aim of mediation in criminal matters is not only to resolve a conflict but also to repair or address harm caused by criminal activity.³⁰

21. Other fields of law also pursue specific objectives, such as administrative law (subject to a limited form of mediation in special circumstances pursuant to Article 1 par 2 (2) of the Draft Mediation Law), which, among others, aims to protect the public interest, or family law, where the best interest of the child always has to be considered.³¹ **The Draft Mediation Law should thus elaborate further on the objectives of the law, while paying attention to the differences stemming from the different legal areas where mediation is conducted.**

2.1.3 Definitions

22. One of the central problems in the current Draft Mediation Law is that it treats all procedures where mediation is initiated largely the same, without taking into account the existing particularities and necessary safeguards inherent in different mediation procedures.
23. Pursuant to Article 1 par 1 (2), the Draft Mediation Law is also applicable, subject to some special rules, to “criminal law conflicts, arising from relations under criminal law pertaining to persons committing minor offences for the first time”. 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. 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 misdemeanor committed, as correctly set out in Article 26 par 3 of the Draft Mediation Law. 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 amend the Draft Mediation Law, so that **criminal matters are dealt with in a separate section of the law or an entirely different law**. Certain problematic aspects of Article 26 of the Draft Mediation Law pertaining to mediation in criminal matters are further discussed under pars 80-91 *infra*.
24. Article 2 par 1 of the Draft Mediation Law defines “mediation” as “a procedure for resolving a dispute (conflict) between parties, conducted with their voluntary consent and mediator’s support in order to reach a mutually acceptable agreement”. This is a very broad definition of “mediation”, which may include other types of alternative dispute resolution such as conciliation.³² It is suggested that the drafters and stakeholders discuss whether to **broaden the scope of the law and explicitly include other forms of alternative dispute resolution or whether**, given the detailed provisions on mediation procedure and principles already contained in the draft, to

³⁰ *Op. cit.* footnote 19, page 6 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)).

³¹ *ibid.* page 6.

³² Internationally, there is no universal agreement on what the term “conciliation” refers to. Sometimes, it is used as an umbrella form for several modes of alternative dispute resolution, including mediation. At times, it is said that conciliation is more about repairing personal relationships, while others are of the opinion that what, as opposed to a mediator, a conciliator has expert knowledge or that the conciliator might play an advisory role in the conciliatory process, which a mediator will generally not.

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provide for a more detailed definition of mediation to clearly distinguish it from other forms of alternative dispute resolution.³³ If the second option is chosen, Article 2 should be more specific, by stating that the **mediator has no decision-making power, that the process is driven by the parties and that the content, not the name of the procedure, is decisive.**³⁴ As mentioned in par 23 *supra*, **separate provisions on mediation in criminal matters should be included as well (unless the relevant stakeholders agree to include these in a separate law).**³⁵

25. Article 2 par 3 of the Draft Mediation Law defines a “mediator” as “a person engaged by parties for mediation in accordance with requirements of this Law”. As mentioned in the European Code of Conduct for Mediators, it is also recommended to **specify in Article 2 par 3 that the mediator shall be an independent and impartial third person, and to define these requirements** (see also pars 30-32 *infra* on independence and impartiality). Even though these attributes are already included in Article 10 par 1 of the Draft Mediation Law, they should be reiterated as a substantive part of the definition of the term “mediator”.
26. Throughout the Draft Mediation Law and the Draft Amendments, the terms “dispute” and “conflict” are used interchangeably to describe the situation that is to be resolved through mediation. In the interests of clarity and foreseeability of both draft laws, it would be preferable to **settle on one term**. Internationally, the term “dispute” is often preferred as a more comprehensive term.³⁶
27. On a similar note, Article 2 par 5 of the Draft Mediation Law describes the agreement in which the outcomes of a successful mediation are recorded as an “agreement on dispute (conflict) resolution”. Subsequently, apart from “agreement on dispute (conflict) resolution”, terms such as “conflict resolution agreement” (Article 25 par 5) and “dispute resolution agreement” (Article 25 par 6 (1)) are also used in the Draft Mediation Law. The internationally preferred term for such agreements is **“mediated settlement agreement”**; regardless of whether this term is chosen or another, **the Draft Mediation Law should avoid inconsistencies and use the same terminology throughout.**
28. Finally, it is also recommended to align the definition of a “criminal law conflict” under Article 2 par 7 of the Draft Mediation Law with **the definition of mediation in**

³³ For a more open definition see e.g., *op. cit.* footnote 14, Annex I Article 1(3) (UNCITRAL Model Law on International Commercial Conciliation) which defines “conciliation” as “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (‘the conciliator’) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute”; see also *op. cit.* footnote 17 par 1 (CoE Recommendation Rec(2002)10 on Mediation in Civil Matters) which defines “mediation” as “a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators”.

³⁴ See for example the definition of mediation in *op. cit.* footnote 20, Article 3 (a) (EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) which defines “mediation” as “‘a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State”.

³⁵ See e.g., *op. cit.* footnote 17, Appendix I (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters) which applies to “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party mediator”.

³⁶ E.g., throughout the UNCITRAL Model Law *op.cit.* footnote 14 or EU Directive 2008/52/EC, *op.cit* footnote 21; the CoE recommendations and guidelines *op cit.* footnotes 18 and 19 use both terms, but more often refer to the term “dispute” than “conflict”.

criminal matters set out in Council of Europe Recommendation No. R (99) 19 concerning mediation in penal matters.³⁷ This definition is wide enough to incorporate all aspects of mediation in criminal matters and emphasizes the need for free consent of the parties as a crucial prerequisite for mediation.

2.2 Modalities and Procedure of Mediation

29. The Draft Mediation Law includes a high number of provisions which outline the rights and responsibilities of the parties, the mediator and other persons involved in the mediation process, as well as the way in which a mediated settlement agreement is concluded and enforced.

2.2.1 Mediator

a) Appointment

30. The mediator is subject to certain responsibilities and requirements which shall ensure his or her suitability and qualification and enhance the trust of the parties in the process. Articles 7, 10 and 11 of the Draft Mediation Law stipulate the responsibilities of the mediator in terms of independence and impartiality. Articles 7 par 3 and 11 par 3 (4) both state that the mediator is prohibited from mediating in circumstances which would prevent him/her from conducting the mediation in line with key mediation principles, including first and foremost the principles of independence and impartiality. Additionally, Article 13 par 1 on rights and responsibilities of parties in mediation stipulates that the parties are entitled to select a mediator of their choice.
31. Article 9 par 1 of the Draft Mediation Law specifies that no outside interference or support is allowed which might affect the impartiality of the process. However, the mediator should also be able to withdraw from the mediation process or put it on hold if the parties are acting in bad faith or if other actors manipulate the process.³⁸ **The Draft Mediation Law currently does not mention such possibility and should be supplemented accordingly.** Additionally, Article 9, while stating that persons responsible for such interference will be held legally liable, does not specify what the term “interference” means and what kind of behavior would entail what type of liability. This should be clearly stated in the Draft Mediation Law and the Draft Amendments should be supplemented in order to reflect such liability of persons interfering with the mediation process.
32. The selection and appointment of the mediator is regulated in Article 22. Paragraph 3 states that prior to his/her selection, a mediator is obliged to disclose any circumstances, which might influence his/her independence and impartiality to the parties and to the mediators’ organization on whose roster he/she is listed. It is unclear from Article 22 par 3 what the consequences of such a disclosure would be and whether it would be within the discretion of the parties to continue working with the

³⁷ *Op. cit.* footnote 17, Appendix I (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters). The definition states that the guidelines apply “to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).”

³⁸ *Op. cit.* footnote 22, page 5 (2012 UN Guidance for Effective Mediation).

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mediator post-disclosure or not. Since mediation is a party-driven process, and parties may select any mediator of their own free will (Article 13 par 1 (1)), Article 22 par 3 of the Draft Mediation Law should be supplemented to state that following the mediator's disclosure, **it is up to the parties to decide whether they want him/her to conduct the mediation.** In order to avoid potential disputes on this issue, it is also recommended that both the disclosure by the mediator and any decision by the parties to proceed with the mediation process afterwards should be done in writing.

b) Eligibility

33. The minimum requirements for working as a mediator are listed in Article 10 of the Draft Mediation Law. It is generally advisable for mediators to have a certain authority/standing, which is why some countries chose to introduce a **minimum age** for persons to be able to act as mediators.³⁹ Furthermore, the Draft Mediation Law in Article 10 par 3 excludes persons “adjudged incapable or partially incapacitated” from being mediators. Here, it is unclear why a person who is “partially incapacitated” might not be able to work as a mediator in certain cases.
34. Additionally, Article 10 par 3 (3) of the Draft Mediation Law excludes “persons with unexpunged or unspent convictions” from being mediators. Such a provision is rather uncommon. One way to amend the Draft Law would be to treat **any prior conviction as a reason to prohibit someone from working as a mediator,⁴⁰ or to take note of the nature of the conviction and only exclude persons whose convictions put their trustworthiness as a mediator into question. Another possibility would be to generally require the mediator to be a person of good standing or character, which, even though vague in formulation, would allow even persons with past minor convictions to work as mediators. The drafters should debate this point and reflect their conclusions in an amended Article 10 par 3 (3).**
35. Additionally, it might be advisable to reconsider Article 10 par 3 (1) of the Draft Mediation Law banning **civil or municipal servants** from being mediators, **as long as they are not otherwise concerned with the case in question.**⁴¹ An exception should be provided in administrative cases where the State is already a party to the dispute, in which case the mediator should not be a civil servant.⁴²

c) Role of the Mediator

36. While Article 10 of the Draft Mediation Law deals with the requirements for mediators, Article 11 sets out his/her rights and responsibilities.

³⁹ *Op. cit.* footnote 19, par 60 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)). See also Section 9 par 1 (1) of the Austrian Law on Mediation in Civil Matters (which requires the mediator to be at least 28 years old) and Articles 15 and 16 of the Mediation Law of the Russian Federation, which introduce a minimum age of 18 for non-professional mediators and a minimum age of 25 for professional mediators.

⁴⁰ E.g., Article 11 of the Austrian Mediation Law in civil matters

⁴¹ See e.g., *op. cit.* footnote 19, par 60 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)) where it is stated that “a judge may conduct mediation if he/she is not responsible for any judicial proceedings concerning the disputes of the case”.

⁴² *ibid.* par 67. See also *op. cit.* footnote 17 (CoE Recommendation Rec(2001)9 on Alternative to Litigation between Administrative Authorities and Private Parties).

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37. Article 10 par 1 states that the mediator's activity may not be income-generating. This provision seems to be somewhat impractical as it is difficult to imagine how a system based on the need for high-quality mediators would be able to completely depend on unpaid volunteers. Moreover, given the rather detailed provisions of the Draft Mediation Law on training and membership in a mediation organization, it is noted that such activities would require extensive resources of the prospective mediator, both financially and time-wise (see further comments in pars 66-72... *infra*). Additionally, Article 24 par 1 (1) of the Draft Mediation Law lists the remuneration of the mediator as one element of the cost of mediation and thus appears to be inconsistent with Article 10. It is therefore recommended to **delete the prohibition of income-generating work as a mediator in Article 10 par 1. Also, consideration could be given to clearly regulating the rates of mediators either in the Draft Mediation Law itself or in a related law or directive.**
38. Furthermore, it would be advisable to also change Article 14 par 6 which allows mediators to be members of only one mediator organization. In most jurisdictions, mediators are free to join as many organizations as they wish, as different mediation services may be oriented towards different mediation markets. Therefore mediators who wish to offer their services to different markets may choose to be on various rosters or panels. To limit mediators to one organization may potentially restrict their work opportunities, particularly if mediation may be conducted as income-generating work.
39. Additionally, Article 11 par 2 (3) of the Mediation Law stipulates that the mediator is not entitled to "provide legal, consultative or other kind of assistance to any of the parties". In light of the mediator's role as a neutral facilitator, this provision should be amended to clarify that he/she is prohibited from giving assistance to only one of the parties, and/or from providing any other types of assistance that would or compromise his or her role and competences.

2.2.2 *The Mediation Process*

a) The Parties

40. Because mediation is a party-driven process, the parties play a particularly active role and their behavior is vital to achieving an amicable outcome. Article 13 par 4 of the Draft Mediation Law sets out that parties have to participate in mediation personally or through legally authorized representatives. It might be helpful to **clarify that in principle, parties shall be present in person during the mediation in order to make an amicable settlement more likely and promote the mediation effort.** Given the aim of the mediation process and the role of a mediator as a facilitator between two parties in conflict, having parties represented by an authorized representative would only make sense in exceptional cases. These exceptions commonly include cases in which one or more parties are minors, incapacitated persons and legal persons.⁴³ It is further advisable to clarify in the Draft Mediation Law that a person may be assisted (not represented) by **legal counsel** and for relevant

⁴³ See further *op. cit.* footnote 19, par 28 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)).

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other laws and regulations of the Kyrgyz Republic to be amended to reflect the obligations and roles of lawyer in the mediation process.⁴⁴

41. It is not clear what Article 19 par 2 of the Draft Mediation Law refers to when mentioning mediation “outside the scope of civil or criminal proceedings”. This may refer to cases of pre-trial or extrajudicial mediation that the parties may have decided on by agreement, to mediation accompanying legal proceedings or to any form of mediation independent of legal proceedings. **This provision should be revised to render its content more understandable.**
42. Overall, the Draft Mediation Law stipulates, in line with international practice, that the parties can refer their case to mediation at any stage before a judicial or arbitral court or tribunal delivers its judgment (Articles 5 par 2, 9 pars 8 and 9, and 20 par 2). Article 9 pars 8-9 mention a possible adjournment of proceedings in line with the procedural legislation of the Kyrgyz Republic but should be supplemented to state that **legal proceedings shall always be suspended while the mediation process is ongoing.**⁴⁵
43. Additionally, in light of party autonomy, Article 23 par 2 (4) of the Draft Mediation Law on form and content of the mediation agreement should be adapted so that it will be **possible for parties to explore any issue that they wish** to, without being limited by the initial agreement which started the mediation process.
44. Finally, the Draft Mediation Law outlines the process and the modalities of concluding a mediated settlement agreement. Article 28 of the Draft Mediation Law provides for court-approved (par 8) and notarized mediated settlement agreements (par 3), which are mostly referred to in the Draft Mediation Law as “agreement[s] on dispute (conflict) resolution”. Article 28 par 10 also provides for expedited enforcement of mediated settlement agreements in cases where a party fails to fulfill its terms. The provision does not specify whether such expedited enforcement is limited to court-approved or notarized mediation settlement agreements, or whether there is any other kind of quality check prior to enforcement.
45. This could mean that any settlement agreement could be subject to an expedited endorsement by a notary or court, subject only to the will of one of the parties. Where agreements are notarized or approved by court, there is a certain quality assurance that the mediated settlement agreement is not the result of illegal actions such as misrepresentation, duress or fraud and, more generally, that the said agreement does not violate the Constitution or other legislation of the Kyrgyz Republic. Article 28 par 10 of the Draft Mediation Law should thus limit automatic **expedited enforcement to cases where the agreements have been previously notarized or court-approved.** It should likewise stipulate that in all other cases, a court or notary should be required to check the content of the mediated settlement agreement prior to the initiation of enforcement proceedings according to set criteria, to ensure that it is in line with domestic law and consistently applied. Only if this is found to be the case, would it be permissible for execution proceedings to begin.

b) Language

⁴⁴ Nadja Alexander, *International and Comparative Mediation: Legal Perspectives*, Alphen aan den Rijn: Kluwer Law International, 2009, chapter 5.

⁴⁵ See e.g., *op. cit.* footnote 17, V b (CoE Recommendation No. R (98) 1 on Family Mediation).

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46. Whereas Article 18 par 1 of the Draft Mediation law allows for the mediation process to be conducted in any language that the parties agree on, Article 18 par 2 stipulates that the “agreement on dispute (conflict) resolution shall be in the state or official language”. This provision raises concerns regarding access to justice/effective remedies and equal treatment and could potentially impair the rights of national minorities to use their own language in private and in public as guaranteed by international human rights treaties and OSCE commitments.⁴⁶ In mediation, it is essential that all parties understand the exact content of the agreement and it is not obvious why the settlement in a party-driven process should always have to be in the state or official language. This should only be required if the settlement agreements are court-approved or notarized. **Article 18 par 2 should thus be amended to state that, in general, mediated settlement agreements may be concluded in any language chosen by the parties and that their validity does not depend of the chosen language. The language requirement should be upheld only for court-approved or notarized agreements, and an additional provision should be included providing official translators/translations free of charge upon request and where necessary.**

c) Costs

47. Article 24 of the Draft Mediation Law outlines the different types of costs of mediation and payment modalities. Under par 3, this article provides that the amount of mediator’s remuneration and terms of payment shall be agreed between the parties and the mediator prior to the signing of the mediation agreement. To avoid misunderstandings, it would be advisable to require the mediator to **inform the parties about all fees and remuneration beforehand** and to specify that the mediation process may not start unless all aspects of remuneration have been accepted by the parties.⁴⁷ Article 24 should be supplemented accordingly.
48. It is further noted that Article 24 does not include any reference to legal aid available to the parties during the process. According to the CEPEJ Guidelines on family mediation and mediation in civil matters, and **in order to ensure equality before the law, legal aid should be available for mediation cases in the same way as for litigation.**⁴⁸ This would also be in line with Article 40 par 3 of the Constitution of the Kyrgyz Republic on legal aid.⁴⁹

2.3 The Confidentiality of Mediation Processes

⁴⁶ CSCE ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’ (29 June 1990) (1990) 29 ILM 1305, pars 32.1 available at <https://www.oscepa.org/publications/reports/special-reports/election-observation-reports/documents/1344-osce-copenhagen-document-1990-eng/file>; Article 27 of the ICCPR; UN HRC General Comment No. 23: The Rights of Minorities (Art. 27) (8 April 1994) GAOR 49th Session Supp 40 vol 1, 106, at par 5.3, available at <https://www1.umn.edu/humanrts/gencomm/hrcom23.htm>.

⁴⁷ *Op. cit.* footnote 19, Article 1.3 (2004 European Code of Conduct for Mediators).

⁴⁸ *Op. cit.* footnote 18, Part 2.1, par 34 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning family mediation and mediation in civil matters). See also *op. cit.* footnote 19, par 52 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)).

⁴⁹ Article 40 par 3 of the Constitution of the Kyrgyz Republic (2010) states that “[e]veryone shall have the right to be provided with qualified legal aid. In cases provided for by the law, legal aid is rendered at the expense of the state”.

2.3.1 *The Extent of Confidentiality*

49. In mediation, the principle of confidentiality is very important as it helps to ensure mutual trust in the mediation process, which is a crucial factor in such cases. If the parties involved cannot trust that information connected to the mediation process remains confidential and is not shared, than this would undermine the entire process and a settlement would become unlikely.
50. Issues surrounding the confidentiality of mediation procedures are addressed in Article 8 of the Draft Mediation Law on confidentiality as well as in Articles 9 pars 2 to 5 and 11 par 1 (2) on guarantees in the mediation procedure. All information arising out of or in connection with mediation should be covered by the confidentiality clause set out in Article 8 of the Draft Mediation Law.⁵⁰ The confidentiality clause currently covers not only the mediator(s) but also everyone else who is involved in the mediation, including those involved in the administration of the mediation process (Article 8 par 2).⁵¹ To ensure absolute confidentiality, **Article 8 pars 2 and 3 should be supplemented to include also experts or other third parties providing opinions or other forms of information under the confidentiality clause.**
51. The mediator should ideally inform the parties about the scope of his/her confidentiality obligations at the start of the mediation process. The confidentiality obligations of the mediator should also extend to any information that one party may convey to the mediator in confidence,⁵² and should extend beyond the duration of the mediation process. **This is currently not addressed in the Draft Mediation Law and Article 8 should be supplemented accordingly.**
52. In case the mediation process does not result in a settlement, the mediator might, if applicable, have to inform a court or other authority about the failure to reach a settlement. Such reporting obligations are not *per se* a breach of confidentiality provisions. However, Article 8 should be amended to specify that the mediator **shall provide no further information⁵³ beyond the failure to reach a settlement**, especially not information that is confidential.
53. In general, the failure of the mediator and of other participants in the mediation process to respect the principle of confidentiality “should be considered a serious disciplinary fault and punished appropriately”.⁵⁴ Article 8 par 5 of the Draft Mediation Law states that such disclosure shall lead to “liability as stipulated by the mediation agreement and laws of the Kyrgyz Republic”, but does not specify the type of liability. While it is welcomed that the Draft Amendments propose to add an offence involving disclosure of information received by mediation participants to the Code of Administrative Liability, it is recommended to supplement Article 8 par 5 by including a reference to this and other possible types of liability.

⁵⁰ See *op. cit.* footnote 14, Article 9 (UNCITRAL Model Law on International Commercial Conciliation); see also Article 6 of the Serbian Law on Mediation available at www.mpravde.gov.rs/files/Law%20on%20mediation_180411.doc.

⁵¹ *Op. cit.* footnote 20, Article 7 (EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters); see also *op. cit.* footnote 19, Part 4 (2004 European Code of Conduct for Mediators).

⁵² *ibid.* Part 4 (2004 European Code of Conduct for Mediators).

⁵³ See *op. cit.* footnote 19, page 11 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)).

⁵⁴ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters of the European Commission for the Efficiency of Justice CEPEJ(2007)13, available at <https://wcd.coe.int/ViewDoc.jsp?id=1223865&Site=DG1-CEPEJ>, par 17.

54. Article 8 par 2 of the Draft Mediation Law provides that “[t]he parties in mediation, mediator, mediators’ organizations, persons participating in the arrangement and conduct of mediation may not disclose mediation-related information, learnt in the course of mediation, *without a written agreement of the parties in mediation*” [emphasis added]. This would mean that if an expert provides an opinion in a mediation process, then this opinion could be disclosed without his/her permission as long as the parties provide their written agreement. This would not be in line with the spirit of mediation, nor would it be in the interest of the expert who provided a confidential opinion. **Article 8 par 2 thus needs to be redrafted so that, next to the permission of the parties, the permission of the person who provides the information is also required prior to disclosure. Article 4 par 1 of the Draft Amendments, with contains a provision of similar effect, should also be amended accordingly.**

2.3.2 Waiving Confidentiality

55. Article 8 par 1 of the Draft Mediation Law contains non-mandatory (default) confidentiality requirements which allow parties to waive confidentiality. Such provisions can also be found in other domestic legislation or international documents.⁵⁵ Proponents of this approach emphasize the principle of party autonomy and argue that confidentiality should be a default rule that can be waived if both parties agree to do so. However, this approach has also been criticized, with the argument that if confidentiality is merely an option that parties can reject at will, the scope of confidentiality becomes less clear and confidentiality rules will become more difficult to interpret by court. It is also feared that optional confidentiality may decrease the parties’ confidence in the use of mediation and may prevent potentially interested persons from entering into mediation.⁵⁶ Supporters of this approach thus argue that confidentiality rules should rather be mandatory and that the parties should not be able to waive them. Based on these arguments, many domestic mediation laws do not allow parties to waive confidentiality.⁵⁷
56. At the same time, also those legal systems which chose to have mandatory confidentiality rules foresee exceptions in certain circumstances.⁵⁸ As there is no international consensus on this issue, drafters and stakeholders in the Kyrgyz Republic **should discuss whether to open up the confidentiality clauses and emphasize the autonomous will of the parties, or whether to give more weight to the inviolability of and trust in the mediation process.** Should they agree on the latter, then an exhaustive list of exceptions should be outlined in the law, as outlined in pars 59-65 *infra*).

⁵⁵ See e.g., Article 6 Serbian Mediation Law *op. cit.* footnote 50 ; Article 9 UNCITRAL Model Law; *op. cit.* footnote 17, VI (CoE Recommendation Rec(2002)10 on Mediation in Civil Matters).

⁵⁶ *Op. cit.* footnote 44, chapters 2 and 9 (Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (2009)).

⁵⁷ E.g., Section 4 of the German Mediation Law; Hong Kong Mediation Ordinance ss8-10, Californian Evidence Code ss 1115–1128, Section 18 of the 2003 Civil Law Mediation Act of Austria; Section 3 of the 2011 EU Mediation Act of Austria; Article 1728 of the Belgian Judicial Code; and the Code of Judicial Proceedings (Finland) Chapter 17 Section 23. These are just some examples and not an exhaustive list.

⁵⁸ See e.g., Article 1728 of the Belgian Judicial Code, which allows the parties to agree to an exception to the obligation of non-admissibility of mediation evidence for the purposes of homologation of a mediated settlement agreement.

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57. The extent to which parties can waive confidentiality has a direct influence on the question of the potential inadmissibility of evidence obtained during mediation in subsequent court proceedings. The Draft Mediation Law covers this issue partly in Article 9 par 2, which provides that the mediator, the persons participating in the arrangement and conduct of the mediation as well as representatives of parties cannot be questioned as witnesses without the consent of the parties. Article 8 par 1 also generally relates to the confidentiality of mediation-related information.
58. It is noted that while Article 9 par 2 protects a number of persons involved in the mediation process, it does not protect the mediating parties from being questioned as witnesses; this provision should thus be amended. Additionally, like Article 8 par 1, the provision provides that if the parties in mediation agree, anybody involved in mediation may be questioned as a witness. In cases where mediation is connected to court proceedings, a complete ban on questioning participants in prior mediation proceedings could be contemplated in order to protect the parties and the integrity of the mediation process. Moreover, it is noted that other forms of evidence are currently not explicitly covered by Article 9 par 2 or 3 (on requesting information from the mediator or mediation organizations). As in the related discussion on waiving confidentiality under pars 55-56 *supra*, a debate should take place as to **whether Article 9 pars 2 and 3 should permit the waiver of the protection by decision of the parties, or whether the current possibility to waive should be deleted. Additionally, Article 9 par 2 or 3 should explicitly prohibit the admission of any mediation-related information as evidence in court proceedings.** In this context, Article 10 of the UNCITRAL Model Law might also serve as guidance to elaborate further the provisions on the admissibility of mediation-related information.⁵⁹

2.3.3 Exceptions to the Confidentiality Rule

59. **Exceptions to the confidentiality principle need to be exhaustive and carefully constructed, in particular when they refer to other laws than the Draft Mediation Law** (e.g., Articles 8 par 1 and 9 par 5).⁶⁰ In that respect, Articles 8 par 1 and 9 par 5, which both provide for exceptions to the principle of confidentiality in cases prescribed or provided for “by the laws of the Kyrgyz Republic” are too vague, and may lead to various different interpretations. It would thus be difficult for parties, lawyers and courts to manage and interpret the relevant provisions in a consistent way. **Instead of addressing exceptions in various provisions within the Draft Mediation Law and in other laws, it would thus be helpful to draft a strong confidentiality clause in a separate article subject to an exhaustive list of clearly outlined exceptions.**
60. Such exceptions will without doubt be necessary in specific cases to protect crucial public interests that may override the need for confidentiality in particular circumstances. **Exceptions should therefore cover the threat of future violence or harm to others and communications to plan or attempt serious crimes or to**

⁵⁹ According to this provision, a party cannot rely on, introduce as evidence or give testimony regarding facts connected to conciliation (as listed in Article 10 par 1 (a)-(f)). Also, the disclosure of information cannot be ordered by an arbitration tribunal, court or other governmental authority and if such information is offered, it shall be inadmissible, no matter if the proceedings relate to the conciliation or not; see *Op.cit.* footnote 14 Annex I (Model Law on International Commercial Conciliation).

⁶⁰ *ibid.* par 18.

conceal ongoing serious criminal activity,⁶¹ as well as information obtained on the abuse of a child or vulnerable party.

61. Additionally, there are exceptions which derive not from overriding public interests but rather from considerations relating to the logic, practicability and functionality of the justice system. These exceptions relate to **pre-existing information** which may be admissible as evidence because it pre-dated the mediation process and should not become inadmissible merely because it was disclosed in mediation. The exception to the confidentiality clause for this type of information should be set out clearly in the law, to avoid a situation where mediation is used to conceal data that should otherwise have been disclosed. The same applies **to information which is public or accessible under freedom of information or privacy laws, including information which the parties to mediation agreed should be public at some phase of the mediation process.**
62. Exceptionally, **information could also become subject to disclosure if a dispute arises between the mediator and the parties, or if the professional conduct of the mediator or another participant (e.g., legal counsel) is challenged. Finally, information should be subject to disclosure if this is necessary to implement or enforce a settlement agreement.**⁶² It is recommended to supplement the Draft Mediation Law accordingly. Exceptions to confidentiality obligations during the mediation process contained in other laws of the Kyrgyz Republic should also be reconsidered and redrafted in light of the above comments.
63. The same exceptions to the rule of confidentiality can generally also be invoked when it comes to the admissibility of mediation-related information as evidence before court. The EU Directive on certain aspects of mediation in civil and commercial matters, for example, specifies that this shall only be possible “where this is necessary for overriding considerations of public policy, in particular when required to ensure

⁶¹ See e.g., *op. cit.* footnote 17, par 30 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters).

⁶² A particularly comprehensive exception clause which includes exceptions that are internationally well accepted can be found in the Hong Kong Mediation Ordinance (section 8(2) and (3)). This provision might be helpful to drafters looking to include a thorough exception clause into the Mediation Law:

“8. Confidentiality of mediation communications

- (1) A person must not disclose a mediation communication except as provided by subsection (2) or (3).
- (2) A person may disclose a mediation communication if—
 - (a) the disclosure is made with the consent of—
 - (i) each of the parties to the mediation;
 - (ii) the mediator for the mediation or, if there is more than one, each of them; and
 - (iii) if the mediation communication is made by a person other than a party to the mediation or a mediator—the person who made the communication;
 - (b) the content of the mediation communication is information that has already been made available to the public, except for information that is only in the public domain due to an unlawful disclosure;
 - (c) the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;
 - (d) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child;
 - (e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates;
 - (f) the disclosure is made for the purpose of seeking legal advice; or
 - (g) the disclosure is made in accordance with a requirement imposed by law.
- (3) A person may disclose a mediation communication (...)
 - (a) for the purpose of enforcing or challenging a mediated settlement agreement;
 - (b) for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or
 - (c) for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.”

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the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person”.⁶³

64. Article 8 par 6 of the Draft Mediation Law provides that “informing competent bodies about a committed or planned crime [...] shall not be regarded as breach of confidentiality”. This provision is problematic, as it is too broad and likely to undermine the need for the parties to be frank and open during the course of mediation. If, for example, a party discloses a committed crime which is irrelevant to the topic of the mediation as such, allowing for subsequent disclosure or reporting of such information would not reflect international practice.⁶⁴ However, an exception could be envisaged for cases in which a serious, violent crime, which has been committed in the past, is confessed in the course of mediation. Reporting this sort of crime would be in line with the obligation of the mediator to do no harm.⁶⁵ Regarding future or ongoing criminal activity, the Draft Mediation Law should be revised in light of the recommendations made in para 60 *supra*.
65. Finally, under Article 27 par 2 of the Draft Mediation Law on specifics of mediation in the field of family relations, exceptions to the confidentiality rule are permissible in cases where the welfare of a child is at stake. It is recommended to **formulate this provision in a more general way, so that it is applicable to all cases of mediation, not only family mediation**, in order to comply with international human rights standards such as Article 3 of the CRC.

2.4 Training and Continuous Education of Mediators

66. The regulation of quality and standards of mediation in legislation generally leads to a professionalization of mediation, moving away from an activity requiring “life skills” to one requiring training, assessment and certification. As already stated in par 24 *supra*, the Draft Mediation Law should specify which processes it shall cover and whether these are limited to mediation or might include other forms of alternative dispute resolution. This definition then also influences the types of training that will be required, as different sets of skills may be necessary, depending on whether the mediator would work as a facilitator, who remains neutral throughout the process, or as someone with advisory powers. Different training and education schemes would be recommended for these roles. In relation to Article 10 on requirements for mediators, it is **assumed that Article 10 par 1 (requiring mediators to be independent and impartial) should be read cumulatively with par 2 requiring mediators to have an academic education. This is not clear from the wording of this provision and should be specified.**
67. When regulating mediation, a balance has to be struck between guaranteeing a certain level of quality and experience through accreditation on the one hand and safeguarding the impartiality, flexibility, diversity and innovation that the mediation process promises on the other hand.

⁶³ *Op. cit.* footnote 20, Article 7 par 1 (a) (EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters).

⁶⁴ *Op. cit.* footnote 44, chapter 6 (Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (2009)).

⁶⁵ Stephen Lancken (2004): “The responsibility of the neutral in respect of mediation confidentiality”, ADR Bulletin: Vol. 7: No. 2, Article 2, available at <http://epublications.bond.edu.au/adr/vol7/iss2/2>.

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68. The Draft Mediation Law partially reflects the above-mentioned shift to professionalization and attempts to maintain the necessary balance between quality/experience and flexibility. Article 10 par 4 provides for independent mediation organizations which are responsible for the training and continuous education of the mediators. More details are set out in Articles 14, 15 and 16 of the Draft Mediation Law regulating mediation organizations, mediators' rosters, and appeals against violations committed by mediators.
69. Structurally, the Draft Mediation Law seems to provide a general framework for mediation, complete with some legislative guidelines, but where the details are to be determined elsewhere. Particularly in relation to the organizational training of mediators, and the mediation organizations themselves, this creates a certain ambiguity as to how standards will be set and maintained. The Draft Mediation Law does not foresee any type of external (e.g., government or other body) approval or oversight process that would ensure that mediation trainings offered and mediation organizations themselves all adhere to a common standard. **While it may not be necessary to outline all of the above in detail in the Draft Mediation Law, the draft provisions should, at a minimum, provide for a specific accreditation body and set out the main elements of an accreditation procedure. By-laws could then develop strong and more detailed rules on mediator accreditation as a means of quality control, including standards to ensure the quality of mediators, the content, types, extent and quality of training that a prospective mediator shall receive (including the number of role-plays or simulations, the content of practical and/or written assessments, and the qualification of trainers and coaches), measures to maintain an established standard (brought about by continuous professional development, mediation and co-mediation practices, mediation simulations and observations), and a collective national mediators' code of conduct, among others.** These regulations should be developed within a clear timeframe and ideally be operational by the time the Draft Mediation Law enters into force.
70. The number of training hours, which pursuant to Article 10 par 4 (2) of the Draft Mediation Law is 100 learning hours, seems to be reasonable in comparison to other jurisdictions which require from less than 40 to up to 400 hours.⁶⁶ The Draft Mediation Law also specifies the required hours of initial training and mentions refresher courses for mediators in Article 14 par 3 on mediators' organizations, which is welcomed; however, it would be advisable to also **specify the scope of the refresher courses in the Draft Mediation Law.** In most civil and common law countries, the standard is maintained by ensuring 15-50 hours of continuous professional development over an average of 2.5 years.⁶⁷ Some countries also require

⁶⁶ Most civil law jurisdictions require a relatively high number of training hours, for example Austria (approximately 370), Germany (approximately 400) and Belgium (approximately 90) compared to common law countries, which generally require approximately less hours of training. E.g., Hong Kong, Australia, Canada, the US and New Zealand require 40 hours of training, followed by role play and sometimes written assessment. Country examples are taken from *Op. cit.* footnote 44, chapter 3 (Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (2009)).

⁶⁷ E.g., Hong Kong: 15 hours of continual professional development over three years; Belgium: 18 hours of continual professional development over two years; Australia: 20 hours over two years; Austria: 50 hours over five years (Country Examples as cited in Nadja Alexander, *International and Comparative Mediation: Legal Perspectives*, Alphen aan den Rijn: Kluwer Law International, 2009, chapter 3)

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mediators to have a set number of hours of mediation practice to retain their certification and be able to work as a mediator continuously.⁶⁸

71. Article 30 par 2 of the Draft Mediation Law seems to imply that any foreign mediation certificates obtained by foreigners are accepted. While this is in principle positive, it is nevertheless **recommended to reassess this provision and make the acceptance of foreign mediation certificates subject to validation by a relevant authority or organization.** This is important in order to avoid a potential influx of foreign mediators who do not operate according to the minimum national standards of the Kyrgyz Republic.
72. Overall, attention should be paid to ensuring the representation of all segments of society in the recruitment and training of new mediators.⁶⁹ 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.⁷⁰

2.5 Mandatory Mediation

73. Articles 4 par 1, 5, 20 par 1 and 20 par 3 of the Draft Mediation Law state that mediation processes are solely based on the will of the parties and that there shall be no mandatory mediation except in the cases of Articles 9 pars 6 and 7 and 25 par 1, where mediation is agreed upon by the parties as a form of mandatory pre-trial or extrajudicial dispute resolution. Courts may refer parties to mandatory information sessions on mediation (Article 21 par 1) or recommend mediation (Article 9 par 10). Similar provisions are common in other countries,⁷¹ but it may nevertheless be advisable to revisit the relevant articles of the Draft Mediation Law in light of their practicability. Indeed, if judges have the duty to refer cases to mandatory briefings, this might lead to prolonged proceedings and, ultimately, raise budget concerns. **Instead, it should be within the discretion of the individual judge to refer the parties to a mandatory briefing, depending on whether he or she deems the case suitable for mediation or not.**
74. At the same time, it is noted that many countries even go beyond mere mandatory mediation briefings and offer an array of incentives to encourage parties to mediate; these range from imposing fines for the failure to mediate where it would be reasonable to do so, to imposing a judicial order or legislative requirement to

⁶⁸ E.g., Australia on top of the required hours of continual professional development, asks for 25 hours of mediation, co-mediation or conciliation within a two-year period to be accounted for.

⁶⁹ *Op. cit.* footnote 17, Appendix V2 par 22 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters).

⁷⁰ 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

⁷¹ E.g., in Austria or other civil law countries.

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mediate.⁷² For example, in England, the Civil Procedure Rules and pre-action protocols effectively represent the “strongest form of encouragement”⁷³ for parties to attempt mediation; if mediation is unreasonably refused by a party, courts have a broad discretion to impose payment orders against the refusing party.⁷⁴

75. In other legal systems, courts may refer parties to mediation before seeking out other avenues, like litigation, in cases where this is deemed appropriate. In France, mediation is said to be voluntary in the sense that the parties must agree to mediate.⁷⁵ However once they have done so,⁷⁶ the court issues an order to this effect and the parties are then compelled to participate in the mediation.⁷⁷
76. The general exception to offering incentives for or mandating mediation relates to mediation in criminal matters, where the process can only start when both parties freely decide to participate in mediation and agree on the basic facts (see further comments on mediation in criminal matters in pars 80-91 *infra*). It is therefore **recommended that law-makers discuss whether to introduce such incentives and in which areas. In the Kyrgyz context, mandatory mediation (in matters not related to criminal law) could be considered; to avoid inconsistencies in legislation, references prohibiting the compulsory start of non-criminal mediation in the Draft Mediation Law should then also be removed.**
77. Additionally, **it should be clarified in the Draft Mediation Law that the principle of voluntariness mentioned in Articles 4 par 1 and 5 of the Mediation Law relates to the will of the parties to engage in mediation, and to accept or reject its outcome, and does not mean that mediation shall not be an earnest attempt to resolve a conflict. Thus the referral by a court or any other competent body as such does not contradict the principle of voluntariness.** Such clarification would also make the Draft Mediation Law more consistent in itself, given that it already provides for cases of mandatory mediation in Articles 9 pars 6 and 7 and 25 par 1. Without this incentive, it may be difficult to convince individuals of the benefits of utilizing mediation, given that it is a new and relatively unknown way of resolving disputes.
78. If the relevant stakeholders in the Kyrgyz Republic decide to change the Draft Mediation Law accordingly, relevant provisions, such as Article 9 pars 6 and 7, should be amended **to make sure that parties are not hindered from resorting to**

⁷² This is the case in most common law legal systems (e.g. US states of Florida (§ 44.102 Florida Statutes) and Texas (Chapter 13, Local Rules of Civil Procedure and Rules of decorum for the District Courts of Travis County, Texas) and Australia s 53A of the Federal Court of Australia Act 1976), while legislation in many civil law countries implies that the principle of voluntariness extends to the choice to attend mediation or not without incentives. Italy is an exception in this regard: Legislative Decree 28/2010, with its art. 5 para. 1 on “mandatory mediation” whereby whoever intends to commence an action before a civil court of law relating to one of the several subject matters listed therein, shall be required, as a pre-condition (*condizione di procedibilità*), to start a mediation process; see also *op. cit.* footnote 20, pars 12 and 14 (EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters) which, while defining mediation as a voluntary process, acknowledges that states may have laws mandating mediation.

⁷³ See Dyson L.J. in *Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday* [2004], Decision of England and Wales Court of Appeal (hereinafter “EWCA”) (Civil Division), EWCA Civ 576, par 30.

⁷⁴ See the Civil Procedure Rules (CPR) r 1.4 and 44.3, and Practice Direction to the Pre-action Protocol, 4.2(f), (g), 4.6(e) and 4.7, and the line of cases that have interpreted these provisions: *Regina (Cowl and others) v Plymouth City Council* [2001] EWCA Civ 1935, *Dunnett v Railtrack plc* [2002] EWCA Civ 303, *Hurst v Leaming* [2002] EWHC 1051 (Ch), *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1479 (Ch) and *Halsey v Milton Keynes General NHS Trust and Steel v Joy and Halliday* [2004] EWCA Civ 576.

⁷⁵ See Article 131-1 of the French Code of Civil Procedure.

⁷⁶ See Article 131-6 of the French Code of Civil Procedure.

⁷⁷ See Article 131-15 of the French Code of Civil Procedure.

other measures, including litigation, if the mediation attempt is unsuccessful. Indeed, it is important that full access to justice is guaranteed.

79. In case of mandatory referral to mediation, the parties should also be entitled to **receive confirmation by the mediator of the initiation and end of the mediation process to use as a proof of prior mediation before court; this should be done without stating the content (if not necessary) of a reached agreement or the reasons why a mediation did not result in settlement (see also par 52 *supra*).**⁷⁸ If the mediation does not result in settlement, it is still possible for the parties to agree on a written record of factual issues which would be treated as uncontested in any ensuing judicial or other proceedings (provided that the parties have previously agreed to disclose such record).⁷⁹

2.6 Mediation in Criminal Matters

80. As previously mentioned (see par 23 *supra*), mediation in criminal matters differs from mediation in other areas in a number of ways and is driven by different policy considerations. First and foremost, in victim-offender mediation, both the victim and the offender must, out of their own free will, wish to start a mediation process.⁸⁰ Furthermore, from the outset, the offender must agree with the victim on the basic facts of events that occurred between them; this is also stipulated in Article 26 par 3 of the Draft Mediation Law on the specifics of mediation in the field of relations under criminal law, which is welcome. The considerations and goals which the mediator has to keep in mind regarding the victim and the offender are also not congruent: victims often hope to gain a stronger voice through mediation, deal with the consequences of victimization in a better way or hope to obtain an apology or reparation from the offender.⁸¹ For offenders, mediation might offer a practical way to make amends, to strengthen their sense of responsibility and in that way further their reintegration or rehabilitation.⁸²
81. Internationally, out-of court mediation has also been acknowledged as a means to prevent crime⁸³ and has been promoted throughout the UN system in a variety of circumstances.⁸⁴ The Draft Mediation Law seems to state some of the goals of victim-offender mediation, such as reconciliation, in Article 28 par 5 on the agreement on dispute (conflict) resolution; however, **the provision is not very clear and should be**

⁷⁸ *Op. cit.* footnote 19, par 39 (CoE DG I Opinion on Serbian Draft Law on Mediation (2013)).

⁷⁹ *Op. cit.* footnote XXX, (Serbian Law on Mediation) at Article 16 .

⁸⁰ *Op. cit.* footnote 18, Appendix II (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters); see also CEPEJ Working Group on Mediation Report by Julien Lhuillier “The Quality of Penal Mediation in Europe”, pars 9 and 23.

⁸¹ See for example *op. cit.* footnote 18, Preamble (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters).

⁸² *ibid.*

⁸³ ECOSOC Res.1997/33 Elements of responsible crime prevention: standards and norms, available at <http://www.un.org/documents/ecosoc/res/1997/eres1997-33.htm>, par 22.

⁸⁴ *ibid.*; see also ECOSOC Res. 1998/23 - International cooperation aimed at the reduction of prison overcrowding and the promotion of alternative sentencing par 3 (b0: ECOSOC Res. 2000/14 Basic principles on the use of restorative justice programmes in criminal matters, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000) plus Annex (Preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters); ECOSOC Res 1999/26 Development and implementation of mediation and restorative justice measures in criminal justice, available at

https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1990-1999/1999/ECOSOC/Resolution_1999-26.pdf; and *op. cit.* footnote 22 (2012 UN Guidance for Effective Mediation)..

reformulated. Ideally, the Draft Mediation Law should be supplemented with a separate section specifically addressing criminal mediation or a separate law on criminal mediation should be drafted (see par 23 supra).

82. Because of the sensitive matters dealt with in victim-offender mediation, quality control is particularly important. **Mediators need to receive thorough training covering not only the specific conflict resolution skills required during this type of mediation, but should also learn how to deal with victims of crimes, particularly to avoid “secondary victimization”.**⁸⁵ They should also have a basic knowledge of the criminal justice system.⁸⁶
83. Pursuant to Article 1 par 2, the Draft Mediation Law applies to mediation in “criminal law conflicts, arising from relations under criminal law pertaining to persons committing minor offences for the first time”. Certain aspects of this provision are too broad, while others are too narrow. It would be **advisable to draft a more detailed provision which clearly states what kind of minor crimes can be dealt with during a mediation process and which kinds of crimes are excluded, either by mentioning them directly or by adding a cross-reference to relevant provisions of the Criminal Code.**
84. There are differing approaches internationally with regard to which crimes are suitable for mediation. At the same time, there seems to be a consensus, in light of the dynamics and objectives of victim-offender mediation, that mediation is only suitable for **crimes committed against natural persons** or, at the most, for crimes against legal persons where affected individuals are clearly identifiable and it is possible to conduct mediation due to the nature of the crimes in question (e.g., property violations). In some countries⁸⁷, almost all crimes committed against natural persons are open to mediation if the victim and the perpetrator so wish. Other countries⁸⁸ specifically exclude certain crimes from the realm of mediation.
85. In light of the rights and interests of the victims, obvious disparities between the mediating parties with respect to, for example, age, maturity, intellectual capacity and any other factor which might lead to an imbalance of power and strength between the two parties should be taken into consideration.⁸⁹ For instance, recognizing the unequal powers of the victims and offenders in domestic violence and rape cases, many countries explicitly exclude such cases from the scope of victim-offender mediation. This has been mirrored at the international level, in particular in the UN Handbook for Legislation on Violence against Women which recommends that legislation should

⁸⁵ i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim. Secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language, unintentionally insensitive comments made by all those who come into contact with victims, insensitive media reporting of cases. See Chapter 5 of the 2009 Report on Non-Criminal Remedies for Crime Victims prepared by the Group of Specialists on Remedies for Crime Victims (CJ-S-VICT) nominated by the Committee of Ministers of the Council of Europe, under the aegis of the European Committee on Legal Co-operation (CDCJ), available at http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf.

⁸⁶ See, for a comprehensive list of what mediators’ training in penal matters could entail, *op. cit.* footnote 18, par 19 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning Mediation in Penal Matters (2007)).

⁸⁷ E.g., see Article 2 of the Law of 22 June 2005 on Mediation of Belgium

⁸⁸ E.g., the Organic Act on Integrated Protection Measures against Gender Violence (2004) of Spain prohibits mediation in cases of all kinds of violence against women.

⁸⁹ *Op. cit.* footnote 84, Annex par 9 (ECOSOC Res 1999/26 on Mediation and Restorative Justice Measures in Criminal Justice).

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“explicitly prohibit mediation in all cases of violence against women, both before and during legal proceedings”⁹⁰ because it “removes cases from judicial scrutiny, presumes that both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability”.⁹¹

The Draft Mediation Law should thus state that neither mediation nor traditional *aksakal* (courts of community elders) proceedings are the appropriate avenue for dealing with cases of domestic violence, or similar offences which fall under the scope of criminal law.⁹²

86. Article 26 par 1 of the Draft Mediation Law stipulates that mediation is not a substitute for criminal proceedings, whereas Article 26 par 7 states that an individual cannot be re-prosecuted for the same crime if parties conducted a successful mediation. This is in line with the principle of *ne bis in idem* (the prohibition of double jeopardy meaning that one person cannot be subjected to legal action twice for the same act).⁹³ These two provisions seem to be inconsistent and should be clarified. **In any case, the mediator should always have the duty to inform the parties about the principle of *ne bis in idem*. Along with information on a possible discontinuation of criminal procedure following a successful mediation, the mediator shall also inform all parties about other consequences of successful mediation such as suspension or mitigation of sanctions.**⁹⁴
87. While Article 19 par 2 of the Draft Mediation Law on the duration of mediation sets out a time limit of sixty calendar days for completing a mediation process, it is not clear whether this shall also apply to victim-offender mediation. This should be clarified, as it might be advisable to set a **different, more flexible time-limit for cases involving victim-offender mediation** in light of the potentially sensitive and difficult issues under discussion.

⁹⁰ UN Women Handbook for Legislation on Violence against Women available at http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/12/UNW_Legislation-Handbook%20pdf.pdf (2012) at 3.9 on page 37.

⁹¹ *ibid.* at 3.9 page 37 (2012 UN Women Handbook for Legislation on Violence against Women); Article 48 of the CoE Convention on preventing and combating violence against women and domestic violence also prohibits mandatory mediation in relation to all forms of violence covered by the convention (signed 11 May 2011, entered into force 1 August 2014) CETS 210.

⁹² An express prohibition of mediation in cases of domestic violence seems to be particularly important given the low level of reporting in cases of domestic violence in the Kyrgyz Republic coupled with the low number of investigations and court proceedings which result in a low conviction rate. Many domestic violence cases in the Kyrgyz Republic are not dealt with as a criminal matter, but instead referred to *aksakals*, courts of community elders, which denies victims of domestic violence access to criminal courts, often even in cases in which the laws of the Kyrgyz Republic provide otherwise. It is likely that persons acting as “judges” in *aksakal* proceedings may also, in the future, be acting as mediators; See Recommendation D and pars 43-46 (2014 ODIHR Opinion on the Draft Law of the Kyrgyz Republic on Safeguarding and Protection From Domestic Violence) available at <http://www.osce.org/odihr/126692?download=true>; see also pars 156-161 of the OSCE/ODIHR Opinion on the Draft Code of Criminal Procedure of the Kyrgyz Republic, available at <http://www.osce.org/odihr/168811?download=true>; also in family mediation, the mediator should pay particular regard to whether violence occurred or may occur in the future and whether mediation is at all appropriate given the circumstances (see *op. cit.* footnote 17, Part III Process of mediation (CoE Recommendation No. R (98) 1 on Family Mediation).

⁹³ *i.e.*, discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*); see *op. cit.* footnote 17, Appendix, par 17 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters).

⁹⁴ See *op. cit.* footnote 18, pars 32-33 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning Mediation in Penal Matters (2007)).

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88. It is recommended to ensure that parties to victim offender mediation should have **access to legal assistance by a qualified lawyer.**⁹⁵ Where necessary, **translation and interpretation** should also be provided.⁹⁶ **Any special regulations which apply to minors during trial should also apply to minors during mediation.**⁹⁷ For juvenile offenders, the provisions in the Draft Code of Criminal Procedure, once adopted, should be applied also in mediation cases, as appropriate, taking into the account the recommendations set out in the Opinion on the Draft Code prepared by OSCE/ODIHR in June 2015.⁹⁸
89. In all cases involving victim-offender mediation, special consideration has to be paid to victims before, during and after mediation, due to the imbalance of power generally existing between the victim and the offender (see also par 85 *supra*).⁹⁹ It should be the **responsibility of the mediator to provide a safe environment taking into account the vulnerabilities of the parties, while making sure that the agreement reached and the obligations found therein conform to the principles of reasonableness and proportionality.**¹⁰⁰
90. Article 26 par 2 of the Draft Mediation Law states that mediation may be applied at any stage of criminal proceedings, which is welcomed.¹⁰¹ A sentence should be added clarifying that this **also extends to the time after a judgment has been delivered and sanctions have been executed.**¹⁰²
91. In cases of victim offender mediation, Article 26 par 9 (1) allows the mediator to gain access to information about the merits of the case. Such a provision is not common in domestic mediation legislation. In victim-offender mediation, the mediator needs to have a **strictly facilitative role and may not act as an advisor**; if a mediator is provided with a court file, this should be sufficient to fulfill his/her facilitative role. A provision which goes beyond that and allows the mediator to “get access to any information relevant to the merits of the criminal case” may transform his/her facilitating role into an investigative and inquisitorial one. **It is therefore recommended to delete Article 26 par 9 (1).**

2.7. Promotion of Mediation Efforts

92. There are a variety of measures that states can initiate in order to promote mediation. Aside from disseminating information, and conducting other awareness-raising

⁹⁵ See *op. cit.* footnote 17, Appendix III. Legal basis, par 8 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters).

⁹⁶ *ibid.* Appendix III. Legal basis, par 8 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters); see also Articles 14 and 27 of the ICCPR.

⁹⁷ See *op. cit.* footnote 17 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters); Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters of the European Commission for the Efficiency of Justice CEPEJ(2007)1; according to par 26 of the Guidelines, special consideration should be paid to, *inter alia*, the child's age, the role of parents and to the inclusion of social workers.

⁹⁸ OSCE/ODIHR Opinion on the Draft Code of Criminal Procedure of the Kyrgyz Republic, in particular pars 61-68, available at <http://www.osce.org/odihr/168811?download=true>.

⁹⁹ *Op. cit.* footnote 18, par 16 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning Mediation in Penal Matters (2007)).

¹⁰⁰ *Op. cit.* footnote 17, Appendix V, par 31 (CoE Recommendation No. R (99) 19 on Mediation in Penal Matters).

¹⁰¹ See also *Op. cit.* footnote 18, par 9 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning Mediation in Penal Matters (2007)).

¹⁰² *Op. cit.* footnote 18, par 9 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning Mediation in Penal Matters (2007)).

measures of mediation schemes to encourage individuals to try mediation, ensuring that mediated settlement agreements are enforceable is another way to demonstrate the benefits of mediation. Article 28 of the Draft Mediation Law regulates the content, effect and execution of mediation agreements.¹⁰³ As mentioned in par 45 *supra*, mediated settlement agreements should be **enforceable unless their content is contrary to domestic law**, and this should be clearly mentioned in the Draft Mediation Law.¹⁰⁴ Another good practice in promoting the use of mediation is to exempt persons from paying court or administrative fees, or at least reducing such fees in cases where they attempted mediation prior to or during legal proceedings or where they reached a mediated settlement agreement after instituting judicial proceedings but before the main first hearing.¹⁰⁵

93. In order to enhance the accessibility of mediation, bar associations, lawyers' associations and courts should **refer interested parties to lists of mediation providers**¹⁰⁶, which could ideally be provided by the mediation organizations from their rosters. The establishment of court-annexed mediation schemes could also be considered to make mediation more attractive and accessible.¹⁰⁷
94. Finally, **awareness-raising measures within the main legal professions**, including by training judges (for instance by the Kyrgyz Judicial Training Center), prosecutors, lawyers, social workers and police officers on the benefits and risks of mediation, as well as the inclusion of mediation in law school curricula are other internationally used methods to promote the use of mediation which may be considered in this context.¹⁰⁸ In relation to judges, it is particularly important that they are trained in checking mediated settlement agreements according to set criteria prior to approval in cases mandated by law or agreed by the parties (see pars 44-45 *supra*) as this will differ from rendering a decision on the merits of a dispute.

2.8 International Mediation

95. The Draft Mediation Law should also include provisions dealing with mediation concerning cases with an international element. Generally, the main principles governing domestic mediation can also be applied to international mediation.¹⁰⁹ Nevertheless, a few particularities remain.
96. **While the Draft Mediation Law contains the principle of *ne bis in idem* in successful penal mediation (Article 26 par 7), it is silent as to the effect of prior mediation of a criminal case in other states.** The CEPEJ Guidelines for a better implementation of Recommendation No. R(99)19 concerning mediation in penal matters state that “[d]ischarges based on mediated agreements should have the same

¹⁰³ Also recommended by e.g., *op. cit.* footnote 17, Part IV (CoE Recommendation No. R (98) 1 on Family Mediation).

¹⁰⁴ *Op. cit.* footnote 20, Article 6 (EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters).

¹⁰⁵ see *op. cit.* footnote 18, Part 3.2 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning family mediation and mediation in civil matters (2007)).

¹⁰⁶ *ibid.* Parts 1.2 and 1.3 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning family mediation and mediation in civil matters (2007)).

¹⁰⁷ *ibid.* Part 1.2 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning family mediation and mediation in civil matters (2007)).

¹⁰⁸ *ibid.* Part 3 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning family mediation and mediation in civil matters (2007)).

¹⁰⁹ See *op. cit.* footnote 17, VIII c (CoE Recommendation No. R (98) 1 on Family Mediation).

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status as judgments or other judicial decisions, if they are taken by official judicial staff, e.g. member of the office of the public prosecutor or judge. Such a decision will preclude prosecution in respect of the same facts in another member state (*ne bis in idem*)”.¹¹⁰ It is recommended to include in the Draft Mediation Law a provision to this effect. As mediation with an international component is particularly often found in family law, especially in custody cases, it might also be advisable to include a provision that **follows the CoE Recommendations on family mediation, which recommends setting up a mechanism for mediation in such cases, in particularly where parents live or are expected to live in different states.**¹¹¹

3. Additional Remarks

97. The Opinion at hand focuses on the Draft Mediation Law as the primary legislation of the Kyrgyz Republic in the field of mediation. It is positive that amendments to other legislation, as contained in the Draft Amendments, are also contemplated as they are necessary to ensure the coherence of the legal framework on mediation in the Kyrgyz Republic.
98. However, a couple of points need to be made specifically with regard to the Draft Amendments. Article 2 par 1 of the Draft Amendments which amends the Code of Civil Procedure might pose problems when stating that the statute of limitations is interrupted with the signing of a mediation agreement as mediation agreements might be signed years before a dispute even arises. **It is recommended to reformulate this Article to clarify that the interruption is only applicable to cases in which the statutory period of limitation has already commenced.**
99. Additionally, Article 2 par 11 (1) of the Draft Amendments amending the Code of Civil Procedure states that the terms of mediated settlement agreements may be part of court records. **This may clash with the principle of party autonomy, in that parties may wish to include a confidentiality agreement in their mediated settlement agreement. If so, the terms of the agreement should not be in the court records.**
100. Finally, it is not clear whether a full **financial impact assessment** has been carried out to analyze the funding required to ensure the implementation of all aspects of the Draft Mediation Law and related amendments, in terms of financial and human resources, as well as training; it is recommended that policy-makers and other stakeholders in the Kyrgyz Republic ensure that such a comprehensive impact assessment is carried out.

[END OF TEXT]

¹¹⁰ *Op. cit.* footnote 18, par 30 (CEPEJ Guidelines for a Better Implementation of Recommendations concerning Mediation in Penal Matters (2007)).

¹¹¹ See *op. cit.* footnote 17, VIII a (CoE Recommendation No. R (98) 1 on Family Mediation).

Annex 1: Draft Law on Resolution of Disputes through Mediation of the Kyrgyz Republic

DRAFT

LAW OF THE KYRGYZ REPUBLIC

“On Resolution of Disputes through Mediation”

This law has been elaborated to create conditions for the application and further development of the mediation procedure in the Kyrgyz Republic, reduction of judicial caseload, promotion of business relationships based on partnership, development of business ethics and harmonization of social relations.

Chapter 1

General Provisions

Article 1. Subject of Regulation and Scope of the Law

1. This Law shall regulate relations concerning the application of the mediation procedure to:

- 1) disputes arising from civil, labor or family relations or other legal relations;
- 2) criminal law conflicts, arising from relations under criminal law pertaining to persons committing minor offences for the first time.

2. The mediation procedure shall not apply if:

- 1) a dispute (conflict) concerns or may concern interests of third persons uninvolved in the mediation procedure, or persons adjudged incapable, unless the third persons or legal representatives of incapable persons act as parties in mediation;
- 2) a state body or a local government body is a party to dispute, except for disputes arising from civil or labor relations.

Article 2. Basic Definitions Used in the Law

This Law includes the following basic definitions:

- 1) **mediation** – a procedure for resolving a dispute (conflict) between parties, conducted with their voluntary consent and mediator’s support in order to reach a mutually acceptable agreement;
- 2) **parties in mediation** – parties in disputes (conflicts) arising from the legal relations specified in Article 1 (1) of this Law;

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- 3) **mediator** – a person engaged by parties for mediation in accordance with requirements of this Law;
- 4) **mediation agreement** – a written agreement between the parties in dispute (conflict) and the mediator, concerning resolution of the dispute (conflict) through mediation;
- 5) **agreement on dispute (conflict) resolution** – a written agreement between the parties, achieved through mediation and pertaining to the dispute itself or certain differences related to it;
- 6) **mediators organizations**– voluntary non-commercial organizations, uniting mediators for achievement of common mediation development goals not contradicting the legislation of the Kyrgyz Republic;
- 7) **criminal law conflict** – a dispute between a crime committer and a victim, as well as the State, as provided by criminal law.

Article 3. Main Goal of Mediation

The main goal of mediation consists in reaching dispute (conflict) resolution option mutually acceptable for the parties.

Article 4. Mediation Procedure Principles

The mediation procedure shall be based on the principles of:

- 1) voluntarism;
- 2) cooperation and equality of parties in mediation;
- 3) independence and impartiality of mediator;
- 4) confidentiality.

Article 5. Voluntarism

1. Mutual free will of the parties expressed in the mediation agreement shall be the condition for participation in mediation.
2. Parties in mediation may withdraw from the mediation process at any stage or return to it before court or arbitration court delivers its judgment on the dispute (conflict). Coercion to mediation or mediation in the absence of any of the parties shall not be permitted.
3. Parties in mediation shall be entitled to exercise their material or procedural rights at their own discretion, increase or diminish their claims, refuse from the subject of dispute (conflict) entirely or partially.
4. In addition to the mediation rules, set by mediation organization or mediator, the parties shall be entitled to set certain mediation rules on their own to ensure maximal effectiveness of mediation for resolution of a specific dispute.

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5. The requirement for holding a mandatory briefing between the parties and the mediator, stipulated by Article 21 of this Law, shall not be perceived as restriction of the principle of voluntarism.

Article 6. Cooperation and Equality of Parties in Mediation

1. Mediation shall be based on constructive cooperation and mutual support of the parties for reaching a mutually acceptable agreement.
2. Parties in mediation shall enjoy equal rights pertaining to selection of mediator, the process of mediation, their positions in this process, means and forms of maintaining their positions, access to information, and assessment of acceptability of conditions of a dispute (conflict) resolution agreement.

Article 7. Independence and Impartiality of Mediator

1. Mediator shall be independent from the parties in mediation, state bodies, local government bodies, legal entities, officials and individuals.
2. Mediator shall be impartial and shall mediate in the interests of all parties, ensuring their equal participation in the mediation process.
3. In the presence of circumstances influencing impartiality of a mediator, he/she shall abstain from mediation.

Article 8. Confidentiality

1. All information related to mediation shall be confidential unless otherwise prescribed by laws of the Kyrgyz Republic or agreed by the parties in mediation.
2. The parties in mediation, mediator, mediators' organizations, persons participating in the arrangement and conduct of mediation may not disclose mediation-related information, learnt in the course of mediation, without a written agreement of the parties in mediation.
3. Mediator, mediators' organizations, persons participating in the arrangement and conduct of mediation may not use mediation-related information, learnt in the course of mediation, without a written agreement of the parties in mediation.
4. Mediator may disclose mediation-related information provided by one party to the other party in mediation only with consent of the information provider.
5. Disclosure of information learnt in the course of mediation without a written consent of the parties in mediation shall entail liability as stipulated by the mediation agreement and laws of the Kyrgyz Republic. Liability for disclosure of such information shall not relieve the responsible person from compensating damage inflicted by disclosure.
6. Informing competent bodies about a committed or planned crime, learnt by mediator in the course of mediation, shall not be regarded as breach of confidentiality.

Article 9. Guarantees in Mediation Procedure

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1. Any interference in mediation activities shall be prohibited. Persons responsible for such interference shall be held legally liable.
2. Mediator, persons participating in the arrangement and conduct of mediation, representatives of the parties in mediation may not be questioned as witnesses regarding information learnt in the course of mediation without the consent of the parties in mediation.
3. Mediation-related information may not be requested from mediator and organizations facilitating the mediation process, unless otherwise prescribed by laws or agreed upon by the parties in mediation.
4. No one may request from mediator a report on a concrete mediation case, unless mediator's responsibility is under consideration.
5. Mediator shall not provide any explanations on the merits of mediation cases that have been or are being examined or submit the cases to anybody's review, unless otherwise provided by the mediation agreement and the laws of the Kyrgyz Republic.
6. If the parties stipulate in the mediation agreement that mediation shall be a mandatory extrajudicial or pre-trial dispute resolution procedure in the presence of circumstances, envisaged by the procedural legislation, the proceedings shall be suspended or terminated.
7. If the parties stipulate in the mediation agreement or in the arbitration clause that mediation shall be a mandatory dispute resolution procedure in the presence of circumstances envisaged by the agreement on dispute resolution or applicable rules of court of arbitration, arbitration proceedings may be suspended or terminated.
8. If a dispute (conflict) has been submitted to court, the parties may apply the mediation procedure any time before the court delivers its judgment on the dispute. Adjournment of dispute examination by court and implementation of other procedural actions shall be determined by the procedural legislation of the Kyrgyz Republic.
9. If a dispute is being examined by court of arbitration, the parties may apply mediation procedure any time before the court delivers its judgment on the dispute. Adjournment of dispute consideration by court of arbitration and implementation of other procedural actions shall be determined by the dispute resolution agreement or applicable rules of court of arbitration.
10. Judges, state or judicial bodies, local government bodies and officials shall inform the parties about the availability and benefits of mediation and shall recommend its use for resolving a dispute (conflict).

Chapter 2

Legal Status of Mediators and Mediators Organizations

Article 10. Requirements for Mediators

1. Any independent, impartial individual, uninterested in the outcome of a case, selected by mutual consent of the parties in mediation and agreeing to undertake mediator's role, may work as mediator.

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Mediator's activity may not be income generating.

2. A person with undergraduate (bachelor's degree) or higher education, who completes mediator's training and is maintained on the roster of mediators, shall be eligible to work as mediator.

3. The following persons may not work as mediators:

- 1) civil or municipal officials except social workers;
- 2) persons adjudged incapable or partially incapacitated;
- 3) persons with unexpunged or unspent conviction;
- 4) lawyers or authorized representatives of one of the parties.

4. An organization providing training to mediators shall independently approve a training program including:

- 1) theoretical and practical parts;
- 2) at least 100 learning hours.

Article 11. Rights and Responsibilities of Mediator

1. In the course of mediation a mediator shall be entitled to:

- 1) hold briefings with all parties simultaneously or with each party individually;
- 2) inform public about his/her activity with observance of confidentiality;
- 3) terminate the mediation if in his/her opinion further progress to resolution of dispute (conflict) between the parties is unlikely and offer the parties to resort to other mediator's services;
- 4) terminate the mediation with written consent of the parties if in his/her opinion further progress in resolution of dispute (conflict) between them is unlikely.

2. A mediator may not:

- 1) put any party at an advantage over the other or diminish rights and legal interests of any of the parties;
- 2) act as a representative of any of the parties in mediation;
- 3) provide legal, consultative or other kind of assistance to any of the parties;
- 4) represent interests of any of the parties in connection with the same dispute (conflict), if the parties have terminated the mediation and then returned to it or if they have declined the services of that particular mediator;
- 5) represent or defend interests of any of the parties in litigation of a dispute (conflict) previously mediated by him/her;
- 6) act as arbitrator or representative of any of the parties in arbitration proceedings related to a dispute (conflict) previously mediated by him/her.

3. A mediator shall:

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- 1) prior to the mediation, explain to the parties its essence, aims and principles, as well as rights and responsibilities of the mediator and the parties and possible implications;
 - 2) in the course of mediation, act with the consent of the parties in mediation;
 - 3) in the course of civil or criminal proceedings, notify investigator or court in writing about parties' refusal from mediation or mediator's services;
 - 4) immediately recuse himself/herself in the event of circumstances preventing him/her from exercising his/her functions in compliance with mediation principles;
 - 5) observe the Mediator's Code of Conduct, approved by the mediators' organization that maintains him/her on its roster.
4. A mediator shall also have other rights and responsibilities provided for by the mediation agreement, this Law and the laws of the Kyrgyz Republic.

Article 12. Civil Liability of Mediator

1. Mediator shall be liable to the parties for harm done as a result of violation of his/her duties in the course of mediation under the provisions of the mediation agreement and civil legislation of the Kyrgyz Republic.
2. Mediator shall sign a civil liability insurance agreement to cover any harm done as a result of mediation activities.
3. Minimum insurance shall amount to 500 standard units established by law.
4. A mediator may not perform his/her duties without signing the insurance agreement.

Article 13. Rights and Responsibilities of Parties in Mediation

1. Parties in mediation shall be entitled to:
 - 1) select a mediator or mediators of their own free will;
 - 2) decline the services of mediator and select another mediator on mutual consent;
 - 3) withdraw from mediation at any stage of the process;
 - 4) participate in mediation personally or through a legally authorized representative;
 - 5) in case of non-fulfillment or improper fulfillment of the agreement on dispute (conflict) resolution, seek its enforcement in the manner prescribed by the laws of the Kyrgyz Republic.
2. The parties in mediation shall implement the agreement on dispute (conflict) resolution in the manner and within the time period specified therein.
3. The parties in mediation shall also have other rights and responsibilities provided for by the mediation agreement, agreement on dispute (conflict) resolution, this Law and the laws of the Kyrgyz Republic.

Article 14. Mediators Organizations

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1. Mediators organizations are non-commercial, self-funded and self-administered organizations, founded on mediators' initiative in compliance with procedural and institutional forms envisaged by the Law of the Kyrgyz Republic "On Non-Commercial Organizations".
2. Mediators organizations shall be founded for ensuring methodical, procedural, institutional and other conditions for provision of mediatory services by mediators.
3. Mediators organizations shall be entitled to arrange training and refresher courses for mediators and to issue corresponding documents (training certificates).
4. Mediators organizations shall be entitled to form associations (unions) for coordination of their activities, development and unification of mediation standards (rules), mediation procedures, terms and conditions for payment of remuneration to mediators by the parties in mediation.
5. Membership in mediators' organizations shall be voluntary.
6. A mediator may be a member of only one mediators' organization.
7. Mediators may establish and apply financial and disciplinary sanctions to their members.
8. Mediators organizations shall be liable to the parties and mediators for any harm done as a result of activities related to the arrangement of mediation in accordance with the procedure established by the civil legislation of the Kyrgyz Republic.

Article 15. Roster of Mediators

1. All mediators' organizations shall maintain their rosters of mediators operating in the Kyrgyz Republic.
2. A roster of professional mediators shall include:
 - 1) mediator's last name, first name and patronymic (if any);
 - 2) mediator's contact information: mail address, electronic mail address, telephone or fax number;
 - 3) information about a sphere of mediation in which a mediator specializes;
 - 4) information about mediator's working language (languages);
 - 5) details of a document certifying mediator's education and special training;
 - 6) information about suspension of mediator's activity or his/her removal from the roster.
3. A mediators' organization may put mediators, meeting requirements of this Law on its roster by giving them a notice within a period of time established by the organization.

In the event of a refusal to put a mediator on its roster, mediators' organization shall provide a motivated written explanation of its decision within the period of time established by it.
4. Mediators shall be removed from the roster of mediators in compliance with the procedure established by the mediators' organization.

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5. The roster of mediators shall be posted on mediators' organization's website in the state and official languages and shall be updated if and when new mediators are put on it.

Information on the roster of mediators shall be submitted to the district state administration at the place of actual location of a mediator.

Article 16. Consideration of Appeals against Violations Committed by Mediators

1. If mediator breaches his/her duties or requirements of this Law, interested persons may appeal to a corresponding mediators' organization.

2. The appeal shall be considered in compliance with a provision approved by the mediators' organization.

3. In case of establishment of violation on the part of mediator, mediators' organization may bring him/her to financial or disciplinary responsibility in compliance with the approved provision.

4. Information about mediator's financial or disciplinary responsibility shall be put on the roster of mediators.

5. Appeal consideration results shall be communicated to the appellant and the mediator.

Chapter 3

Mediation Procedure

Article 17. Time and Venue of Mediation

1. The parties may agree at their own discretion upon place, date and time of mediation.

2. Date and place of mediation in criminal cases shall be determined by agreement with investigator or judge examining the case.

Article 18. Language of Mediation

1. The parties may agree at their own discretion on language or languages of mediation.

2. Agreement on dispute (conflict) resolution shall be in the state or official language.

Article 19. Duration of Mediation

1. Duration of mediation shall be defined by the mediation agreement with due regard to requirements of this Law.

2. If mediation is outside the scope of civil or criminal proceedings, mediator and the parties shall use their best efforts to complete the mediation within sixty calendar days.

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In exceptional cases, where there is a need for obtaining additional information or documents due to complexity of dispute (conflict) to be resolved, duration of mediation may be extended maximum for thirty calendar days by mutual agreement of the parties and the mediator.

Article 20. Mediation Conditions

1. Mediation shall be conducted on mutual consent of the parties upon signing of a written mediation agreement.
2. Mediation in resolution of disputes arising from civil, labor and family relations or other relations may be applied both before the reference to court or court of arbitration and after the start of legal proceedings.
3. Investigator, judge or arbitrator may not coerce parties to mediation in any form.
4. A party may be offered to apply mediation:
 - 1) at request of the other party;
 - 2) by investigator;
 - 3) by judge or arbitrator;
 - 4) by notary;
 - 5) by mediator or mediators organization at request of the other party.
5. If a party sends a written proposal on applying mediation to the other party and fails to receive its approval within fifteen calendar days or any other reasonable term stipulated in the proposal, such proposal shall be considered declined.
6. Mediators organization may recommend potential mediator or mediators upon the receipt of a corresponding request from a party or parties.
7. Mediation procedure shall start on the day of signing of the mediation agreement by the parties.
8. Running of the statute of limitation shall be suspended for the period of mediation from the date of signing of the mediation agreement.

If the mediation terminates without signing of agreement on dispute (conflict) resolution, running of the statute of limitation resume from the date of termination.

Article 21. Mandatory Briefing

1. In order to promote the application of mediation, investigator or judge shall, within their conciliatory powers, refer the parties in dispute to a mandatory briefing with mediator.
2. The parties may be referred to the briefing at any stage of investigation, during preliminary procedure or at any stage of legal proceedings.
3. In the course of the briefing a mediator shall:
 - 1) explain to the parties in dispute advantages of mediation over legal proceedings;
 - 2) offers the parties options on dispute (conflict) resolution through mediation.

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4. If a briefing coincides with legal proceedings, judge shall suspend the proceedings until the end of the briefing, with due observance of timeframe for proceedings set by the procedural legislation of the Kyrgyz Republic.

Article 22. Selection and Appointment of Mediator

1. The parties shall select mediator or mediator organization for mediation by mutual consent.
2. Mediators organization may recommend potential mediator or mediators or appoint them upon the receipt of a corresponding written request from the parties.
3. Prior to his/her selection or appointment in accordance with this article, a mediator shall, in the presence of circumstances able to influence his/her independence and impartiality, immediately communicate this fact to the parties and the mediators organization that maintains him/her on its roster.

Article 23. Form and Content of the Mediation Agreement

1. In case of mutual agreement about resolution of dispute (conflict) through mediation the parties shall sign a written mediation agreement.
2. Following are the essential provisions of the mediation agreement:
 - 1) date, time and place of agreement;
 - 2) last name, first name and patronymic (if any) or names of the parties in dispute (conflict);
 - 3) last name, first name and patronymic (if any) or names of representatives of the parties in dispute (conflict) with details of documents certifying their authorities;
 - 4) description of the subject of dispute (conflict);
 - 5) language (languages) of mediation;
 - 6) confidentiality obligation of the parties in mediation and implications of breach of confidentiality;
 - 7) last name, first name and patronymic (if any) of a mediator or mediators;
 - 8) terms and procedures of payment of mediation-related expenses, as well as mediator's remuneration rate;
 - 9) terms and procedures of payment of legal expenses (if a dispute is examined by court, court of arbitration);
 - 10) grounds and scope of mediator's responsibility for actions or inaction causing losses (damage) to a party in mediation;
 - 11) duration of mediation;
 - 12) mediation procedure.
3. Mediation procedure may be stipulated by the parties in the mediation agreement by reference to mediation rules confirmed by a corresponding mediators' organization.

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4. Unless otherwise stipulated by law, the parties shall be entitled to stipulate in the mediation agreement that mediator may independently determine the mediation procedure considering circumstances of the dispute, preferences of the parties and the need for the fastest resolution of the dispute.

Article 24. Mediation Costs

1. Mediation costs shall include:

- 1) remuneration to the mediator;
- 2) costs incurred by the mediator in relation to the mediation, including costs of travel to the place where the dispute (conflict) is considered as well as accommodation and food;
- 3) costs of services of interpreters, experts, specialists involved in the mediation process;
- 4) other costs agreed by parties in mediation and the mediator.

2. Mediators may provide mediation services for a fee or free of charge.

3. The amount of the mediator's remuneration and terms of payment shall be agreed between the parties and the mediator prior to signing a mediation agreement.

4. Unless agreed otherwise by parties, the parties shall share the mediation costs in equal proportions.

5. If the mediator refuses to mediate due to circumstances preventing his impartiality, he shall return the money paid to him after deduction of costs incurred in the mediation process up to the moment the impartiality considerations were identified.

Article 25. Specifics of mediation in the field of civil, labor, family and other legal relations

1. In any agreement, parties may envisage mediation as a mandatory procedure for extrajudicial or pretrial dispute resolution. Terms of mediation shall be independent from the effect of the agreement.

2. Term of mediation in resolution of disputes (conflicts) being considered by court or arbitration may be prolonged in compliance with civil law, law of criminal procedure or law on arbitration

3. A mediation agreement between parties shall suspend civil, criminal or arbitration proceedings on the case for the term of the mediation.

4. Participation in mediation may not be used as admission of guilt by a party in the trial or arbitration that is a party in the mediation process.

5. Refusal to sign a conflict resolution agreement may not aggravate the position of the party in the trial or arbitration that is a party in the mediation process.

6. After termination of mediation that is part of a civil or criminal trial or arbitration, the mediation shall immediately send to the judge or arbitrator that tries the case

- 1) if a dispute resolution agreement is signed, - an original copy of the agreement;

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2) in other cases, - a written notification on termination of the mediation indicating grounds as envisaged in article 29 of this Law.

7. If a party in mediation is a minor, participation of parents or a representative of a guardianship authority is mandatory.

Article 26. Specifics of mediation in the field of relations under criminal law

1. Mediation does not substitute for criminal proceedings.
2. Mediation may be applied at any stage of the criminal proceedings.
3. For participation in mediation, parties shall agree on essential circumstances of the case.
4. Necessary legal guarantees shall be provided to the parties in the process of mediation.
5. In case no agreement on dispute (conflict) resolution is reached, participation in mediation may not be considered as admission of guilt in the proceedings of the case.
6. Refusal to sign a mediation agreement or agreement on dispute (conflict) resolution may not aggravate the position of the party.
7. The case may not be re-prosecuted for the same crime if the mediation was used and the parties agreed on dispute (conflict) resolution in the mediation process.
8. Non-fulfillment of the agreement on dispute (conflict) resolution achieved through mediation may not be considered as an aggravating circumstance.
9. Mediator mediating in criminal cases has the right to:
 - 1) get access to any information relevant to the merits of the criminal case;
 - 2) meet parties, including those under arrest, with no limitation on the number and duration of the meetings.
10. Investigator, prosecutor, judge, council of one of the parties may not act as mediators in criminal cases.
11. Mediator shall be held responsible for disclosure of information made available to him in the process of investigation or trial.

Article 27. Specifics of mediation in the field of family relations

1. In the process of mediation, the mediator shall consider legitimate interests of the child.
2. In the mediation reveals facts that threaten or may threaten normal growth and development of the child or cause serious damage to his protected interests, the mediator shall notify a child rights protection authority.

Article 28. Agreement on dispute (conflict) resolution

1. An agreement on dispute (conflict) resolution shall be concluded in writing.
2. Essential terms of an agreement on dispute (conflict) resolution shall include:

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- 1) date, time and place of the agreement;
- 2) name, family name and patronymic (if any) or name of the parties to the dispute (conflict);
- 3) name, family name and patronymic (if any) or names of representatives of the parties to the dispute (conflict), with indication of details of their certificates of authority;
- 4) description of the subject of the dispute (conflict);
- 5) name, family name and patronymic (if any) of the mediator or mediators;
- 6) terms of the agreement, methods and terms of their fulfillment, consequences of non-fulfillment.

3. At parties' option, the agreement on dispute (conflict) resolution may be certified by a notary or an official authorized for notarial actions in compliance with the Law of the Kyrgyz Republic On Notaries.

4. An agreement on resolution of a dispute resulting from civil, labor, family or another kind of relations is a transaction intended for establishment, change or termination of civil rights and responsibilities of the parties. Such deals shall be subject to rules of civil legislation on compensation, novation, waiver of debt, offsetting of a similar counterclaim, and on damage compensation.

Rights violated as a result of non-fulfillment or inadequate fulfillment of the agreement of dispute resolution shall be protected by methods envisaged by civil legislation.

In case of non-fulfillment or inadequate fulfillment of the agreement of dispute resolution the party in mediation that violated the agreement shall be held responsible as envisaged by civil law of the Kyrgyz Republic for non-fulfillment or inadequate fulfillment of contractual commitments.

5. Agreements on resolution of conflicts resulting from relations that are subject to criminal law shall be agreements on conflict resolution through recovery of damages inflicted to the victim, and reconciliation between the offender and the victim.

Conclusion of an agreement on dispute (conflict) resolution is a circumstance excluding criminal prosecution.

6. An agreement on dispute (conflict) resolution shall be a basis for termination of the case following a procedure envisaged by the Codes of Civil or Criminal Procedure of the Kyrgyz Republic.

7. An agreement on dispute (conflict) resolution shall be a basis for termination of arbitration proceedings as envisaged by the agreement between the parties in the arbitration proceedings or by applicable rules of arbitration.

8. An agreement on dispute resolution may be also approved by court or arbitration as a peaceful agreement in compliance with the procedural law or agreement between the parties or applicable rules of arbitration.

9. An agreement on dispute (conflict) resolution shall come into effect on the day of signing by the parties and shall be binding for the parties.

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10. In case of failure of a party to fulfill terms of the agreement and at the option of the other party, an executory endorsement shall be made by a notary or a write of execution shall be issued by court.

Article 29. Termination of Mediation

Mediation shall be terminated in the case of:

- 1) the parties signing an agreement on dispute (conflict) resolution – from the day the agreement is signed;
- 2) the mediator identifying circumstances excluding the dispute (conflict) resolution through mediation – from the day of the circumstances are identified;
- 3) one, several or all parties refusing the mediation due to the impossibility of the dispute (conflict) resolution through mediation – from the day a written refusal is signed by the parties;
- 4) written refusal to continue mediation by one of the parties – from the day a written refusal is sent to the mediator or another party;
- 5) expiration of the mediation term – from the expiration date in consideration of the requirements of this Law;
- 6) death of a party that is a natural person, or liquidation of a party that is a legal entity – from the day of the death or legal equity liquidation.

Chapter 4

Final Provisions

Article 30. Validity of Training Certificates

1. Documents confirming graduation from mediation training, issued before this Law entered into effect shall be considered valid.
2. Aliens and stateless persons having obtained the mediator status abroad and willing to mediate in the Kyrgyz Republic shall be released from the obligation to take a mediation training in compliance with this Law, on the principle of mutuality, unless envisaged otherwise by law.

Article 31. Procedure for Enactment of this Law

1. This Law shall enter into force on the day of its official publication.
2. The Government of the Kyrgyz Republic shall adjust its normative legal acts in accordance with this Law.

Annex 2: Draft Law of the Kyrgyz Republic on Amendments and Additions to Some Legislative Acts of the Kyrgyz Republic

DRAFT

**Law of the Kyrgyz Republic
“On Amendments and Additions to Some Legislative Acts of the Kyrgyz Republic”**

Article 1. Amend the Civil Code of the Kyrgyz Republic (Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1996, issue #6, p. 80) to introduce the following additions:

1. Add subsection 5 to paragraph 1, Article 217, to the following effect: “if a mediation agreement is signed”;
2. Add words “by signing a mediation agreement” after the words “in the established order” in Article 218 of the Code.

Article 2. Amend the Code of Civil Procedure of the Kyrgyz Republic (Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 2000, issue #3, p. 158) by making the following changes and additions:

1. In Article 41 of the Code:
 - amend the title by adding words “agreement on dispute resolution through mediation” after “peaceful agreement”;
 - amend paragraph 2 by adding words “or an agreement on dispute resolution through mediation” after “by peaceful agreement”;
 - amend paragraph 4 by adding words “or an agreement on dispute resolution through mediation” after “peaceful agreement of the parties”.
2. Amend paragraph 3, Article 45, by adding words “and an agreement on dispute resolution through mediation” after “peaceful agreement”.
3. Amend paragraph 2, Article 46, by adding words “and an agreement on dispute resolution through mediation” after “peaceful agreement”.
4. Amend paragraph 2, Article 58, by adding “an agreement on mediation, an agreement on dispute resolution through mediation” after “peaceful agreement”.
5. Amend paragraph 1, Article 73 by adding subsections 4 and 5 to the following effect:
 - “4) the referendary or the arbitrator: on the circumstances that came to his notice in relation to his duties as referendary or the arbitrator;
 - 5) the mediator, parties, their representatives, persons participating in preparing and conducting the mediation, - on circumstances that came to their notice in the process of the mediation, unless the parties have agreed otherwise;”;Re-number subsection 4) as 6), respectively.

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6. Amend paragraph 2, article 112, by adding words “or agreement on dispute resolution through mediation” after “peaceful agreement”.
7. In subsection 3, paragraph 1, Article 135, substitute the word “arbitration” with “arbitral”, and add words “or through conclusion of an agreement on dispute resolution through mediation between the parties” after the words “agreement of parties”.
8. Amend Article 150 by adding subsections 13 and 14 to the following effect:
 - «13) explain to the parties their right to appeal to the court of arbitration for the dispute resolution and consequences of such an appeal;
 - 14) explain to the parties their right to resolve the dispute through mediation, also opportunities, advantages and consequences of mediation, and send the parties for a mandatory briefing with the mediator;».
9. Amend paragraph 1, article 170 by adding words “sending the parties for a mandatory briefing with the mediator,” after the words “additional evidence”;
10. Amend paragraph 2, Article 173, by adding words “, or resolve the dispute through mediation.” after the words “peaceful agreement”.
11. Rephrase article 174 as follows:

“Article 174. Plaintiff’s withdrawal of claim, defendant’s admission of claim, and peaceful agreement of parties or agreement on dispute resolution through mediation

 1. Plaintiff’s withdrawal of claim, defendant’s admission of claim, and statement of parties on dispute resolution or conditions of peaceful agreement of parties shall be included in the court records and signed by the plaintiff, defendant or both parties, respectively. If the plaintiff’s withdrawal of claim, defendant’s admission of claim, dispute resolution through mediation, or peaceful agreement of the parties are expressed in written statements and agreements addressed to the court, the statements and agreements shall be included in the case and a reference shall be made in the court records.
 2. Prior to acceptance of the claim withdrawal or admission or approval of the peaceful agreement by the parties of the statement on dispute resolution through mediation, the court shall explain consequences of the respective proceedings to the plaintiff, defendant or parties.
 3. The court shall give its decision on approval of the plaintiff’s claim withdrawal or defendant’s claim admission or the peaceful agreement of the parties of statement on dispute resolution through mediation, and thereby shall simultaneously terminate proceedings on the case. The decision shall indicate conditions of the peaceful agreement of the parties approved by the court.
 4. In case of defendant’s claim admission and its acceptance by court, a decision shall be made for satisfaction of the claimed requirements.
 5. In case the court refrains from accepting the defendant’s claim admission or approving the peaceful agreement for reasons specified in paragraph 4, article 41 of

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this Code, the court shall give a decision and continue reviewing the merits of the case.

6. A peaceful agreement or an agreement on dispute resolution through mediation that is not executed voluntarily, shall be enforced compulsorily, based on a writ of execution issued by the court upon an application of the interested party.”;

12. Amend Article 216 by adding subsection 6 to the following effect:

“6) conclusion of a mediation agreement by parties.”.

13. Amend paragraph 1, article 218, by adding subsection 5 to the following effect:

“5) in case envisaged by subsection 6, article 216 of this Code, - until termination of the mediation.”.

14. Amend subsection 3, article 221, by adding words “by conclusion of an agreement on dispute resolution through mediation,” after the words “plaintiff’s withdrawal of the claim,” and amend paragraph 11 by adding “or agreement on dispute resolution through mediation,” after the words “arbitration court”.

15. Rephrase article 326 as follows:

«Article 326. Plaintiff’s withdrawal of claim, peaceful agreement of parties or agreement on dispute resolution through mediation

Plaintiff’s withdrawal of claim or peaceful agreement of parties, agreement on dispute resolution, executed after submittal of an appeal or a submission, shall be presented to the appeals instance in writing. Prior to approval of the claim withdrawal, agreement on dispute resolution through mediation, peaceful agreement, the court shall explain consequences of the respective proceedings to the plaintiff or the parties.

After approval of the plaintiff’s withdrawal of claim, agreement on dispute resolution through mediation, or peaceful agreement of the parties, the appeals instance shall revoke the decision and terminate proceedings on the case. If the court rejects the claim withdrawal or peaceful agreement for reasons specified in paragraph 4, article 41 of this Code, it shall review the case in the appeals procedure.”.

16. Amend subsection 2, paragraph 1, article 412, by adding “or agreement on dispute resolution through mediation” after the words “peaceful agreement”, and paragraph 2 of the same article by adding words “or agreement on dispute resolution through mediation” after the words “peaceful agreement”.

Article 3. Amend the Criminal Code of the Kyrgyz Republic (Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1998, issue #7, p. 229) as follows:

In Article 66, add words “, also through mediation” after the words “reconciled with the victim”.

Article 4. Amend the Criminal Procedural Code of the Kyrgyz Republic (Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1999, issue #10, p. 442) as follows:

1. Amend par 4 of Article 60 by adding subsection 5 to the following effect:

“5) the mediator, persons participating in preparing and conducting the mediation, representatives of parties, - on circumstances that became known to them

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in the process of mediation, unless the parties have agreed otherwise;”, Re-number subsections 5), 6) and 7) as 6),7) and 8), respectively;

2. In par 5, substitute ‘six’ with ‘seven’;
3. In par 2, Article 225, add “including 12) and 14) of paragraph (1),” after the words “this Code”;
4. In Article 281, add words “also through mediation” after the words “right for reconciliation with the accused,”.

Article 5. Amend the Code of Administrative Liability of the Kyrgyz Republic (Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 1999, issue #2, p. 77) as follows:

1. Amend the Code by adding Article 80-1 to the following effect:

«Article 80-1 Disclosure of information received by mediation participants in the mediation process

Disclosure of information received by mediation participants in the mediation process, without consent of the party that provided the information, unless these actions carry signs of a penal action, -

shall be punishable with a fine in the amount of twenty standard units.”;

2. Amend article 511 of the Code by adding words “article 80-1,” after the words “and their deputies”.

Article 6. Amend the Law of the Kyrgyz Republic “On Judicial Enforcement Proceedings and Status of Court Enforcement Officers in Kyrgyz Republic” (Bulletin of the Jogorku Kenesh of the Kyrgyz Republic, 2002, issue #4, p. 160) as follows:

1. Amend subsection 1, paragraph 1, article 15, by adding words “agreements on dispute resolution through mediation” before the words “approved by the court”;

2. Amend paragraph 1, article 19, by adding subsection 3 to the following effect:

“3) by conclusion of a mediation agreement by the parties.”;

3. Amend article 23 of the Law by adding subsection 8 to the following effect: “8) of a mediation agreement by the parties.”;

4. Amend article 25 of the Law by adding subsection 7 to the following effect: “7) in cases envisaged by subsection 8, article 23 of this Law, - until completion of the mediation.”;

5. Amend Article 27 of the Law by adding subsection 8 to the following effect: “8) through conclusion of an agreement on dispute resolution through mediation between the plaintiff and the debtor.”;

6. Amend paragraph 1, article 37, by adding words “complete the enforcement proceedings through mediation” after the words “judicial enforcement proceedings.”;

7. Amend subsection 2, paragraph 1, article 40, by adding words “or agreement on dispute resolution through mediation;” after the words “peaceful agreement”.

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Article 7. This Law shall enter into force on the day of its official publication. The Government of the Kyrgyz Republic shall bring its normative acts in line with this Law.

**President
of the Kyrgyz Republic**