

DETAILED INTRODUCTION

On the Draft Law on Mediation

Mongolia first adopted the Law on Mediation in 2012 as part of the judicial reform package to reduce the court caseload and develop alternative dispute resolution based options. Almost 12 years have passed since that time, and according to two studies on the effectiveness of the implementation of the Law on Mediation¹ it was concluded that the court-based mediation is being successfully implemented, while, despite the introduction into the Law the legal foundation for non-court based private mediation (also known as commercial mediation, and mediation based at the government and non-governmental organizations), it has not been sufficiently implemented. The reason for this could be related to the fact that when the settlement agreement is concluded at the private mediation center it cannot be enforced mandatorily, which results in a situation where the parties have to resort to the court again for resolution of their dispute.

In addition, the conclusion of the research report “Evaluating the Consequences of the Implementation of Some Provisions of the Law on Mediation” conducted in December 2023, states that Mongolia prepared a draft law based on the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation² when adopting the Law on Mediation in 2012, where Article 14 of the Model Law provides that if the parties resolve their dispute and reach a settlement agreement, the settlement agreement may be binding upon the parties. However, in Mongolia, the omission of this regulation in the preparation of the draft law constitutes the main reason for the stagnation of the activities of the mediation centers specified in Article 8 of the current Law on Mediation, as can be gauged by the results of these studies.³

Other countries offer their citizens alternative dispute resolution options by simultaneously developing court based and non-court based mediation, and in Mongolia, there is opportunity and demand for the development of non-court based alternative forms of private mediation. For example, in countries with highly developed mediation, the number of cases resolved by the courts and the number of cases resolved by mediation are equal or close to being equal, while in Mongolia this ratio is approximately 4:1, which indicates the need, resources, and demand for the development of private or commercial mediation.

In this regard, the draft Law includes amendments to the Law on Mediation to strengthen private mediation, create incentives for accessing mediation, ensure that agreements concluded as a result of private mediation are enforced by the court, and introduce a system for accreditation of private mediation centers. The draft Law has 6 Chapters, and Article 33.4 of the Law on Legislation provides that in cases where the draft law constitutes a revised draft law, each of the Chapters shall be categorized and

¹ “Mongolian Legislation Association” NGO has completed a study on the effectiveness of law enforcement in 2015 and 2020, as commissioned by the Japan International Cooperation Organization (JICA) and the Judicial General Council.

² Website of the United Nations Commission on International Trade Law <https://shorturl.at/mnrR7> (Last accessed 26 February 2024).

³ M. Munkhnaran “Evaluating the consequences of the implementation of some provisions of the Law on Mediation”, UB 2023, page 25.

commentaries provided accordingly. Consequently, the following will introduce the draft Law Chapter by Chapter.

Chapter One. General provisions

In Article 1 of the draft Law, the purpose of the law was revised in more detail. As the purpose of the current law was too generic, it was revised to align it with the purpose of mediation process specified in Article 5.1 of the Law. This will help citizens better understand the importance of mediation when reading the purpose of the Law.

In Article 2 of the draft Law, the “Law on Misdemeanors” was added, and in Article 15.12 of the Law on Misdemeanors, the provision, which states that “If a person violates the procedures established by the Law on Mediation, a fine of 100 units shall be imposed on a person and 1,000 units shall be imposed on a legal entity” is in force.

In Article 3.1 of the draft Law, commercial legal disputes were added, and in Article 3.2 it was clarified that if mediation was to be used in administrative and criminal law disputes, then it can be accessed only if it is specified in other laws. This is because the principles applicable to criminal dispute mediation are different from those applicable to commercial and civil dispute mediation, and therefore, it cannot be regulated by this Law. Also, Article 3.3 of the draft Law clearly articulates that mediation can be used before initiation of the civil case proceedings and at any stage of the litigation. Article 3.5 of the draft Law opens the possibility for the application of the mediation-arbitration process. Just as mediation can be accessed after the initiation of the civil case proceedings, it outlines the possibility to access mediation after the initiation of the arbitration proceedings, where the settlement agreement is to be enforced by the arbitration decision in the event of reconciliation.

Article 4.1.1 of the draft Law clarifies the definition of mediation and brings it closer to the definition provided in the Singapore Convention. In Article 4.1.2 of the draft Law, the term “citizen” has been removed and replaced with the term “person” so as not to exclude foreign nationals from mediation processes. In Article 4.1.3 of the draft Law, the definition of a mediator has been added with the qualification “free of conflict of interest”, which brings it closer to the definition in the Model Law and Singapore Law. In Article 4.1.4 of the draft Law, a new definition of “mediation center” has been added, and the draft Law requires for the private mediation to be carried out solely by the mediation center and further adds an requirement for its accreditation. A new Article 4.1.6 on “Agreements and Negotiations on Recourse to Mediation” has been added to the draft Law. This is intended to provide greater clarity on accessing mediation services, as it is considered that if the parties have agreed to resort to mediation in the event of a dispute arising from the contract, it is deemed that preliminary dispute resolution proceedings have been initiated.

Chapter Two. Mediation process

Article 5 of the draft Law adds the principles of “ensuring the independence of the parties and equality in mediation”, “mutual agreement on the mediation process”, and “mediation process shall be conducted in privacy”. These principles constitute the characteristics of mediation highlighting its advantages over the court, and additional

principles have been formulated to make it more concrete. However, the principle of “voluntary implementation by the parties” that was in the current Law has been removed. Mediation is carried out by the parties on the voluntary basis, but in some types of disputes the mediation is not voluntary but rather constitutes the basis for the implementation of the principle of preliminary proceedings.

Article 6 of the draft Law adds the provisions on the jurisdiction for resolving disputes through mediation and the incentives for such dispute resolution mechanism. Article 6.2 of the draft Law provides for non-court based mediation center to conduct mediation regardless of geographical jurisdiction, which is aimed to offer more options for citizens. Article 6.3 of the draft Law clarifies that if the parties have agreed to resort to mediation after the civil case proceedings have been initiated then they can access not only court-based mediation but also non-court based mediation. Article 6.5 of the draft Law includes “all types of lease agreement disputes, property lease agreement disputes, disputes related to bank loans, and disputes related to non-banking financial institutions”, where preliminary resolution proceedings were established for these types of disputes. According to 2023 court report, there were 5,721 disputes related to bank loans and 10,514 disputes related to non-banking financial institutions, which account for a significant proportion of civil disputes. In addition, as the parties to disputes related to lease agreements and property rental agreements are more likely to reach a settlement than the parties to other types of disputes, a preliminary resolution procedure has been established based on this characteristic. Article 6.6 of the draft Law has been revised from the previous provision, whereby if the parties have entered into an agreement to resolve the dispute through mediation, it is considered that a preliminary dispute resolution proceedings have been established, which further provides that a contract may include an agreement on the mediation process. Article 6.8 of the draft Law is a regulation aimed at stimulating mediation and increasing the number of people who resort to mediation, and is an enabling mechanism that is also used in other countries. Article 6.9 of the draft Law stipulates that if the parties refer their dispute to mediation at any stage of the litigation, the court stamp duty shall be refunded. Currently, if the parties reach a settlement, the stamp duty is reduced by 50 percent and allocated accordingly.

Article 8 of the draft Law has been renamed as “Non-court based mediation”. Non-court based mediation will be conducted through a “Mediation Center”, which will be located at an institution without legal personality or at the non-governmental organization with legal personality. Mediation services will be rendered only via the mediation center, and individual mediators will not provide mediation services independently. The mediation center will be accredited by the Minister of Justice, and the Mediation Committee established by the Ministry of Justice will submit a proposal to the Minister. Moreover, it stipulates that the Minister will issue a license to mediators working at the non-court based Mediation Centers based on the proposal of the Mediation Committee.

Article 9 of the draft Law provides a new structure and powers of the Mediation Committee, including the authority to grant licenses to mediators, propose revocation of licenses, accredit non-court based mediation centers, propose revocation of accreditation, maintain records, resolve complaints about the activities of the mediation center, and resolve ethical conduct issues of mediators working at the mediation center. It also provides the procedures for resolving ethical conduct issues of individual mediators and complaints filed with the mediation center.

The draft Law *centralizes the mediation regulatory system under the Ministry of Justice, which constitutes a model*, and in countries such as Turkey and Italy, the mediation regulatory body is situated under the authority of the Ministry of Justice. The Ministry of Justice determines and ensures the implementation of policies related to mediation, and has the authority to register, accredit, train, and receive complaints related to mediation centers and individuals.

Article 10 of the draft Law outlines the requirements of the mediation centers and a list of documents to be submitted for accreditation, as well as the regulation of the process for granting licenses to individual mediators. In terms of the requirements of the mediation centers, the experiences of Japan were taken into account, and the requirements were defined accordingly.

Articles 11 and 12 of the draft Law amend the powers of the Mediation Council to apply to mediators at the court-based mediation only.

Article 13 of the draft Law retains the same requirements for mediators as the current Law.

Chapter Three. Participants in Mediation

Article 14.1 of the draft Law expands the scope of participants in mediation, whereby it amends it to include a person participating in mediation “with the consent of the parties”. Article 14.3 of the draft Law highlights the possibility of conducting mediation remotely (virtually or via telephone communication) and for legal entities to participate in person through their authorized representatives. Also, Article 14.4 of the draft Law adds the possibility of “experts” to be participants in mediation.

Article 15 of the draft Law reflects the rights and obligations of the parties involved in mediation without making any significant changes to the current legal provisions, and Article 15.1.10 adds the right to “request assistance from the mediation center in connection with the selection of a mediator” and Article 15.2.3 adds the obligation to “...act promptly in selecting a mediator”. This is because the parties need to select a mediator quickly and conduct the process promptly when resolving their dispute through mediation; thus, the above rights and obligations were included in the draft Law.

Article 17 of the draft Law clarifies that when a lawyer participates in mediation, he/she “has the duty to advise the client to mediate if it is in his/her best interests, and to advise the client to reach an agreement if it is in his/her best interests”. This is intended to prevent the lawyer from interfering with the parties when they are trying to reach a settlement agreement.

Article 18.1 of the draft Law amends the legal provision to allow third parties to participate in the mediation process “at the request of the parties”. This is because the principle of mediation is for the parties to determine the procedure themselves, and it eliminates the possibility of third parties participating at the request of the “mediator”.

Chapter Four. Mediation Procedures

Article 20.1 of the draft Law determines that mediation process shall be conducted in privacy without the involvement of persons other than the participants in the mediation process. This is because mediation process is characterized by the strict adherence to non-disclosure of the confidentiality of the mediation process by any of the participants.

Article 20.5 of the draft Law stipulates that “Mediation process may be conducted virtually at the request of the parties”. In this regard, recommendations and procedures for carrying out the mediation process virtually have been developed.

Article 21 of the draft Law provides in detail the confidentiality of mediation process. In doing so, it clearly specifies the facts and information that cannot be disclosed by the participants in the mediation process and those that cannot be used as witnesses. In addition, Article 21.4 of the draft Law provides five conditions under which participants in the mediation process may disclose information. These confidentiality provisions were based on the confidentiality provisions of the Model Law.

Article 23 of the draft Law sets out the procedure for initiating the mediation process and filing a notice to mediate. Article 23.1 of the draft Law provides that mediation shall commence upon filing a notice to mediate to the mediation centre and submission of a response to participate in the mediation by the invited party. It is important to clarify when the mediation shall commence, thereby clarifying the timeframe from which the mediation period shall be counted.

Article 24 of the draft Law stipulates the procedure for selecting a mediator, and unless the parties agree otherwise, one mediator shall be involved. Within 7 days of the invitation to participate in the mediation, the mediation center shall provide the parties with a list of mediators and shall organize a process to confirm the mediator selected by the parties. In doing so, it shall propose a mediator who has no conflict of interest. If the parties fail to select a mediator within 7 days, the mediation center will select and appoint a mediator. This is intended to ensure the speedy mediation process.

Article 25 of the draft Law regulates the first meeting of the mediation. In this case, the parties may reach a settlement agreement at the first meeting, and if they do not reach a settlement agreement at the first meeting, they will sign a date for the next meeting, and the incentive to attend the next meeting is included in Article 25.4 of the draft Law. If the parties have submitted a notice to participate in the mediation process and signed a date for the next meeting, but do not attend the next meeting for a valid reason, and as a result, the mediation process is unsuccessful and the dispute is being resolved at the court, the liability for paying the court stamp duty is imposed on the party that failed to attend the meeting of the mediation process, as has been reflected into the draft Law.

Article 29 of the draft Law provides that a settlement agreement concluded at the non-court based mediation or with the support of a mediator from the mediation center shall be enforced by the judge's decision upon application to the civil court of first instance of the district jurisdiction of one of the parties.

Article 31.3 of the draft Law stipulates that the costs and fees of mediators of a mediation center shall be regulated in accordance with the procedure established by the mediation center.

Chapter Five. Mediation of Certain Types of Disputes

Article 33 of the draft Law stipulates for the use of mediation in commercial disputes. In this regard, Article 33.1 of the draft Law provides for a mandatory first meeting with the mediator in disputes arising from such relations, if one of the parties to the dispute is a commercial entity. If the first meeting is unsuccessful and the parties have not scheduled a subsequent meeting, they may resort to the court to resolve the dispute.

This model combines voluntary mediation and the mandatory application of mediation as a preliminary dispute resolution procedure, and it is important for balancing the number of disputes that are subject to litigation and the number of disputes that are referred to mediation. While countries such as the Czech Republic and Italy use this type of mechanism for commercial and civil case mediation, countries such as Lithuania, Luxembourg, and the United Kingdom require that the first meeting to be conducted with the participation of a mediator in family dispute matters.

Chapter Six. Miscellaneous

Article 36.1 of the draft Law also imposes an obligation on the “mediation centers” to promote awareness of mediation among the public and support the parties in reaching a settlement agreement.

--oOo--

BRIEF INTRODUCTION

On the draft Law on Mediation

In Mongolia, the Law on Mediation was first adopted in 2012 as part of the judicial reform package to develop an alternative dispute resolution option for the resolution of legal disputes. The law establishes the legal basis for resolving disputes through alternative form of dispute resolution such as mediation with the support of a mediator, regulates relations concerning the implementation of mediation, and establishes the scope of the law for the use of mediation in civil case disputes, labor disputes, and family disputes. Thus, the enforcement of a specialized law on mediation in Mongolia has paved the grounds for citizens to resolve their disputes in a cost-effective and time-efficient manner in comparison to resorting to the court for resolution of the dispute.

In Mongolia, a mixed system of the court-based mediation and non-court based mediation was legalized by 2012 Law on Mediation, but a study on the effectiveness of the law's enforcement⁴ concluded that court-based mediation was successfully implemented, and it further concluded that the core of the law's implementation was aimed at strengthening and improving the court-based mediation. For example, according to statistics on the court-based mediation, 47,587 out of a total of 223,468 civil cases, or an average of 17.2 percent of all civil cases, were successfully resolved through mediation in 6 years from 2014 to 2020, which is significant in reducing the caseload of the civil courts by the same percentage.⁵

However, the actual implementation of the non-court based mediation at the government and non-governmental professional associations is insufficient, and this was due to the fact that even if mediators work at the government and non-governmental organizations, professional associations and successfully resolve the parties' disputes, the settlement agreement is not enforced by the court's decision, which has negative implications related to additional costs and loss of time required for resorting to the court again for resolution of the dispute.⁶ Accordingly, the implementation of mediation at the governmental and non-governmental institutions, as specified in Article 8 of the Law on Mediation, has not reached the sufficient level.

Therefore, the draft Law introduces the following principled amendments to strengthen and revive non-court based (commercial mediation) mediation and create an alternative dispute resolution option. These include:

- The settlement agreement concluded as a result of non-court based mediation is to be enforced by the court, thus opening up the possibility of compulsory execution in the event of a breach of the obligation of the settlement agreement enforced by the court;

⁴ "Mongolian Legislation Association" NGO has completed a study on the effectiveness of law enforcement in 2015 and 2020, as commissioned by the Japan International Cooperation Organization (JICA) and the Judicial General Council.

⁵ Judicial Research, Information, and Training Institute, "Review of the Evaluation of the Consequences of the Implementation of the Law on Mediation", Judiciary Journal No. 2, 2020, page 128.

⁶ JICA, Judicial General Council, "Study on the effectiveness of the implementation of the Law on Mediation", UB 2020, p. 84.

- As the settlement agreement reached by non-court based mediation is binding and serves as the basis for enforcement proceedings, a new accreditation system for mediation centers has been established to increase citizens' trust in non-court based mediation and to carry out supervision and regulation;
- The draft Law also stipulates that the Ministry of Justice, similar to practices in other countries, will carry out functions such as accreditation, issuance of licenses, training, and retraining for the regulatory system of non-court based mediation. In doing so, the draft Law also stipulates that the currently successfully implemented court-based mediation shall be maintained;
- Non-court based mediation will be conducted by the mediation center, and the draft Law stipulates the requirements for the mediation centers;
- In addition, the draft Law includes incentives for resolving disputes through mediation. For example, it establishes a preliminary resolution procedure for parties to resort to mediation in disputes that are likely to be resolved through mediation, such as loans issued by the banks and non-banking financial institutions, leases, and property rental agreements. It also includes regulations that provide incentives for parties to resort to mediation, such as mandatory first meetings and exemption from court stamp duties if the parties themselves apply for mediation to resolve their dispute but mediation fails to reach a settlement agreement;
- The confidentiality regulations of the mediation have been improved and reflected in a manner consistent with international standards.

In relation to the drafting of the Law, the legislator has conducted a study on the effectiveness of the implementation of 2012 Law on Mediation, a preliminary study to determine the demand for drafting the law, a study on the effectiveness of the law, and a study on the costs of the law, as stipulated in the Law on Legislation.

In addition, discussions and consultative meetings were held with the support of international organizations such as the International Law Development Organization (IDLO) and the European Bank for Reconstruction and Development (EBRD) before drafting the law.

In drafting the law, the experiences of other countries were studied, and this was done without focusing on a specific country case study but rather comparing the good international practices of other countries concerning the specific issues such as the mediation regulatory body, the method of enforcing the settlement agreement, the system for accrediting mediation centers, the requirements of mediators, and the legal regulations to intensify mediation, which were considered within the scope of the preliminary study to determine the demand for the law.

--oOo--