

MONGOLIA

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

The concept of arbitration is not new in Mongolia. Mongolia established its first arbitration court in 1960 to resolve foreign trade disputes. However, it is only in the last two decades that commercial arbitration has been developing a modern form of alternative dispute resolution method for business. Mongolia revised its arbitration legislation and enacted the revised *Arbitration Law of Mongolia* on 26 January 2017 ("**Arbitration Law**"). As a result of this revision, Mongolia is now a jurisdiction that has adopted the UNCITRAL Model Law.¹

Key places of arbitration in the jurisdiction?	Ulaanbaatar, the capital city of Mongolia.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	Under the Arbitration Law, the parties, arbitral tribunals and arbitral institutions are obligated to keep confidential all arbitral awards, orders and information exchanged between parties, unless parties agree otherwise.
Requirement to retain (local) counsel?	It is common to retain local counsel but is not a legal requirement.
Ability to present party employee witness testimony?	Parties may submit witness testimonies of their employees. It is in the arbitral tribunal's discretion to then weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Parties can hold meetings and hearings outside of the seat of the arbitration.
Availability of interest as a remedy?	The Arbitration Law is silent on this matter. Subject to the substantive law applicable to the dispute, parties have a right to claim interest as a remedy. Under Mongolian law a party can claim interest as a remedy if the other party is in breach of its monetary payment obligation. ²
Ability to claim for reasonable costs incurred for the arbitration?	Parties may claim for reasonable costs incurred in the arbitration proceedings. Unless parties agree otherwise, it is in the arbitral tribunal's full discretion to decide on the allocation of costs.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Mongolia-qualified lawyers are permitted to enter into contingency fee arrangements, save for disputes involving one's personal status (e.g., adoption, divorce etc.) and criminal cases ³ - which as explained below are not arbitrable disputes. As for third-party funding, whereas this is not expressly regulated under the Arbitration Law, the Regulations for Lawyers' Professional Activities provide that Mongolia-qualified lawyers

¹ http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

² Article 222.5, the Civil Code of Mongolia.

³ Clause 2.4(7), Regulations for Lawyers' Professional Activities by Mongolian Bar Association.

	have an obligation to maintain its professional independence from a third-party that is funding the lawyer's fees. ⁴
Party to the New York Convention?	Yes, Mongolia became a State party to the New York Convention in 1994 (with common declarations in respect of reciprocity and commercial disputes).
Other key points to note?	Following the adoption of the Arbitration Law, bankruptcy issues became arbitrable under Mongolian law, whether or not the bankruptcy issue is a "core" issue or not, subject to certain conditions.
WJP Civil Justice score (2019)	Mongolia is ranked 59 th out of 126 countries with a score of 0.54.

⁴ Clause 6.4(3), the Regulations for Lawyer's Professional Activities by Mongolian Bar Association.

ARBITRATION PRACTITIONER SUMMARY

The *Arbitration Law of Mongolia* of 26 January 2017 (“**Arbitration Law**”) adopted the wording of the UNCITRAL Model Law with very few deviations, including its amendments of 2006, to ensure predictable legal framework for arbitration in Mongolia. The Arbitration Law applies to both domestic and international arbitrations seated in Mongolia.

Date of arbitration law?	The Arbitration Law was enacted on 26 January 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The Arbitration Law is based on the 1985 UNCITRAL Model Law, including its amendment of 2006, with only few minor deviations such as slightly different procedural requirements for domestic arbitration.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	For domestic arbitration, first instance civil courts and the courts of civil appeals handle jurisdictional challenges, assistance in collecting relevant evidence and the annulment and enforcement of arbitral awards. For international arbitration, the Court of Civil Appeals in Ulaanbaatar performs most court functions relating to arbitration.
Availability of ex parte pre-arbitration interim measures?	The court may issue an order for pre-arbitration interim measure and the proceedings for such order can be ex parte.
Courts’ attitude towards the competence-competence principle?	The arbitration tribunal may rule on its own jurisdiction.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the New York Convention.
Courts’ attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	The courts tend to regularly respect the decision of the courts of the seat of the arbitration setting aside an arbitral award. There is no publicly available case where a Mongolian court recognized and enforced a foreign arbitral award that was annulled by the court of the seat of the arbitration.
Other key points to note?	An agreement to arbitrate consumer disputes can only be made after the dispute has arisen.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Law is substantially based on the UNCITRAL Model Law, including its amendments in 2006, by strictly following its wording, with very few amendments.

The Arbitration Law applies to both international and domestic arbitration and provides for substantially similar treatment of each process. In line with the UNCITRAL Model Law, “international arbitration” is defined as an arbitration in which:

- (a) the parties to an arbitration agreement have, at the time of concluding that agreement, their places of business in different countries;
- (b) the place of business of the parties is different from the seat of arbitration, if determined in, or pursuant to, the arbitration agreement;
- (c) the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is different from the place of business of the parties; or
- (d) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.⁵

An arbitration that does not fall within the ambit of the above definition is regarded as a domestic arbitration under the Arbitration Law.

Although the principles, standards and substantive requirements for both types of arbitration remain the same, the Arbitration Law sets out slightly different procedural requirements for international and domestic arbitration. For example, in respect of international arbitration, a party may submit its application to set aside an arbitral award to the court within 90 days of the date on which the award was received, whereas this time limit is shortened to 30 days for domestic arbitration.⁶

Further, in international arbitration, the Court of Civil Appeals in Ulaanbaatar performs most court functions relating to arbitration, including dealing with all applications to challenge arbitrators and set aside arbitral awards.⁷ This exclusive jurisdiction of the Court of Civil Appeals in Ulaanbaatar is intended to facilitate the development of judicial expertise in international arbitration within the judiciary.

1.2 When was the arbitration law last revised?

The Arbitration Law was passed by the Parliament of Mongolia on 26 January 2017, replacing the previous arbitration legislation of 2003. The Arbitration Law came into effect on 27 February 2017. No amendment has been made to the Arbitration Law since then as of October 2019.

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

There are no express regulations or established practice on this issue. However, Mongolian courts tend to apply the substantive law of the contract. In the event the parties did not choose the substantive law of the contract, Mongolian courts determine the governing law in accordance with the conflict of law rules set forth

⁵ Article 3.2, the Arbitration Law.

⁶ Article 34.3 of the Model Law.

⁷ Article 6.2, the Arbitration Law.

in Article 549 of the Civil Code of Mongolia. Parties are free to contract out of Mongolian law regarding conflict of laws.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes. The concept of separability of an arbitration agreement is expressly recognised in Article 8.10 of the Arbitration Law.

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The arbitration agreement must be in writing. The written form is satisfied if the arbitration agreement is contained in an exchange of letters, telefaxes, telegrams or other means of electronic communications.⁸ Further, the arbitration agreement will be deemed to be in writing if it is contained in an exchange of statements of claim and of defence in which the existence of an agreement is alleged by one party and not denied by the other.⁹ Moreover, in line with the Model Law, a reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing.¹⁰

With respect to consumer rights disputes, the Arbitration Law stipulates that an arbitration agreement is enforceable only if it is made in writing by the parties after the dispute has arisen and the seat of arbitration is specified in such agreement.¹¹

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

In principal, arbitration agreements only bind the persons which are parties to it. However, in certain circumstances, a third party who is not a signatory to an arbitration agreement may be bound by the arbitration agreement as a matter of law. These circumstances include when the third party is the successor or assignee of the signatory, or the third party is the “alter ego” of the signing party through the piercing of the corporate veil.¹²

2.5 Are there restrictions to arbitrability?

Under the Arbitration Law, any dispute that is referred to in an arbitration agreement is arbitrable unless such dispute falls within the exclusive jurisdiction of the court.¹³

Pursuant to the Civil Procedure Code of Mongolia, in respect of international disputes, the following matters fall within the exclusive jurisdiction of the Mongolian courts and therefore cannot be subject to arbitration:¹⁴

- (a) disputes relating to the ownership, possession and use of immovable property; located in the territory of Mongolia;
- (b) disputes relating to the reorganisation or liquidation of legal entities established under Mongolian law and disputes arising out of resolutions and decisions made by those legal entities, their branches and representative offices;
- (c) disputes relating to the validity of registrations made by Mongolian courts and other public administration offices;

⁸ Article 8.7, the Arbitration Law, which is consistent with Article 7.4 of Model Law.

⁹ Article 8.8, the Arbitration Law.

¹⁰ Article 8.9, the Arbitration Law.

¹¹ Article 8.11, the Arbitration Law.

¹² Under the Company Law of Mongolia, the piercing of corporate veil is possible if (i) the subsidiary becomes insolvent due to the decision of the parent company; or (ii) assets contributed to the company by a shareholder is not distinguished from the personal property of such shareholder.

¹³ Article 9.1, the Arbitration Law.

¹⁴ Article 190, the Civil Procedure Code of Mongolia.

- (d) disputes relating to the validity of registration of patents, trademarks and other IP rights by a Mongolian administrative office and disputes relating to the application of registration of IP rights;¹⁵ and
- (e) disputes relating to the enforcement of court judgments in Mongolia or disputes relating to requests for enforcement.

Further, Mongolia became a State Party to the New York Convention in 1995, which it ratified subject to declarations regarding the reciprocity and commercial reservations. These reservations were applied to be consistent with Mongolian law, whereby issues of a non-commercial nature, such as the status of a person and matrimonial disputes, fall exclusively within the jurisdiction of the courts.

In addition, the courts have final and exclusive jurisdiction over standard labour disputes such as wrongful termination, transfer, disciplinary punishment and employer's claims for compensation for damages under the Labour Law of Mongolia. As for collective disputes, a non-binding labour arbitration is a mandatory step before the parties resort to the court.

With respect to arbitrability of bankruptcy issues, if all the following conditions are satisfied, the court may refer any and all disputes involving bankruptcy issues, whether or not the bankruptcy issue is a "core" issue, for determination by arbitration:

- (a) there is an arbitration agreement in respect of the dispute;
- (b) the party subject to the bankruptcy proceedings entered into the arbitration agreement before the bankruptcy proceedings commenced; and
- (c) the administrator or trustee did not reject the contract containing the arbitration agreement.¹⁶

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Consistent with the Model Law, for a dispute which is the subject of an arbitration agreement, if a party raises an objection prior to the presentation of arguments on the merits of the dispute, the court must dismiss the action unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.¹⁷

Where an action referred to above is pending before the court, arbitral proceedings may nevertheless be commenced or continued, and an award may be made.¹⁸

3.1.1 If the place of the arbitration is inside of the jurisdiction?

No difference.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

No difference.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

Mongolia does not have a tradition of anti-suit injunctions. It is highly unlikely that Mongolian courts would respect injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation

¹⁵ General commercial disputes with regards to copyrights and patents that are not related to the validity of the registration are arbitrable.

¹⁶ Article 5.1, the Arbitration Law.

¹⁷ Article 10.1, the Arbitration Law.

¹⁸ Article 10.2, the Arbitration Law.

proceedings. Instead, an arbitral tribunal may commence and continue arbitration proceedings and make an arbitral award even while a suit pertaining to the action is pending before a Mongolian court.¹⁹

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Mongolia courts will not issue anti-suit injunctions restraining proceedings seated outside Mongolia. Pursuant to Article 29.1 of the Arbitration Law, Mongolian courts may grant interim measures in relation to arbitral proceedings regardless of where the seat of the arbitration is.

4. The conduct of proceeding

4.1 Can parties retain outside counsel or be self-represented?

Parties can be represented by outside counsel or be self-represented.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

An arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. A failure to comply with such duty may, but not automatically, justify a challenge of the arbitrator. Whether such failure to disclose would constitute a justifiable doubt as to the arbitrator's impartiality or independence depends on the circumstances and facts.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Under the Arbitration Law, consistent with the Model Law, courts assist in the constitution of the arbitral tribunal in the following circumstances:

- (a) parties having agreed to have three arbitrators, and one party has appointed its arbitrator, but the other party does not appoint its own arbitrator within 30 days from the request by the other party to appoint the same;
- (b) parties having agreed to have three arbitrators, and both parties appointed each of their arbitrator, but the appointed two arbitrators did not appoint the third arbitrator within 30 days; and
- (c) an authorised person (arbitral institution or other competent person) failed to perform its function to appoint arbitrator(s).²⁰

When appointing an arbitrator, courts should have due regard to any qualifications prescribed by the agreement of the parties and shall consider such potential arbitrators' independence and impartiality. In case of appointment of an arbitrator in international arbitration proceedings, the Arbitration Law provides that courts should appoint an arbitrator of a nationality other than the parties to the extent possible.²¹

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider ex parte requests?

As mentioned above, Mongolian courts may issue interim measures in connection with arbitrations regardless of the seat of such arbitration.²² The courts shall take interim measures in accordance with the Civil Procedure Code, such as detention of property, specific performance and injunctions, freezing bank

¹⁹ Article 10.2, the Arbitration Law.

²⁰ Article 13.5, the Arbitration Law.

²¹ Article 13.8, the Arbitration Law.

²² Article 29.1, the Arbitration Law.

accounts and ordering security payments.²³ Mongolian courts may consider ex parte requests with respect to interim measures relating to provision seizure or disposition of certain property.

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Pursuant to Article 30.1 of the Arbitration Law, arbitrators must ensure the equal treatment of the parties and must give them a full opportunity to present their cases.

Parties are free to determine the procedures to be followed by the arbitral tribunal. If the parties did not determine the arbitral procedures, the arbitral tribunal shall conduct the arbitration proceedings as it considers appropriate.

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Article 50.1 of the Arbitration Law provides that, unless otherwise agreed by the parties, the arbitral tribunal and the parties to the arbitration shall be obliged to keep the confidentiality of arbitral awards, decisions and information exchanged during the arbitration proceedings.

4.5.2 Does it regulate the length of arbitration proceedings?

There is no express provision on the duration of arbitration proceedings in the Arbitration Law.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Parties are free to agree on the seat of the arbitration. If the parties cannot agree on the seat, the arbitral tribunal shall determine the seat of the arbitration having regard to the circumstances of the case, including the convenience of the parties.²⁴

In principle, the arbitral tribunal may meet at any place it considers appropriate for oral hearings and consultation among its members, or inspection of goods, other property and documents.²⁵

4.5.4 Does it allow for arbitrators to issue interim measures?

The Arbitration Law mirrors the Model Law and unless otherwise agreed by the parties to the arbitration, the arbitral tribunal may, at a request of a party, grant preliminary orders and interim measures of protection as the tribunal may consider necessary in respect of the subject matter of the dispute.²⁶ The conditions for granting such interim measures include:

- (a) if the measure is not ordered, harm not adequately reparable by an award of damages is likely to result and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed;
- (b) the requesting party has a reasonable possibility of succeeding on the merits of the claim; and
- (c) the request for the interim measures is clear and measurable.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

According to Article 31.2 of the Arbitration Law, arbitral tribunals are entitled to determine the admissibility, materiality, relevance and weight of the evidence. The Arbitration Law does not provide for any restrictions to the presentation of testimony by a party employee.

²³ Article 69.1, the Civil Procedure Code.

²⁴ Article 32.1, the Arbitration Law.

²⁵ Article 32.2, the Arbitration Law.

²⁶ Article 19, the Arbitration Law.

4.5.6 Does it make it mandatory to hold a hearing?

Unless it would contradict the parties' agreement, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of received documents and other materials.²⁷ However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal must hold a hearing at an appropriate stage of the arbitration proceedings, if so requested by a party.²⁸

4.5.7 Does it prescribe principles governing the awarding of interest?

There is no provision in the Arbitration Law as to whether the parties are entitled to recover interest and such issue should be resolved in accordance with the substantive rules applicable to the dispute.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Article 41.1 of the Arbitration Law provides that, unless the parties agree otherwise, the arbitral tribunal shall decide the allocation of the costs, the amount and payment procedures thereto. The arbitration cost includes (i) fees and expenses of arbitrators; (ii) administration fees of the arbitral institution; and (iii) fees and expenses incurred in relation to witnesses and experts as well as legal services for the arbitration.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

There are no express provisions in the Arbitration Law and other related laws to exempt arbitrators from civil liability. Accordingly, in theory, arbitrators may be held liable if they breach their obligations but there is no court decision regarding civil liability of arbitrators.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Arbitrators could potentially commit bribery and corruption offences but none of them give rise to any particular concerns in respect of arbitration.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Article 44.2 of the Arbitration Law allows parties to waive the requirement to provide reasons for an award.

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The Arbitration Law is silent on this matter. The question of whether parties may waive the right to seek the annulment of the award is not tested and established under Mongolian law.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical mandatory requirements for such matter.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No. The Arbitration Law does not permit a party to appeal an arbitral award.

²⁷ Article 36.1, the Arbitration Law.

²⁸ Article 36.2, the Arbitration Law.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Mongolia is a State party to the New York Convention. The grounds for refusing recognition or enforcement provided in the Arbitration Law are the same as those under the Convention. A party seeking enforcement based on the arbitral award needs to apply to the first instance civil court having jurisdiction over the respondent or the respondent's assets for an enforcement decision, and the court shall issue an enforcement decision unless it finds any of the grounds for refusal. The enforcement application must include the original copy of the award or a duly certified copy of the award. If the award is not in the Mongolian language, a Mongolian language translation of the award must be appended. The Arbitration Law does not provide any distinction between local and foreign awards.

With respect to time limits, the Law on Enforcement of Court Decisions provides for a three-year statute of limitations for the commencement of enforcement proceedings of arbitral awards.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

It is highly likely that Mongolian courts would dismiss an application for the enforcement of an arbitral award where an annulment or appeal proceeding has been initiated at the courts at the seat of arbitration pursuant to Article 49.1.1 of the Arbitration Law, which mirrors Article V(1)(e) of the New York Convention.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Mongolian courts regularly respect the annulment decision made at the seat of the arbitration. There are no publicly available cases where the courts in Mongolia have enforced a foreign arbitral award which had been annulled at its seat.

5.8 Are foreign awards readily enforceable in practice?

Foreign arbitral awards are enforced unless there are grounds for refusal.

6. Funding arrangements: Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

In accordance with the Regulation for the Lawyers' Professional Activities issued by the Mongolian Bar Association, Mongolia-qualified lawyers are permitted to enter into contingency fee arrangements, save for cases in respect of personal status (matrimonial disputes etc.) and criminal cases. Such contingency fee cannot exceed 30% of the overall service result.

As for third-party funding, there are no express regulations under Mongolian law. However, in accordance with the Regulations for the Lawyers' Professional Activities, Mongolia-qualified lawyers have an obligation to maintain their independence from undue influence from persons who paid the lawyer's professional fees.

7. Is there likely to be any significant reform of the arbitration law in the near future?

As the Arbitration Law was enacted only over 2 years ago, there is no immediate plan to make any significant reform in the law in the near future.