LABOUR ACT, 2007 (ACT NO.11 0F 2007)

A

Accommodation *(sec.28)* (***M***) – An employee who is required to live at the place of employment or to reside on any premises owned or rented by the employer is entitled to adequate *housing* supplied by the employer including *sanitary and water facilities*. In the case of an employee required to reside on *agricultural* land the employer must, in addition:

- Provide suitable *accommodation* for the employee's *spouse and dependent children*;
- permit the employee to keep *livestock* and to *cultivate land* to meet the reasonable needs of the family; or
- alternatively, by agreement, provide the family with sufficient *food* to meet their reasonable needs; or
- as a second alternative, and also by agreement, pay the employee an *additional allowance* to buy such food.

An employer who terminates the employment of an employee who is required to live at the place of employment or to reside on any premises owned, leased or provided by the employer may not require the employee to vacate the said premises or place unless -

- in the case of an employee residing on agricultural land, the employer gives the employee three months written notice to vacate; or
- in the case of other employees the employer gives the employee at least one month's written notice to vacate the accommodation.

Notwithstanding such notice, if an employee has referred a dispute to the Labour Commissioner alleging an unfair dismissal within 30 days following the termination of employment the employer may not require the employee to vacate the premises until the dispute has been resolved.

Discussion: It is important to note that the provision contemplates two categories of employees entitled to accommodation: Employees required to live on agricultural land and employees required to live on employers' premises which do not constitute agricultural land, and that the benefits for the two in terms of this section differ. Furthermore, from the context of the provision, and being a basic condition of employment, it is to be understood that the benefits mentioned are free of charge, although their value in certain instances may be taken into account when evaluating remuneration packages (>Remuneration). Agricultural sector employers

should, in addition, take cognizance of the existence of any *collective agreements* or *wage orders* which may have been published in the *Government Gazette* and which set out minimum levels which have to be met with regard to these benefits.

Changes: The requirement to give a certain period written notice to an employee to vacate accommodation upon termination of employment is new, as is the stipulation allowing an employee to remain even longer if a complaint of unfair dismissal has been lodged. However, quite apart from this stipulation in the Labour Act, it is common fair practice to give a person reasonable notice if accommodation needs to be vacated. Under normal circumstances a period of up to three months in this regard is not excessive. A problem can, nevertheless, arise if some serious incident has occurred involving the employee who may thus pose a security risk to the employer. Continued occupation of accommodation under such circumstances could become intolerable. The employer may then be obliged to seek an alternative solution. This would ideally take the form of some mutually agreed arrangement in lieu of continued occupation of the accommodation by the dismissed employee.

Administration of regulations – > Regulations, administration of

Agricultural employees – > *Accommodation*

Annual leave *(sec.23)* (***M***) – Leave entitlement of an employee is four consecutive weeks with full remuneration in respect of each annual leave cycle, calculated as follows:

Number of days in ordinary work week	Annual leave entitlement in working days
6	24
5	20
4	16
3	12
2	8
1	4

The term “ordinary work week” above means the number of days per week ordinarily worked by an employee.

Employers must observe the following rules with regard to the granting of annual leave:

1. If an employee does *not normally work a fixed number of days* per week, leave is calculated on the basis of the average number of days worked per week over the 12 months prior to the commencement of a new annual leave cycle multiplied by four.
2. A leave cycle is *twelve months* calculated from the date of appointment and is repeated after each completion of 12 months.
3. The *employer may determine* [this should be in consultation with the employee] when annual leave is to be taken, but it should not be taken later than four months after the end of the leave cycle or at the most six months after the end of the cycle if the employee has so agreed in writing.
4. The employer may grant an employee *occasional paid leave* which leave is deducted from the annual entitlement.
5. An employee who is remunerated by direct deposit into an account receives leave payment on the *normal pay date*, whereas other employees receive their leave payment on the *last working day before commencement of leave* unless they request payment also to be on the normal pay date.
6. Annual leave *may not run concurrently* with sick leave, maternity leave or compassionate leave.
7. An *additional day* of paid leave must be granted *for each public holiday* which falls on a working day during the leave period.
8. An employee *may not work* for the employer *whilst on leave.*
9. Payment of money *in lieu of leave* is prohibited, except upon termination of employment.
10. An employer may not in terms of section 30 *(>Termination of employment on notice)* give notice of termination of employment to an employee during any period of leave to which an employee is entitled, nor may an employer allow such notice to run concurrently with any period of leave.

Discussion: In terms of section 37, upon termination of employment an employee is entitled to full payment for any period of annual leave due for a completed annual leave cycle as well as to accrued leave for an uncompleted leave cycle. Accrued leave for an incomplete annual leave cycle is calculated on a pro rata basis depending on the number of full months worked during that incomplete annual leave cycle. The employee does not qualify for such accrued leave of an uncompleted leave cycle if (except if for a lawful reason) no due notice of termination or payment in

lieu of notice has been given by the employee to the employer.

Payment for leave due for a completed leave cycle must, however, be paid regardless of whether notice has been given or payment has been effected by the employee in lieu of notice.

Changes: There are three departures from the previous situation regarding annual leave as formerly applicable under the Labour Act, 1992: Two of them comparatively minor, the third more far-reaching.

The first change is the automatic forfeiture of accrued leave for an uncompleted leave cycle if no proper notice has been given, referred to under 'Discussion' above.

Secondly, item 5. above represents a slight change from the previous situation prevailing under the Labour Act, 1992, in that an employee formerly had the choice of either receiving leave money before going on leave or to receive payment on the normal remuneration date. This no longer applies to an employee who is remunerated by direct deposit into an account. Such an employee will simply continue to receive his/her remuneration at the normal pay interval as usual, irrespective of whether on leave or not.

The third change consists of an increase in the number of paid annual leave days to which employees were entitled under the Labour Act, 1992. Employees working a five day week were previously entitled to 18 paid days leave per annum and employees working a 6 day week were entitled to 21 paid days leave per annum. This has now been changed to 20 and 24 paid days leave, respectively. The manner in which annual leave entitlement is formulated in the new Act is more explicit than in the previous wording and leaves little room for misinterpretation. The inclusion of a separate but related provision for employees working irregular days per week is also a notable enhancement.

Appeals of arbitration awards – *>Arbitration of disputes*

Application of Act *(sec.2)* (***U***) – The Labour Act, 2007 with limited exceptions, *applies to all employers and to all employees* in all economic sectors and throughout all the Regions of the territory of the Republic of Namibia.

The *only exceptions* are the Namibian Defence Force; the Namibian Police Force; the Namibian Central Intelligence Service; the Prison Service; and a municipal police service. However, in the case of these organisations

section 5 of the Act (Prohibition of discrimination in employment) is equally applicable.

With regard to the Apprenticeship Ordinance, 1938, the Merchant Shipping Act, 1951 and any law on the employment of persons in the State, special provisos exist. The Minister of Labour and Social Welfare may by notice in the Government Gazette declare any provision in these laws inoperable if they relate to remuneration or conditions of employment and are in conflict with the Labour Act, 2007. The Minister may also additionally or alternatively declare that any provision of the Labour Act, 2007 does apply with any modification specified by the Minister. However, in respect of any such provisions in these other laws regarding which the Minister has made no such declaration and which contain provisions more favourable than the Labour Act, 2007 such provisions are applicable to the employees concerned, but if they are less favourable than similar provisions of the Labour Act, 2007 the Act prevails.

Discussion: The intention of the legislature in making the Labour Act, 2007 so widely applicable is clearly aimed at providing protection to the greatest segment of the Namibian workforce reasonably possible. But there are certain exceptions to the Act's inclusiveness as indicated above, and some voices have gone up in the past expressing concern about the situation, particularly with regard to prison services.

Why certain sectors are excluded

Justification for having excluded certain limited sectors from the full ambit of the Labour Act, 2007 can be traced, *inter alia,* to the provisions of ILO Convention No.158 of 1982 (Convention Concerning Termination of Employment at the Initiative of the Employer), of which Namibia is a signatory. Article 1, Paragraph 4. of the Convention stipulates that –

"4. In so far as is necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisation of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention."

Furthermore, Article 1, Paragraph 5. of the Convention states that –

"5. In so far as is necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the Convention or certain provisions

thereof other limited categories of employer persons in respect of which special problems of substantial nature arise in the light of particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them."

Indeed, it is widely accepted international practice to exclude certain strategic categories of state employees such as the police and armed forces, which have particular significance for a country's security and public safety, from the general labour legislation regime. Such services are usually governed by specifically focused statutory instruments which also include employment related matters, as is the case in Namibia. Nevertheless, some hold the view that a feasible alternative could be to have prison services, for example, covered by general labour legislation, but to be declared 'essential services' and thereby precluding the right to potentially risky industrial action by such employees.

Foreign Mission personnel and NGO's

The situation of foreign mission personnel employed at embassies, high commissions etc, is not spelt out in the Act and can give rise to uncertainty as to whether its conditions of employment are applicable or not. Accredited foreign mission officials are covered by the protocols of the Geneva Convention, in terms of which, whilst such persons are expected to respect the laws of the host country, they are not subject to them. In practice, foreign emissaries are employed under the laws of their native countries and the provisions of the Labour Act, 2007 are not applicable.

As far as Namibian citizens employed by foreign missions are concerned, the provisions of all Namibian legislation, including the Labour Act, 2007 do apply. Matters such as leave, overtime, public holidays, social security, termination, etc., should, therefore, correctly be dealt with in accordance with the provisions of the local legislation. If it were to come to a dispute, however, the situation is not so clear cut. Certainly, Labour Ministry officials could assist by means of mediating a solution in an informal manner. But if such attempts were to fail, the employer might have to be approached along diplomatic channels to have the matter amicably resolved. The normal formal dispute resolution mechanism would mostly not apply.

Non-Governmental Organisations, or NGO's, are normal employers for the purposes of the Labour Act, 2007 and their employees enjoy all the protections of the Act as in the case any other Namibian employee. Non-Namibian citizens employed by NGO's need to have work permits, as would be applicable to any other employer employing such personnel, and the Labour Act, 2007 also applies to them.

Arbitration agreement – *>Private Arbitration*

Arbitration procedure – *>Arbitration of Disputes and >Private Arbitration*

Arbitration of Disputes (*Chapter 8: Part C and D*) –

Sections 84 to 91, appearing as entries A. to H. below, deal with arbitration of disputes.

Discussion: The alternative dispute resolution method of *arbitration (>NLL 1 pp.61 & 129)* is one of the centre pieces of the Labour Act, 2007. It introduces an entirely rethought and modernized official approach to the resolution of labour disputes in Namibia, replacing the former district labour court system. Arbitration is a process by which a dispute is submitted to a non-judicial third party who hears the case of the disputing parties in order to expeditiously determine the matter by making a binding award. Sections 84 to 90 of the Act relate to compulsory arbitration under the auspices of the *Labour Commissioner* and section 91 relates to voluntary *private arbitration (>NLL 1 p.154).*

A. Definitions *(sec.84)* (***M***) – Dispute is defined under section 82(1) as –

(a) a complaint relating to the breach of a contract of employment or a collective agreement;

(b) a dispute referred to the Labour Commissioner in terms of section 45 of the *Affirmative Action (Employment) Act, 1998 (Act 29 of 1998)* [these are affirmative action related disputes arising between employees or their representatives on the one hand and *relevant employers (>NLL 1 p.113)* on the other];

(c) any dispute referred to in terms of section 82(16) [subsection (16) refers to an unsuccessfully conciliated dispute which the parties have agreed is to be referred to arbitration by the conciliator];

(d) any dispute that is required to be referred to arbitration in terms of the Labour Act, 2007.

Changes: The definition of dispute has been amplified and adjusted to fit in with the requirements of dispute resolution by arbitration as per the Labour Act, 2007. Reference to the Arbitration Act, 1965 previously appearing in the Labour Act, 1992 has been removed. All labour dispute

arbitration, whether under the auspices of the Labour Commissioner or private arbitration, is consequently done within the framework and according to the provisions of this Act, and any applicable guidelines, codes of good practice or code of ethics issued by the Minister of Labour and Social Welfare as contemplated in section 137 of the Act.

B. Arbitration *(sec.85)* (***N***) – This section establishes arbitration tribunals as contemplated in Article 12(1)(a) of the Namibian Constitution, for the purpose of resolving labour related disputes.

Arbitration Tribunals

Arbitration tribunals operate under the auspices of the Labour Commissioner and have jurisdiction to hear and determine any dispute or other matter arising from the interpretation, implementation or application of the Labour Act, 2007. An arbitration tribunal has the power to make any order that it is authorised to make in terms of any provision of the Act.

Arbitrators

The Minister appoints arbitrators to perform the duties and function and to exercise the powers conferred on arbitrators in terms of the Act. Such appointments are done subject to the laws governing the public service and may be on a fulltime or part-time basis. The Minister may also appoint part-time arbitrators *from outside* the public service subject to such terms and conditions as he/she may determine. Any appointments may be withdrawn by the Minister on good cause shown.

The Labour Commissioner designates individuals appointed by the Minister as Arbitrators to hear and determine disputes. An arbitrator must be independent and impartial in the performance of his/her duties in terms of the Act.

Part-time arbitrators from outside the public service are paid fees and allowances at a rate determined by the Minister with the approval of the Minister of Finance, which fees and allowances may differ in respect of different categories of arbitrators as decided upon by the Minister.

[See Regulation 17: *Appointment of conciliators and arbitrators]*

C. Resolving disputes by arbitration through Labour Commissioner *(sec. 86)* ***(N)*** – Determining employment related disputes by arbitration involves several main phases aimed at eventual fair resolution of the subject of disagreement.

Referral of dispute

Any party to a dispute may refer the dispute in writing to the Labour Commissioner or any labour office of the Ministry. In the case of alleged unfair dismissal the referral must be done not later than six months after the dismissal. Any other type of dispute must be referred within one year after the date of the cause of action. A copy of the referral must be served on the other party(ies) to the dispute.

Designation of Arbitrator

The Labour Commissioner will designate an arbitrator to arbitrate the dispute and will notify the parties of the arbitrator and the place, date and time of the arbitration hearing.

Conciliation

An arbitrator is obliged to first attempt to settle the dispute by means of conciliation, i.e., by prevailing upon the parties, and assisting them, to come to a voluntary resolution of the dispute. [This is viewed as the preferred outcome of the matter, as neither party would feel coerced into accepting a result with which it disagrees.]

If conciliation fails the arbitrator must commence to determine the dispute through formal arbitration.

Procedure

Whilst the arbitrator is guided by arbitration rules formulated by the >*Committee for Dispute Prevention and Resolution*, the arbitrator has a discretion to conduct the hearing in a manner he/she considers appropriate in order to determine the dispute **fairly and quickly.** In doing so the arbitrator must deal with the substantial merits of the dispute with the **minimum of legal formalities.**

The arbitrator has the additional powers to –

- *Subpoena (>NLL 1 p.163)* any person to attend an arbitration hearing;
- administer an oath or accept an affirmation;
- question witnesses; and
- suspend arbitration proceedings and resume conciliation instead if the parties agree.

A person who ignores a subpoena or refuses to answer a question by the arbitrator commits an offence and is liable on conviction to a maximum fine of N$10000.00 and/or 2 years imprisonment.

Rights of Parties

A party to a dispute has the right to –

- Give evidence;
- call witnesses;
- question witnesses of the other party; and
- address concluding remarks.

Representation

A party to a dispute -

- may appear in person at the arbitration hearing;
- if the party is an >*employee*, he/she has the right to be represented by a fellow employee, or by an office bearer or an official of his/her registered trade union;
- if the party is an >*employer*, he/she/it has the right to be represented by an office bearer, or by an official of a registered employers' organisation; and
- if the party is a *juristic person (>NLL 1 p.144)* it has the right to be represented by an employee of that entity.

Representation by Legal Practitioner

An arbitrator may permit a lawyer to represent a party in arbitration proceedings if both parties to the dispute agree; or, if at the request of a party, the arbitrator is satisfied that the dispute is of such complexity that it is appropriate for the party to be represented by a lawyer and that the other party will not be prejudiced thereby (negatively affected).

Representation by any Other Individual

An arbitrator may also permit any other individual to represent a party in arbitration proceedings if both parties agree; or, if at the request of a party, the arbitrator is satisfied that representation by the individual will facilitate the effective resolution of the dispute or attainment of the objectives of the Act; that the individual meets prescribed requirements; and that the other party to the dispute will not be prejudiced. In deciding whether to permit representation of a party by any other individual as contemplated above, the arbitrator must take into account applicable guidelines issued by the Minister under section 137 of the Act.

Award

The arbitrator must issue a signed award with brief motivation in support of his/her decision within *30 days* of the conclusion of the arbitration proceedings. In making the award the arbitrator must bear in mind any code of good practice or guidelines published by the Minister. Arbitrators are empowered to make any appropriate arbitration awards including:

- *Interdicts (>NLL 1 p.142)*;
- Orders to remedy a wrong;
- *Declaratory orders (>NLL 1 p.135)*;
- Orders of reinstatement;
- Awards of compensation; and
- Orders for costs.

An arbitrator may only include an order for costs in the award if a party, or the person who represented the party in the arbitration proceedings, acted in a frivolous manner (silly, petty, not being serious) or in a vexatious manner (having insufficient reason and seeking mainly to annoy the other party) by proceeding with the dispute, defending the dispute or by acting in such a manner during the proceedings.

[See Regulation 20: *Referral of dispute to arbitration;* Regulation 21*: Request for representation at conciliation or arbitration;* and Regulation 27: *Proof of service of documents]*

Discussion: Arbitration under Chapter 8, Part C of the Labour Act, 2007 provides the statutory framework for an easily accessible, public funded and efficacious means to deal with labour disputes of right, whether of a collective or an individual nature. In taking over the functions of the former district labour courts in this regard, arbitrations by the Office of the Labour Commission seek to remove the shortcomings of the former system, thus contributing to a more equitable and stable employment environment. Certainty in this regard is an essential prerequisite for socio-economic development and was one of the principal considerations leading to the drafting of a Labour Act, 2007.

Speeded-up process and need for preparedness
In similar vein, it is evident that the architects of the Act were intent on having disputes involving alleged unfair dismissal resolved as soon as possible in the best interest of all parties, and not to allow such matters to remain in limbo or to be inordinately drawn out. Thus the time limit of 6 months for the referral of such disputes and no specific provision for recourse to condonation which could encourage the institution of complaints outside the prescription period. (This does not, however, mean that a party is barred from submitting an application for condonation of late referral to an arbitrator. That can still be done in compliance with Part 6 of The *Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, 2008 >Regulations (boxed discussion.))*

Furthermore, although the Act does not specifically say so, it does appear from its context that arbitration should proceed immediately (possibly even the same day) after attempts at conciliation have broken down. Obviously the arbitrator has a measure of discretion to adjourn proceedings if there are compelling reasons to do so. However, parties to a dispute coming up for arbitration should be thoroughly prepared and ready to lead evidence straight away, in the event of conciliation failing. Alternatively, they must come to the proceedings with a proper mandate for a negotiated settlement and be willing to concede or compromise in the course of conciliation.

A party may also apply for postponement in accordance with the *Rules Relating to the Conduct of Conciliation and Arbitration,* although approval of such postponement is left to the discretion of the Arbitrator. Whatever the case may be, the *con/arb (>NLL 1 p.69)* approach of Chapter 8 obliges employers to be much more focussed in dealing with labour disputes than previously.

Representation

On the issue of representation of parties at arbitration, the freedom to choose any representative of choice which was granted to litigants in the district labour court by the Labour Act, 1992, has been curtailed in compulsory arbitration under the Labour Act, 2007. This was done upon proposal by the social partners during the initial brainstorming phase when amendments to the former Labour Act were being explored. The parties agreed that the playing field in dispute resolution needed to be levelled, and the whole process to be speeded up by simplification thereof: Focus should hence forth be on the merits of a case rather than on technicalities frequently introduced by lawyers and consultants. In terms of the new Act, it is only under special circumstances that a legal practitioner or other person may represent a party to a dispute, subject to the arbitrator's approval. On the other hand, parties belonging to a registered trade union or employers' organisation have access to representation by officials or office bearers of such bodies.

The right to legal representation at proceedings before a Tribunal established by law as provided for in Article 12 *(Fair Trial)* of the Namibian Constitution, is thus not absolutely recognized in the Labour Act, 2007. The situation is somewhat mitigated by the fact that under compulsory arbitration the parties have the right to note an appeal against an award on a question of law (or if the dispute relates to a fundamental right on a question of law and/or fact) or to make application for review on procedural grounds to the Labour Court.

Significantly, the role of trade unions and employers' organisations is

much enhanced by the rules for representation. Clearly this contributes to the strengthening of these bodies and simultaneously also the institutions of collective bargaining and tripartism in Namibia.

The other main alternative for representation at arbitration, namely, that parties represent themselves, will require that they become more adept with arbitration procedures. This should eventually result in more hands-on skills and insight into the dynamics of dispute prevention and resolution, particularly on the part of employers, on whom normally rests the onus of proof. Self-representation by employers certainly appears to be the preferred approach within the spirit and intent of the Labour Act, 2007.

Regulations and Rules

Any party involved in arbitration, either as Applicant (usually an employee or former employee) or as Respondent (usually the employer or former employer) must have regard to the Regulations and Rules issued by the Minister. They, *inter alia,* give more specific instructions on procedures prior to-, during-, and subsequent to arbitration, including the official forms to be used by the Labour Commissioner and the parties involved. The Regulation and Rules constitute part of the legal framework within which the arbitration takes place. Both the Regulations and Rules are dealt with in the boxed discussion under the item *>Regulations (Sec.135)* further on in the Lexicon

Simplified procedure and main forms

The procedure for a typical, straightforward referral of a dispute to the Labour Commissioner, and determining thereof by an arbitrator, can be summarised as follows:

i) The process commences with the Applicant completing a *>Form LC 21 Referral of Dispute to Conciliation or Arbitration* (Annex I) and serving it on the Respondent. The LC 21 contains information on the nature of the dispute and particulars of the Applicant and Respondent. It should also have an outline of steps taken to resolve the dispute attached to it.

ii) The Applicant makes an affidavit *>Form LG 36 Proof of Service of Documents* (Annex 1) and files it together with a copy of the LC 21 with the Labour Commissioner. A copy of the LG 36 must also be served on the Respondent.

iii) Should one or both of the parties to the dispute wish to apply to the arbitrator for permission to be represented by a legal practitioner or other person such as a consultant this must be done on *>Form LC 29 Request for Representation at Conciliation or Arbitration in Terms of Section*

82(13) or Section 86(13) (Annex I). No formal application is required if representation is to be done by an official or office bearer of a registered trade union or registered employers' organisation of which the Applicant/ Respondent is a member.
iv) The Labour Commissioner designates a competent person as arbitrator to determine the dispute.
v) The Labour Commissioner or a designate completes >*Form LC 28 Notice of Arbitration Hearing* (Annex I) containing information on the arbitrator, date, time and venue of the arbitration event and serves it on the parties. Unless the parties agree otherwise they must be given at least 14 days notice of the hearing.
vi) Should any of the parties require the services of an interpreter; want any witnesses to be subpoenaed; or wish to apply for postponement; this must be done as directed on form LC 28.
vii) On the appointed time and date the arbitrator attempts to resolve the dispute by conciliation, failure of which, he/she commences formal arbitration. The arbitration is fully recorded and usually follows the pattern of explanation of the procedure by the arbitrator; opening statements by the parties; testimony of witnesses; cross-examination of evidence by the opposing party and the arbitrator; and finally, closing arguments by both the Respondent and Applicant.
viii) The arbitrator weighs the evidence and arguments presented and forwards a written, motivated award to the parties within 30 days of the arbitration event.

D. Effect of arbitration awards *(sec.87)* ***(N)*** – All awards *are binding*, unless of an advisory nature such as a declaratory order, and may be made an order of the >*Labour Court* upon filing in the Court by an affected party or by the Labour Commissioner. Any money amount forming part of an award earns interest from the date of the award at prescribed rates, unless the award provides otherwise.

E. Variation and rescission of awards *(sec.88)* (***N***) – An arbitrator may change or revoke an award at own instance or upon application by a party within 30 days after service of the award. This may be done if an award was wrongly made in the absence of a party; or if it is ambiguous or contains an error or omission; or if it was made because of a mistake on the part of both parties.

F. Appeals or reviews of arbitration awards *(sec.89)* (***N***) – A party to a dispute may note an *appeal (>NLL 1 p.129)*, or make application for *review (>NLL 1 p.160)*, to the Labour Court against an arbitrator's award.

Types of appeal
Appeals may be noted on any questions of law, or in certain cases involving fundamental human rights and protections, on a question of fact or law, or both fact and law (full appeal).

Types of review
Reviews may involve alleged defects in the arbitration proceedings in relation to the lawful duties of an arbitrator; gross *irregularities* by the arbitrator in the conduct of the *proceedings*; or in the arbitrator overstepping his/her powers. The Act also provides for a situation where it may be alleged that an award has been improperly obtained, i.e., involved corruption.

Procedure and timeframe
Appeals must be noted in accordance with the Rules of the High Court *within 30 days* after the award has been served on the party intending to appeal. Applications for review must also be made within 30 days unless the alleged procedural shortcoming involves corruption in which case the applicant has 6 weeks as from the date on which the corruption was uncovered. The Court may, however, condone the late noting of an appeal on good cause shown.

Suspension of award
When an appeal is noted, or an application for review is made, this has the effect that any part of the award that is adverse to the interest of an employee is suspended (is not put into operation for the time being), but any part of the award that is unfavourable to the interest of the employer remains unchanged. However, an employer has the right to apply to the Labour Court to have such adverse effects suspended.

In considering such an application the Court must consider any *irreparable harm* that would result to either the employee or the employer if the award, or part of it, were to be suspended or not suspended. If the balance of irreparable harm favours neither the employer nor the employee conclusively, the Court must determine the matter in favour of the employee.

In taking a decision regarding a suspension of an award pending the final determination of the appeal or review, the Court may order that all or part of the award be suspended or may attach certain conditions to its order. This could include (but is not limited to) requiring a monetary award to be

provisionally paid into Court, or that an employer be obliged to continue paying an employee's salary pending the final determination of the appeal or review even though the employee is not working for the employer during that time.

Setting aside of award

If the Labour Court, in response to an appeal or application for review, decides to set an award aside it may –

- determine (judge) the dispute which had originally been before an arbitrator in any manner which it considers appropriate; or
- make any award it considers appropriate about the procedures to be followed to determine the dispute; or
- refer the matter back to the arbitrator or direct that a new arbitrator be designated.

It follows that if an appeal to, or an application for review by, the Labour Court fails the arbitrator's award is upheld and becomes fully enforceable.

Intervention by the Minister

When an appeal is noted or an application for review is made and the appeal or review involves the interpretation, implementation or application of the Act, the Minister may intervene in the proceedings on behalf of the State if the Minister considers it necessary for the effective administration of the Act.

Discussion: What is meant by a *question of law* includes the interpretation, manner of application, failure to observe, etc., of any relevant statutory or common law rule, including promulgated regulations and guidelines and court precedent applicable to the matter at hand. A *question of fact*, on the other hand, refers to actual things or occurrences that are known, or are claimed, to exist, relating to the case. In terms of this section, therefore, appeals not specifically relating to human rights and protections will only be permitted to be directed at questions of law and not to involve the factual or substantive merits of a case as such.

The concept of *irreparable harm* as stipulated in this section, means that the Court is obliged by the Act to adopt a stance markedly advantaging an employee in this regard. Only under a very stringent set of circumstances will an employer be able to prevent an adverse award to be suspended whilst appealing against it, whilst in the case of an employee appealing or making application for review, the suspension of an award favouring the employer is virtually automatic.

G. Enforcement of awards *(sec. 90)* (***N***) – If a party does not comply with the terms of an arbitration award the other party may apply to a labour inspector to take such steps as may be necessary to enforce compliance, including the institution of execution proceedings (legal seizure and sale of property of the defaulting party).

[See Regulation 22: Application to enforce arbitration award]

H. Private arbitration *(sec.91)* (***N***) – The Labour Act, 2007 provides for referral of a dispute to voluntary *private arbitration (>NLL 1 p.154)* as an alternative to compulsory arbitration by the Labour Commissioner.

Arbitration Agreement

For this purpose parties to an existing-, or a potential future dispute may agree in writing to refer the matter to arbitration in accordance with the provisions of section 91 of the Act. Such an Arbitration Agreement includes a clause in a collective agreement, framed in accordance with section 73, providing for future disputes between parties to be referred to private arbitration.

If any party to an Arbitration Agreement refers a dispute that should be referred to private arbitration to the Labour Commissioner, the Labour Commissioner is obliged to refer the dispute back for private arbitration in accordance with the agreement.

Arbitrator

In case the person initially agreed upon by the parties to be the private arbitrator as part of the Arbitration Agreement is, for any reason, unable to act in that capacity, the parties may appoint another arbitrator. If the parties fail to reach consensus on this aspect, the Labour Court may, upon application appoint an arbitrator on their behalf. Under normal circumstances the appointment of an arbitrator may only be terminated if both parties to the agreement concur. The appointment of an arbitrator may, however, be set aside by the Labour Court on good cause shown.

Powers of the Private Arbitrator

A private arbitrator is empowered in terms of the Act to:

- *Subpoena* persons to appear at an arbitration hearing;
- administer oaths or accept affirmations of witnesses;
- *question* any individual on any issue relevant to the matter being heard;
- *suspend* arbitration proceedings and conciliate instead if the parties agree; and

- generally to ***conduct the arbitration*** in a manner which he/she deems appropriate in order to determine the dispute ***fairly and quickly*** whilst dealing with the substantial merits of the dispute **with a minimum of legal formalities.**

Rights of parties in private arbitration
A party to a dispute has the right to –
- give evidence;
- call witnesses;
- question witnesses of the other party; and
- address concluding remarks.

Representation
A party to a dispute in private arbitration may appear in person or to be represented by anybody of his/her choice at the arbitration proceedings, subject to what the parties agreed to in the Arbitration Agreement. The Act does not impose any restriction on parties to private arbitration regarding representation as it does in the case of compulsory arbitration.

Award
Unless the Arbitration Agreement provides otherwise, the arbitrator must issue a signed award with motivation in support of his/her decision within *30 days* of the conclusion of the arbitration proceedings. The parties may, however agree that the award be made in shorter period.

Subject to the *terms of reference* set out in the Arbitration Agreement, a private arbitrator is empowered to make any appropriate arbitration award including –
(a) an *interdict (>NLL 1 p.142)*;
(b) an order to remedy a wrong;
(c) a *declaratory order (>NLL 1 p.135)*;
(d) an order of reinstatement;
(e) an award of compensation; and
(f) an order for *costs (>NLL 1 p.134)* (*not* restricted only to situations where a party has acted frivolously or vexatiously as in the case of compulsory arbitration).

Effect of arbitration awards
All private arbitration awards *are binding*, unless they are intended to be of an advisory nature such as a declaratory order, and may be made an order of the *>Labour Court* upon filing in the Court by a party affected by the award. Any money amount forming part of an award earns interest from the date of the award at prescribed rates, unless the award provides otherwise.

Variation and rescission of awards
In terms of the Act, an arbitrator in private arbitration, similar to the situation in compulsory arbitration, may change or revoke an award at own instance or upon application by any party within 30 days after service of the award, if wrongly made in the absence of a party; or if it is ambiguous or contains an error or omission; or if it was made because of a mistake on the part of both parties.

Reviews of private arbitration awards
A party to a dispute may make application for *review (>NLL 1 p.160)*, to the Labour Court against an arbitrator's award.

Types of review
Reviews may involve alleged defects in the arbitration proceedings in relation to the lawful duties of an arbitrator; gross *irregularities* by the arbitrator in the conduct of the *proceedings*; or in the arbitrator overstepping his/her powers. The Act also provides for a situation where it may be alleged that an award has been improperly obtained, i.e., involved corruption.

Procedure and timeframe
Applications for review must be made within 30 days unless the alleged procedural shortcoming involves corruption in which case the applicant has 6 weeks as from the date on which the corruption was uncovered.

Suspension of award
When an application for review is made, this has the effect that any part of the award that is adverse to the interest of an employee is suspended (is not put into operation for the time being), but any part of the award that is unfavourable to the interest of the employer remains unchanged. However, an employer has the right to apply to the Labour Court to have such adverse effects suspended.

In considering such an application the Court must consider any *irreparable harm* that would result to either the employee or the employer if the award, or part of it, were to be suspended or not suspended. If the balance of irreparable harm favours neither the employer nor the employee conclusively, the Court must determine the matter in favour of the employee.

In taking a decision regarding a suspension of an award pending the final determination of the review, the Court may order that all or part of the award be suspended or may attach certain conditions to its order. This could include (but is not limited to) requiring a monetary award to be provisionally paid into Court, or that an employer be obliged to continue

paying an employee's salary pending the final determination of the review even though the employee is not working for the employer during that time.

Setting aside of award
If the Labour Court, in response to an application for review, decides to set an award aside it may refer the matter back to the arbitrator or direct that a new arbitrator be designated.

It follows that if an application for review by the Labour Court fails the arbitrator's award is upheld and becomes fully enforceable.

Intervention by the Minister
When an application for review of a private arbitration award is made and the review involves the interpretation, implementation or application of the Act, the Minister may intervene in the proceedings on behalf of the State if the Minister considers it necessary for the effective administration of the Act.

Termination of Arbitration Agreement.
An Arbitration Agreement terminates only by consent of all parties to the agreement or by an order of the Labour Court.

The agreement does not terminate through the death, sequestration or winding up of any party, but in such circumstances an arbitration that has commenced must be kept in abeyance until an executor, administrator, curator, trustee, liquidator or judicial manager has been appointed.

Discussion: Private Arbitration under Chapter 8, Part D of the Labour Act, 2007 is intended to make the benefits of conventional arbitration accessible to stakeholders as a complementary alternative to compulsory arbitration as provided for in Part C. Both forms of arbitration as appearing in the Labour Act are innovative in the sense that they constitute new approaches in Namibia's evolving statutory labour dispute prevention and settlement repertoire.

The nature of private arbitration
Arbitration in its traditional application, that is, in the manner and sense in which it is ordinarily understood and practised, is by its very nature a voluntary, private procedure for the speedy resolution of civil disputes.

Although it is common all over the World to have a statutory framework within which formal arbitration takes place (such as, for example, is provided by the Arbitration Act (Act 42 of 1965), the essential elements of

arbitration are confidence by all parties in the ability and impartiality of the arbitrator; privacy; flexibility of procedure and finality of outcome.

It is these elements which make ordinary arbitration, despite initial costs involved, attractive to disputing parties which seek to avoid the rigid, often drawn out, processes involved in judicial litigation. Even as far as costs are concerned, arbitration can be considered a cheaper option than litigation could potentially be in the long run, if the often huge expenses involved in instructing counsel in protracted court action and potential appeal proceedings are considered.

Distinguishing Features

The main aspects distinguishing private arbitration from compulsory arbitration in the context of the Labour Act, 2007, either directly or by implication, include the following attributes:

- For the purpose of private arbitration parties can either pro-actively draw up and sign a future orientated Arbitration Agreement (terms of reference and manner to deal with a potential future dispute) ahead of time; or they can choose to draw up an Arbitration Agreement on an ad *hoc basis* to deal only with a current dispute.
- the parties can mutually choose any suitable person as an arbitrator;
- the parties may avail themselves of external assistance to arrange the preliminary formalities of the arbitration if they so wish;
- the arbitration proceedings may be held in private and at any venue, and on any date and time they may decide upon;
- the parties may be represented at arbitration by anybody of their choice;
- the arbitrator is not obliged to first attempt to conciliate the dispute before commencing arbitration proceedings;
- in making the award the arbitrator is not bound by guidelines issued in terms of section 137;
- the award may be kept confidential;
- the award is not subject to appeal but can be reviewed by the Labour Court on procedural grounds; and
- whereas compulsory arbitration is a service offered to the public free of charge by the State, private arbitration involves costs which the parties may agree to carry as they deem fit.

Apart from the initial cost factor, a potential drawback of private arbitration is that the award may not become known by the public – even if it is a good award from which others may benefit – if the parties decide to keep it confidential.

Arbitration Agreement
The Arbitration Agreement consists of a formal document, drawn up and entered into on a voluntary basis by two or more parties who have a labour related relationship such as an employer and an employee or registered trade union and an employer.

The document's main clause and stipulation is a formal accord between the parties to submit a given labour related dispute between them to a third outside party for fair adjudication and a binding award which the parties agree to accept. The agreement may include the name of a specific person who is to act as arbitrator or may indicate the method to be followed in having such a person appointed.

The agreement must either clearly spell out the specific dispute which is to be determined by the arbitrator in a current instance or must describe what kinds of future disputes are to be determined by the arbitrator should they occur.

The Arbitration Agreement can also include other terms of reference such as powers of the arbitrator in making an award, format of the award, time limits, discovery, other procedural aspects to be complied with or allowed, choice of venue, confidentiality, possibility of appeal, duration, etc.

It follows that an Arbitration Agreement for private arbitration can be a fairly simple and straightforward document of intention, or it can be a quite elaborate and prescriptive protocol. Whatever the case, it must comply with the provisions of section 91 of the Labour Act, 2007.

However, neither the Regulations and Rules prescribing procedure to be followed for arbitration in terms of section 86; nor the official forms which have been prescribed for that purpose, are applicable to arbitration conducted in terms of section 91

Arbitrator *– >Definitions and Interpretation*

Automatic termination of contracts of employment *(sec.32) – >Termination of employment*

Award *– >Arbitration of Disputes*

B

Basic Conditions *(sec.9)* (***M***) – All matters dealt with in Chapter 3 of the Labour Act, 2007 constitute basic conditions of employment and under Parts B to F form five main categories:

1. Remuneration –

(a) Calculation of wages (sec.10)
(b) Payment of remuneration (sec.11)
(c) Deductions and other acts concerning remuneration (sec.12)
(d) Wage order (sec.13)
(e) Exemption from wage order (sec.14)

2. Hours of work –

(a) Continuous shifts (sec.15)
(b) Ordinary hours of work (sec.16)
(c) Overtime (sec.17)
(d) Meal intervals (sec.18)
(e) Night work (sec.19)
(f) Daily spread-over (sec.20)
(g) Weekly rest period (sec.20)
(h) Sunday work (sec.21)
(i) Public holidays (sec.22)

3. Leave –

(a) Annual leave (sec.23)
(b) Sick leave (sec.24)
(c) Compassionate leave (sec. 25)
(d) Maternity leave (sec.26)
(e) Extended maternity leave (sec.27)

4. Accommodation –

Provision of accommodation (sec.28)

5. Termination of employment –

(a) Period of employment (sec.29)
(b) Termination on notice (sec.30)
(c) Payment in lieu of notice (sec.31)
(d) Automatic termination (sec.32)
(e) Unfair dismissal (sec.33)
(f) Redundancy (retrenchment) (sec.34)
(g) Severance pay (sec.35)

(h) Transportation on termination (sec.36)
(i) Payment on termination (sec.37)
(j) Certificates of service (sec.37).

A basic condition of employment as provided for in the Act *automatically forms a term of any employment contract*, whether it is specifically mentioned in the contract or not. However, if there is any other law also regulating a certain class of employees (such as apprentices), and if such a law contains a more favourable provision, that provision will apply to the employees in question. If, however, that other law's provision is less favourable, the Labour Act's provision on that specific aspect will apply. Where a contract of employment, or a collective agreement, contains a more favourable condition of employment than the Act, then the more favourable term will have precedence.

A basic condition of employment can be altered by >*exemption* or *variation* granted by the Minister in accordance with the provisions of section 139, and will apply to the extent altered by the exemption or variation.

Discussion:

It is important to note that whenever a provision in Chapter 3 uses the phrase *"an employer must"* or *"the employer must";* or the phrase *"an employer must not require or permit an employee"* or *"the employer must not require or permit an employee"; or* words to that effect, it means that the employer is under obligation to literally do what the provision requires.

That remains so even if the employee agrees or even requests the employer to deviate from the provision, such as for example, be willing to work on a Sunday for ordinary pay or take less annual leave than the law requires. That would constitute what is sometimes known as 'contracting out' and is unlawful under the Act unless an exemption has been granted by the Minister as contemplated in section 139. The reason for this is that the Act seeks to protect employees and job seekers (who may be desperate to find employment) from potential exploitation which would neither be in their own nor in the public interest.

The term *"must"* which in the Labour Act, 2007 generally replaces the term "shall" used in the Labour Act, 1992 is peremptory (obligatory) and must be interpreted as such. The term *"may"* where it appears in the Act usually indicates some degree of option, i.e., the person it is directed at can, but is not obliged to, do as indicated in the provision, depending on circumstances and/or level of discretion allowed in the wording.

Changes: Several basic conditions appearing in Chapter 3 are new or have been modified to some extent in relation to the previous Act. Where this is the situation the relevant discussion of the item is indicative thereof.

Basic wage *– >Definitions and interpretation*

C

Calculation of remuneration and basic wages *(sec.10)* (***M***) – For the purposes of the Act remuneration can be either based on a specific *time interval* (such as hourly wages or monthly salary) or on any *other measurable basis* (such as production related piecework or sales commission).

In the latter case the employee is considered – for the purpose of *calculation of different types of benefits* provided for in the Act – to be remunerated on a weekly basis. The *weekly remuneration or basic wage* is obtained by adding the employee's earnings for the preceding 13 weeks (3 x 4.333 weeks) and dividing the total by 13. If the employee has worked less than 13 weeks the total earnings of that lesser period is divided by the actual number of weeks worked to obtain the (average) weekly remuneration or basic wage.

To calculate the comparable *hourly, daily, weekly or monthly* remuneration or basic wage of an employee who is paid either on an hourly, daily, weekly (including piecework/commission payment), fortnightly or monthly basis, as the case may be, use the following method: Refer to the Table below and locate the horizontal line for the employee's applicable pay period. Read across on that line to the vertical column for the desired comparable remuneration or basic wage and apply the formula set out in the cell or block of the Table where the line and column cross each other.

TABLE 1 – CALCULATION OF REMUNERATION AND BASIC WAGES

	To calculate hourly rates	To calculate daily rates	To calculate weekly rates	To calculate monthly rates
Employees whose remuneration is set by the hour		Multiply the hourly rate by the number of ordinary hours of work each day.	Multiply the hourly rate by the number of ordinary hours of work each week.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the day	Divide the daily rate by the number of ordinary hours of work each day.		Multiply the daily rate by the number of ordinary days of work each week.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the week	Divide the weekly rate (or calculated weekly rate) by the number of ordinary hours of work each week.	Divide the weekly rate (or calculated weekly rate) by the number of ordinary days of work each week.		Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the fortnight	Divide the fortnightly rate by two times the number of ordinary hours of work each week.	Divide the fortnightly rate by two times the number of ordinary days of work each week.	Divide the fortnightly rate by two.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set by the month	Divide the monthly rate by 4,333 times the number of hours ordinarily worked each week.	Divide the monthly rate by 4,333 times the number of days ordinarily worked each week.	Divide the monthly rate by 4,333.	

Note:

i) 'ordinary hours' may not exceed the statutory *>ordinary hours of work* and do not include overtime.
ii) 'ordinary days' means the normal fixed number of days an employee works per week.

Certificate of employment/service *– >Termination of employment*

Child labour, prohibition and restriction of *– >Fundamental Rights and Protections*

Closed shop *– >Recognition and Organisational Rights of Registered Trade Unions >C. Deductions of trade union dues*

Codes of good practice *– >Guidelines and codes of good practice*

Collective agreement *– >Definitions and Interpretation*

Collective Agreements (*Chapter 6 Part D*) – Sections 70 to 73, appearing as entries A. to D. below, deal with collective agreements.

Discussion: Collective agreements between employees and employers and their representative organisations are fundamental to the labour relations regime continued and reinforced by the Labour Act, 2007.

A *collective agreement (>NLL 1 p.63)* is a formal document intended to *constitute a binding contract* between one or more registered trade unions on the one hand and one or more employers, one or more or more registered employers' organisations, or one or more employers and one or more employers' organisations, on the other hand. It represents a voluntary accord relating to a specific set of circumstances or competing interests between consenting legal persons. The terms of the agreement must satisfy certain basic requirements in order to be valid and must be similarly understood by both parties. There are two main categories: *procedural agreements* and *substantive agreements*.

Procedural Agreement

A procedural agreement regulates the relations between the parties, i.e., management, union, shop stewards and employees – its most common form in industrial relations is the *recognition agreement.* Procedural

collective agreements are usually applicable indefinitely, i.e., they are not limited to any specific period of time.

The act of recognition per se, that is, recognition of a registered trade union as exclusive bargaining agent by an employer or employers' organisation, need not necessarily be done in terms of a long formal procedural agreement as has hitherto usually been the case. Regulation 11(2) of the Labour General Regulations: Labour Act, 2007, provides for recognition through the mere completion of Form LC 11 of the Regulations by an employer or employers' organisation and submitting it to the relevant union with a copy to the Labour Commissioner.

Substantive Agreement

Substantive collective agreements mostly involve tangible aspects with financial implications relating to conditions of employment such as wages, allowances and incentive bonus schemes and are usually applicable for a fixed period of time. Certain clauses of a substantive agreement, such as items relating to hours of work or pension may, however, be of a more permanent nature in that they become conditions of employment once agreed upon.

Although not yet common in Namibia, one can also have a combined procedural and substantive agreement covering all aspects in one document.

A. Legal effect of collective agreements *(sec.70)* (***U***) – Once signed by the duly authorised representatives of all the parties a collective agreement is applicable for the full period stated therein and is legally binding on –

(a) the parties to the agreement;
(b) the members of the registered trade union that is party to the agreement;
(c) the members of any registered employers' organisation that is party to the agreement;
(d) all employees in the *bargaining unit (>NLL 1 p.130)* if the union has been recognized as an *exclusive bargaining agent (>NLL 1 p.139) in terms of sec. 64)*; and
(e) all employees, employers, registered trade unions and employers' organisations to whom the agreement has been extended by the Minister of Labour by notice in the *Official Gazette* in terms of section 71.

A collective agreement relating to terms and conditions of employment automatically changes the contents of all contracts of employment affected thereby: cessation of membership of a union or employers' organisation does not nullify its binding effect. Nevertheless, a collective agreement does not prevent an employer agreeing to more favourable conditions of employment, unless the agreement specifically forbids it, and provided the employer enters into such a contract of employment in good faith and without undermining collective bargaining or the status of the union involved.

B. Extension of a collective agreement (with an exclusive bargaining agent) to non-parties *(sec.71)* (***U***) – The parties to a collective agreement are entitled to approach the Minister to extend the agreement to all employers and employees in their specific industry or economic sector. If so approached in the prescribed manner, the Minister will publish the request in the *Official Gazette* and invite objections within a period not exceeding 30 days. Copies of any objections received will be served on the parties to the application who are required to respond to the objection no later than within 14 days.

If after consideration of all inputs the Minster is satisfied that – the collective agreement does not conflict with any law; is, on the whole, no less favourable than the conditions of employment previously applicable; and contains an appropriate arbitration procedure to resolve potential disputes – he is obliged to extend the agreement for a fixed period of time to all other relevant employers and employees by publication in the *Gazette*. The Minister may extend the period of applicability of the collective agreement in the prescribed manner, if approached to do so by the parties.

[See Regulation 14: *Request to extend collective agreement to non-parties to the agreement]*

C. Exemptions from an extended collective agreement *(sec.72)* (***M***) – A dissatisfied employer, or any other person, who is bound by a collective agreement which has been made applicable to an entire economic sector, may formally apply to the Minister to be excused from its provisions. The Minister, if satisfied that special circumstances exist justifying the request, *may wholly or partly exempt the applicant* by notice in writing (subject to any conditions he/she may hold as appropriate) and inform the parties to the collective agreement accordingly.

[See Regulation 15: *Application for exemption from extension of collective agreement]*

Change: The previous Act specifically provided for the parties to the collective agreement, or the person who applied for an exemption, to note an appeal to the Labour Court against any decision made by the Minister in this regard. The new Act is silent on such a possible course of action, which, however, does not mean that right to do so has been removed.

D. Disputes arising from application, interpretation or enforcement of collective agreement *(sec.73)* (***M***) – A collective agreement must contain a clause providing for an arbitration procedure in accordance with Chapter 8 Part C (compulsory arbitration), or in accordance with Chapter 8 Part D (private arbitration), which the parties to the agreement must set in motion in the event of a dispute arising concerning its implementation. Such a clause is not necessary if provision has been made in another collective agreement (usually a procedural recognition agreement) for the resolution of disputes amongst the parties.

If a collective agreement does not contain an arbitration clause; is inoperative; or one of the parties hampers the resolution of the dispute in terms of the agreement, the Labour Commissioner may be approached. The latter then has the discretion to either refer the dispute to an arbitrator to arbitrate the dispute in terms of Part C of Chapter 8, or to refer the matter for arbitration in accordance with part D of Chapter 8.

Collective bargaining *–>Registration of trade unions and employers' organisations (Rights of registered trade unions and registered employers' organisation)*

Changes: Previously there was no compulsion to have an arbitration clause in a collective agreement, although in order to apply to have a collective agreement registered by the Labour Commissioner there had to be a clause providing for the settling of disputes, which could, however, be limited to mediation or referral to conciliation if the parties so preferred.

Committee for Dispute Prevention and Resolution (*Chapter 9 Part B*) – Sections 100 to 103, appearing as entries A. to D. below, deal with the Committee for Dispute Prevention and Resolution.

Discussion: The Committee for Dispute Prevention and Resolution is a new statutory body established to assist in numerous ways to promote labour peace and facilitate the speedy settlement of individual and employment-related conflict. More particularly, the Committee, established under section 97(1)(a) of the Act as a Committee of the >*Labour Advisory Council*, is a specialist body created for the purpose of recommending rules for the conduct of conciliation and arbitration and a code of ethics for such practitioners. It also has various other important functions including reviewing the performance of the Office of the Labour Commissioner on a regular basis and reporting thereon.

A. Functions of Committee for Dispute Prevention and Resolution *(sec.100)* (***N***) – The functions of the Committee are to recommend to the Labour Advisory Council:

- Rules for conciliation and arbitration.
- Policies and guidelines for dispute prevention and resolution.
- A code of ethics for conciliators and arbitrators appointed in terms of sections 82 and 85, respectively.
- Qualifications for and appointments of conciliators and arbitrators in terms of sections 82 and 85.

The Committee must also:

- Regularly review the performance of dispute prevention and resolution by the Labour Commissioner and report thereon to the Labour Advisory Council (LAC).
- Report to the Labour Advisory Council on the activities of the Labour Commissioner.
- Perform any other function assigned to it by the Act or by the Labour Advisory Council.

B. Composition of Committee for Dispute Prevention and Resolution *(sec.101)* (***N***) – The seven members Committee for Dispute Prevention and Resolution is composed of a chairperson designated or appointed by the Labour Advisory Council (LAC) in consultation with the Minister and six other individuals:

- two persons representing the interests of registered Employers' Organisations, one of whom must be a member of the LAC;
- two persons representing the interests of registered Trade Unions, one of whom must be a member of the LAC; and

- two persons representing the interests of the State, one of whom must be a member of the LAC, and both these persons to be appointed or designated in consultation with the Minister.

Discussion: Where a prospective member of the Committee is a member of the Labour Advisory Council he/she is designated by the Labour Advisory Council to serve on the Committee. Where such a candidate is not a member of the LAC he/she is appointed from outside by the LAC to serve on the Committee. Designated members, therefore, serve simultaneously on both the LAC and the Committee, whilst appointed members serve only on the Committee

C. Terms of office and conditions of membership *(sec.102)* (***N***) – A member of the Committee for Dispute Prevention and Resolution who is also a member of the Labour Advisory Council holds office for as long as that member is a member of the LAC. If not a member of the LAC the person holds office for 3 years and may be re-appointed at the end of that period. A member who is not in the employment of the State qualifies for the payment of allowance for attending meetings as well as travel and subsistence reimbursement.

D. Procedures of Committee for Dispute Prevention and Resolution (*sec.103*) (***N***) – The Committee is empowered to make its own rules for the conduct of its meetings.

Compassionate leave *(sec. 25)* (***N***) – An employee is entitled to five days compassionate leave on full remuneration during each 12 months period of employment if there is a death or serious illness in the family. 'Family' in this context means a parent, husband, wife, child, grandparent, brother, sister, father-in-law or mother-in-law of the employee.

The five days do not form part of annual, sick or maternity leave; are not transferrable from one period of 12 months to the next; and do not entitle the employee to any additional remuneration upon termination of employment. The section requires the Minister to prescribe the form and manner in which such leave may be applied for by an employee and any other information which may be required to support an application [such as, for example, a death certificate, medical certificate, an affidavit, or certificate by a registered social worker or pastor].

[See Regulation 5: *Compassionate leave]*

Conciliation of Disputes (*Chapter 8 Part B*) – Sections 81 to 83, appearing as entries A. to C. below, deal with the conciliation of disputes.

Discussion: *Conciliation (>NLL 1 p.70)* is a process by which a third party assists two disputing parties to settle their differences by reaching a mutually acceptable solution. In terms of section 1, conciliation includes *mediating* a dispute; conducting a *fact finding* exercise; and making an *advisory award* if it will enhance the prospects of settlement or if the parties to the dispute so agree. Conciliation replaces the function of conciliation boards as provided for in the previous Labour Act, 1992.

A. Definitions *(sec.81)* (***N***) – The following types of disputes may be conciliated in accordance with the provisions of the Act:

- Dispute of interest (meaning any dispute concerning a proposal for new or changed conditions of employment, but does not include a dispute that is required to be resolved by adjudication in the Labour Court or by arbitration).
- A complaint relating to affirmative action contemplated in the Affirmative Action (Employment) Act, 1998.
- A dispute affecting the national interest referred for conciliation by the Minister, or a dispute relating to a review or declaratory order referred for conciliation by the Labour Court.

B. Resolution of disputes through conciliation *(sec.82)* (***N)*** – Determining employment related disputes through conciliation involves several steps aimed at eventual settling of the matter by mutual agreement.

Conciliators

The Minister appoints conciliators to perform the duties and function and to exercise the powers conferred on conciliators in terms of the Act. Such appointments may be on a fulltime or part-time basis. The Minister may also appoint part-time conciliators *from outside* the public service subject to such terms and conditions as he/she may determine. Any appointments may be withdrawn by the Minister on good cause shown.

The Labour Commissioner designates individuals appointed by the

Minister as conciliators to try to resolve by conciliation any dispute referred to the Labour Commissioner in terms of the Act.

Part-time conciliators from outside the public service are paid fees and allowances at a rate determined by the Minister with the approval of the Minister of Finance.

Referral of dispute

Any party to a dispute may refer the dispute in the prescribed form directly to the Labour Commissioner or to any labour office in the different regions. A copy of the referral must be served on the other party(s) to the dispute.

Designation of Conciliator

The Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve the dispute will designate a conciliator to attempt to resolve the dispute through conciliation and will notify the parties of the conciliator and the place date and time of the first conciliation meeting.

Procedure

The conciliator must attempt to resolve the dispute through conciliation within 30 days of the referral, or any longer period agreed to by the parties. If the party who referred the dispute fails to attend the meeting the period is extended to the date that is 30 days after the meeting. If the other party fails to attend the conciliation the 30 day period lapses immediately on the date of the intended conciliation.

Whilst the conciliator is guided by conciliation rules formulated by the Committee for Dispute Prevention and Resolution, he/she must determine how the conciliation is to be conducted and may require that additional meetings be held within the relevant 30 day period.

A conciliator has the power to *subpoena (>NLL 1 p.163)* any person to attend a conciliation meeting, administer an oath or accept an affirmation and may question any individual about any matter relevant to the dispute. A person who ignores such a subpoena or refuses to answer a question by the conciliator commits an offence and is liable on conviction to a fine and/or imprisonment.

Representation

A party to a dispute -

- may appear in person at the conciliation proceedings hearing;
- if the party is an >*employee*, he/she has the right to be represented by a fellow employee, or by a member, an office bearer or an official of his/her registered trade union;

- if the party is an >*employer*, he/she/it has the right to be represented by a member, an office bearer, or official of his/her registered employers' organisation; and
- if the party is a *juristic person (>NLL 1 p.144)* it has the right to be represented by a director, member or employee of that entity.

Representation by Legal Practitioner

An conciliator may permit a lawyer to represent a party in conciliation proceedings if both parties to the dispute agree, or, if at the request of a party, the conciliator is satisfied that the dispute is of such complexity that it is appropriate for the party to be represented by a lawyer and that the other party will not be prejudiced (negatively affected).

Representation by any Other Individual

A conciliator may also permit any other individual to represent a party in conciliation proceedings if both parties agree; or, if at the request of a party, the conciliator is satisfied that representation by the individual will facilitate the effective resolution of the dispute or attainment of the objectives of the Act; that the individual meets prescribed requirements; and that the other party to the dispute will not be prejudiced.

In deciding whether to permit representation of a party by any other individual as contemplated above, the conciliator must take into account applicable guidelines issued by the Minister under section 137 of the Act.

Unresolved disputes

The conciliator issues a certificate to the effect that a dispute is unresolved if he/she believes that there is no prospect of settlement at that stage of the dispute, or if the 30 day period has elapsed. If the parties at this juncture so agree, the dispute can be referred to arbitration for final determination. Other options include lawful >*strike and lockout.* Whatever the decision, a conciliator remains seized of the dispute until it is settled and must continue efforts to have it resolved.

[See Regulation 17: *Appointment of conciliators and arbitrators; Regulation 18: Referral of dispute to conciliation; Regulation 21: Request for representation at conciliation or arbitration; and Regulation 27: Proof of Service of documents]*

C. Consequences of failing to attend conciliation meetings (sec.83) (***N***) – If the Labour Commissioner has referred a dispute for

conciliation and the party who referred the matter to the Labour Commissioner fails to attend the meeting, the initial 30 days period is extended to a date that is 30 days after the intended conciliation. If the other party fails to attend the conciliation the 30 day period lapses immediately on that date.

In any other dispute referred to conciliation the conciliator may dismiss the matter if the party who referred the dispute fails to attend a conciliation meeting. On the other hand, the conciliator may determine the matter if the other party to the dispute fails to attend a conciliation meeting.

If the Labour Commissioner, upon application by the defaulting party, is satisfied that there were good grounds for the failure to attend, he/she may reverse the decision of the conciliator and conciliation can again proceed as originally intended.

[See Regulation 19: *Application to reverse decision of a conciliator]*

Contracts entered into by State for provision of goods and services *(sec.138)* (***U***) – An employer who is issued with a licence, permit, grant or concession by the State in terms of any law on mining and minerals, wild life, environment and tourism, or fisheries, or who enters into a contract with the State for the provision of goods or services, must give a written undertaking that relevant employees are employed on terms and conditions *no less favourable* than –

- those provided for in a *collective agreement* in that industry; or
- those prevailing for *similar work* in the industry and the region in which the employees are employed; or
- those prevailing in the *nearest appropriate region*, if similar work is not performed in that specific region.

Disputes regarding compliance with such an undertaking may be determined by the Labour Court upon application by any person, including the Minister of Labour and Social Welfare.

Constitution of the Republic of Namibia[1] – The Namibian Constitution referred to at the beginning of the >*Preamble* to the Labour Act, 2007, is the supreme law of the nation embodying the fundamental principles, institutions, rights and obligations according to which its inhabitants are governed.

[1] The Constitution of the Republic of Namibia was unanimously adopted by the 72 member democratically elected multi-party Constituent Assembly on the eve of Namibian independence and was promulgated in Government Gazette No.2 of 21 March 1990

Discussion: *The Namibian Constitution* constitutes the legal foundation of all spheres of public and private life. As such the Constitution covers a wide range of topics fundamental to statehood and societal wellbeing. It also represents the basic terms of reference for most labour-related matters.

Fundamental Human Rights and Freedoms (Chapter 3)
Chapter 3 of the Namibian Constitution is of particular relevance in this regard. The Chapter deals with various group- and person orientated normative concepts, all of which are vital for the survival of plural democracy. Briefly, the Chapter's Articles touching most directly on labour/ employment concerns are the following:

• *Protection of Fundamental Rights and Freedoms (Art.5)*
This Article proclaims that the fundamental rights and freedoms enshrined in the Constitution shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of Government and its agencies, and where applicable to them by the natural and legal persons in Namibia.

• *Respect for Human Dignity (Art.8)*
The Preamble to the Namibian Constitution opens with the words *"Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace …" This solemn sentiment forms the foundation of all civilized social intercourse including equitable employment relations. It gains additional resonance by the pointed declaration in Article 8 that "The dignity of all persons shall be inviolable", i.e., it is never to be infringed or dishonoured.

• *Slavery and Forced Labour (Art.9)*
The fundamental prohibition of slavery and forced labour enunciated in Article 9 is largely self-explanatory and forms a core value of modern employment principles.

• *Equality and Freedom from Discrimination (Art. 10) and Apartheid and affirmative action (Art.23)*
The linked themes of these two Articles find expression not only in section five of the Labour Act, 2007 (Prohibition of discrimination and sexual harassment in employment), but even more significantly, an entire statute has been dedicated to the subject (the Affirmative Action (Employment) Act No. 29 of 1998).

• *Fair Trial (Art.12)*

Article 12 of the Namibian Constitution reflects and enshrines, amongst others, what is known in law as natural justice. The concept refers to fundamental, universal principles of natural moral law which must be observed in the adjudication of criminal and civil cases. The principles include prior notice of the nature of an accusation against any person; opportunity for the accused to prepare for defence and to state his/her case; and hearing of the matter by an impartial adjudicator. The Article also refers to more specific aspects implied by the foregoing such as the calling of witnesses, cross-examination and entitlement to representation of choice.

In labour matters the rules of natural justice apply not only in formal labour-related trials by courts and tribunals established by law, but generally also to internal disciplinary hearings and appeals.

• *Children's Rights (Art. I5)*

Important aspects of Article 15 of the Namibian Constitution find expression in section 3 of the Labour Act, particularly in so far as they relate to minimum age of legal employment and protection of children in such employment.

• *Administrative Justice (Art.18)*

Article 18 of the Constitution stipulates that administrative bodies and officials shall act fairly and reasonably and comply with relevant common law and statutory requirements. Any deeds and decisions by them are answerable to a competent Court if challenged by an aggrieved party. Also this principle is echoed in various provisions of the Labour Act.

• *Fundamental Freedoms (Art.21)*

Article 21 is the source of several prominent provisions in the Labour Act, 2007. Amongst others, the multifaceted clause determines that all persons have the right to freedom of association including freedom to form and join associations or unions, including trade unions; freedom to assemble peaceably and without arms; freedom of speech and expression; freedom to practice any profession, or to pursue any occupation, trade or business; and freedom to withhold labour without being exposed to criminal penalties. These rights form the basis of Chapters 6 and 7 of the Act which deal with Trade Unions and Employers' Organisations and Strikes and Lockouts, respectively.

Principles of State Policy (Chapter 11)

The other most important chapter of the Namibian Constitution from an employment and labour relations perspective, is Chapter 11 on 'Principles of State Policy'. The Chapter's opening provisions contained in Article 95, declare that the State shall actively promote and maintain the welfare of the people by adopting policies aimed, inter alia, at:

- Protecting health and safety at the workplace;
- securing equality of opportunity for women and their entitlement to maternity benefits;
- active encouragement of independent trade unions;
- membership of the ILO and, where possible, adherence to its Conventions and Recommendations;
- provision of social security benefits;
- ensuring that workers are paid adequate levels of remuneration (the phrase used is 'a living wage'); and
- encouragement of the population to influence Government policy by debating its decisions (linking up to the idea of tripartism).

Most, if not all, of these policy aspects have been taken up in appropriate statutory measures and other official instruments. The rest of Chapter 11 is dedicated to foreign relations (including respect for international law and treaty obligations) and economic matters (mixed economy concept, diverse forms of ownership, etc.) which, although they have important implications for employment, do not directly affect labour administration as such.

Other Chapters of the Namibian Constitution also committed to topics touching on actual or potential labour content, include those dedicated to the institutions of the Ombudsman (Chapter 10) and the Public Service Commission (Chapter 13).

In addition, Article 144 of Chapter 21 (Final Provisions), states that unless otherwise provided by the Namibian Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under the Constitution shall form part of the law of Namibia. This means, amongst others, that ratified ILO Conventions become part of the Nation's domestic law.

Protection

From the foregoing it is clear that labour and employment matters, and aspects connected thereto, feature very prominently in the Namibian Constitution. The Constitution explicitly articulates the moral principles

which act as a guiding matrix for labour legislation and practice in the country. Any actions by the State, employers, trade unions or any other individuals or organisations, which may be construed as contravening any of its stipulations, can be contested in Court. The Constitution simultaneously provides a shield against excesses of any kind, irrespective of whether such excesses emanate from the private or public sectors.
The full text of Chapter 3 and Chapter 11 of the Namibian Constitution – the contents of which are variously reflected in the provisions of the Labour Act, 2007 and also find expression in many other spheres of policy formulation and application by Government and the social partners – appears as an Appendix to the Namibian Labour Lexicon Volume 2 *(first edition)* The Labour Act, 2004, A to Z.

Constitutions of trade union or employers' organisation – >Trade Unions and Employers' Organisations

Continuous shift *– >Definitions relating to Basic Conditions of Employment*

Conventions of the International Labour Organisation

– The conventions and recommendations of the International Labour Organisation referred at the close of the >*Preamble* of the Labour Act, 2007.

Discussion: Conventions are formal international tripartite instruments (or agreements) adopted by the International Labour Organisation (ILO) to guide member countries in developing appropriate labour policies, laws and practices. Also referred to as international labour standards, ILO Conventions and Recommendations constitute the backbone of modern labour legislation. That is particularly the situation in the case of new labour jurisdictions which exist in a number of Southern African countries, including Namibia. A thorough study of the Labour Act, 2007 reveals that elements of numerous Conventions and Recommendations have been taken up in its various provisions. In addition, numerous elements of other ILO instruments (labour standards) are taken up in ancillary labour-related legislation, such as the Employees' Compensation Act, 1941, Social Security Act, 1994, the National Vocational Training Act, 1994, and the Affirmative Action (Employment) Act, 1998.

International labour standards embody the end-result of extremely painstaking deliberations by the nations of the world on critical labour and social issues. In the form of Conventions they constitute international

treaties which are binding and enforceable under international law for signatory countries which have to adapt their policies, laws and practices accordingly. In the form of Recommendations they carry strong practical and moral persuasiveness for ILO member States without, however, embracing the element of compulsion that characterises Conventions. Recommendations are meant as guidelines and usually go into more detail on any given topic than do Conventions. It is not uncommon to have both a Convention and a Recommendation adopted on the same theme. In other instances, the ILO passes only a Convention, or as happens more often, only a Recommendation.

When a Convention has been adopted by the International Labour Conference in Geneva, member countries are invited to ratify it. Ratification consists of presenting the instrument to a country's legislature for perusal and formal adoption. The relevant country is then obliged to bring its legislation, policy and practice into line with the provisions of the Convention concerned. Taking due consideration of the fact that the nations of the world vary considerably in terms of social and economic development modern ILO Conventions are phrased in a manner to allow ratifying countries some flexibility in their application, without losing the core purpose of the instrument.

Having the character of international law, State judiciaries may take cognizance of the contents of ratified Conventions in handing down judgements. Any litigating party can likewise take recourse to the provisions of such instruments in legal argument before Court. Furthermore, ministries of labour take into account the spirit of ratified Conventions in executing their various responsibilities. Equally, collective bargaining is influenced by the contents of such standards, as any of the negotiating parties can justifiably have regard to the principles embodied therein.

In short, ILO Conventions form an integral part of the labour and industrial relations systems of virtually all nations of the world. Knowledge of the purpose and nature of these instruments is essential for the implementation of the laws and policies involved. ILO Conventions officially ratified by Namibia to date, are the following:

- Forced Labour Convention, 1930 (C. 29 of 1930);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (C. 87 of 1948);
- Right to Organise and Collective Bargaining Convention, 1949 (C. 98 of 1949);
- Equal Remuneration Convention, 1951 (C. 100 of 1951);
- Abolition of Forced Labour Convention, 1957 (C. 105 of 1957);
- Discrimination (Employment and Occupation) Convention, 1958 (C.

111 of 1958 ;
- Minimum Age Convention, 1973 (C. 138 of 1973);
- Tripartite Consultation (International Labour Standards) Convention, 1976 (C. 144 of 1976);
- Labour Administration Convention, 1978 (C. 150 of 1978);
- Termination of Employment Convention, 1982 (C. 158 of 1982); and
- Worst Forms of Child Labour Convention, 1999 (C. 182 of 1999).

The spirit and intent of these ratified Conventions are not only reflected in the provisions of the Labour Act, 2007 but also find expression in several other areas of policy formulation and application by Government and the social partners.

Costs *– >Labour Court*

Cultivation of land *– >Accommodation*