OPTIONS FOR PRIVATE ARBITRATION IN NAMIBIA

REPORT ON A WORKSHOP

presented by the

Namibia Institute for Democracy

in association with the

Konrad-Adenauer-Stiftung

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FOREWORD

The labour scene in Namibia is in a state of flux, with the influence of regionalism and globalization being felt stronger at present than ever before. We have growing labour market fluctuations caused by a variety of political, social, and economic factors, often coming from far beyond our borders; accelerating human resources development, recently given a powerful impetus by employers' forward looking affirmative action plans; trade union initiatives aimed at coping with a rapidly changing shop floor environment; and Government's ambitious job creation programmes, such as those linked to Aussenkehr, Scorpion, Ramatex and Labour Based Works.

But potentially even more decisive for the social partners than the above, are some major institutional innovations due to be implemented very soon. One of these is the novel emphasis on alternative dispute resolution, which actually constitutes the main thrust of a totally overhauled new labour statute, presently being given the final touches before its tabling in Parliament early next year.

The Draft Labour Bill puts arbitration at the centre of the system of alternative dispute resolution, with virtually all types of potential labour disputes ultimately subject to its method of adjudication. Next to compulsory arbitration provided for in the Draft Bill, private or voluntary arbitration is also catered for. Private arbitration could henceforth be performed either in terms of a special provision in the Draft Bill, or in terms of the Arbitration Act. However, whilst private arbitration is an effective and almost indispensable institution in a number of prominent countries, it is not a very well known concept in Namibia, especially in the field of employment.

With a view to exploring the possibilities of private arbitration as a complementary alternative to compulsory arbitration, the Namibia Institute for Democracy organized a high-level Workshop last month on a limited, invitation only, basis. The Workshop was addressed by experts in the

field and participants represented various stakeholders in civil society. Besides Government, these included the Namibian Employers' Federation, the Namibia Chamber of Commerce and Industry, the National Union of Namibian Workers and sister unions, the Namibia Peoples Social Movement, the Society of Advocates, the Law Society of Namibia, the Legal Assistance Centre, the University of Namibia and the Media.

The Workshop was deemed a resounding success by participants, having been informative, pragmatic, thought-provoking and future-orientated. The intention of this Report, therefore, is to provide a slightly abridged version of the presentations made and decisions taken as a reference document. The Report will be disseminated not only to the Workshop participants but also to a slightly larger audience of stakeholders who may have an interest in its contents and dispute resolution processes in general. We trust that this will, in some measure, add to the quality of the current debate on the topic in pursuit of improved labour relations and equitable employment policies and practices in Namibia.

The NID would like to take the opportunity to again thank all the speakers who contributed so significantly to the level of understanding of the subject matter and subsequent discussion through their valued inputs. We particularly wish to express our gratitude to the Honourable Chief Justice of Namibia, Judge Johann Strydom, for gracing the occasion with his presence and formally opening the proceedings. Likewise, a special word of thanks is due to Mr John Brand, Director of AMSSA, who travelled from Johannesburg and made a most worthy contribution to the Workshop. Acknowledgement is also due to Dr Johann van Rooyen, who did the initial consultative liaising with stakeholders on the idea of holding a private arbitration workshop, as well as to all participants who through their active presence, bore testimony to the significance of the theme under exploration.

Lastly, we are indebted to the Resident Representative of the Konrad-Adenauer-Foundation, Dr W. Maier, for his generous support of the project in both word and deed.

It is the sincere conviction of the Namibia Institute for Democracy that initiatives of this nature are crucial in preparing the way for meaningful dialogue on matters of national importance. Dialogue, in the sphere of employment relations, is vital for creating better understanding between the social partners, and for establishing the means for informed decision making. It is our hope that this Report will contribute in no small way to facilitate such processes in the potentially sensitive sphere of future private arbitration in our country.

Theunis Keulder

Executive Director

NAMIBIA INSTITUTE FOR DEMOCRACY

Windhoek, 20 November 2001.

OPENING OF WORKSHOP ON PRIVATE ARBITRATION

by

The Honourable Chief Justice Johan Strydom

(Highlighted excerpts of speech)

There can be no doubt that in general private arbitration has not yet been widely used in Namibia as an alternative to the formal court procedure in the resolving of disputes amongst litigants. The result being that with this eventuality looming in the near future we find ourselves quite unprepared to deal therewith. Being a judge you will forgive me if I look at this problem from the perspective of the court and deal with it on the basis of how, in future, arbitration can assist and complement the courts.

In many countries, notably Western Europe and the United States of America, arbitration has long ago ceased to be regarded as only an alternative procedure for the formal court process and has developed into an institution without which commerce, and more particularly international commerce, can hardly function. The uncertainty which often exists in regard to which court, or the laws of which country, shall apply in resolving a dispute which has arisen in an international contract, is simply and effectively cut short by agreement of the parties to take such matters to arbitration before an agreed arbitration tribunal subject to particular laws.

Although there are certain orders and judgements which can only be given by a court of law the range of matters suitable for arbitration proceedings is very wide. In regard to compensatory matters there is virtually nothing that I know of which cannot be dealt with by an arbitration tribunal or single arbitrator.

Notwithstanding the adaptability to almost any suit we find that in Namibia arbitration is still reserved for building and engineering contracts and matters pertaining to expropriation of land.

Why then are we so reluctant to make use of the arbitration process notwithstanding the fact that there are many advantages to take, particularly compensatory matters, on arbitration? In my opinion there are mainly three issues which can be mentioned in this regard.

1. The first is the attitude of the lawyers. Whether we want to believe it or not when it comes to litigation we are conservative in our outlook and we do not easily welcome change, which may influence the way we practise. That notwithstanding, I am of the opinion that lawyers can and must play an important role in this regard.

2. The second reason, which in my opinion contributed to the situation, is that there is no real infrastructure which can facilitate matters being taken on arbitration. There is no panel from which the parties can choose an arbitrator or arbitrators. There is no available venue or administrative structure, which can take charge of proceedings to ensure an efficient, smooth and quick transition from the pleading stage to the hearing of the matter. Without some infrastructure, delays will still occur where e.g. arbitrators must find time to make themselves available for arbitration. Only when some infrastructure is in place can one begin to create awareness amongst the public of the availability of arbitration as an alternative dispute resolution mechanism. This is important because it is after all the litigant who can determine which forum will suit his needs best.

3. This brings me to the third factor which in my opinion needs attention. That is the Arbitration Act, Act 42 of 1965. We share this Act with South Africa. In Namibia very little changes were brought about in regard to the general content of the Act and one wonders, given the development which took place over the world concerning arbitrations, how far the provisions of this Act have been overtaken by such development. I have been informed that in South Africa new legislation has been prepared and which, like legislation in Zimbabwe and other African Countries, not only addresses arbitration on the domestic level but also addresses it internationally. Once South Africa's new legislation is in place we, in Namibia, may find ourselves out of step with the international community and our neighbouring countries.

I am convinced that the time has come that we in Namibia take a closer look at arbitration and the advantages that it holds. Of course it would not suit all of us to take matters on arbitration and not all matters are capable of being taken on arbitration but I have the distinct impression that arbitration, as an alternative to the formal court process, is very much under-utilised in Namibia. There can be no doubt that better utilization will also bring relief to the overcrowded courts and in that way will contribute to greater accessibility of the courts to the ordinary man in the street. I see here today representatives of various institutions. In my opinion this is a step in the right direction to involve all those who can help to establish for Namibia a reputable, efficient and reliable alternative method of resolution of disputes by voluntary arbitration.

The Namibia Institute for Democracy and its executive director, Mr Keulder, must be complimented with the initiative that they have taken in this regard. Mr Chairman, it is now my privilege to declare this workshop open.

VOLUNTARY ARBITRATION UNDER THE DRAFT LABOUR BILL

by

Mr B.M. Shinguadja, Labour Commissioner

(Highlighted excerpts of presentation)

Alternative Dispute Resolution provides a conducive opportunity to parties to the dispute in resolving their conflict by utilizing different processes such as mediation, conciliation or arbitration. These processes can be compulsory or voluntary in nature, depending on country to country and the reasons therefor.

My focus for this presentation is therefore confined to the Voluntary Arbitration or Private Arbitration as being proposed under the New Draft Labour Bill.

Generally, arbitration is a less formal process of adjudication where an impartial third party will, at the end of proceedings, decide or rule on issues which were submitted to him/her. Arguments and evidence can be submitted by the parties. The ruling or decision of an arbitrator, who is the third party, is always binding on the parties and in many cases final. Arbitration is mostly confined to disputes of right and only by law or agreement can it apply to a dispute of interest or collective dispute.

Section 87 of the New Draft Bill makes provision for parties, by agreement in writing, to refer the dispute to private arbitration. Further to this, parties may make provision under their collective agreements to refer their dispute to a private arbitrator. This is not only a direct recognition of private arbitration as a process but also a practical demonstration for social partners (employers and trade unions) to establish a window of choice. What are some of the advantages of voluntary or private arbitration? Voluntary arbitration advantages may be given as follows:-

(a) it is believed that it offers the parties an opportunity to choose their own arbitrator (but not always);

(b) parties determine their own terms and conditions of arbitration;

(c) the proceedings are totally private and conducted at a place, time and venue mutually agreed by the parties;

(d) it is perceived that the dispute may be "resolved faster" than if it was referred to compulsory arbitration. However, this is also arguable for several reasons; and

(e) costs may be equally shared, etc.

The logic behind this proposed alternative or appropriate dispute resolution approach is primarily to offer the parties an opportunity to choose the process which they think suits them better. A process which they can manage, control and hopefully trust.

However, the private arbitration process, like any other process, has its own drawbacks too. Some of the drawbacks are:-

* it is very expensive because parties have to bear the costs arising from or associated with the voluntary arbitration proceedings unlike the compulsory process which is state financed;

* the public will be denied access to the proceedings hence bad or best labour practices will not be known outside the private arbitration room. This can have negative effects to the labour jurisprudence of the country, parties with the similar dispute may not know how it was resolved, etc.;

* the likelihood of the parties to agree on an unqualified arbitrator is quite high;

* this alternative is only possible if there are good and sound labour relations between the disputing parties; and

* parties may agree to private arbitration but not on a specific arbitrator (see Section 87(18) of the Draft Bill). This can lead to a lengthy process.

While voluntary or private arbitration is proposed as another appropriate dispute resolution process, it will not be prudent for this process to be run and managed by untrained and not properly qualified arbitrators. It is proposed therefore that as much as parties to the dispute are free to choose private arbitration, they should bear in mind that they will be obliged to only use qualified and accredited arbitrators.

Apart from discouraging "fly by nights" or unqualified arbitrators, the Draft Labour Bill anticipates a system that seeks to create uniformity, ethics and standards in labour dispute resolution processes in Namibia.

Observations from other systems, e.g., South Africa and Australia, indicate that the private arbitration process has also not made a real great contribution to labour dispute settlements. Employers and trade unions are largely still using public and compulsory arbitration most of the time.

If there are those who want to pursue the route of private arbitration, the law has explicitly authorized voluntary arbitration now and in the future. It is up to the parties and potential arbitrators themselves to express their interest, demonstrate their ability and professionalism in sustaining this alternative process.

Finally, private or voluntary arbitration is not a replacement of the compulsory or public arbitration process at all. It is only a complementary alternative in a wide and public dispute resolution system.

ARBITRATION IN TERMS OF THE ARBITRATION ACT

by

Mr Peter Koep, Attorney

(Highlighted excerpts of presentation)

An arbitration is the reference of a dispute between parties for a final determination in a quasi-judicial manner by a person or persons other than a Court of competent jurisdiction, alternatively it is a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision after the arbitrator has first impartially received and considered evidence and submissions from the parties.

The advantages and disadvantages of arbitration over litigation have been summarised by Voet as follows:

> "It is a common thing for arbitrators to be approached with a view to the termination of a dispute and the avoidance of a formal trial. The reasons for resorting to arbitration are the fear of the too heavy expenses of law suits, the din of legal proceedings, the harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of the Law."

I shall discuss some of the advantages and disadvantages briefly:

1. REDUCED COST

It is unlikely that an arbitration involving a serious conflict between the parties, alternatively involving a point of law, will be any less expensive than Court proceedings would be. An arbitrator in these instances will in all likelihood be an experienced professional who is entitled to payment for his/her time. Both parties to the dispute will, no doubt, also be represented by experts in their respective fields.

Lesser disputes dealing with matters of a less important nature to both the employer and employee may well be cheaper if arbitration is resorted to.

2. CHOICE OF ARBITRATOR

One of the major advantages of an arbitration is the fact that the parties can choose the arbitrator, who will most likely be an expert in his/her field. An arbitrator should also be sensitive to the industrial relations environment in which he or she must operate as a result of social and political factors, which so often form the basis of labour disputes.

3. CONVENIENCE

The arbitration can, by agreement, take place anywhere and at any time. Were the dispute to be heard by a Court of Law, this would not be possible. Furthermore, an arbitration should be able to be held at relatively short notice and the exchange of any documentation can be expedited by agreement. Especially in labour matters it must be in the interest of all parties to resolve the dispute as quickly and efficiently as possible.

4. PRIVACY

The niceties of a dispute in a labour matters are very often of a confidential nature and may be embarrassing to either one or both of the parties.

5. FLEXIBILITY

Because of the consensual nature of an arbitration, the arbitrator and the parties can agree on the rules to be used in any particular arbitration.

6. INFORMALITY

Because of the informality of an arbitration, it may well be that the acrimonious atmosphere which is often created by a Court of Law will not exist and that the parties will actually be able to address their differences under more casual circumstances and in comfortable surroundings.

7. FINALITY

The reason why especially employers will be reluctant to refer a dispute to an arbitration under the Act is the finality of the award of the arbitrator. It is therefore essential that the arbitrators are competent in their field, that their approach will not be tainted by bias and that their general approach is professional. By agreement between the parties it can be agreed that the award will not be final, but that within a time specified subsequent to the award, either party could lodge an appeal to an appeal tribunal, which could be agreed upon in advance.

8. PERFORMANCE

One of the frustrations experienced by parties to an arbitration, is that they often find it difficult to have the award executed. Even though an arbitration tribunal may order specific performance of any contract, it may only do so in circumstances in which a Court of Law would have had the power to do so.

9. CHALLENGING THE AWARD

An unsuccessful party to an arbitration has two options with which to challenge the arbitrator's award, namely remittal and setting aside. In the case of remittal the matter is referred back to the same arbitrator, so that he/she can remedy some defect in his-/her award.

The Arbitration Act provides full grounds on which an award may be set aside:

9.1 Where any member of an arbitration tribunal has misconducted him-/herself in relation to his/her duties as arbitrator or umpire.

9.2 Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings;

9.3 Where an arbitration tribunal has exceeded its powers;

9.4 Where an award has been improperly obtained; and

9.5 On any common law grounds.

10. GENERAL

An arbitration agreement is defined for purposes of the Arbitration Act as "a written agreement providing for the reference to arbitration of any existing disputes or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not." The arbitration agreement is therefore a contract and the agreement will be construed according to the ordinary principles, governing the interpretation of contracts.

Furthermore, the agreement has to be in writing and even though the Act does not require this, should be signed by both parties. The Arbitration Act does not exclude the common law, therefore a submission to arbitration which may be invalid according to the Act, but which complies with common law principles is valid and may even be made an Order of Court.

It will be of utmost importance that arbitration agreements are drawn professionally, taking into consideration the relevant facts of every dispute.

It is undoubtly desirable that not only lawyers be trained as arbitrators, but that lay people also be given the opportunity of qualifying as arbitrators. There may, however, be resistance to known trade unionists or those in management positions acting as arbitrators, as their independence will be questioned and allegations of bias will surface. In this regard, the parties will no doubt keep in mind that an allegation and subsequent proof of bias against an arbitrator may well be sufficient reason to convince a Court of Law to review the arbitrator's award.

There is some difference of opinion to the extent to which an arbitrator ought to be familiar with the law and legal process:

1. There is little doubt in my mind that any arbitrator must understand the Labour Act and also the niceties of the In this regard it must be remembered that the Courts ultimately give judgement on the interpretation of the Act and that lawyers drive these applications.An arbitrator may well take a certain view of the interpretation of the Act, but other arbitrators will not be bound to that view.

2. The arbitrator will also have to have some knowledge of the Rules of Evidence to guide him-/her in deciding which evidence may be regarded as reliable or admissible.

3. He/she will need to understand the law of contract, in order to ascertain what the rights and obligations of the parties are. The contract will have to be interpreted.

4. The arbitrator must understand the Rules of Natural Justice.

5. There must be some knowledge of the Rules of Procedure in judicial tribunals. He/she must be able to decide who has the onus of proof.

6. Furthermore, even in terms of the Labour Act there may be delictual claims to be resolved by arbitration. This warrants a study of the principles of the Law of Delict.

It is, therefore, in my view, imperative that the training be as comprehensive as possible.

Unless the arbitration agreement clearly sets out the duties and obligations of the arbitrator, the arbitrator is within certain parameters free to determine the procedures.

Whereas in our inherited system of law a Judge acts as an umpire and rarely interferes in the actual process, the arbitrator's role may be different and the arbitration may take the form of being in nature more inquisitorial than accusatorial. It is likely that in matters such as a dispute of right, where a question of law is to be decided, the participation of the arbitrator in the process will be less than in a matter where the arbitrator feels that either or both parties are wasting time, are asking irrelevant questions or fail to deal with the arbitration agreement. At all times the arbitrator will have to bear in mind the Rules of Natural Justice and not in the process prejudice either party.

There is a fine line between interfering in the process and making justified enquiries into the procedure. The decision of an arbitrator who adopts an approach which is too inquisitorial may well be taken on review on various Common Law grounds.

I have since preparing this paper had sight of Section 87 of the Draft Amended Labour Bill, which refers to private arbitrations. I wish to note the following:

1. The grounds for a review have not been limited.
2. It is not stated that the arbitrator's award is final and no provision seems to have been made for an appeal.
3. If the arbitrator is a private individual not employed by the Ministry of Labour, he/she may not find the time to subpoena people to attend hearings.
4. Section 87(8): I foresee that this clause will give rise to many a dispute and a number of review applications and it must be considered whether this is advisable or not.
5. Section 87(9): I would shorten the 30 days to 10 days.
6. Section 87(14): Why should the Arbitration Act 1965 not apply? The advantage of applying the Arbitration Act is that there is settled case law on the interpretation of various sections of the Act.
7. If the arbitration is voluntary, why should parties agree to arbitrate in terms of the Labour Act, where conditions are imposed which may not enjoy the support of those wishing to make use of the arbitration, and not rather in terms of the Arbitration Act, amended to suit the circumstances. The Sections under the Bill which may give rise to concern are:

7.1 The rules promulgated in terms of Section 97(a);

7.2 The arbitrator must take into account code of good practice issued in terms of Section 140; and

7.3 Take into account any guidelines issued by the committee for dispute prevention and resolution.

In order to make private arbitrations a viable and effective option for those involved in labour disputes it is important to simplify the procedure, to not impose too many rules and conditions, and to make sure that the participants to the arbitrations have faith in the system.

THE ARBITRATION AND MEDIATION SERVICE OF SOUTH AFRICA

and

OPTIONS FOR NAMIBIA: THE WAY FORWARD

by

Mr John Brand, Director of AMSSA

(Highlighted summary of presentation)

The origins of AMSSA can be traced to the former Independent Mediation Services of South Africa (IMSSA) established during the turbulent South African pre-democracy years. The institution was created because of the illegitimacy of the then existing judiciary system which was not recognized by large sectors of society, leading to major inequities and civil unrest (in Namibia at the present stage of history, this is no longer the case, and private arbitration would have to be considered for different reasons).

In an attempt to address the then prevailing apartheid situation, a panel of independent experts was established to mediate disputes and litigate on behalf of workers, unionists and other victims of oppression. Initially the system was financed mainly by donor funding. Arbitration by the panellists was performed under the Arbitration Act, rather than the Labour Relations Act. In many instances IMSSA was instrumental in resolving potentially explosive situations and alleviating the plight of countless employees. The judicial process was arduous and often drawn out (one major court case took 13 years to wrap up, by which time several of the plaintiffs had already passed away), and arbitration was found to be a much more expeditious process.

After the 1994 democratisation of the country, donor funding dwindled and alternative ways were sought to finance the proceedings. Unfortunately, that was not very successful and in the end IMSSA was disbanded for financial reasons, also linked to poor governance. Eventually, a new organisation, The Arbitration & Mediation Service of South Africa (AMSSA), was established in December 2000, inter alia, by certain former IMSSA members, and is currently the main facilitator of private alternative labour dispute resolution and related services in South Africa.

Most matters being dealt with involve post-dismissal arbitration, i.e. dismissals which have taken place after the employer has followed the normal procedural route of a full disciplinary hearing required by South African labour law. Some countries, such as the USA, provide for pre-dismissal arbitration as an alternative, more efficient, way to deal with dismissals. Where the legal system permits an option of pre-dismissal arbitration, dismissals need not necessarily be preceded by fully-fledged formal hearings. However, if an employee objects to his/her dismissal, the matter is automatically referred to arbitration for final determination. Enormous costs and time are saved by this short-route process. (South Africa is currently considering amendments to its labour legarelation which will also provide for the possible option of pre-dismissal arbitration in addition to existing post-dismissal arbitration).

Arbitration of labour matters can, to some extent, take on different forms. There could, for example, be a total absence of pleadings and statements prior to commencement of proceedings which speeds matters up appreciably. Similarly, there also need not be any pre-arbitration meetings. However, arbitration agreements between the parties must be fair and well formulated, therefore it is preferable that quality standard agreements (i.e. in which the parties agree to private arbitration, terms of reference, choice of arbitrator, venue, date, etc.) be developed, which can be routinely utilized.

Initially, labour arbitration in South Africa was mainly adversarial in nature (the plaintiff and respondent actively contesting each other with the arbitrator presiding as a mostly passive adjudicator) rather than inquisitorial (where the arbitrator has an active, probing role in the whole procedure). The inquisitorial approach can give rise to a wrong perception of bias against which the arbitrator must guard.

Thus, in the course of time, private labour arbitration in South Africa has assumed the character of a hybrid between the two alternative approaches, which is found to be working well and more suited to the greater majority of arbitration cases, in which the parties are not represented by lawyers. Here a more lay-friendly orientation is required to assist the unrepresented disputants

to have confidence in the outcome of arbitration, and to be more effective and comfortable with the process itself. The method mainly involves assistance with technicalities, summarising and narrowing of the issues before evidence is led, and also making sure that no important aspects are left out. The hybridized approach results in what can be termed a 'mediated statement of pleadings'.

While parties are free to be represented by lawyers or otherwise, it is important to deal firmly with difficult persons who through their conduct may seek to disrupt or delay proceedings. Generally the arbitration hearings are not recorded, except for the keeping of hand-written notes. With more complex cases as well as in the instance of statutory arbitration, full recordings are, however, necessary.

It has been found that there is a very high level of compliance by parties involved in voluntary arbitration - AMSSA has a rate of approximately only one percent of cases going on review. For the statutory CCMA (Commission for Conciliation, Mediation and Arbitration) about 50% of arbitration awards go on review. Compliance in voluntary arbitration is not limited to acceptance of awards, but extends to the parties' participation in the process, punctuality and sticking to the terms of reference of arbitration agreements.

Appropriate training is very important in private arbitration. Not only of the arbitrators, but also of the people making use of their services in as far as they may be unrepresented. For this purpose workshops, seminars and educational literature are important aids for basic skills development in order for lay persons to participate effectively in arbitration proceedings. The arbitrators themselves need to be well qualified and properly accredited. Usually this involves attending and passing a five day arbitration training course offered by AMSSA for a basic fee of N$2 000.00 per person. Five day mediation courses are also available. After that, refresher courses are offered at regular intervals. Arbitrators need to instill confidence and for that purpose a suitable track record is vital, although it does not mean that an arbitrator necessarily has to be a lawyer. In this regard one should not be too strict regarding admission of candidates. Results are what count most, and an arbitrator is but as good as his last arbitration.

While it makes sense to have practitioners of compulsory arbitration accredited and controlled, private arbitrators should be separately accredited and not be put into a statutory straight-jacket.

AMSSA is not profit driven, but has, rather, chosen to follow the service route. Service users are assisted by a small centralised secretariat to choose arbitrators from decentralised panels based in different regions. They are given the names, CV's, fee structures and availability of panellists and make a choice on that basis. Usually the actual arbitration takes place at the premises of an employer, but could be held at another venue as well. AMSSA helps with the paperwork but the arbitrator contracts directly with the service users including all aspects of invoicing. AMSSA receives a small percentage for administrative overheads. The institution is totally self-sufficient, not relying on any donor or government funding.

The relationship between private arbitration and statutory arbitration (CCMA in SA) is very important. Traditionally arbitration has always been a voluntary non-legalistic process. That is the very essence of arbitration. As soon as statutory arbitration becomes obligatory one is in fact faced with a situation of compulsory adjudication.

It was originally anticipated, or at least hoped for, that compulsory adjudication in the form of statutory arbitration would assume some of the positive attributes of standard arbitration, but unfortunately this has not happened. At present it is often as difficult for workers to get justice as it was before the statutory creation of the CCMA. The length of the process is a major disadvantage for workers - once an award is eventually made a worker may already be gone and be untraceable. A weak statutory system, can, in a certain sense, be regarded as being employer friendly, because it allows matters to be drawn out. Some employers will therefore only opt for private arbitration if a statutory system is functioning well. The effect of private arbitration, in fact, is in favour of employees. Consequently, it is important to have both strong statutory arbitration and strong voluntary arbitration mechanisms in place, as the two complement each other.

A statutory system needs major resources to pay arbitrators sufficiently well and to provide for infrastructure. If budgetary allocations are insufficient, the system will not function well. The limited resources of the State should be focused on the most needy sectors of the economy such as domestic and farm workers. Ideally, statutory arbitration would not be easily accessible to wealthy unions and employers, who swamp the available services. Thus all pillars of the total arbitration system need to be in place and function smoothly within the context of a healthy relationship, i.e., functional synergy, between the two pillars.

Although it is important to have a source of published awards, private arbitration awards can only be published with the consent of the parties. For this purpose AMSSA informs parties that if they do not issue instructions in this connection within seven days of an award, then it may automatically be published. Awards can also be put onto an internet website or appear in Butterworths. In general AMSSA has made lots of literature available on the topic of arbitration and other alternative dispute resolution procedures.

Turning to the issue of expenses, the point was made that it is a major myth that private arbitration is costly. Indeed, the statutory system is much more expensive when all the steps are followed. The average time spent on CCMA arbitration is three hours per case and the incidence of reviews is colossal. Private arbitration, as already mentioned, has a very high rate of compliance. For example, for a day fee of R2 000 to R3 000, divided by two, the parties receive a speedy award and the matter is closed. The statutory route may be followed by huge court expenses, many times in excess of the private arbitration expense. On occasion a union or employee may ask the employer to bear the full costs of the arbitration proceedings, but even then the situation is still preferred by the employer, rather than having the uncertainty and potential high cost of the statutory route. Lloyds of London have recently accepted an insurance scheme for employers for private arbitration and this has given the approach a major boost.

A matter which will have to be thoroughly debated in Namibia, is whether to opt for a single private arbitration institution with various panels for different topics (e.g., labour, construction,

land, insurance, community issues, etc.), or to have separate organisations. It was put to the workshop that a single strong organisation in civil society with different specialist panels would probably be prize number one in view of Namibia's limited population and relatively small economy. That would be a matter for the country's stakeholders to decide upon as they plot the course for the way forward for alternative dispute resolution in Namibia.

STEERING COMMITTEE FOR PRIVATE ARBITRATION IN NAMIBIA

(Outcome of Private Arbitration Workshop presented by NID at Safari Court, Windhoek, on 23 October 2001)

At the close of the presentation by the workshop's last speaker, Mr John Brand, Director of AMSSA, the floor was opened for suggestions to the way forward. It transpired that the workshop participants were much in favour of promoting private arbitration - parallel to statutory arbitration - as an alternative method for dispute resolution and promoting better relations between the social partners.

After short debate, it was decided to elect an Arbitration Steering Committee which would be tasked to investigate options as to how best to go about the task and report back to stakeholders. The participants elected the following persons as ad hoc members of the Committee: -

- **Mr Clement Daniels**, Director of the Legal Assistance Centre (LAC), as Chairperson and Convenor;
- **Mr Sackey Aipinge**, National Union of Namibian Workers (NUNW) Senior Representative, as member;
- **Adv Louis Muller**, S.C., as member;
- **Dr Johann van Rooyen**, Chairman of the Namibian Employers' Federation (NEF), as member;
- One person to be nominated by the Labour Commissioner, Mr Bro-Matthew Shinguadja, as an additional member.

At the time of compiling this Report the Steering Committee had met once on 6 November 2001 and took the following resolutions for a provisional plan of action:

1. **Investigate the business/organisational form of a Namibian private arbitration body;**

2. **Conduct an in-depth study on the scope of private arbitration in terms of Section 87 of the Draft Labour Bill;**
3. **Call a stakeholders meeting to be held in January 2002; and**
4. **Contact arbitration institutions in South Africa for an initial arbitration training course to be held in Windhoek in February 2002.**

A follow-up meeting of the Arbitration Steering Committee was scheduled for 22 November 2001, during which progress with regard to the plan of action would be tabled and discussed. Participants of the Private Arbitration Workshop are constantly updated on all new developments.

ANNEXURE A

PROGRAMME

OPTIONS FOR PRIVATE ARBITRATION IN NAMIBIA

Tuesday, 23 October 2001

Windhoek

08h30 - 09h00	Arrival and registration
09h00 - 09h10	Welcome *Mr. Theunis Keulder* *Executive Director: Namibia Institute for Democracy*
09h10 - 09h30	Official Opening *Hon. Chief Justice Johan Strydom*
09h30 - 10h10	Voluntary Arbitration under the new Labour Act *Mr. B.M. Shinguadja* *Labour Commissioner*
10h10 - 10h50	Arbitration under the Arbitration Act *Mr. P.F. Koep* *Lawyer*
10h50 - 11h00	Coffee and Tea
11h00 - 12h00	The Arbitration and Mediation Service of South Africa *Mr. John Brand* *Director, AMSSA*
12h00 - 13h00	Options for Namibia: The Way Forward *Facilitator: Mr. John Brand*
13h00	Lunch

ANNEXURE B

Invitation to attend the Workshop Options for Private Arbitration in Namibia
Safari Court · 23 October 2001

In light of the forthcoming new labour legislation in Namibia, the demand for quick and quality labour arbitration in Namibia has never been greater. The availability of private alternative dispute resolution options could serve an important purpose in this regard. The Namibia Institute for Democracy (NID) therefore wishes to introduce the concept of private arbitration to Namibian stakeholders by presenting a workshop entitled *"Options for Private Arbitration in Namibia"*. The workshop will serve as an introduction and investigate the status of private arbitration in Namibia.

The NID takes pleasure in extending to you an invitation to attend this workshop.

Date	:	***Tuesday, 23rd October 2001***
Venue	:	***Omatako Room 2***
		Safari Court
Time	:	***08h30 - 14h00***
RSVP	:	Theunis Keulder
		Tel: 229117/8

In anticipation of your attendance.

Yours faithfully

Theunis Keulder
- Executive Director -

ANNEXURE C

PRIVATE ARBITRATION: A BRIEF OVERVIEW

Private arbitration in employment matters is soon due to play a much more prominent role in Namibia than heretofore. With compulsory arbitration hovering in the wings, poised to replace the current district labour court system, the theme of arbitration in general, is set to become much more topical than before. According to reports in the media, the new draft labour legislation approved by the Cabinet Committee on Legislation places the emphasis of dispute resolution on arbitration, relegating the role of litigation mainly to follow-up appeal options in matters of law.

The present district labour court system is fated to undergo a phasing out process and eventual total elimination. In its place we will have statutory (compulsory) arbitration to be administered by a suitably geared Office of the Labour Commissioner (OLC). Complaints by unions, employees and employers, in connection with matters relating to dismissal, disciplinary action and conditions of employment, which are currently chiefly dealt with at the level of the district labour court, will in future be lodged with the OLC. In fact, virtually all disputes of right, involving matters even such as those relating to retrenchment, recognition, discrimination, and unlawful industrial action will follow the route of statutory conciliation/arbitration by the OLC if any of the disputing parties decides to lodge a formal complaint.

But what if the disputing parties choose not to follow the route of statutory arbitration, for whatever reasons of their own? What if they are seeking alternative ways to come to terms with their differences? What other possibilities do they have to settle matters fairly and efficiently amongst themselves? One answer, of course is 'private arbitration', also referred to as 'voluntary arbitration'.

It appears that to a large extent the envisaged model for compulsory statutory arbitration in Namibia has been fashioned after the example of the South African CCMA system (Commission for Conciliation, Mediation and Arbitration), introduced a few years ago to replace the ailing

Industrial Court in that country. Namibia's system will, however, contain certain innovations expected to make it even more efficacious than its counterpart.

Be that as it may, private arbitration has long served as a reliable complementary alternative to official dispute resolution procedures with our southern neighbour. There, it all started with the establishment of IMSSA back in 1984 (Independent Mediation Services of South Africa), the autonomous body of enlightened labour lawyers and IR experts, which often contributed to the equitable resolution of formidable, politicised labour strife - especially during the volatile years leading up to the ultimate attainment of democratisation in 1994. Unfortunately, IMSSA became defunct shortly afterwards and was eventually replaced by AMSSA (Arbitration and Mediation Services of South Africa) in December 2000.

Significantly, for this is sometimes misunderstood, private labour arbitration is not intended to compete with statutory arbitration but rather to complement such services. It permits parties, who can afford it, to select an arbitrator or mediator of their own choice, and to arrange settling of disputes quickly and efficiently. It thus lightens the burden on official structures and permits them to focus their resources where they are needed most.

In the case of AMSSA, there are panels of qualified and experienced mediators and arbitrators in various provinces, co-ordinated by a centralised secretariat. Panellists are bound by a strict code of conduct, which seeks to ensure high standards of performance and the delivery of punctual, high-quality written awards. Every accredited panellist is required to have undergone appropriate training and is also required to attend on-gong skills development courses.

Naturally, users demand speedy and efficient administration of events once they have decided upon private arbitration. The AMSSA secretariat is specially geared to meet that demand. It carries a database on each panellist, which includes a summary curriculum vitae, normal availability of the panellist and his/her fees. This information is made available to the parties and once they have agreed on an arbitrator, the event is set up. A venue, date and time is confirmed and all is ready for an expeditious determination of their problem.