PRIVATE ARBITRATION OF LABOUR DISPUTES UNDER THE ARBITRATION ACT 42 OF 1965

1. We are of the opinion that existing and future labour disputes may be referred to private arbitration under the Arbitration Act 42 of 1965 (*"the Arbitration Act"*) by a dispute resolution clause in an employment contract on the grounds that follow.

2. Labour disputes may be resolved by private arbitration according to the following three discernible procedures:

2.1. First: private arbitration according to a dispute resolution clause in a collective agreement contemplated in section 73(1) of the Labour Act 11 of 2004 (*"the Labour Act"*) (*"collective agreement private arbitration"*).

2.2. Second: private arbitration of a dispute which the parties thereto agreed in writing to refer to arbitration contemplated in section 91(2) of the Labour Act (*"section 91(2) private arbitration"*). This arbitration is subject to review by the Labour Court in terms of the Labour Act.

2.3. Third: private arbitration pursuant to a dispute resolution clause in an employment contract under the Arbitration Act (*"Arbitration Act private arbitration"*). This arbitration may be subject to review by the Labour Court in terms of the Arbitration Act by section 117(1)(c) of the Labour Act.

3. The phrase *"a dispute resolution procedure"* in section 73(1) is sufficiently wide to include Arbitration Act private arbitrations to resolve existing and future disputes arising from employment contracts. For example a registered trade union and an employer may agree in a collective agreement that existing and future disputes arising from employment contracts between the employer and members of the trade union shall be referred to Arbitration Act private arbitrations. Or a collective agreement may provide that existing and future disputes shall be referred to private mediation under Chapter 8 Part D of the Labour Act.

4. In *Labour Supply Chain Namibia (Pty) Ltd v Hambata* 2012 (1) NR 313 (LC) (*"Hambata"*) the employment contract provided that future disputes arising therefrom be referred to private arbitration as per section 91 of the Labour Act. The employee resigned but laid a dismissal complaint with the Labour Commissioner's office which referred the matter to arbitration before an arbitrator under Chapter 8 Part C of the Labour Act. The employer contended that the arbitrator lacked jurisdiction because the parties had referred the

dispute to private arbitration as contemplated in section 91(2) of the Labour Act. The Court held at [13] that only existing (as opposed to future) disputes may be referred to private arbitration in terms of section 91(2). It was not contended, considered or decided by the Court that an employer and an employee may not in terms of the dispute resolution clause in the employment contract between them agree to refer future disputes arising therefrom to Arbitration Act private arbitration, or that their mentioned dispute resolution agreement does not oust the jurisdiction of or is not enforceable against an arbitration tribunal constituted under Chapter 8 Part C. Thus *Hambata* in our opinion does not deprive employers and employees of their contractual freedom and dignity to refer existing and/or future disputes to Arbitration Act private arbitration by a dispute resolution clause in their employment contract.

5. The freedom of employers and employees alike, to refer by a dispute resolution clause in an employment contract between them any existing and **future** dispute arising therefrom to Arbitration Act private arbitration, is protected by the values of freedom and dignity enshrined in the Constitution, and is enforceable per *pacta sunt servanda* (agreements must be complied with) by virtue of the Constitution (*Barkhuizen v Napier* 2007 (5) SA 323 (CC) [57]).

6. The Labour Act does not expressly or by necessary implication oust the resolution of existing or future disputes arising from employment contracts by Arbitration Act private arbitration. The implication to curb the freedom of contract as mentioned above must be clear, and it cannot be clear, if it has to be astutely winkled from the contextual crevices of the Labour Act (with apologies to Holmes AJA (as he then was) in *Rogat v Rogat* 1982 (3) SA 928 (A) at 939E-H).

7. In the circumstances we recommend that consideration be given to use:

7.1. our following model dispute resolution clause in employment contracts:

DISPUTE RESOLUTION

Should any dispute, disagreement or claim arise between the parties connected to, relating to or concerning this agreement, including but not limited to its validity or voidability ("the dispute"), the parties agree to attempt resolving the dispute according to the ADR Forum rules of mediation.

If the dispute has not been resolved within 7 days of the notice of desire to mediate, any party may terminate the mediation.

If the dispute has not been resolved by mediation, the dispute shall be resolved by arbitration according to the ADR Forum rules of arbitration.

Notwithstanding anything to the contrary contained in this agreement, the **[insert client's name]** shall in its sole discretion be entitled to institute legal proceedings in a court of law of competent jurisdiction to resolve the dispute.

7.2. our *ad hoc* model agreements to refer existing disputes to mediation and arbitration:

***AD HOC* AGREEMENT TO MEDIATE**

We,

AB of ________________________________

and

CD of ________________________________

hereby agree that we shall attempt to settle any dispute, disagreement or claim between us:

1. connected to, relating to or concerning the contract between us dated ______________, a copy of which is attached hereto,

Or

2. set out in the schedule to this agreement,

according to the ADR Forum rules of mediation.

***AD HOC* AGREEMENT TO ARBITRATE**

We,

AB of ________________________________

and

CD of ________________________________

hereby agree that any dispute, disagreement or claim between us:

1. connected to, relating to or concerning the contract between us dated ______________, a copy of which is attached hereto,

Or

2. set out in the schedule to this agreement,

shall be resolved according to the ADR Forum rules of arbitration.