

INSURANCE CONFERENCE 2020

**ARBITRATION, LITIGATION AND LIABILITY RISK IN THE
INSURANCE SECTOR**

By

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Kafula Bio Profile

Kafula Mwiche is a Legal Practitioner with over 19 years' practicing experience, in both the public and private sectors. Kafula is a Chevening Scholar and holds a Master of Laws Degree LL.M (International Business) from the University of Manchester; a Bachelor of Laws (LL.B) and a Bachelor of Arts Degrees (B.A Ed) from the University of Zambia. Upon admission to the Bar Kafula worked in private practice with the Firm's Malambo & Silwamba and the later joined Sharpe & Howard Legal Practitioners before moving to the Energy Regulation Board where he served as Legal Counsel. He served as Group Legal Counsel and Company Secretary with Madison Financial Services Plc for twelve years. He has also served on a number of Boards. He is Chairman of Action Africa Help Zambia and an Executive Board member of Africa Help International. He is the Vice Chairman of the Zambia Center for Communication Programs. He also serves as a Commissioner of the Anti- Corruption Commission. He is also an Associate of the Chartered Institute of Arbitrators and a Member of the Zambia Association of Arbitrators.

ALTERNATIVE DISPUTE RESOLUTION ADR

- Negotiation;
- Mediation;
- Conciliation; and
- Arbitration

LITIGATION

Litigation is the process of parties taking their dispute to the legally established tribunals i.e Courts of Law for the tribunal to make a determination .

DISADVANTAGES OF LITIGATION

Litigation has the following undesirable characteristics

- ▶ Judicial Systems are often congested and therefore resolution of disputes is often delayed with undesirable consequences
- ▶ Litigation is not flexible as it is bound by formal rules of procedure and evidence

DISADVANTAGES OF LITIGATION

- ▶ Judges are not experts
- ▶ Proceedings are in the Public domain
- ▶ Litigation is Court Driven
- ▶ Parties are seen to be adversaries
- ▶ Costly

ADVANTAGES OF ADR

- ▶ Flexibility
- ▶ Party autonomy
- ▶ Expedient
- ▶ Party Driven
- ▶ Less Costly
- ▶ Confidential

ARBITRATION

- ▶ Impartial third party determines the dispute after hearing the facts taking evidence and applying the law.
- ▶ Arbitrator then issues a final binding decision known as an award
- ▶ Award is enforceable like a court judgments

ARBITRATION

- ▶ An award can not be appealed against and can only be challenged on very specific grounds
- ▶ An Arbitrator is usually a person with knowledge on the matters in dispute
- ▶ Arbitral proceedings are confidential

ARBITRATION IN INSURANCE

- ▶ A dispute can only be referred to arbitration if there is an arbitration Agreement.
- ▶ In Insurance the arbitration agreement should be by way of a clause contained in the Policy Document.

ARBITRATION CLAUSE

“....all disputes, claims, controversies and disagreements arising out of, relating to, or in connection with this POLICY, including any question regarding the policies existence, validity, rights and obligations ...”

LIABILITY RISK

- ▶ A liability risk is a vulnerability that can cause a party to be held responsible for certain types of losses.
- ▶ In insurance the major risk is for the Policies to be shaky arising from inter alia ineffective policy documents
- ▶ Lack or inadequate disclosures to the clients of the terms and Conditions.
- ▶ Defective or poor underwriting

LIMITING THE LIABILITY RISK OF INSURANCE COMPANIES

Madison Insurance Company Limited v. Avrill Cornhill and Michael Kakoma Appeal No. 19 2017 Supreme Court Judgement

- ▶ “where there is an insurance policy an insured party or third party claiming on the basis of Section 137 of the Roads and Road Traffic Act against an insurer ought not claim more than their loss and what is covered in the insurance policy. This assertion is founded in the principle of indemnity as rationalised by the court.”

CONCLUSION

- ▶ Arbitration should be able to work more favourably for the insurance industry than Litigation
- ▶ Liability Risk should be mitigated by ensuring that the policy documents are clear to ensure that liability does not exceed the policy liability.

Thank You and May God Bless

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