IBAI

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THIS ISSUE

TIME TO ACCELERATE

FROM PRESIDENT DESK

Greetings!

Autumn – time of the year where everything seems to change. And the change continues to surround us all from technology, culture through to pandemic and beyond.

In our recently concluded AGM on September 2021, we had invited Ms. Vibha Padalkar, MD & CEO of HDFC Life as a Guest Speaker who gave us insight on the Life Insurance Industry and the exciting times ahead in the sector. I once again thank all the Broker members for having faith in electing me as the President. I also welcome three new additions to the IBAI Board Mr. Gurunath from TVS Insurance Broking, Mr. Rohit Kapur from GoldKey Insurance Brokers and Mr. Anuraag Kaul from JK Insurance Brokers.

We have done the hard mile, now its time to press the accelerator and take full advantage of the surge in the business environment. The projected figures released by RBI has been encouraging, we are again looking for 9.5% growth rate.

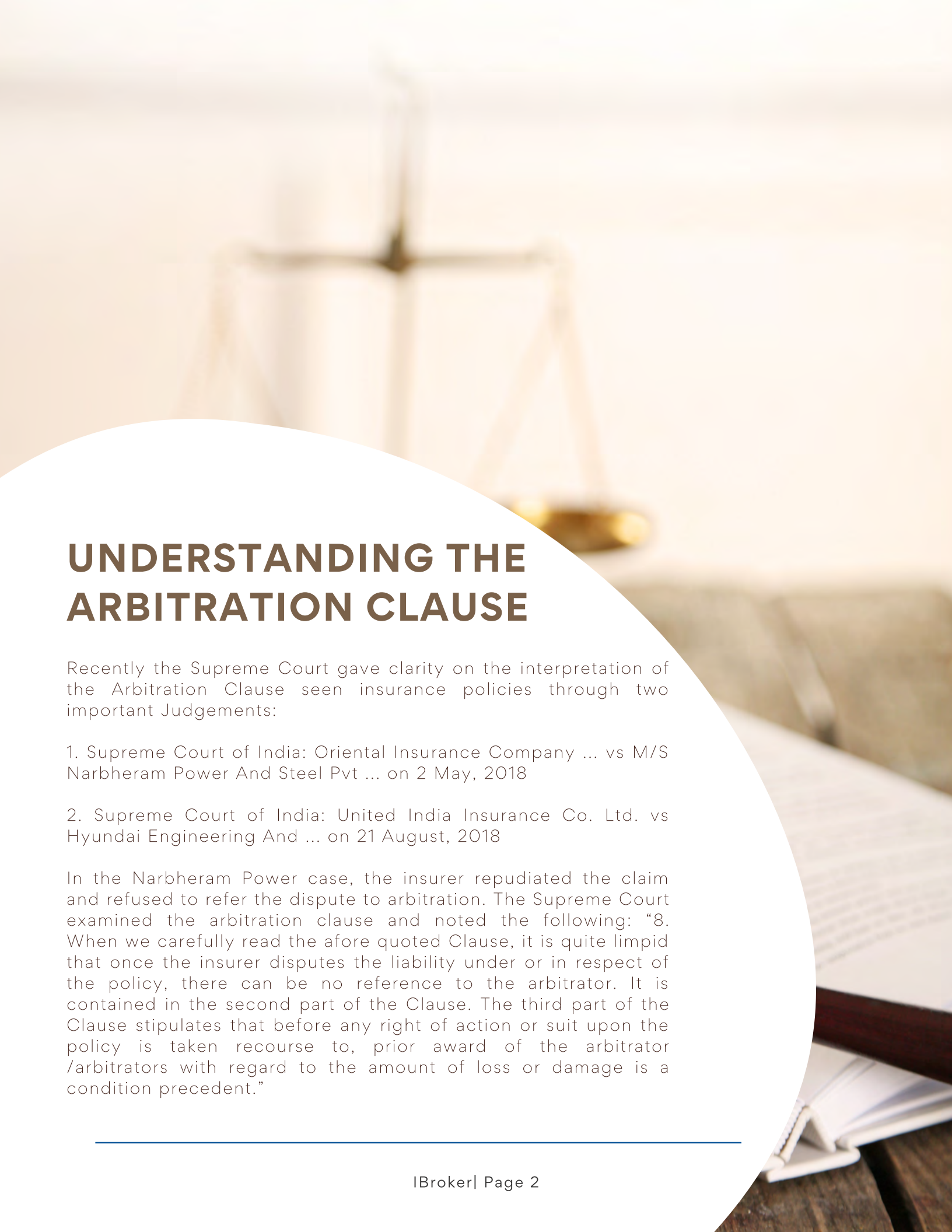
The rebound in economic activity gained traction in August-September, facilitated by the ebbing of infections, easing of restrictions and a sharp pick-up in the pace of vaccination.

After a prolonged slowdown, industrial production posted a high y-o-y growth for the fifth consecutive month in July. The manufacturing PMI at 53.7 in September remained in positive territory. Services activity gained ground with support from the pent-up demand for contact-intensive activities. The services PMI continued in expansion zone in September at 55.2, although some sub-components moderated. High-frequency indicators for August-September – railway freight traffic; cement production; electricity demand; port cargo; e-way bills; GST and toll collections – suggest progress in the normalisation of economic activity relative to pre-pandemic levels; however, indicators such as domestic air traffic, two-wheeler sales and steel consumption continue to lag. Non-oil export growth remained strong on buoyant external demand.

As we close the second quarter of F.Y. 21-22, the GI figures have been quite impressive, with a growth of 12.78% as compared to half year ended 30th September 2020. There has been a tremendous growth as far as the SAHI company's premiums are concerned, where they have shown an impressive growth of 39%, which clearly indicates the momentum in the Health segment and the inclination of the customers towards securing their family.

At IBAI our priority continues to be advocating for members interest and concerns as we concentrate on evolving issues facing our clients, our profession and our industry.

Sumit Bohra
President, IBAI



UNDERSTANDING THE ARBITRATION CLAUSE

Recently the Supreme Court gave clarity on the interpretation of the Arbitration Clause seen insurance policies through two important Judgements:

1. Supreme Court of India: Oriental Insurance Company ... vs M/S Narbheram Power And Steel Pvt ... on 2 May, 2018

2. Supreme Court of India: United India Insurance Co. Ltd. vs Hyundai Engineering And ... on 21 August, 2018

In the Narbheram Power case, the insurer repudiated the claim and refused to refer the dispute to arbitration. The Supreme Court examined the arbitration clause and noted the following: “8. When we carefully read the afore quoted Clause, it is quite limpid that once the insurer disputes the liability under or in respect of the policy, there can be no reference to the arbitrator. It is contained in the second part of the Clause. The third part of the Clause stipulates that before any right of action or suit upon the policy is taken recourse to, prior award of the arbitrator /arbitrators with regard to the amount of loss or damage is a condition precedent.”

The Court referred to three well known insurance Judgements of the SC namely 1) General Assurance Society Ltd vs Chandumull Jain and Anr (1966) given by a Constitution Bench; 2) Oriental Insurance Co. Ltd vs Samayanallur Primary (1999) 3) United India Insurance Co. Ltd vs M/S.Harchand Rai Chandan Lal (2004). In para 12 the SC said: "parties are bound by the clauses enumerated in the policy and the court does not transplant any equity to the same by rewriting a clause. The Court can interpret such stipulations in the agreement. It is because they relate to commercial transactions and the principle of unconscionability of the terms and conditions because of the lack of bargaining power does not arise."

The Supreme Court thus ruled that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the conditions in which the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are sufficiently clear, then the controversy pertaining to the appointment of arbitrator has to be put to rest.

The Supreme Court found that the language used in the second part of the clause was absolutely categorical and unequivocal inasmuch as it stipulated that it was clearly agreed and understood that no difference or disputes shall be referable to arbitration if the insurer has disputed or not accepted the liability. The SC found that the High Court where the case was heard first had fallen into a grave error by expressing the opinion that there is incongruity between Part II and Part III.The analysis of the HC was found to run counter to the principles laid down in the three-Judge Bench decision in Vulcan Insurance Co. Ltd vs Maharaj Singh & Another on 3 October, 1975."

2. Supreme Court of India United India Insurance Co. Ltd. vs Hyundai Engineering (2018)

This case relates to the arbitration clause contained in an Engineering Policy (CAR).

The SC found that this matter was already dealt with by a three-Judge Bench of the Supreme Court in Oriental Insurance Company Limited (as above), which followed the line taken in the case Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Anr. (1976) 1 SCC 943, which was also decided by a three-Judge Bench. In paragraphs 11 & 12 of Vulcan Insurance Co. Ltd. decision, the Supreme Court answered the issue thus:

"11. Although the surveyors in their letter dated April 26, 1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1, the appellant (insurer) at no point of time raised any such dispute. The appellant company in its letter dated July 5 and 29, 1963 repudiated the claim altogether. Under clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1 (insured). If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of clause. In this case, however, the insurer repudiated its liability to pay any amount of loss or damage as claimed by the insured. In other words, the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.

CLARITY GIVEN BY COURTS TO MAKE ARBITRATION CASES EASIER FOR THE INSURED

The Supreme Court in recent times completely changed its view point on the intervention of courts in Arbitration, blocking the tendency of insurers to rush to courts for ensuring that arbitration notices are declared not valid for many reasons. The most important reason cited by insurers was that the insured had given of their free will 'full and final' discharge voucher and not raised any objection or any complaint of economic duress imposed by the insurer. Typical is the case below:

United India Insurance Company vs. Antique Art Exports Private Limited, (2019)

In this case before the Supreme Court, the insurer prayed that the insured had given full and final discharge without demur. On examination of the matter the SC found that "Indisputedly, both the claims were accepted by the respondent (insured) without any demur or protest". However, 11 weeks later the insured claimed that fraud, coercion and undue influence was exercised and he was forced to sign on the dotted lines without furnishing any prima facie evidence in support of the allegations."

The High Court before which the case went earlier had found that a reading of subsection (6A) of Section 11 of the Arbitration Act which has been introduced by virtue of Amendment of the Act in 2015 observed that once there was in existence an arbitration agreement, acceptance of the payment disbursed by the insurer, whether it was under coercion or undue influence, is a matter to be examined by the Arbitrator and accordingly proceeded to appoint the sole arbitrator to adjudicate the dispute between the parties.

However, the Two Judge Bench of the SC in this case turned down the arbitration notice of the insured and stated that there was prima facie no dispute after the discharge voucher was signed by the insured without any demur or protest and claim being finally settled with accord and satisfaction. Only after 11 weeks of the settlement of claim a letter was sent on 27th July, 2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record to prove the allegation.

So as the claim was settled with accord and satisfaction, no arbitral dispute could exist under the agreement to be referred to the Arbitrator for adjudication."

However, in deciding the above matter, the SC overruled another of its judgement in Duro Felguera S.A. Vs. Gangavaram Port Limited which had observed that Section 11(6A) of the Act had limited the jurisdiction of the Court to mere examination of whether a valid arbitration agreement existed or not.

The Real Position with regard to Arbitration

M/s Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman, (2019)
The Supreme Court in the case M/s Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman, (2019), took up the issue of the above contradictory judgements so as to harmonise the position. So, a 3-judge bench was set up. The 3 judge Bench after considering the Law Commission Report and other judgements on the issue came to the conclusion that the judgement of the Court in United India Insurance Company vs. Antique Art Exports Private Limited was incorrect. The 3 Judge Bench held:

"This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement, and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59."

It may be noted that even before the United India case seen above, the Supreme Court had in the case National Insurance Co. Ltd. v. Boghara Polyfab, (2009) 1 SCC 267, held that full and final discharge, if given without any cause to show duress by the insured, will not be a ground for arbitration. The decision of the SC in Boghara Polyfab, was legislatively overruled by the insertion of Section 11(6A) in 2015. Thus, the burden of determining issues relating to the validity of the arbitration agreement and the scope of reference of the disputes, was shifted to the arbitral tribunal in line with international best practices.

This Judgement by the Supreme Court makes it open for any insured to issue an arbitration notice if they have a quantum-based dispute. To have a quantum dispute, the insurer should have admitted liability as stated in the arbitration clause. Once this is done and the arbitration has been set in process, it is for the arbitrator/s to examine the issues as to whether the claim has been really settled without any duress or any other infirmity which the insured may allege and attempt to prove.

II ARBITRATION ACT 1996 RELEVANT PROVISIONS

Sec 3	Receipt of written communications. —(1) Unless otherwise agreed by the parties,— (a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and	A written notice is necessary to the insurer invoking arbitration
Sec 11 (4)	If the appointment procedure in sub-section (3) applies and— (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court];	When the appointment of arbitrator is not done as in (a) or the arbitrators fail to agree on the presiding arbitrator as in (b), they need to approach the High Court for the same.
Sec 12	12. Grounds for challenge – (3) An arbitrator may be challenged only if— (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality,	Challenge of an arbitrator can be only on the grounds of independence or impartiality as per 5th Schedule (below
	Conduct of arbitral proceedings	
Sec 18	18. Equal treatment of parties —The parties shall be treated with equality and each party shall be given a full opportunity to present his case.	Arbitrator must treat parties equally and given full opportunity to present their case.
Sec 19.1	19. Determination of rules of procedure—(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).	The Tribunal is not bound by the Code of Civil Procedure, or the Indian Evidence Act.
Sec 19.2	(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.	Parties are free to agree on the procedure
Sec 20	20. Place of arbitration— (1) The parties are free to agree on the place of arbitration.	Parties can agree on the place of arbitration.
Sec 21	21. Commencement of arbitral proceedings—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.	

	Section 23: Statements of claim and defence.	
Sec 23.3	(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.	The insured must make their statement of claim and the insurer will thereafter present their defense.
Sec 23.2	(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.	All necessary documents must be filed by each party
Sec 23.2 (2 A)	[(2A) The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.]	The Insurer, if needed, can make a counter claim.
Sec 23.3	(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.	The parties can amend or supplement the claim or defence.

Sec 24	24. Hearings and written proceedings— (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials	Unless agreed by the parties, the arbitrator can conduct the arbitration by oral arguments or on the basis of documents etc.

Sec 29	29. Decision making by panel of arbitrators— (1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. (2) Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.	The arbitral award is valid on the basis of the majority. The question of procedure may be decided by the presiding arbitrator, if authorised.
Sec 29 A	2 [29A.Time limit for arbitral award— (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.	The standard time is 12 months for making the award. The time starts from the date on which the arbitrator/s have received notice of their appointment.
Sec 29.3	(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months. (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:	Time may be extended by 6 months if the parties mutually consent. After this the mandate of the arbitrator terminates. Either of the parties have to go to a High Court to get the arbitration period extended

Sec 31	31. Form and contents of arbitral award— (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. (2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. (3) The arbitral award shall state the reasons upon which it is based, unless— (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under section 30.	The award has to be made in writing and shall be signed by the members of the Tribunal. The Tribunal has to give the reasons on which the award is based.
Sec 31.5	(5) After the arbitral award is made, a signed copy shall be delivered to each party.	Each party will get an original copy duly stamped and signed.
Sec 31.6	(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.	Interim award can be made by the Tribunal.
Sec 31.7 (a)	(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.	Interest can be paid – "arbitral tribunal may include...." (see the article on interest)
Sec 31.7 (b)	[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. Explanation—The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]	This relates to post award interest.
Sec 31.8	[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.] Explanation—For the purpose of clause (a), "costs" means reasonable costs relating to— (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award.	Cost of Arbitration – seen the article on awarding cost.

Sec 33	33. Correction and interpretation of award; additional award.— (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties— (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award; (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.	Correction and interpretation of award
Sec 34	34. Application for setting aside arbitral award — (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).	Appeal against the award can be only on very limited grounds
Sec 34(b)	(b) the Court finds that— (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India. 1 [Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]	The ground that an award is in conflict with the public policy of India is the main ground that can be taken as given in the clarification section.
Sec 31.8	35. Finality of arbitral awards —Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively. 2 [36. Enforcement — (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.	Award can be enforced in court

THE ARBITRATOR

An arbitrator is a person to whom differences and disputes are submitted by the parties concerned. The functions of the Arbitrator are quasi-judicial in nature. The Supreme Court in the case Union of India vs M/S Ambika Construction decided on 16 March, 2016 said that: "However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law."

In the notice served by the insured on the insurer, they nominate their arbitrator, and also ask the insurer to agree to the appointment of the arbitrator chosen by them. If they cannot agree upon a single arbitrator within 30 days of invoking arbitration, then the insurer has to appoint their arbitrator, and these two arbitrators have the power to appoint the third arbitrator. If they cannot agree to the same, then the matter is to be taken up as per section 11 of the Arbitration Act and the appointment of the presiding (third) arbitrator will be made by the High Court. Therefore, an arbitration proceeding can be conducted before a sole arbitrator if both parties agree to a sole arbitrator or before three arbitrators, by having the third (presiding) arbitrator appointed by the two arbitrators or the High Court appointing the Presiding Arbitrator.

As per the amended Act of 2019, "The Eighth Schedule" of the Act has laid down the qualifications and experience of the Arbitrator. This is followed by a section termed 'General norms applicable to Arbitrator'.

The Fifth Schedule of the Act lists the grounds that may give rise to justifiable doubts as to the independence or impartiality of the Arbitrator. These needs to be ensured before an Arbitrator is appointed to ensure that the eligibility and neutrality of the Arbitrator chosen by a party is not challenged.

Status of the Arbitral Tribunal

When the arbitral tribunal enters upon reference, it assumes the role of a judge. It should act without fear or favour and conduct the proceedings in a manner that enhances confidence in the arbitrator and the process of arbitration. The arbitrator need not be an expert on law and procedures as required in courts, but must have the resolve to act fairly and apply the rules of natural justice. The duty of the tribunal is to find out the truth relating to the disputes from the evidence proffered by the parties in an impartial manner.

Power of the Tribunal to Adjudicate Counter Claims

Sec. 23(2A) of the Arbitration Act allows for counter claims by stipulating that "The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement." This has been allowed in the amendment passed in 2015 to enable counter claims to be adjudicated in the same reference with the respondent not having to go for a separate reference as this would save time and expenses.

The Significance of Pleadings

Parties are bound by the pleadings they have made. These are to be read as a whole and later they cannot go beyond what they have pleaded. The object of pleading is to enable the opposite party to understand the case that is being put forward. All necessary and material facts should be pleaded and in the absence of pleading, evidence if any produced cannot be considered. A pleading has to be understood as a whole and there cannot be a selective or out of context reading of it.

Sec. 23 (3) of the Act allows parties to amend or supplement the claim made as follows: "Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

Arbitrator must follow the terms of the Contract

Sec. 28(3) of the Act states that: "(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction." An arbitrator cannot act arbitrarily or independently of the contract. He has no power apart from what the parties have given to him under the contract. The Supreme Court in the case "Associated Engineering Co vs Government Of Andhra Pradesh And ... (1991) stated the following: "The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But if he has remained inside the parameters of the contract and has construed the provisions of the contract; his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it."

The Supreme court further stated that "An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see Mustill & Boyd's Commercial Arbitration, Second Edition, p. 641). He commits misconduct if by his award he decides matters excluded by the agreement (see Halsbury's Laws of England, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to, not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award." The court also added that "If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Such error going to his jurisdiction can be established by looking into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence."

When can the Arbitrator Close the Case with the Consent of the Parties?

When the proceedings have been duly completed, it should be recorded by the arbitrator that both parties have completed their respective arguments and they have nothing further to add. This fact should be specifically stated in the minutes under acknowledgement by the parties. The parties may also be asked to give their note that they had the full opportunity to present their case and that they have nothing further to add.

WHAT GROUNDS ARE TO BE TAKEN TO ESTABLISH THE MERITS OF THE CASE

The Significance of Pleadings

Parties are bound by the pleadings they have made. These are to be read as a whole and later they cannot go beyond what they have pleaded. The object of pleading is to enable the opposite party to understand the case that is being put forward. All necessary and material facts should be pleaded and in the absence of pleading, evidence if any produced cannot be considered. A pleading has to be understood as a whole and there cannot be a selective or out of context reading of it.

Sec. 23 (3) of the Act allows parties to amend or supplement the claim made as follows: "Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it."

Framing of Issues

It is not obligatory for the arbitrator to frame issues because he is not bound to follow the procedure laid down in the code of Civil Procedure. The Supreme Court in the case "Fiza Developers & Inter-Trade vs Amci (I) P.Ltd.& Anr" (2009) stated "Framing of issues is necessary only where different types of material propositions of fact or law are affirmed by one party and are denied by the other and it is therefore necessary for the court to identify the issues and specify the party on whom the burden to prove the same lies. When this exercise has already been done by the statute, there is no need for framing the issues". However, it is customary for arbitral proceedings to frame issues in consultation with parties so that the issues that each party wishes to adjudicate may get due importance. The arbitrator may therefore finalise issues in consultation with the parties.

Core Ground to be Kept in Mind when filing the Statement of Claim

It should be kept in mind that the core issue is a dispute on quantum as paid by the insurer. Keeping this in mind it is necessary to show what was the full claim lodged, what proof was offered in evidence of the full claim, the perils that caused the loss as covered in the policy, the proof offered including photographs, internal reports, public documents such as fire brigade report, police report, report to other government authorities, newspaper reports, etc. The estimates given to the insurer/surveyor, the valuations and other documents indicating the actual indemnity sought, as available etc. If reinstatement has been done the actual cost of reinstatement has to be filed before the Tribunal.

It is necessary, if possible, to file the survey report as the insured now can get the survey report under the IRDAI Regulations, and if this is not possible the insurer must be compelled to file the survey report with all attachments as given by the surveyor to the insurer. The delay, harassments, omissions by the surveyor and insurer, if any, should be recorded. The manner in which the insured has been denied full indemnity has to be clearly outlined. The extra interest or any other economic duress that has been suffered by the insured should be clearly brought on record, especially when pleading for higher interest. Costs should be fully claimed with clear recording of costs incurred.

The copy of the policy as received from the insurer in full should be filed.

It is expected that the insurer also may file their documents. Both parties would need to admit or deny the documents filed by the other party, and what is denied would need to be proved. If allowed, witnesses can be produced by the parties and affidavits are filed by the party producing the witness and the other party is given the opportunity to cross examine the witness.

INTEREST TO BE AWARDED IN ARBITRATION

Sec. 31 of the Arbitration and Conciliation Act 1996 as amended up to date, speaks of interest that may be awarded. The relevant section reads as under:

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation: The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]"

The Act empowers the arbitrators to award interest at all the three stages of the dispute, namely pre-suit, pendente lite and future interest. Supreme Court in the case Executive Engineer, Dhenkanal vs N.C.Budharaj (Dead) (2001) stated (para 48) that: "For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in Jenas case [1988 (1) SCC 418] taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitle any party nor shall it empower any Court to reopen proceedings which have already become final, and apply only to any pending proceedings."

However, the Act uses the term "tribunal may". However, the insured must plead strongly for interest and also cite the Protection of Policyholder Regulations 2017 showing that it is an obligation of the insurer to pay interest for delay in settlement of the claim.

An insurance claim is considered a liability in the books of the insurer and the insurer is obliged to make a provision as soon as a claim is notified to the extent that is considered reasonable. The reasonable provision is set often after the surveyor provides an estimate of the loss, which may get reviewed as more facts and figures emerge as the survey progresses. The nature of insurance is to provide full indemnity for covered losses and hence it is necessary that there be a full provision for the loss reported which is under survey. Such a provision made in the books of the insurer begins to earn interest after the provision is made.

Thus the IRDAI (Protection of Policyholders' Interests) Regulations, 2002 and thereafter its updated version in 2017 provide the following:
Sec. 9 (6) of the 2002 Regulation: (6) Upon acceptance of an offer of settlement as stated in sub-regulation (5) by the insured, the payment of the amount due shall be made within 7 days from the date of acceptance of the offer by the insured. In the cases of delay in the payment, the insurer shall be liable to pay interest at a rate which is 2% above the bank rate prevalent at the beginning of the financial year in which the claim is reviewed by it.

Sec. 15 (10) of the 2017 Regulation states: 10. In the event the claim is not settled within 30 days as stipulated above, the insurer shall be liable to pay interest at a rate, which is 2% above the bank rate from the date of receipt of last relevant and necessary document from the insured/claimant by insurer till the date of actual payment.
Sec. 9 (2) of the Regulations 2002 state that: In no case shall a surveyor take more than six months from the date of his appointment to furnish his report. Further the Regulations allow the insurer to seek an additional report within 15 days and the surveyor should furnish the additional report within three weeks. It is seen that no such additional report was sought by the Insurer. Further, the Regulation also stipulates that "On receipt of the survey report or the additional survey report, as the case may be, an insurer shall within a period of 30 days offer a settlement of the claim to the insured."

Recent Court Ruling
It is clear that after the Arbitration and Conciliation Act was amended in 2015 and thereafter, the interest rate to be applied for amounts awarded has to be moderated as per the ruling of the Supreme Court. Supreme Court of India in the case Vedanta Limited vs Shenzhen Shandong Nuclear Power (on 11 October, 2018). The salient aspects are given below:

"2.9 The presentAppellant filed aCounter Claim amounting toRs. 2458,34,89,367 along with Interest @18% p.a.for determination before the arbitral tribunal.

2.10 The arbitral tribunal passed a detailed Award dated 09.11.2017, wherein the Tribunal awarded the following amounts: 135. The aforesaid amount shall be payable along with interest at the rate of 9% from the date of institution of the present arbitration proceedings provided the amount is paid/deposited within120 days of the award.

3. 'Interest' is defined as "the return or compensation for the use or retention by one person for a sum of money belonging to or owned by any reason to another", HALSBURY'S LAWS OF ENGLAND para 106 (4th Ed., 1980). In essence, an award of Interest compensates a party for its forgone return on investment, or for money withheld without a justifiable cause.

6. The discretion of the arbitrator to award interest must be exercised reasonably. An arbitral tribunal while making an award for Interest must take into consideration a host of factors, such as: (i) the 'loss of use' of the principal sum; (ii)the types of sums to which the Interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest (not applicable to Indian cases); (v) whether simple or compound rate of interest is to be applied; (vi)whether the rate of interest awarded is commercially prudent from an economic stand-point; (vii) the rates of inflation,(viii) proportionality of the count awarded asInterest to the principal sums awarded. On the one hand, the rate of interest must be compensatory as it is a form of reparation granted to the award holder; while on the other it must not be punitive, unconscionable or usurious in nature. Courts may reduce the Interest rate awarded by an arbitral tribunal where such Interest rate does not reflect the prevailing economic conditions or where it is not found reasonable, or promotes the interests of justice (FCI v. AM Ahmed AIR 2007 SC 829) ...

8. In the present case, the arbitral tribunal has adopted a dual rate of Interest in the Award. The Award directs payment of Interest @ 9% for 120 days post award; if the amount awarded is not paid within 120 days', the rate of Interest is scaled upto 15% on the sum awarded. The dual rate ofInterest awarded seems to be unjustified. The award of a much higher rate of Interest after 120 days' is arbitrary.

10....The grant of 15% Interest is excessive and contrary to the principle of proportionality and reasonableness."
In view of the above guidance of the Supreme Court any plea for excessive interest cannot be considered or allowed by this Tribunal.

COST TO BE AWARDED IN ARBITRATION

Sec. 31 (8) of the Arbitration and Conciliation Act, 1996 "31. Form and contents of arbitral award. — (8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Sec.31-A of the Arbitration Act. Sec. 31A of the Arbitration Act has the following provisions:

3[31A. Regime for costs: (1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine: (a) whether costs are payable by one party to another; (b) the amount of such costs; and (c) when such costs are to be paid. Explanation: For the purpose of this sub-section, "costs" means reasonable costs relating to: (i) the fees and expenses of the arbitrators, Courts and witnesses; (ii) legal fees and expenses; (iii) any administration fees of the institution supervising the arbitration; and (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs: (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including: (a) the conduct of all the parties; (b) whether a party has succeeded partly in the case; (c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay: (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs from or until a certain date."

It is a legal principle that "costs follow the cause". In this regard the Law Commission of India published their report on Costs in Civil Litigation in May 2012 which was noteworthy in that it was based on the observations of the Supreme Court that costs need to revisited. The Commission cited the cases of Ashok Kumar Mittal vs. Ram Kumar Gupta (2009) 2 SCC 656 and Vinod Seth Vs. Devinder Bajaj (2010) 8 SCC 1, where the Supreme Court decried the system then existing of levying meagre costs. The Commission in its findings stated that "The principle that costs should follow the event which finds statutory recognition in Section 35 of CPC ought to be given effect to by the Courts with all seriousness and the deviations should be rare."

Thus, with regard to costs in general it is amply clear that costs have to be borne by the losing party for any issue that they have lost on merit.

HOW INSPECTION IS CHANGING IN LINE WITH NEW TECHNOLOGIES AND COVID SCENARIO: PRE-INSPECTION

EXCLUSIVE

Ravinder Kumar
Founder & CEO
WIMWISURE

While the global outbreak of COVID-19 had a negative impact on the motor insurance industry, Do It Yourself technology platforms has signaled to be an essential technology to manage the crisis caused by the virus bringing about a multitude of procedural innovation. The process of vehicular pre-inspection is one such example.

What is pre-inspection of motor vehicles?
In auto insurance, pre-inspection refers to the vehicle inspection before the insurance company approves of policy issuance for the vehicle. It aids in determining the vehicle's physical condition and in detecting any pre-existing vehicular damage. The prospective insurer does not cover these pre-existing damages. Pre-inspection thereby prevents fraudulent claims for pre-existing damages. It also plays a decisive role for the insurer in determining the premiums and accepting or rejecting the insurance.

An inspection for automobile insurance is not mandatory for is required in the case of an ownership change, a switch from TP to comprehensive, additional coverage, or at the time of a claim. Pre-inspection is also a prerequisite for break-in insurance wherein the motor insurance is not renewed by the vehicle owner on time, leading to its expiry. Thereby it involves a new proposal submission and a mandatory pre-inspection.

Traditional process of Pre-inspection and the impact of COVID 19:

Traditionally, during pre-inspection, the authorized surveyor or insurance company representative takes down some information about the car, such as the chassis number and registration number, and take images of the vehicle to serve as visual documentation of its condition. With the repetitive nature of the task and the requirement of manual intervention, the operation gets susceptible to procedural inefficiencies, higher costs, delays, and lead to customer dissatisfaction

With the advent of COVID 19, surveyors could no longer visit the policyholders for inspection, thereby delaying the procedures. This necessitated the need for technological breakthroughs.

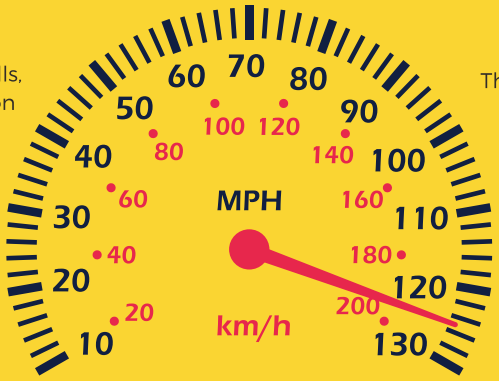
Emergence of Self Inspection in pre-inspection:
The emergence of technology and smartphone usage has simplified the process of pre-inspection. Using AI-based apps customers may now take photos of their vehicles and upload them for pre-inspection.

Here's the process of how WIMWIsure an AI-enabled insurance services platform aids in real-time pre-inspection of vehicles.

Step 3
The application guides the customer to complete the inspection using their mobile device

Step 4
The photographs/ videos of the vehicle received from the customer are then checked for quality parameters

Step 2
The customer then receives automated calls, SMS & Whatsapp messages with inspection details



Step 5
The status of the case is submitted using an automated response from API for policy issuance

Step 1
Customer details such as the Customer's Name, Phone & Vehicle Number are received from the Customer through Case Create API

Step 6
A policy purchase is then triggered based on the reaction of the inspection, followed by a payment link being sent to the customer

The entire process can be completed within 30 min.

As a result of this innovation, the inspection module would quickly assess the damage to the car/vehicle, cutting the processing time from days to minutes. Additionally, it would also cut down manual inspection cost overheads, ensuring efficient use of resources and human capital, business scalability, increased customer satisfaction, reduction in fraud and human error, thereby resulting in cost savings and increased profitability.
Finally, AI-based online pre-inspections would also ensure the protection of employees' health and safety, particularly in pandemic times

Key Takeaway:
While COVID -19 created a few roadblocks, negatively impacting business operations, it fueled the uptake of remote and touchless technologies. The automobile insurance sector is benefiting from AI-powered technologies and automation. Pre-inspection tasks, once known for being time-consuming and tedious, can be conducted in a matter of minutes now. It has helped the customer and the insurer safeguarding their respective interests and laid the groundwork for future interventions.

About WIMWIsure:

WIMWIsure is an enterprise tech provider founded by Ravinder Kumar, An IIM Ahmedabad alumnus in the year 2017. WIMWIsure is developing a mobile and AI-enabled insurance services platform for the general Insurers and their service providers to streamline, expedite the policy issuance and after-sale services. Our products enable the insurance companies to eliminate the requirements of manual physical risk inspection/surveys and underwriting decisions. The power of our on-demand services, machine learning algorithms and computer vision platforms support real-time & transparent sharing of information to enhance the entire insurance value chain and reduce the distribution, administrative, fraudulent costs by up to 70%.

Till date, WIMWIsure's portal has been used to issue over 4 Lakh motor insurance policies by various insurers, web-aggregators, and brokers. Over 20+ Indian insurers and leading technology-based Brokers are using our platform right now with increasing acceptance from the industry every day.

AI IN LIFE & HEALTH INSURANCE UNDERWRITING & CLAIMS

Sundaram Venkatavaradan
Secretary, IBAI
MD & CEO, Abhivridhi Insurance Brokers

You wake up in the morning stare at your phone, Carpe Diem! The phone recognises your face however bad or good you look. Now imagine the same face recognition technology starts reading your face and giving you a report on how dehydrated, depressed or happy you are ?

Welcome to Facial recognition technology with AI, primarily its used to match your digital image with your real self./video image against a database of faces.

As the process involves facial image acquisition followed by extracting and measuring physiological features, it is considered as biometrics. Just as fingerprints, every individual has a unique facial feature or Faceprint. The technology can be used in insurance industry to resolve various issues involving underwriting (UW) and claims. The selfie analysis technique along with dynamic questioning can be used to estimate age, sex, BMI and lifestyle habits. This helps to generate personalized policy quote within minutes.Facial AI is also being used for claim processing and detecting fraudulent claims. Using advanced deep learning models, the system can analyse the claimant's responses and micro-expressions/reactions to a set of real-time questions and predict whether the claim is genuine or if any further investigation is needed.

The Facial AI technique used as solution for above problems involves training a neural network model on data consisting of face images of different individuals with BMI labels. A neural network model can be trained on age-based face images with class labels as predefined age ranges and also for predicting whether the test face is of an offender or not.

Apart from the various applications, facial recognition models are less accurate compared to other biometrics. Also, there have been technical issues in detecting the gender of different races of people throughout the world. Issues of data leaks and privacy laws of different countries are hindrances in smooth application of Facial AI.

Merger of Facial AI technology with data collected from wearables can provide excellent insights for underwriting. As both face analyser and wearables like Fitbit can estimate body fat and BMI, they can complement each other by providing supporting evidence, hence paving the way for a more accurate UW. This further lays the foundation for continuous underwriting. If a customer who is also a hyper tension patient is doing workouts regularly (as tracked by face analyser and wearables), she/he may not need to pay the extra premium, or their premium can be reduced based on the healthy lifestyle opted. Facial AI reinforced with other biometrics like fingerprints or OTP verification can mitigate the vulnerability of the securitysystem.

Insurance companies face many issues related to underwriting and claim processing with respect to the time and tedious processes involved with old techniques. Consequently, they are aiming to make a shift towards AI solutions in an attempt to reduce human involvement and using the technology to ease the working processes, without compromising on the quality of customer service and accuracy.

Artificial intelligence can help in several areas such as fraud detection, reducing the overall clearance process, improving customer experience by automating most tasks, etc. Machine learning and deep learning are the methods employed in artificial intelligence. Each method performs excellently on different variety of data. For example, deep learning is best suited to solve problems involving visual data. Data is an important factor for the success of deep learning models, and this poses a new question of "How to collect data?". The conventional ways includehiring people to collect data and annotateit according to the problem statement

REGULATOR CORNER

09.07.2021

IRDAI INDIAN INSURANCE COMPANIES (AMENDMENT) REGULATIONS, 2021

To harmonise various regulations applicable to insurers with Insurance (Amendment) Act, 2021 read with Indian Insurance Companies (Foreign Investment) Rules, 2015

23.07.2021

Standards and Benchmarks for the Hospitals in the provider Network

30.07.2021

Withdrawal of Guidelines on "Indian owned and controlled"

04.08.2021

Solvency Margin for Crop Insurance Business

06.08.2021

Guidelines on settlement of Life Insurance Claims to the victims of Flood in Maharashtra.

12.08.2021

1. List of Products/add-ons noted during the FY-2020-21
2. Health Products for 2021-22
3. List of Main Products/Add-ons noted during the FY 2021-22(April 2021-June2021)
4. Terms and Conditions of Life Products for F.Y. 2021-22
5. Insurance Act,1938 - incorporating all amendments till 2021

08.09.2021

1. Draft regulations relating to IIB
2. Title Insurance Products
3. Exposure Draft on IRDAI (Surety Insurance Contracts) Guidelines, 2021
4. Product Structure for Cyber Insurance
5. To be guided by the model policy wordings for Personal Cyber Insurance
6. RDAI (Trade Credit Insurance) Guidelines, 2021

13.09.2021

a) Issuance of Electronic Policies and (b) Dispensing with physical documents and wet signature on the proposal form

Exemptions extended upto the period 31/03/2022.

16.09.2021

List of Insurance Repositories

14.09.2021

a) Issuance of Electronic Policies and (b) Dispensing with physical documents and wet signature on the proposal form

Exemptions extended upto the period 31/03/2022. Applicable for Health Insurers

30.09.2021

Public Disclosures by Insurers

Under Sec. 14 (2) (e) of the IRDA Act, 1999 insurers must ensure compliance with the public disclosure requirements

17.09.2021

a) Issuance of Electronic Policies and (b) Dispensing with physical documents and wet signature on the proposal form

Exemptions extended upto the period 31/03/2022. Applicable for Life Insurers

20.09.2021

Policyholder Complaints Registration form

Applicable to all insurance products

WIMWISURE

Self Inspection Platform for Remote Risk Assessment

- Motor (Break-in) Insurance
- Property/Fire Insurance
- Physical Asset Verification

Our product eliminates the requirements of manual physical risk inspection and surveys. The power of our on-demand services support real-time & transparent sharing of information to enhance customer experience & reduce the distribution & administrative costs by up to 70%.

4 Lakh
Inspections

20+
Insurers/Brokers

30K+
Agents/POS

4.5 *
Customer Ratings

1 Lakh+
Downloads

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