VOLUME 6 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

PREDICTIVE LITIGATION AND SUNK-COST MANAGEMENT: ALGORITHMIC FORESIGHT IN ARBITRATION STRATEGY

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I. INTRODUCTION

Corporate litigation is primarily a matter of managing resources. Every dispute a company faces involves careful consideration of cost, risk, and business priorities. However, many decisions in litigation still rely on instinct, professional optimism, or a reluctance to abandon money already spent. This article examines how predictive litigation tools can enhance how corporations deal with disputes, focusing on international commercial arbitration. It also argues that company secretaries and in-house counsel are in the best position to lead this change within their organizations.

II. THE SUNK-COST PROBLEM IN CORPORATE LITIGATION

The sunk-cost fallacy occurs when companies continue with a course of action simply because resources have already been invested, even if the future outlook is poor[1]. In litigation, this tendency can be costly. If a board keeps funding arbitration proceedings not because the case is strong but because stopping feels like admitting previous expenditures were wasted, it is making a governance mistake. Money already spent is unrecoverable. The only question that should guide any decision is whether further spending can be justified based on reasonable expectations for the future.

This issue appears in real disputes. In **Halliburton Co. v. Chubb Bermuda Insurance Ltd [2020] UKSC 48**, the UK Supreme Court dealt with a prolonged arbitration surrounding Deepwater Horizon insurance claims. While the main issue was arbitrator impartiality, the case illustrates how corporations can get stuck in expensive, lengthy proceedings where costs escalate and the original strategic rationale becomes harder to justify[2].

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Closer to home, **Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV (2022 INSC 884)** provides an equally instructive example. What began as a commercial arbitration over an offshore construction contract turned into years of disputes over arbitrator fees. ONGC, a public sector entity under audit scrutiny, found it difficult to exit a costly arbitral process. This eventually required intervention from the Supreme Court of India to reconstitute the tribunal entirely[3]. This case highlights how arbitration proceedings can outlive their initial purpose without proper cost governance and predetermined exit mechanisms, leading to resource consumption beyond any rational assessment made before starting.

At the international level, in **Occidental Petroleum Corporation v. Republic of Ecuador (ICSID Case No. ARB/06/11)**, Ecuador underestimated Occidental's treaty claims. This led to an award of around USD 1.77 billion[4]. A more disciplined, data-driven assessment of similar investment treaty cases earlier could have significantly altered Ecuador's litigation approach.

The company secretary's office, which advises the board on governance and risk, is a logical place to implement more structured, evidence-based litigation reviews. Both the UK Corporate Governance Code (2018) and the King IV Report on Corporate Governance (2016) state that boards are responsible for overseeing material risks, and significant litigation is certainly one of them[5].

III. HOW PREDICTIVE LITIGATION TOOLS WORK IN ARBITRATION

Predictive litigation tools use data analysis and pattern recognition to estimate a dispute's likely outcome. They consider factors such as the background and track record of arbitrators, how similar cases were decided in the past, what damages were awarded in those disputes, and how parties in comparable situations acted regarding settlement.

These tools are particularly useful in arbitration. Although arbitral awards are not formally binding as precedent, there is now a growing collection of published awards that can be analyzed for trends. Institutions like the ICC, LCIA, and ICSID regularly publish awards that support this type of analysis. Platforms like Jus Mundi and Lex Machina have developed specific tools for international arbitration professionals. These help assess, for example, how

a particular arbitrator has historically managed jurisdictional objections or what damages outcomes have been common in infrastructure disputes.

In India, the introduction of **Section 31A of the Arbitration and Conciliation Act, 1996**, through the 2015 Amendment, established a formal costs framework in Indian arbitration for the first time. This change acknowledged the poor and inconsistent management of cost outcomes in arbitration for decades[6]. The existence of a statutory costs framework generates a fresh and expanding dataset, which will support the outcome analytics that predictive tools depend upon as Indian arbitration evolves. The case of **M/s. SBP & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618**, where the Supreme Court reinforced arbitration as a more efficient and cost-effective alternative to litigation, further emphasizes that Indian courts have long recognized the importance of keeping dispute costs in line with the value in question[7].

IV. THE COMPANY SECRETARY'S ROLE IN LITIGATION GOVERNANCE

The company secretary has a crucial role in litigation governance that is often overlooked. In addition to their formal responsibilities for board administration and regulatory compliance, the company secretary brings something that directors and external counsel may not provide — continuity. Directors and law firms may change, and strategies can shift under pressure. However, the company secretary remains constant, along with the institutional knowledge of how a dispute started, what commitments were made, and what decisions the board has made previously.

The Chartered Governance Institute has established that the company secretary's function includes advising the board on how to manage material risk[8]. When litigation poses a material risk, which is common for listed companies and those with substantial contractual obligations, the company secretary should be actively involved in structuring, reviewing, and, when necessary, concluding litigation decisions.

A formal litigation review process, presented regularly at board or audit committee meetings and informed by updated cost and probability assessments, is essential for good governance. The situation in **ONGC v. Afcons** illustrates what can happen when this process is missing. A company as large and sophisticated as ONGC still lacked adequate mechanisms to address a fee dispute early on, which allowed it to escalate to Supreme Court proceedings. A properly

structured litigation governance protocol, guided by the corporate secretary, would have identified the deadlock early and created a path for resolution or exit.

V. A PRACTICAL FRAMEWORK FOR MANAGING SUNK COSTS

Three principles should guide any organization that wants to manage litigation costs more sensibly.

Look forward, not backward. Board discussions about ongoing disputes should concentrate on future possibilities — the chances of success, the potential additional costs, and the value of a negotiated settlement — rather than on how much has already been spent. The company secretary should ensure board papers reflect this focus.

Set review triggers in advance. Before arbitration starts, the board should agree on specific conditions that will automatically prompt a dispute to be reviewed again. These might include costs reaching a certain percentage of the claim value, an unfavorable procedural ruling, or a significant change in the likelihood of a favorable outcome. By agreeing on these triggers beforehand, the board removes the urge to continue out of habit or momentum.

Record exit decisions properly. If the board chooses to end proceedings, the governance record should clearly show that the decision was based on rational, forward-looking reasons. This is important for insurance, regulatory disclosures, and the organization's own learning moving forward.

VI. ON THE USE OF ANALYTICAL TOOLS: ACCOUNTABILITY AND PRIVILEGE

A valid concern about predictive litigation tools is accountability. If a decision is based on data analytics, who is responsible when things go wrong? The answer is clear: these tools do not make decisions. They organize and present information. The ultimate decision and responsibility lie with qualified legal counsel and the board.

This aligns with how courts have viewed probability-based reasoning. In **Barker v. Corus UK Ltd [2006] UKHL 20**, the House of Lords recognized that probabilistic analysis is legitimate in legal reasoning[9]. Using data to shape a litigation strategy is fundamentally similar. The ICC Commission on Arbitration and ADR has also acknowledged the growing role of technology in dispute resolution, provided that the data and assumptions are properly disclosed and professional oversight is maintained[10].

Regarding legal privilege, company secretaries should ensure that any predictive assessments are commissioned through legal counsel with the main goal of managing ongoing or anticipated litigation. In India, this is particularly important given the broad scope of legal professional privilege set out in the **Indian Evidence Act, 1872**, and the evolving law on confidentiality in arbitration processes. In international arbitration, where document production follows the **IBA Rules on the Taking of Evidence (2020)**, it's wise to get early advice on how these materials will be treated.

VII. CONCLUSION

The sunk-cost problem has caused corporations in India and around the world to spend much more on litigation than sensible decision-making would ever warrant. The tools to tackle this issue now exist. Company secretaries are not just administrators; they are governance professionals who create and uphold the systems that help boards make responsible decisions. In the context of arbitration, this means establishing proper review processes, ensuring that past spending does not influence future choices, and keeping a clear record of how and why litigation decisions were made. Organizations that excel in this will not only save money but will also make better decisions and be able to show that they have.

FOOTNOTES:

[1] Arkes, H.R. and Blumer, C., 'The Psychology of Sunk Cost' (1985) 35 *Organizational Behavior and Human Decision Processes* 124.

[2] *Halliburton Co. v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

[3] *Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*, 2022 INSC 884, Supreme Court of India, 30 August 2022.

[4] *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.

[5] Financial Reporting Council, *UK Corporate Governance Code* (2018), Principle O; Institute of Directors in Southern Africa, *King IV Report on Corporate Governance for South Africa* (2016), Principle 11.

[6] Arbitration and Conciliation (Amendment) Act, 2015, inserting Section 31A into the Arbitration and Conciliation Act, 1996; Law Commission of India, *246th Report on Amendments to the Arbitration and Conciliation Act, 1996* (2014).

[7] *M/s. SBP & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618, Supreme Court of India.

[8] Chartered Governance Institute (ICSA), *The Governance of Risk* (2019 Guidance Note), p. 14.

[9] *Barker v. Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.

[10] ICC Commission on Arbitration and ADR, *Report on Information Technology in International Arbitration* (ICC Publication No. 963E, 2017).