

**ARBITRAL SECRETARIES AND THE SHADOW ADJUDICATION
PROBLEM: DELEGATION, LEGITIMACY AND THE LIMITS OF
TRIBUNAL ASSISTANCE**

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Introduction

Arbitration has evolved significantly from its traditional perception as a streamlined and party-driven mechanism into a procedurally intensive system characterised by complex documentation, expert evidence, jurisdictional disputes, and strict procedural timelines. In response to these increasing managerial demands, arbitral tribunals have developed a growing reliance on arbitral secretaries to assist with organisational, research, and drafting functions. Although such assistance is frequently justified on grounds of efficiency and cost-effectiveness, it raises an important structural concern regarding the legitimacy of arbitral adjudication and the extent to which secretarial participation may dilute the tribunal's personal decisional mandate.

Judicial authorities have increasingly acknowledged the risks associated with excessive delegation in arbitral proceedings. In *P v Q*,¹ the English High Court observed that although arbitral secretaries may assist tribunals in administrative matters, adjudicatory authority must remain with the arbitrators themselves. Similarly, in *Sonatrach v Statoil Natural Gas LLC* [**"Sonatrach"**],² the Court emphasised that tribunals must retain effective control over the reasoning process underlying the award. These decisions illustrate the growing judicial concern that excessive intellectual involvement by arbitral secretaries may compromise the non-delegable nature of arbitral decision-making and weaken party confidence in the legitimacy of the process.

¹ *P v Q* [2017] EWHC 148 (Comm).

² *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm).

The legitimacy of arbitration is grounded in party autonomy. Arbitrators are chosen by parties because of their expertise, independence, and adjudicatory judgment. The authority of an arbitral award depends upon the assumption that the reasoning and conclusions contained in it are those of the appointed tribunal. Judicial authority has consistently recognised that arbitral power derives legitimacy from party consent and must operate within the limits of that mandate.³ When individuals lacking such authority make substantive intellectual contributions to the award, the arbitral process risks creating what may be described as shadow adjudication, namely, the informal diffusion of decision-making authority outside the structure of party consent.

The issue is not the existence of arbitral secretaries, which is widely accepted in institutional practice, but the absence of a principled distinction between permissible administrative assistance and impermissible delegation of adjudicatory functions. Institutional guidance acknowledges this concern but addresses it in broad and largely self-regulatory terms.⁴ In jurisdictions where arbitration continues to operate predominantly through ad hoc procedures, the absence of formal safeguards further intensifies the risk. This article argues that shadow adjudication constitutes a due process concern that undermines the personal nature of the arbitral mandate and weakens the legitimacy of arbitral awards at both the enforcement and annulment stages. It proposes a functional framework based on non-delegation, transparency, and party control as a means of reconciling procedural efficiency with adjudicatory legitimacy.

The Managerial Turn and Epistemic Influence

The growing reliance on arbitral secretaries must be understood in the context of arbitration's overall proceduralisation. Tribunals must handle large volumes of pleadings, complex evidentiary exercises, and numerous interlocutory applications. Secretarial aid allows for the preservation of the procedural record, the creation of chronologies, the organization of documentary materials, and the scheduling of hearings. These functions are often classified as administrative and so these are uncontroversial.⁵

Nevertheless, the modern practice often goes beyond the field of logistical coordination. These functions influence the manner in which tribunals engage with the evidentiary record. "The

³ *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

⁴ ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (ICC 2019) ¶¶ 180-183, 185.

⁵ LCIA, *LCIA Notes for Arbitrators* (LCIA 2020) ¶ 202.

individual who synthesises evidence and frames legal questions may significantly influence the tribunal's deliberative process.

This epistemic dimension distinguishes contemporary secretarial assistance from traditional clerical support. The secretary is not merely sorting out material, but also arranging the way that it will be presented to the tribunal. Consequently, the risk goes further than formal delegation and includes the risk of informal intellectual influence in which the parties are unaware.

The Personal Mandate and Non-Delegation

The power of arbitrators to carry out adjudicatory roles is non-transferable and personal. Arbitrators are appointed by parties since they trust that they can make judgments and do so in a competent manner. The Indian jurisprudence has continuously stressed the necessity of consent of parties in arbitration. The Supreme Court defined arbitration in the case of *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* as an adjudicatory procedure where the parties' agreement is the basis for its legitimacy.⁶

The principle of non-delegation is rooted in this consensual foundation. Although the assistance of administration is allowed, the design of legal reasoning, the evaluation of evidence, and the introduction of findings are all intellectual endeavours that are inseparably connected with adjudication. This distinction is enhanced by comparative judicial power. In *P v Q*, the English High Court ruled that while the use of a tribunal secretary is permitted, any delegation of decision-making authority would be incongruous with the arbitrators' mandate.⁷ Similarly, in *Sonatrach*, the Court stressed that arbitrators must maintain control over the reasoning process.⁸

The evidentiary challenge is the confidentiality of deliberations. Because parties do not have access to the internal decision-making process, the non-delegation concept is difficult to implement in practice. This structural opacity creates the conditions for shadow adjudication.

Enforcement and Annulment Implications

There are direct implications qua setting aside and enforcement actions of an award emanating from the legitimacy issues due to the aforementioned shadow adjudication. A failure to correctly form the panel or procedural issues could lead to a challenge to an award that relies on the

⁶ *Bharat Aluminium Co.* (n 3).

⁷ *P v Q* (n 1).

⁸ *Sonatrach* (n 2).

reasoning of an anonymous third party. Failure to comply with the parties' agreement about the arbitral process may result in the refusal of enforcement under the New York Convention.⁹ This may apply in cases where the parties did not voluntarily consent to the transfer of adjudicatory powers.

Indian courts have adopted a similar approach. In *Associate Builders v DDA*, the Supreme Court ruled that violations of natural justice are grounds for setting aside a judgment.¹⁰ When shadow adjudication denies a party the ability to challenge the logic behind the award, the procedural fairness of the process is jeopardized.

The challenge stems from evidentiary proof. Because the work of the secretary is rarely documented, parties may find it impossible to prove that improper delegation occurred. This underlines the need of procedural safeguards that establish an evidence record.

The Indian Context: Ad Hoc Practice, Time Pressure and Procedural Legitimacy

The Indian arbitral system presents a distinct institutional context for the problem of shadow adjudication. Even though institutional arbitration is growing, a significant percentage of proceedings continue to remain ad hoc, particularly in domestic commercial disputes. In such cases, the tribunal and the parties primarily shape the procedural framework with minimal external supervision. Although the Arbitration and Conciliation Act, 1996 [**Arbitration Act**] does not expressly regulate the scope of functions performed by arbitral secretaries, the power to appoint administrative assistance is often traced to section 6 of the Arbitration Act, which permits parties to authorise any person, including an institution, to determine certain procedural issues with the consent of the parties. This provision is frequently relied upon to justify the appointment of tribunal secretaries for administrative and organisational assistance. However, section 6 cannot be interpreted as permitting unrestricted delegation of adjudicatory responsibilities. The provision facilitates procedural autonomy and efficiency, but it does not dilute the tribunal's obligation to independently evaluate evidence, formulate legal reasoning, and render the award. This limited statutory recognition, when read alongside the time-bound requirement under section 29A, creates a procedural environment in which reliance on secretarial assistance becomes both attractive and insufficiently regulated.

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art V(1)(d).

¹⁰ *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49.

Constrained timetables have an impact on deliberation. Courts with large records to handle within strictly set statutory time limits can delegate the preparatory or analytical work to be done so that awards can be made in time. Whereas administratively effective, this kind of delegation threatens to change the decisional nature of the tribunal. The objective of expedition must therefore be balanced with adjudicatory integrity.

The Indian courts always demand that arbitral decisions should be based on independent application of mind and observance of natural justice. In *ONGC Ltd. v Western Geco International Ltd.*,¹¹ the Supreme Court has determined that an award should reflect reasoned consideration of evidence, showing that intellectual consideration should be made by the tribunal itself. Outsourcing of the analysis work to a secretary undermines this judicial principle.

In *Ssangyong Engineering & Construction Co. Ltd. v NHAI* [**“Ssangyong”**],¹² the significance of a fair chance to respond to the tribunal’s rationale and the fact that violations of natural justice might warrant a re-evaluation of an award under section 34 were both upheld by the Court. Unacknowledged intellectual work compromises such a chance through the introduction of the kind of analysis, which is not subject of adversarial scrutiny.

Similarly, *Associate Builders v DDA*¹³ demands that the arbitral conclusions should have an independent and rational basis of reasoning. Where an undisclosed third party shapes the reasoning, the need to apply mind independently is affected. An Indian doctrine however is an expression of an implicit non-delegation rule even though it is not actually written down.

Enforcement, Annulment, and the Burden of Proof

The shadow adjudication issue directly applies to the enforcement and the set-aside action. The New York Convention grants powers to deny enforcement in cases where the arbitral procedure deviates off-course of the agreement between the parties.¹⁴ In the absence of an agreement to the delegation of adjudicatory functions the involvement of such nature can constitute a procedural irregularity in Article V(1)(d).

¹¹ *ONGC Ltd. v Western Geco International Ltd.* (2014) 9 SCC 263.

¹² *Ssangyong Engineering & Construction Co. Ltd. v National Highways Authority of India* (2019) 15 SCC 131.

¹³ *Associate Builders* (n 10).

¹⁴ New York Convention (n 9) art V(1)(d).

The Indian jurisprudence adopts a similar approach under section 34 of the Arbitration Act.¹⁵ The Supreme Court in *Ssangyong* decided that an award could be challenged where natural justice is violated or material evidence left out.¹⁶ The independent use of mind of a tribunal may be compromised in case the logic behind a given award is provided by a hidden agent.

The difficulty lies in proof. The deliberations at the arbitral level are confidential and the work of the secretary is hardly documented, which forms an asymmetry in the structure, between the transparency of the principle of non-delegation and managing to ground the breach of this principle.

Comparative jurisprudence illustrates this evidentiary burden. In *P v Q*, the English High Court dismissed an appeal on the part of the secretary on the grounds that it is the arbitrators who decide the case, and the secretary did not have a say in the process.¹⁷ Help with research or drafting was also insufficient to amount to delegation without evidence of independent judgment on the part of the secretary.

These restrictions imply that use of post-award judicial review is insufficient. The procedural safeguards at the arbitral level are necessary to achieve the appropriate regulation and create the documentary account of the functions of the secretary.

Institutional Practice and its Structural Limits

The institutional rules are aimed at controlling arbitral secretaries, through consent of the parties, and limiting their duties to administrative tasks, with the appreciation of the non-delegation principle. These measures are still, however, limited.

First, advice is based on labels, that is, to be administrative and not substantive, and lacks a functional test. Such activities as the drafting of chronologies, an overview of submissions or the preparation of procedural orders might include an element of analytical input, but they remain considered to be administrative.

¹⁵ Arbitration and Conciliation Act 1996, s 34.

¹⁶ *Ssangyong Engineering & Construction Co Ltd* (n 12).

¹⁷ *P v Q* (n 1).

Second, it is more enforcement-based. The extent of the secretarial work is supposed to be presided over by tribunals without an outside supervision and the work done itself is not required to be documented or the level of intellectual input to be revealed.

Third, the after-effects of over dependence are ambiguous. Whether or not such behaviour would warrant annulment or non-enforcement in the absence of provable prejudice makes the existing guidance less of a deterrent.

Such structural gaps imply that the institutional regulation that is in place is not sufficient to mitigate the epistemic risks that are inherent in shadow adjudication.

Legitimacy, Reform, and the Epistemic Authority of the Tribunal

The legitimacy of arbitration depends not merely upon procedural efficiency but upon the epistemic authority of the tribunal. Parties accept arbitral awards because they trust that the outcome reflects the independent judgment of the arbitrators they selected. This trust is rooted in party consent and in the expectation that the tribunal itself will evaluate evidence and formulate legal reasoning. Shadow adjudication disrupts this foundation by introducing an undisclosed actor into the deliberative process. Even where the tribunal formally approves the reasoning, the diffusion of intellectual authorship weakens the relationship between consent and adjudication. The problem therefore extends beyond formal delegation and concerns the perceptible authorship of the award itself. Where analytical contributions remain opaque, parties are deprived of the opportunity to engage with the reasoning underlying the award, thereby weakening confidence in arbitration as a consensual dispute resolution mechanism.

To deal with this risk, it is not necessary to remove arbitral secretaries but create a set of principles of regulation. Functional differentiation is the beginning point. Organisational and logistical work e.g. document management, scheduling and formatting could be outsourced since it would not impact content. In comparison, non-delegable aspects of the arbitral mandate comprise legal analysis, evidence assessment, formulation of findings and substantive reasoning.

Procedural safeguards need to be provided to support functional limits. This proposed role by the secretary should be given during the appointment period so as to have informed consent. The tribunal ought to keep a documented list of duties done as a component of the procedural file to allow it to deal with the evidentiary gap that prevents challenges on excessive delegation. The parties should also not lose a literal right to have an objection to certain functions without losing

control over the adjudicatory structure. These provisions change the secretarial support to an open and responsible procedural process and not a non-traceable managerial habit.

Conclusion

The growing prominence of arbitral secretaries is a problem, as it underscores the inherent tension between administrative efficiency and adjudicatory legitimacy, but also demonstrates the complexity of the procedure and time constraints of modern arbitration. This article has asserted that, absence of a principled distinction between administrative assistance and intellectual choice is the primary problem, and not the presence of secretarial assistance. The personal mandate of the tribunal is threatened, and the epistemic basis of arbitral authority is undermined when the secretarial engages in determination of evidence, or the formulation of legal reasoning.

The constrainability of present-day institutional policy advice and the normative silence of the Indian statutory system is exposed through the conceptualization of this threat as shadow adjudication. The paradigm of functionality which is founded on meaningful party control, demanded transparency, job distinction, and responsibility which is recorded in documents offers a rational manner of ensuring efficiency without compromising legitimacy. Finally, arbitration has its strength in the belief of parties in a neutral decision of the tribunal. To preserve this trust, it is recommended that the adjudicatory power should be transparent, personal and confined to persons nominated by the parties to settle their dispute.