March 2026

The Supreme Court of India clarifies that arbitrator ineligibility cannot be waived by conduct and may be challenged for the first time under Section 34 of the Arbitration and Conciliation Act, 1996

The Supreme Court of India ("**Supreme Court**") in ***Bhadra International (India) Private Limited vs. Airports Authority of India***[1] ("**Bhadra International**") resolves questions around contracts between private entities and government/public sector entities, which have long contained arbitration clauses vesting exclusive power to appoint the sole arbitrator in the government entity itself.

While the Arbitration and Conciliation (Amendment) Act, 2015[2] addressed this by inserting Section 12(5)[3] into the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), critical questions as to what constitutes a valid waiver and the timing of a challenge to the unilateral appointment remained unsettled. The Supreme Court's judgment resolves these questions and imposes an affirmative obligation on arbitrators.

Brief facts

1. Bhadra International (India) Private Limited and Novia International Consulting Aps, as a joint consortium ("**Bhadra**") executed licence agreements in 2010 with Airports Authority of India ("**AAI**") for ground handling services at various airports.
2. The arbitration clause empowered the Chairman of AAI to appoint the sole arbitrator. Disputes arose in 2015, and Bhadra invoked arbitration in November 2015, after the 2015 Amendment had come into force.
3. The Chairman of AAI accordingly appointed a sole arbitrator. At the first procedural hearing, the arbitrator recorded that neither party had any objection to his appointment.
4. Bhadra thereafter participated fully in the proceedings, filing its statement of claim, applying for interim relief under Section 17 of the Arbitration Act, and jointly seeking 2 (two) extensions of mandate under Section 29A of the Arbitration Act.
5. A nil award was passed on July 30, 2018. Bhadra challenged the award under Section 34 of the Arbitration Act and, only in 2022, sought to amend its petition to raise for the first time the ground of unilateral appointment. Both the Single Judge and the Division Bench of the Delhi High Court rejected the challenge. The Supreme Court allowed the appeals.

[1] 2026 SCC OnLine SC 7 (decided on January 5, 2026)
[2] The Arbitration and Conciliation (Amendment) Act, 2015, which came into effect on October 23, 2015.
[3] Any person whose relationship with the parties, their counsel, or the subject matter falls under the Seventh Schedule is disqualified from acting as an arbitrator. However, the parties may expressly waive this disqualification through a written agreement.

Issues

1. Whether the sole arbitrator could be said to have become ineligible to be appointed as an arbitrator: by virtue of Section 12(5) of the Arbitration Act?
2. Whether the parties could be said to have waived the applicability of sub section (5) of Section 12 of Arbitration Act, by their conduct, either expressed or implied?
3. Whether the appellants could have raised an objection to the appointment of the sole arbitrator for the first time in an application under Section 34 of the Arbitration Act?

Findings and analysis

Unilateral appointment is *void ab initio*

The Supreme Court, applying the line of authority from *TRF Limited vs. Energo Engineering Projects Limited*[4], held that the Chairman of AAI, as part of the management of a party to the dispute, fell within items 1, 2, 5, 12, and 13[5] of the Seventh Schedule of the Arbitration Act.

An ineligible person cannot appoint or nominate another arbitrator as one who cannot sit on the chair himself cannot authorise another to sit on it either. The appointment was accordingly held *void ab initio.*

The Supreme Court also clarified that a Section 21 notice invoking arbitration is not consent to any particular appointment, it is merely the mechanism to set the arbitration agreement in motion.

What constitutes a valid waiver?

The proviso to Section 12(5) of the Arbitration Act permits parties, after disputes have arisen, to waive the ineligibility bar "by an express agreement in writing."

The Supreme Court undertook a careful construction of this expression, contrasting it with the 'deemed waiver' by conduct standard under Section 4 of the Arbitration Act. The Court held that the legislature's deliberate prefixing of "express" before "agreement" and the requirement that it be 'in writing' together mandate a conscious, bilateral, and informed decision that is documented and not inferred. The following were held to fall short of a valid waiver:

1. the Section 21 notice invoking arbitration;
2. a procedural order recording that parties have 'no objection' to the appointment;
3. submission of the statement of claim;
4. filing of applications for interim relief under Section 17 of the Arbitration Act;
5. joint applications for extension of mandate under Section 29A of the Arbitration Act; and
6. continued participation in proceedings, however prolonged.

[4] (2017) 8 SCC 377; affirmed most recently by the Constitution Bench in *Central Organisation for Railway Electrification v. ECI-SPIR-SMO-MCML (JV), (2025) 4 SCC 641*

[5] Under the Seventh Schedule of the Arbitration Act, the listed relationships render a person ineligible to act as an arbitrator. (a) Item 1: arbitrator is an employee, consultant, advisor or has any past business relationship with a party; (b) Item 2: arbitrator currently represents or advises one of the parties or affiliate; (c) Item 5: arbitrator is a manager, director or part of management in an affiliate of one of the parties which affiliate is directly involved in the matters in dispute; (d) Item 12: arbitrator is a manager, director or part of management or has similar influence on one of the parties; and (e) Item 13: arbitrator has a significant financial interest in one of the parties or the outcome of the case.

Challenge maintainable for the first time at the Section 34 stage

The Supreme Court characterised ineligibility under Section 12(5) of the Arbitration Act as a defect going to the root of the arbitrator's jurisdiction, not merely to the conduct of proceedings. The Supreme Court held that arbitral tribunal derives its authority from the consent of the parties, expressed through a valid agreement and an appointment made in accordance with the Arbitration Act.

Where the appointment is void, consent is absent and the tribunal is without jurisdiction, an award passed in such circumstances is *non-est* in law and carries no legal recognition. Consequently, a challenge may be raised at any stage, including for the first time in an application under Section 34 of the Arbitration Act.

Arbitrator's obligation at the first hearing

The Supreme Court placed an affirmative obligation on the arbitrator personally. The Supreme Court held that upon entering reference, the arbitrator must, at the very first hearing, satisfy himself that the parties are willing to participate and insist upon a written waiver agreement expressly dispensing with the Section 12(5) bar under the Arbitration Act. If a party does not appear despite notice, the arbitrator must not proceed and must immediately withdraw.

Practical implications

1. Parties with legacy government and public sector contracts that vest unilateral appointment power in the counterparty's officer should prioritise revising the appointment mechanism. The 2015 Amendment applies to all arbitrations commenced on or after October 23, 2015, regardless of when the contract was executed.
2. Where a party chooses to proceed before an arbitrator appointed under a unilateral appointment clause, the only legally safe route is a fresh, bilateral, written agreement executed after disputes arise that explicitly acknowledges the Seventh Schedule ineligibility and records informed consent to overlook it. A procedural 'no objection' on record is no longer adequate.
3. Parties who have participated in arbitration under a unilaterally appointed arbitrator may still raise the ineligibility ground under Section 34 of the Arbitration Act, provided the limitation period has not expired. The Supreme Court's characterisation of the award as *non-est* may also raise questions as to whether the limitation period applies at all, a point future courts may need to address.
4. Arbitrators who are unilaterally appointed must now, as a matter of judicial direction, obtain a written waiver at the first hearing before proceeding. Arbitral institutions should also incorporate this requirement into their administrative protocols.

Conclusion

The Supreme Court's decision consolidates the post-2015 arbitration framework on appointment integrity while resolving 3 (three) open questions with lasting practical effect: the exhaustive definition of what does not constitute a valid waiver, the maintainability of a belated Section 34 challenge grounded in jurisdictional defect, and the imposition of a personal due diligence obligation on the arbitrator.

For contracting parties and practitioners, the takeaway is that appointment mechanisms must be structured for statutory compliance from the outset, and where they are not, there is no procedural substitute for a conscious, express, written agreement between fully informed parties.

Disputes Practice

With domain experts and strong team of dedicated litigators across the country, JSA has perhaps the widest and deepest commercial and regulatory disputes capacity in the field of complex multi-jurisdictional, multi-disciplinary dispute resolution. Availing of the wide network of JSA offices, affiliates and associates in major cities across the country and abroad, the team is uniquely placed to handle work seamlessly both nationally and worldwide.

The Firm has a wide domestic and international client base with a mix of companies, international and national development agencies, governments and individuals, and acts and appears in diverse forums including regulatory authorities, tribunals, the High Courts, and the Supreme Court of India. The Firm has immense experience in international as well as domestic arbitration. The Firm acts in numerous arbitration proceedings in diverse areas of infrastructure development, corporate disputes, and contracts in the area of construction and engineering, information technology, and domestic and cross-border investments.

The Firm has significant experience in national and international institutional arbitrations under numerous rules such as UNCITRAL, ICC, LCIA, SIAC and other specialist institutions. The Firm regularly advises and acts in international law disputes concerning, amongst others, Bilateral Investor Treaty (BIT) issues and proceedings.

The other areas and categories of dispute resolution expertise includes; banking litigation, white collar criminal investigations, constitutional and administrative, construction and engineering, corporate commercial, healthcare, international trade defense, etc.

This Prism is prepared by:

Dheeraj Nair
Partner

Vishrutyi Sahni
Principal Associate

Vikramaditya Singh
Associate

19 Practices and
40 Ranked Lawyers

8 Ranked Practices,
22 Ranked Lawyers

15 Practices and
20 Ranked Lawyers

13 Practices and
49 Ranked Lawyers

20 Practices and
24 Ranked Lawyers

8 Practices and
10 Ranked Lawyers
Highly Recommended in 5 Cities

Regional Legal Expertise Awards (APAC) of the Year
Energy Firm Competition/
Antitrust Firm

Among Best Overall
Law Firms in India and
14 Ranked Practices
---
9 winning Deals in
IBLJ Deals of the Year
---
15 A List Lawyers in
IBLJ A-List – 2026

Recognised in World's 100 best
competition practices of 2026

Ranked Among Top 5 Law Firms in
India for ESG Practice

Asia M&A Ranking
2025 – Tier 1

For more details, please contact km@jsalaw.com

Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi