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Abstract

In arbitral jurisprudence, a sense of competition between the principles of party autonomy and limited intervention by the court always attracts the concentration of different commentators. Previously, the English arbitration practices were immensely criticised for its interventionist attitude into the arbitration proceedings and arbitral awards. Limiting the judicial intervention, as one of the factors, prompted the Government to enact the new Arbitration Act in 1996. This Act enshrines both the competing issues as general principles of arbitration. However, does the Act establish the esteemed balance? A plain reading of the concerned provisions of this Act reveals that there are two restrictions on party autonomy: first, compliance to some mandatory provisions during undertaking an arbitration agreement; and second, necessary safeguards for upholding public interest. Does the Act allow the court to exercise its authority beyond these two restrictions? If yes, then how does this Act strike a fair balance between the principles of party autonomy and limited judicial intervention? This study analyses these issues.

1. Introduction

In legal parlance, party autonomy is a recognised principle of arbitration which demands proper respect from national courts. Prior to the enactment of the UK Arbitration Act 1996,[1] the English arbitration practices were immensely criticised due to the wide scope it would have provided for court intervention in arbitral proceedings. Consequently, the Act was enacted giving English arbitration law an entirely new face, a new policy, and a new foundation. It aims to replace the earlier broader scope of judicial intervention and embody a new balance of relationships between the parties, advocates, arbitrators, and the court.[2] The principles of party autonomy and limited judicial intervention are the offshoots of this

[1] Hereinafter referred as the Act.

[2] Lord Mustill and Stewart C Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2nd edn-reprint, Butterworths 2001) Preface 1st para.

balance. However, does the Act strike a fair balance between these two general principles? Before answering this question, it is essential to know which elements constitute such a fair balance. The principle of party autonomy in any arbitration agreement aims for an independent and private arrangement of dispute resolution among the parties.[3] It needs support from the judiciary for its proper enforcement. The judiciary supports the parties' autonomous arrangement of dispute resolution if it aligns with the basic judicial principles and public interest of the country. When any such autonomous arbitral arrangement complies with the principles and public interest issues of the country, and the judiciary restrains itself from intervening into the matter, it can be called that the arbitral system and judiciary are maintaining a fair balance. This study aims to find out whether a fair balance is being maintained between the principle of party autonomy and the principle of limited judicial intervention under the present Act. To do so, two aspects have been explored in this research: the extent of party autonomy which the Act allows; and how does the Act refrain the court from intervening into the party autonomy

2.0. The extent of party autonomy under the Arbitration Act 1996

The doctrine of party autonomy, which was first developed by academics, has gained extensive acceptance in national legal systems.[4] Before involving in further discussion, it seems necessary to identify what party autonomy is and how it comes into existence. Generally speaking, party autonomy is the discretionary power of the parties whereby they can agree upon the laws and procedure to be applied in resolving their dispute arising out of any agreement.[5] An arbitration agreement derives its power from party autonomy.[6] Arbitral tribunal owes its existence to the agreement of the parties and, in applying the law chosen by the parties, an arbitral tribunal is simply carrying out their agreement.[7] Therefore, party autonomy comes into sensible existence through an arbitration agreement. For determining the extent of party autonomy, it is necessary to understand the limit of discretion the parties may incorporate in the arbitration agreement. Lord Mustill and Boyd in this regard state, '[p]arty autonomy gives the parties and their lawyers the opportunity to control all aspects of

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[3] Yas Banifatemi 'Chapter 19: The Law Applicable in Investment Treaty Arbitration' in Katia Yannaca-Small (ed) *Arbitration Under International Treaty Arbitration* (2nd edn Oxford University Press 2018) 485.

[4] Nigel Blackaby, Constantine Partasides and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 3.97.

[5] Banifatemi (n 3).

[6] Sunday A Fagbemi, *'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth and Reality'* (2015) 6 (1) AFE Babalola University: J. of Sust. Dev. Law & Policy 222, 226.

[7] Redfern (n 4) para 3.99.

the proceedings, however unsuited to the nature of dispute, and however wasteful in terms of money, time and effort the agreed method might be...'[8] Therefore, the essence of party autonomy includes the parties' freedom to- determine their governing law,[9] and prefer arbitrators and arbitral mechanism with a view to resolving their dispute. Such freedom is expected 'be respected in every way possible'.[10] This freedom and the concerned national law's respect to it reveal the extent of party autonomy under that particular national law. In this part, freedom of the parties in exercising autonomy under the English arbitration Act will be discussed by analysing the concerned provision of the Act.

Section 1(b) of the Act sets 'party autonomy' as one of the basic principles of arbitration. It states that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.'[11] The reference to certain terms in this provision discloses that freedom of parties is subject to certain limitations. The first part of this provision, for instance, 'should be free to agree' signifies the parties' freedom to design the laws and proceedings of the arbitration while recording an agreement. This design is not unqualified because the words 'should be free' indicate an implied restriction in exercising wide autonomy because the word 'should' is a conditional one. It allows the exercise of discretion in agreeing any matter, but such discretion is under the supervision of the judiciary. If the drafters of this legislation had used 'shall be free' or 'are free[12]', it would have indicated exclusive freedom to exercise party autonomy. Ideally, this provision does not allow exclusive party autonomy, rather it impliedly demands observance of some standards while drafting an arbitration agreement. Moreover, the second part of the provision stipulates an explicit restriction in the case of designing the arbitration arrangements and deciding the dispute. It legislates that party autonomy will be exercised subject to the principle of public interest. However, it is to be noted the excuse of 'public interest' though explicit in the provision is not under exclusive scrutiny. Why the principle of 'public interest' does not seem to be an exclusive forbiddance? This is because there are some subsequent qualifying phrases in this section- such as 'such safeguards as are necessary'[13]. These conditional phrases mean that any agreed matter in an arbitration proceeding may seem as against the public interest of

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[8] Mustill (n 2) 26

[9] Julian D M Lew, Loukas A Mistelis, Stefan M Kroll, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) para 17-10.

[10] Elizabeth Shackelford 'Party Autonomy and Regional Harmonisation of Rules in International Commercial Arbitration' (2005-2006) 67 University of Pittsburgh Law Review 897, 903.

[11] The UK Arbitration Act 1996 (AA 1996), section 1(b).

[12] As prescribed in the UNCITRAL Model Law on International Commercial Arbitration 1985, art 19(1).

[13] AA 1996, section 1(b).

any country or even that of the UK. Despite this fact, the judiciary may consider that certain matter to be not 'necessary' in public interest. It allows the court to have a proportionality test in determining any issue to be against public interest. This analysis reveals that parties have the autonomy to design the method of their dispute resolution, but this autonomy should be under implied or express scrutiny of the judiciary. If any matter of the arbitration proceedings is alleged to be against public interest, the court will not declare that matter *ultra-virus* right away. Rather, it will assess whether the matter is really necessary to be declared as against public interest. If it is found unnecessary to be declared as against public interest, the court will not interfere in the process. It appears that the Act arranges a supportive attitude to the arbitration proceeding, rather than allowing exclusive judicial power to interfere in the proceeding.

Part- I of the Act, which establishes party autonomy, begins with the heading 'arbitration pursuant to an arbitration agreement.' It stipulates that there must be an agreement to arbitrate wherein the parties will agree with their preferred arbitration proceeding. For being effective under English law, this agreement must be in writing or somehow recorded[14] with an intention to submitting to arbitration any present or future dispute.[15] A well drafted arbitration agreement can exclude the jurisdiction of the courts and reflect the real needs to express the desire of the parties.[16] Part-I of the Act provides specific guidelines to be followed during recording or drafting an arbitration agreement. Parties cannot insert their desires on a whim and their autonomy is not unfettered while preparing the agreement too. This is because there are some provisions in the Act which require strict compliance in drafting any agreement. For example, certain sections of part I of the Act are 'mandatory', in the sense that they cannot be overridden by agreement of the parties. The mandatory provisions of this Part are listed in Schedule 1 of the Act and those are effective notwithstanding any agreement to the contrary.[17] Any agreement in contravention of the mandatory provisions will not be effective on the plea of party autonomy. The scope of party autonomy is thereby restricted through the mandatory provisions.[18] In case of any non-

[14] AA 1996, section 5.

[15] AA 1996, section 6.

[16] Ar. Gör. Şeyda Dursun, 'A Critical Analysis of the Role of Party Autonomy in International Commercial Arbitration and An Assessment of Its Role and Extent' (2012) 1 Yalova Üniversitesi Hukuk Fakültesi Dergisi 161, 168 .

[17] AA 1996, section 4(1)

[18] Bruce Harris, Rowan Panterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell 2014) para 4C.

compliance to these mandatory provisions, the court has the full authority to declare any agreement contrary to these provisions null and void and having no effect.

Conversely, there are some 'non-mandatory' provisions which do not require strict compliance. Parties to any agreement have the discretion to avoid compliance to these non-mandatory requirements.[19] The majority of sections in part-I are in the 'non-mandatory' category[20] which eventually allow the parties to agree on their own arrangements.[21] Therefore, the parties have freedom to exercise autonomy in agreeing to any matter that fall within the purview of non-mandatory provisions regardless its noncompliance with those provisions. The presence of non-mandatory provisions allows the parties ample discretion to agree on various issues of their arbitration arrangements. For example, the parties are allowed to agree in all matters relating to the constitution of a tribunal, powers of the tribunal, and powers of the court to arbitral proceedings. Moreover, the parties can agree on the time of commencing arbitral proceedings,[22] and fixing all procedural and evidential matters.[23] They also have the autonomy to constitute the arbitral tribunal,[24] and specify the functions of the arbitrators, chairman,[25] or the umpire.[26] The parties are even free to agree on the powers of the arbitral tribunal, such as deciding on its own substantive jurisdiction,[27] appointing experts, legal advisors or assessors,[28] making provisional awards,[29] and providing appropriate remedies,[30] interest[31] and costs.[32] Parties have also the autonomy to specify the role of courts in some matters of arbitral proceedings, for example, they may agree on the extent of court's power in determining any preliminary point of law,[33] its powers to extending time,[34] and even excluding the court from entertaining appeal.[35]

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[19] Ibid, para 4B.
[20] Ibid para 4C.
[21] AA 1996, section 4(2)
[22] AA 1996, section 14(1)
[23] AA 1996, section 34(1)
[24] AA 1996, sections 15(1), 16(1), 17(1), 18(1)
[25] AA 1996, section 20(1)
[26] AA 1996, sections 21(1), 22(1)
[27] AA 1996, section 30(1)
[28] AA 1996, section 37(1)
[29] AA 1996, section 39
[30] AA 1996, section 48
[31] AA 1996, section 49(1)
[32] AA 1996, sections 61, 62, 63, 65
[33] AA 1996, section 45
[34] AA 1996, section 50
[35] AA 1996, section 69

The above discussion reveals the extent of autonomy the parties may enjoy in drafting an arbitration agreement under the Act. It appears that this Act allows the parties to frame all the relevant matters according to their needs, which include the commencement of arbitration, composition, powers and functions of the arbitral tribunal and all procedural and evidential matters. Additionally, part-I of the Act legislates several default measures under the auspices of certain legal terminologies, for example, 'unless the parties otherwise agree', or 'unless otherwise agreed by the parties', or 'if or to the extent there is no such agreement. The default provisions have been carefully crafted to provide a balanced and functional set of rules for nearly all the non-mandatory issues that might arise, which will be adopted simply by not saying anything about the matter.[36] It means, agreeing to arbitration under the English law without specifying an intention contrary to the default provisions is one sort of party autonomy. Like the discretion of exercising party autonomy, the parties, in this case, are agreeing to the default procedure prescribed in the Act. It means that the parties are submitting them under the authority of the Act in case of getting any dispute settled by arbitration. It is something like they are, by default, agreeing to the proceedings prescribed in the Act instead of choosing their own proceedings. Thus, the non-mandatory provisions seem to be making the notion of party autonomy unrestricted. It means the parties will not confront any restriction in case of exercising their autonomy of getting the dispute resolved through their chosen ways. Therefore, it reveals that the Act allows wide party autonomy, but this is subject to two major restrictions: i) principle of public interest and ii) mandatory provisions. Does the Act truly confine the court within these two restrictions or can courts take stances beyond these two? A discussion on this hypothesis would answer better whether the balance is fair enough. Since the parties know there are only two restrictions, limiting judicial intervention within the purview of these two can be considered a fair practice.

3.0. Confining the judicial intervention within the apparent restrictions on party autonomy

The principle of limited court intervention in section 1(c) of the Act states 'in matters governed by this Part the court should not intervene except as provided by this Part'. It is clear recognition of party autonomy and the desire to limit the court's role in arbitration so as

[36] Susan Blake, Julie Browne, Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (3rd edn, Oxford University Press 2014) para 26:59

to give effect to it.[37] The underlying philosophy is- where parties have agreed that their dispute should be resolved by arbitration, the court should not intervene except and to the extent necessary.[38] It is believed that most arbitration seated in England and Wales are conducted, from start to finish, without any need for court involvement.[39] As was described by Aikens J in *Elektrim SA v Vivendi Universal SA & Ors* whereby the approach embodied in the Act is 'to give as much power as possible to the parties and the arbitrators, and to reduce the role of the courts to that of a supporter of the arbitration process up to an award being made'.[40] Despite having this supportive approach, in the following paragraphs, endeavours would be carried out to check whether the court confines itself to the principle of public interest and mandatory provisions through discussing court's role in assisting arbitral proceedings and rectifying serious injustice.

3.1. Assistance to arbitral proceedings

It is said that the English court's approach has considerably shifted to support the notion of party autonomy. The courts in general have either adopted a broad and more flexible approach or have applied the Arbitration Act 1996 strictly to reflect parties' intentions.[41] In the earlier part, mandatory provisions have been found as the apparent restrictions on party autonomy. Ideally, it is not true because these provisions have been designed to support arbitral proceedings. The following points would exemplify the mandatory provisions' support towards party autonomy.

1. An arbitration agreement is the document which reflects the parties' desire to arbitrate any 'present or future dispute'.[42] But it might happen that 'a party may bring court proceedings in breach of an existing arbitration agreement…[43] To prevent a party from breaching such agreement by bringing court proceedings, section 9(1) allows the other side to apply for a stay of those court proceedings[44] unless he is content to forego his

[37] David St John Sutton, Judith Gill and Matthew Gearing, *Russell On Arbitration* (24th edn, Sweet & Maxwell 2015) para 7-002.
[38] Blake (n 36) para 26:61.
[39] Kieron O'Callaghan and Jerome Finnis, 'Chapter 20: Support and Supervision by the Courts*'* in Julian D. M. Lew, Harris Bor (eds), *Arbitration in England, with chapters on Scotland and Ireland*, (Kluwer Law International 2013) para 20-1.
[40] [2007] EWHC 571 (Comm) [71].
[41] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2010) para 16.15.
[42] AA 1996, section 6.
[43] Blake (n 36) para 31.05.
[44] Ibid para 31.07.

right to have the dispute referred to arbitration and choose instead to defend the action before the court.[45] Where it is feared that proceedings are about to be commenced in any foreign country, it may be possible to apply for an anti-suit injunction.[46]

2. Party autonomy authorises the parties to agree on the prospective time-frames for having a dispute settled through arbitration. For example, the parties may include in their agreement within how many days of arising a dispute they would commence the arbitration,[47] how many days the tribunal may take to pass an award,[48] and how many days the tribunal could take to complete the arbitral proceedings.[49] However, the mandatory provisions authorise the court to intervene into the matters of time-frame at the instance of any party if the party satisfies some exceptional circumstances. For example, the situations under which the party agreed the time-frame are such as were outside the reasonable contemplation of the parties, and that it would be just to extend the time, or the conduct of one party makes the agreed time-frame unjust[50] or a substantial injustice would otherwise be done if the court does not extent the time.[51] Although the court possesses the power to extend the time-frame previously agreed by the parties in the aforementioned exceptional circumstances, recent cases concerning the Act show that the courts rarely extend time for commencing an arbitration when a party has missed a contractual time bar.[52]
3. The usual position is that arbitrators are appointed by the parties or through mechanisms agreed by them without any involvement of the courts.[53] In addition, there are default provisions in non-mandatory category which permits the court to assist the parties in appointing the arbitrators. But the mandatory provisions authorise the court to remove any preferred arbitrators of a particular party if at the instance of any aggrieved party the court is satisfied that there are justifiable doubts over the arbitrator's impartiality and qualifications.[54]

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[45] Sutton (n 37) para 7-008.
[46] Blake (n 36) paras 31.06, 29.58.
[47] AA 1996, sction 14.
[48] AA 1996, section 50.
[49] AA 1996, section 79.
[50] AA 1996, section 12(3).
[51] AA 1996, section 50.
[52] *Cathiship SA v Allanasons Ltd* [1998] 2 Lloyd's Rep 511 [520] (per Mr Geoffrey Brice QC).
[53] Blake (n 36) para 31.15.
[54] AA 1996, section 24(1).

4. Mandatory provisions permit the court to intervene in determining ‘any question as to the substantive jurisdiction of the tribunal’.[55] This provision is also a good example of the court’s support to party autonomy because the court will not consider any such matter unless ‘it is made with the agreement in writing of all the other parties…’[56]

The arbitration procedures depend fundamentally upon the agreement of the parties which causes a tension between the consensual basis of arbitration on the one hand and the establishment of an efficient arbitration 'system' on the other hand.[57] The Act (in particular mandatory provisions) may be viewed as a further step towards the creation of such a 'system'.[58] In other words, though the mandatory provisions have been enshrined in the Act as some restrictions upon party autonomy, those are, in true sense, conducive for a balanced nexus between party autonomy and judicial authority.

3.2. Rectifying serious injustice by judicial review

The court always retains an inherent power to intervene into any matter during exercising the power of judicial review notwithstanding any confinements specified in any law. Nevertheless, the Act defines some area of confinements for the court. For example, the court may exercise its discretion while reviewing enforcement of award,[59] challenges to the award on the ground of serious irregularity[60] and appeals on a point of law.[61] During these reviews, does the Act confine the court within the mandatory provisions? Or does the Act give wide power to the court for reviewing any matters irrespective of mandatory or non-mandatory provisions for sake of public interest to justice?

At this stage, section 1(c) is necessary to be reiterated. It provides that ‘in matters governed by this Part the court should not intervene except as provided by this Part’. This provision itself allows the court to intervene into the matters of party autonomy by legislating ‘should’ instead of ‘shall’. As in *AES- UstKamenogorsk v Ust-Kamenogorsk JSC*[62] it was held that-

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[55] AA 1996, section 32(1).
[56] AA 1996, section 32(2)(a).
[57] Karen Maxwell, ‘English Arbitration Act 1996: Will Anything Change in Practice?’ (1997) 13(4) Arbitration International 435.
[58] ibid.
[59] AA 1996, section 66.
[60] AA 1996, section 68.
[61] AA 1996, section 69.
[62] [2013] UKSC 35 [33].

> [T]he use of the word 'should' in s.1(c) was also a deliberate departure from the more prescriptive 'shall' appearing in article 5 of the UNCITRAL Model Law. …in matters which might be regarded as falling within Pt 1 it is clear that s.1(c) implies a need for caution, rather than an absolute prohibition, before any court intervention.

The spirit of this principle invites the court's intervention into the matters decided following the party autonomy. Consequently, it has been criticised for extending court's power to treat an arbitral tribunal as an inferior branch of the judicial system.[63] It may be argued that party autonomy is restricted by section 1(c) regardless of the provision being mandatory or non-mandatory. However, questions may arise surrounding when the court's intervention might be allowed by the Act. The answer remains it is at that time when the parties fail to follow the acceptable standard in the arbitration agreement.[64] As examples of this proposition of failure to follow the prescribed standards the following discussions on section 66, 68 and 69 of the Act are worthy of perusal.

Section 66 provides that an award made by the tribunal pursuant to an arbitration agreement may be enforced in the same manner as a judgment or order of the court to the same effect. Nevertheless, the court has discretion not to grant leave to enforce an award.[65] This discretion will be exercised in an appropriate case in the interests of justice and not as an administrative rubber stamping exercise.[66] In *Soleimany v Soleimany*,[67] a dispute between father and son was brought to the court where the plaintiff arranged the export of carpets from Iran in breach of the revenue laws and export controls of that country and the defendant sold the carpets in England and elsewhere. When disputes arose, both agreed for arbitration before the Beth Din in accordance with Jewish law. The Beth Din made an award in favour of the plaintiff, ignoring the issue of smuggling since it would have no effect under Jewish law. The plaintiff applied *ex parte* to have registered it as a judgment under English law. The English Court of Appeal stated:

> [W]here a foreign arbitration award was made pursuant to a valid arbitration agreement but was based on a contract which was illegal under the law of a friendly foreign state where that law governed the contract or

[63] Anthony Diamond, 'Publication Review on book The Arbitration Act 1996: A Commentary' (2004)' 70(1) Arbitration 70, 71.
[64] Fagbemi (n 6) 243.
[65] Sutton (n 37) para 8-005.
[66] *West Tankers Inc v Allianz Spa* [2012] EWCA Civ 27 [38].
[67] [1999] QB 785.

> the contract was to be performed in that state, the English court would not enforce that award on the grounds of public policy.

A liberal *dictum* than the *Soleimany* case came out in *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd*[68] where allegation of using personal influence and bribery were not considered as against public policy rather activities such as terrorism, drug trafficking, prostitution and pedophilia, corruption and fraud were considered as offensive to public policy. Hence, Wade [69] efficiently compared the findings of these two cases concluding that:

> [A] foreign arbitral award can be enforced even if the underlying contract offends against English public policy, providing that: (a) the award does not offend against any fundamental rule of English public policy; and (b) the award does not offend against the public policy of the governing law and/or the curial law; even if (c) the award is contrary to the public policy of the place of performance.

Considering the above precedent, it can briefly be said that the courts are not free to intervene into any arbitral award on the ground of violating public policy unless it contravenes any fundamental public policy which is 'necessary to safeguarding public interest'.[70] However, in reviewing any challenge for serious irregularity under s. 68 of the Act, the court has the authority to scrutinise the arbitral tribunal's decision. In doing so, the court will enquire whether the tribunal has caused substantial injustice to the applicant and failed to follow the parties' agreement relating to its powers,[71] procedure,[72] issues in controversy[73] and form of the award.[74] It will also enquire whether the same has also been caused due to non-compliance with core principles of justice such as violation of natural justice,[75] uncertain or ambiguous remedy,[76] attainment of award by fraudulent means or an award contrary to public policy,[77] and any other admitted irregularity.[78]

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[68] [2000] QB 288.
[69] Shai Wade, '*Westacre v Soleimany*: what policy? which public?' (1999) 2(3) Int ALR 97-102.
[70] See discussion in part- 2.0 of this effort.
[71] AA 1996, section 68(2)(b) & (e).
[72] AA 1996, section 68(2)(c).
[73] AA 1996, section 68(2)(d).
[74] AA 1996, section 68(2)(h).
[75] AA 1996, section 68(2)(a).
[76] AA 1996, section 68(2)(f).
[77] AA 1996, section 68(2)(g)
[78] AA 1996, section 68(2)(i).

Regarding the tribunal's failure to adhere to the parties' agreement, the court should rectify the tribunal's mistake and also intervene where public interest requires it necessary for remedying substantial injustice in the proceedings. In *Lesotho Highlands Development Authority v. Impregilo SpA and Ors*[79], it was alleged that the arbitrators exceeded their powers by expressing the award in European currencies and by awarding pre award interest in circumstances not permitted under Lesotho law. The House of Lords stressed on the necessity of focusing intensely on the particular power under the arbitration agreement but decided the matter as a mere error of law which would not amount to an excess of power under section 68(2)(b). As mentioned earlier, the court and arbitral tribunal will follow the parties' agreement regarding determination of arbitral procedure. Nevertheless, there are examples of non-interference with the tribunal's decision which defied parties' subsequent agreement regarding the procedure because the court found it necessary for justice.[80] In fixing the issues of dispute, the court is not supposed to intervene into the parties' agreement nor tribunal's decision. Once it is recognised that a tribunal has "dealt with" an issue, section 68(2)(d) does not allow any qualitative assessment as to how the tribunal dealt with it and it also does not matter whether it has done so well, badly, or indifferently.[81] But the court reserves all authority to check whether failure to deal with any issue has caused substantial injustice.[82] For example, in *Secretary of State for the Home Department v Raytheon Systems Ltd*, the court directed to re-open an issue for conscious consideration.[83]

Similarly, section 68 is also embodied with some key judicial principles which are *sine quo non* for upholding justice for public interest. Section 68(2)(a) deals the 'matter such as bias, procedural unfairness and breach of natural justice'.[84] Violation of these principles must undergo judicial review regardless of the wide scope of party autonomy within the legal framework. In this regard, the judicial and arbitral principles of justice have been amalgamated as the test for bias is the same for both justices, jurors, and arbitrators.[85] However, the English law embraced 'fair minded and informed observer' test whereby

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[79] *Lesotho Highlands Development Authority v. Impregilo SpA and Ors* [2005] UKHL 43.
[80] *Secretary of State for Defence v Turner Estate Solutions Ltd* [2014] EWHC 244 (TCC).
[81] *Primera Maritime (Hellas) Ltd and others v Jiangsu Eastern Heavy Industry Co Ltd and another* [2013] EWHC 3066 (Comm) 40.
[82] *Petrochemical Industries Co (KSC)* v. *Dow Chemical Co* [2013] 2 CLC 864 [15].
[83] Margarita N. Michael, 'Case Comment on Setting aside an award for serious irregularity: the Secretary of State for the Home Department v Raytheon Systems Limited' (2015) 18(2) Int ALR N13-N16.
[84] Harris (n 18) Para 68G
[85] *AT&T Corporation v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 [39]

'justifiable doubts' regarding the arbitrator's impartiality or independence[86] must be proved. Section 68(2)(g) allows the court to review the matters of party autonomy in case of any fraudulent practice causing substantial injustice. In case of an allegation of fraud practice, the Act allows the court to consider an innocent failure to give proper disclosure,[87] or the innocent production of false evidence[88] as non-fraudulent. Under the same provision, public policy is another ground of judicial intervention as discussed earlier while discussing section 66 in this article. An arbitral proceeding can also be challenged where any irregularity in the arbitral proceedings or award is decided as admitted by the tribunal or arbitral institution.[89]

An appeal on point of law under section 69 is restricted to party autonomy. The parties to arbitration may agree to exclude the appellate power of the court against any decision of the arbitral tribunal.[90] However, there is an alternative way of avoiding this restriction upon court's intervention for upholding public interest. These restrictions mean that appeals on questions of law are often 'dressed up' as challenges under section 68 which can be brought as of right.[91]

The policy in favour of party autonomy does not permit derogation from the provisions of section 68. However, the matter of 'serious irregularity' specified in section 68 is tantamount as the 'substantial injustice'. It must be followed preliminarily that any alleged irregularity has caused substantial injustice in case of any judicial intervention.[92] The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process.[93] This discussion reveals that the court has the power to rectify any error caused by the arbitral tribunal, being subject to party autonomy. For example, the court during reviewing a tribunal's decision would consider whether the tribunal went beyond the parties' agreed power and proceedings. However, if the court finds the parties' agreement in contrary to public interest, party autonomy would not restrict the court to rectify it. Moreover, neither party autonomy nor the tribunal's discretion could refrain the court from exercising judicial review on the ground of fundamental principles of

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[86] Austin I Pullé, 'Securing Natural Justice in Arbitration Proceedings' (2012) 20 (1) Asia Pacific Law Review 63, 85.
[87] *Profilati Italia SrL* v *PaineWebber Inc* [2001] CLC 672 [21].
[88] *Elektrim SA v Vivendi Universal SA* [2007] 1 CLC 16 [81].
[89] AA 1996, section 68(2)(i).
[90] AA 1996, section 69.
[91] Sutton (n 37) para 8-132.
[92] *Lesotho* (n 79) [28].
[93] Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, February 1996, para 280.

justice. That is why, the Departmental Advisory Committee on Arbitration Law commented that where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.[94]

4.0. Conclusion

The UK Arbitration Act 1996 adopted party autonomy and limited judicial intervention as its general principles and replaced some judicial authorities prevailed earlier by newly enshrined mandatory provisions. This approach aims to avoid confrontation between the above two principles. This article preliminarily observes that party autonomy adopted in this Act is subject to two restrictions: the mandatory provisions of the Act and the principles of public interest. Although this preliminary observation shows that the mandatory provisions are the restrictions on party autonomy, in practice it finally appeared that those have been enshrined in the Act with a view to using judicial powers to support the arbitration. Hence, the scheme of mandatory and non-mandatory provisions strikes a balance between the principles of party autonomy and limited judicial intervention. However, any autonomy provided to the parties is not beyond the court's scrutiny if it seems necessary for safeguarding public interests. The Act does not allow using the court as a rubber-stamping institution for legalising any party autonomy which is contrary to fundamental principles of justice and public policy. As an output of this cautious judicial approach, certain new principles, for example, 'substantial injustice', 'serious irregularity', 'fair minded and informed observer test' etc. have emerged in English jurisprudence. Thus, when the parties' agreement and tribunal's decision cause fundamental injustice, the Act would not restrict the court to intervene into arbitration. Allowing a broad extent of party autonomy and confining the judicial intervention within the areas of fundamental injustice, the Act made the balance quite fair.

[94] *Petroships Pte Ltd v Petec Trading and Investment Corporation and Ors* [2001] 2 Lloyd's Rep 348