Name of Student

Instructor's Name

Course

Date

Arbitration

Question One

Under international arbitration law, the parties may agree to use, by reference, an arbitration clause they had used in a previous similar contract.[1] In the same vein, the parties may choose to agree on a single master dispute clause, which will be incorporated into subsequent contracts by reference.[2] Even if the new contract contains somewhat distinct terms, the master clause can still be incorporated, with appropriate alterations.[3] The most important aspect is that the parties are aware of the clause to be incorporated, and have unequivocally expressed their intention to be bound by it under the new contract.[4] What is required of them is to ensure that the circumstances of the previous clause fit the new contract.

In the instant case, the Techno and Boost are negotiation "another satellite sale", implying that their previous agreements concerned the same subject matter. Thus, even if the terms of the new contract of sale are fairly different, the two companies can choose to use a previous arbitration clause, rather than drafting a new one. This is consistent with Article 7(6) of the UNCITRAL Model Law, which allows the parties to refer to an arbitration clause they signed previously. Article 7(2), however, makes it a condition that the new contract should be in writing, and the reference made therein should be in such a way as to make the previous

[1] R Doak Bishop, "A Practical Guide for Drafting International Arbitration Clauses" 12, 24 November 2016 <http://www.kslaw.com/library/pdf/bishop9.pdf>.
[2] Bishop 12.
[3] Bishop 12.
[4] Bishop 13.

arbitral clause part of the contract.[5] Arising from this normative framework is the fact that the arbitration clause so referred should in writing for it to be valid.[6] By dint of Article 7(3) of the Model Law, an arbitration clause is said to be in writing if its contents are recorded in any form, whether or not such a clause or the entire contract has been concluded orally, by conduct, or by other means.[7]

General words of reference are sufficient for an arbitration clause to be incorporated in the new contract. In the case of *Habas Sinai v Sometal SAL*,[8] The question was whether the London arbitration clause previously used by the parties in some contracts signed between them was integrated into the new contract of June 2008. Evidence cogently indicated that there was no express reference to the London clause. The 2008 contract generally stated that "all the rest will be same as our previous contracts."[9] The court held that general words of reference would be sufficient to incorporate the previous clause into the new contract.[10] In this case, it was clear that the general reference in the 2008 contract was similar to clauses in some of the previous contracts. As such, the Court concluded that the parties' intention to incorporate that clause was incontestable and, hence, the tribunal had jurisdiction to deal with the matter.

A similar dispute may arise in the instant case if Techno and Boost decide to refer to the previous clause using general terms. To avoid such a dispute, the CEOs should incorporate the previous clause in the same wording. From the facts of the case, it is true that

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[5] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006. 24 November 2016 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.
[6] Carolina M Gorgni, "Validity of Arbitration Clauses Incorporated by Reference into Bill of Lading" (2005) 19.
[7] UNCITRAL Model Law, Article
[8] *Habas Sinai Ve Tibbi Gazlar isthisal Endustri AS v Sometal SAL*. EWHC 29 (Comm) [2010].
[9] International Law Firm, "General words sufficient to incorporate arbitration clause into sale contract: Habas Sinai Ve Tibbi Gazlar isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm)" (Ince & Co International LLP, 2011).
[10] International Law Firm 3.

the CEOs have expressed their intention to incorporate the specific clause used in previous contracts.

Question Two

Designation of seat by the arbitral tribunal

The seat or place of arbitration is not the same as the physical location of arbitration. The term 'seat' generally refers to the procedural order (*lex arbitri*) that the parties have agreed should apply in any disputes arising from their contract.[11] Simply defined, it is the legal location of arbitration. The choice of the seat or place of arbitration largely depends on the laws in place at the potential seat.

Article 20(1) of the Model Law accords the parties the freedom to agree on the seat of arbitration. The parties are, however, advised to choose a place in a country that has ratified or acceded to the New York Convention.[12] This is because arbitral awards rendered in a country that is not a party to the Convention are unenforceable in other countries.[13] Where the parties have a deadlock, the arbitral tribunal has discretion to determine the seat, taking into account the circumstances of the dispute as well as the convenience of the parties.[14] Thus, given the disagreement between Tucan and Techno/Boost, the tribunal has the option to designate the seat of arbitration.

Must the tribunal select one of the places nominated by a party?

The wording of Article 20(1) of the Model Law is not restrictive. This means that the arbitral tribunal, in choosing the place of arbitration, is not limited to the places proposed by the parties. This reasoning is partly affirmed by Article 20(2) of the Model Law, which states that the tribunal may, unless the parties otherwise agree, choose the meeting place. Although

[11] Doug Jones AO. "A Guide to International Arbitration" (Clayton Utz 2012) 8, 24 November 2016 <https://www.claytonutz.com/ArticleDocuments/178/Clayton-Utz-Guide-to-International-Arbitration-2012.pdf.aspx?Embed=Y>.
[12] Doug Jones AO 8.
[13] Doug Jones AO 8.
[14] UNCITRAL Model Law, Article 20(1).

the scope of this provision is limited to, among others, the issues of consultation, hearing, and inspection of goods or documents, it underscores the tribunal's discretion to select the seat of arbitration. Thus, in the present case, the tribunal is not bound to designate one of the places nominated by Tucan and Techno/Boost.

Ranking of the seats nominated by Tucan and Techno/Boost

As noted above, parties are advised to choose a place in a country that has signed to the New York Convention to allow for mutual recognition and enforcement of foreign awards.[15] However, a cursory look at the list of the signatories to this Convention and the UNCITRAL Model Law indicates that Belize is not a party. This represents a gap that is likely to affect the enforceability of foreign awards. As such, Tucan's proposal may be detrimental in the long run.

Although Jamaica is a party to the UNCITRAL Model Law and the New York Convention, her domestic legal framework still has some gaps.[16] Commercial arbitration has rapidly increased, but the enabling legislation has passed the test of time.[17] Moreover, Jamaica has very few internationally recognized experts in the area of arbitration.[18] She also lacks a credible institutional framework for supervision and control of arbitration practitioners.[19] The country is not even recognized as an international centre for arbitration. However, her membership to the New York Convention places her in a higher position than Belize.

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[15] Stephen Bickford-Smith, "Which Seat to Choose - London, Stuttgart, Paris or Edinburg?" 20 May 2009, *Land mark Chambers*, 24 November 2016 <http://www.landmarkchambers.co.uk/userfiles/documents/resources/SBS_Which_Seat_to_Choose_-_Arbitration_Talk.pdf>.

[16] Review Committee of the Chartered Institute of Arbitrators, *Draft Report of the Review Committee of the Chartered Institute of Arbitrators – Caribbean Branch,* (Kingston: Chartered Institute of Arbitrators, 25 August 2009) 4.

[17] Review Committee of the Chartered Institute of Arbitrators.

[18] Review Committee of the Chartered Institute of Arbitrators.

[19] Review Committee of the Chartered Institute of Arbitrators.

London is one of the leading hubs of arbitration globally with many arbitral institutions.[20] Given its long history in arbitration, it stands out as the best arbitration seat in the matter between Tucan and Techno/Boost. The London Court of International Arbitration (LCIA) proposed by Techno/Boost was established in 1981, implying that it has a broad experience in international arbitration.[21] The 1996 Arbitration Act is informed by the UNCITRAL Model Law, but it is not a wholesale law. Thus, the Act offers many benefits, including the freedom to modify proceedings to the advantage of the parties.[22] Additionally, the fact that the United Kingdom is a party to the New York Convention and other reciprocal arrangements provides an effective legal landscape for recognition and enforcement of arbitral awards.[23] The other advantage is the wide use of the English language, which makes communication easy in the UK. Courts in London are staffed by high calibre judges with good common law backgrounds.

Vancouver is one of the very busy cities in the world.[24] If it is designated as the seat of arbitration, the Commercial Arbitration Act of British Colombia shall apply. This Act domesticates the UNCITRAL Model Law in British Columbia.[25] This, together with the domestication of the New York Convention, enhances consistency and certainty in the enforcement of foreign arbitral awards. British Columbia has a mature judicial system.[26] The enforcement of foreign awards is often in line with the New York Convention and the principles enshrined in the UNCITRAL Model Law.[27] This promotes the finality of arbitral awards. Further, courts in British Columbia have recognized the importance of restraining

[20] Bickford-Smith.
[21] Bickford-Smith.
[22] Bickford-Smith.
[23] Bickford-Smith.
[24] Gerald W Ghikas, "Vancouver, British Columbia: An Ideal "seat" for International Commercial Arbitrations Among Parties from the Asia Pacific Region" 31 August 2007, *Martindale-Hubbell*, 25 November 2016 <http://www.martindale.com/international-law/article_Borden-Ladner-Gervais-LLP_321638.htm>.
[25] Ghikas.
[26] Ghikas.
[27] Ghikas.

judicial intervention in the arbitration proceedings. Canada also has very knowledgeable arbitrators who have good broad experience in international arbitration. This may be evidenced by the presence of British Columbia International Arbitration Centre in Canada.[28] As such, Vancouver stands out as a good place of arbitration.

From the foregoing analysis, London stands as the leading seat of arbitration, followed by Vancouver. Kingston is ranked the third while Belize City is the last. This hierarchical arrangement is based on the above assessment.

Question Three

Choosing arbitrators is a very cumbersome process that requires the parties to be specific to matters that are relevant to their arbitration.[29] As such, interviews of prospective arbitrators must be limited to merit. The parties should not delve into superficial issues that cannot help them choose a competent arbitrator. The parties may, for instance, focus on the potential arbitrator's impartiality, independence, intelligence, language, availability, and expertise.[30] The parties should, however, be careful not to discuss issues that touch on the merits of their dispute. The parties or their lawyers should not take advantage of the interview to present their views about the dispute. They should not make factual or legal statements beyond what is necessary to enable the prospective arbitrator understand the general nature of the dispute. For instance, a lawyer should not discuss his or her position in relation to the facts in issue. Crucially, the scope of the interview should be constrained to circumvent impropriety.

In the present case, the questions asked by In are somewhat permissible. The first issue In presents touches on the general overview of the case. In particular, In stated that the facts in issue emanate from a contract-based dispute. Further, In's subsequent questions about

[28] Ghikas.
[29] Doak Bishop, Craig Miles and Robertor Aguirre Luzi,"Interviewing and Selecting Arbitrators" *Arbitration Column* 47, 25 November 2016 <http://www.kslaw.co`m/imageserver/KSPublic/Library/publication/LatinLawyerInterviewingArbitrators.pdf.>.
[30] Bishop, Miles and Luzi 47.

corruption are permissible because corruption is the modern-day issue that subverts access to justice. It is, therefore, meant to test Smith's general understanding on corruption cases, and how such cases should be determined in court.

Further, the CEO's first query generally raises a point of conflict of interest, which is prohibited under international arbitration law. The American Arbitration Association (AAA) Rules requires a neutral arbitrator to disclose circumstances of impartiality or bias.[31] While this does not apply to the CEO, the provision proscribes such issues and any person who exhibits such traits in an interview forum may be considered to have acted contrary to the spirit of the law. Under the International Bar Association Principles, a lawyer should not exhibit any conflict of interest, unless otherwise allowed by law. In the circumstances, the appointment of Smith was flawed and procedural challenge lodged is likely to succeed.

Question Four

International arbitration is premised on party autonomy. The parties have latitude to agree on how they intend to appoint arbitrators. This is a historical right that strikes a distinction between international arbitration and litigation. It is worth noting that the enjoyment of this right does not limit a party from delegating the task of appointing arbitrators to a neutral institution. However, arbitration is a consensual system, and most parties choose not to delegate their right to a particular institution. According to them, the right to choose arbitrators is a core tenet that makes international arbitration attractive. This tenet enhances the quality of arbitral awards. This is because the parties have the autonomy to choose arbitrators who have the relevant legal and technical expertise, cultural awareness and language skills to understand the circumstances of the case and correctly assess it.[32]

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[31] See Rule 19 of the American Arbitration Association.

[32] Steven Finizio and Claudio Sala, "Conference preview, Expert View: Selection of Arbitratirs" 4, 11 August 2012. 25 November 2016 <http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/cdr%20nov-dec%2012%20wilmerhale%20expert%20view%20V3.pdf.pdf>.

This advantage is, however, outweighed by a number of weaknesses. As a general rule anchored in the UNCITRAL Model Law ad Rules, party-appointed arbitrators must remain neutral. This means that they should demonstrate their independence and impartiality in the arbitral process. Yet, this requirement does not restrain the parties from appointing arbitrators who they expect would favor them. In the case of *Urbaser S.A. v Argentina*,[33] a challenge was raised against an arbitrator due to his academic statement that no arbitrator or human being is absolutely independent or impartial. This statement, according to the challengers, evidenced the arbitrator's intention to be partial. A study by Berg indicated that about 100 percent of dissents in disputes arising from investment treaties are made by party-appointed arbitrators, and approximately 100 percent of such arbitrators decide in favor of the parties that appointed them.[34] These statistics raise a question as to the impartiality of party-appointed model. This provides some empirical evidence to the fact that party-appointed model is no effective as is thought to be. The challenge of questionable neutrality may be remedied by permitting each party to choose his or her own arbitrator. The practicality of this suggestion is, however, arguable. In this regard, a complementary model to the party-appointed model is necessary.

The current framework of arbitration exhibits an additional model of appointment by neutral institutions. In the present case, it has been proposed that this new model should replace the traditional party-appointed model. The author in this paper tends to disagree because, while new model is advantageous in many ways, it is ridden with a number of conundrums. Thus, it cannot work effectively as a standalone model without the party-appointed model. Its feasibility is therefore a serious concern. Admittedly, the institutional-appointment model has been underway for a number of years. But, for it to completely

[33] ICSID Case No ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010) 40.
[34] Finizio and Sala 5, citing Albert Jan van den Berg. "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration." Arsanjani et al. *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman.* 2010. 825.

replace the traditional model, there must be amendments of the existing legal framework because it has largely been structured to accommodate the party-appointed model. It will be good if such a suggestion is implemented as a pilot project. This will test its feasibility before implementing it fully as a replacement model. This justifies the above position that the institutional-appointed model should continue as a complementary model and not a replacement model.

Further, the legitimacy of the institutional-appointment model is marred by a number of weaknesses. Concerns have arisen as to the effectiveness of this model vis-a-vis the party-appointed model. When called upon to nominate arbitrators, most institutions nominate from specific lists of arbitrators. For instance, the International Chamber of Commerce (ICC) chooses arbitrators in accordance with proposals submitted by its national committees.[35] Such committees at times rely on existing lists. Thus, a shift to the institutional appointment model is fraught with uncertainties on how the lists are constituted and the criteria used to select arbitrators from the lists.[36] However, even if the process is transparent, it is uncertain that its increased use will attract particular confidence in the international arbitration.[37] In the same vein, it is uncertain whether the process will confute the fact that some arbitral institutions have not been able to understand the issues in certain cases.

In addition, the institutional appointment model is, arguably, limited to a small number of full-time arbitrators with different reputational backgrounds.[38] Conversely, the party appointment model is characterized by a large number of arbitrators who are selected by the parties on merit. Thus, the parties do not have to rely on a small number of arbitrators.

The choice of arbitrators depends on certain standards, such as open-mindedness and the quality. Arbitrators should meet such standards for them to be appointed. Unfortunately,

[35] Finizio and Sala 5.
[36] Finizio and Sala 5.
[37] Finizio and Sala 5.
[38] Finizio and Sala 5.

institutional staff are not well placed to measure the standards and, in making their choice, they may consider standards which are distinct from those prioritized by parties.[39] Arbitral Institutions often assess the quality of an arbitrator from an administrative and institutional viewpoint, leaving out certain standards that are indicative of an arbitrator's competence. If all appointments are mandatorily institutionalized, arbitrators who want to be reappointed would need to be keen on their reputation compared with those who have to corrupt fellow arbitrators or staff to get reappointed.[40]

Notwithstanding the above drawbacks, arbitral institutions can offer an effective alternative to the party appointment model. Arbitral institutions have the capacity to promulgate rules that will enable them select quality arbitrators. Parties need to change attitude and welcome the embrace the institutional appointment model. As regards the party-appointed model, what is required is party autonomy to enhance the effectiveness of international arbitration.

Question Five

The practice of holding meetings followed by the issuance of procedural orders has been, and still remains, a culture for arbitral tribunals. The author of this paper partly agrees with the fact that such a practice is indeed a historical artefact.[41] In practice, after a tribunal has been selected and properly constituted, it often organizes preliminary meetings to deliberate on procedural issues. For instance, arbitral tribunals often arrange a preliminary meeting with the parties to deliberate on the timetable and applicable rules. This meeting gives rise to the first procedural order. Thereafter, the tribunal may issue a number of procedural orders relating to, among others, the production of documents, admission or refusal of evidence, or revision of previous orders.

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[39] Finizio and Sala 5.
[40] Finizio and Sala 5.
[41] Norburg & Scherp Advokatbyrå, "Amendment of procedural orders in arbitration" (27 October 2016) *Newsfeed.* 25 November 2016 <http://www.lexology.com/library/detail.aspx?g=6b6df01f-5da7-4987-ae0b-d5b048aad263>.

On the one hand, the law clearly outlines the procedural matters ranging from the choice of arbitrators. These provisions should be used to reduce the number of preliminary meetings. The use of electronic means of communication is palpable. The UNCITRAL Arbitration Rules recognize such means of communication in Articles 2 and 3. For instance, the meeting to discuss timelines can be avoided by applying the UNCITRAL Arbitration Rules. Article 2 thereof provides for notice and calculation of periods of time. The notice may be sent through the means specified in the Rules, including electronic means. In this regard, there is no need to hold preliminary meetings if the law clearly provides for how the various players in arbitration should communicate and resolve the dispute.

Further, the standard of party autonomy is very central in arbitration law. This standard requires the arbitral tribunal to comply with any agreement between the parties on how arbitration should proceed. Thus, should the tribunal fail to comply with the parties' agreement, this would constitute a viable ground for setting an arbitral award aside. The parties can use their autonomy to limit preliminary meetings which are inimical to the procedural law. Any such limitation should, however, be reasonable and proportionate.

On the other hand, preliminary meetings may afford the arbitrators an opportunity to meet with the lawyers representing the parties. It may happen that the lawyers have not had a chance to meet the arbitrators because the initial procedures are mostly conducted by correspondence. Preliminary meetings can also enhance the efficiency of the arbitral process as the parties are accorded an opportunity to deliberate on issues that were unforeseeable when the arbitration clause was drafted or agreed upon. The meetings may also be useful when the parties have decided to take their matter to an arbitral institution. The parties may, for instance, take their time to know the procedural rules of the

institution or, if the matter is still before the selected arbitrators, the substantive laws of the seat of arbitration. Even if such instances are rare, preliminary meetings provide a good platform for the parties to settle issues about appointment of arbitrators, the means of communication, costs of arbitration, and who the proper parties to the case are.

It is worth noting that the parties should carefully organize their preliminary meetings to avoid unnecessary wastage of time and cost. There must be effective communication between all the players in the arbitration proceedings to make it easy for the parties to promptly determine any emerging issues.

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