2018

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Christopher French

Texas Law Review Online
Volume 97

Article

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Christopher C. French*

I. Introduction

Imagine finding yourself in litigation in a foreign country. Then, imagine learning that, in the past, your opponent has routinely hired the person who will be the "neutral" adjudicator in your case. Now imagine that since the commencement of the litigation your opponent subsequently has appointed the adjudicator to also be its party-appointed arbitrator in other pending disputes arising out of the same incident that has given rise to your dispute. And, imagine that neither the adjudicator nor your opponent discloses the adjudicator's appointments in the other pending disputes. Would you feel like the adjudicator is going to treat your case fairly and impartially?

Assuming the case does not involve a car accident caused by an American tourist in a third world country that is being adjudicated in a sham trial, do you think the judge would remove the "neutral" adjudicator if you were to challenge the adjudicator for potential bias in favor of your opponent? If you said "yes," then you would be wrong in an English arbitration proceeding pursuant to a "Bermuda Form" insurance policy.

This scenario is not a hypothetical situation. The material elements of this scenario currently are unfolding in English courts for Halliburton Company (Halliburton), a Fortune 100 company based in Houston with approximately 55,000 employees and operations in about 70 countries.[1]

On April 20, 2010, when a deep-water oil well in the Gulf of Mexico was in the process of being plugged and temporarily abandoned, the well

* Christopher C. French is a Professor of Practice at Penn State Law School; J.D., Harvard Law School; B.A., Columbia University.

1. HALLIBURTON CO., 2017 ANNUAL REPORT, FORM 10-K 1 (2018).

suffered a blowout.[2] There was an explosion and a fire on the Deepwater Horizon oil rig servicing the well.[3] BP Exploration and Production Inc. (BP) was the lessee of the rig.[4] Transocean Holdings LLC (Transocean) was the owner of the rig and had been engaged by BP to provide the crew and drilling teams.[5] Halliburton provided cementing and well-monitoring services to BP in connection with the temporary abandonment of the well.[6]

Numerous claims were asserted against BP, Transocean, and Halliburton by the U.S. Government, as well as corporate and individual claimants in connection with the explosion and massive oil spill that ensued.[7] Many of the claims were consolidated into a single multidistrict litigation in federal court in the Eastern District of Louisiana.[8] Shortly before a verdict was rendered in a trial regarding liability, Halliburton settled for approximately $1.1 billion.[9] Ultimately, when judgment was rendered, Halliburton was only found 3% liable.[10]

Halliburton has substantial insurance to cover its liabilities. The policy at issue in the English litigation is a Bermuda Form liability policy drafted and issued by Chubb Bermuda Insurance Ltd. (Chubb) (formerly known as ACE Limited) that provides $100 million of coverage.[11] When Halliburton's $100 million claim was tendered for payment, Chubb denied coverage, contending that Halliburton's settlement was unreasonable and entered without Chubb's consent.[12]

Although the policy specified that New York law would govern the resolution of any disputes, the policy called for arbitration in London with three arbitrators—one appointed by each party and the third appointed by the two chosen arbitrators. If the two chosen arbitrators could not agree upon the third arbitrator, then the appointment was made by England's High Court.[13] The two chosen arbitrators could not, in fact, agree on the third arbitrator so the High Court appointed Arbitrator M, an arbitrator requested by Chubb, as the chair of the arbitration panel.[14]

Chubb previously had appointed Arbitrator M as a party-appointed arbitrator in numerous matters, and he was currently an arbitrator in two

2. Halliburton Co. v. Chubb Bermuda Ins. Ltd. [2018] EWCA Civ. 817, [4] (Eng.).
3. *Id.*
4. *Id.* at [5].
5. *Id.*
6. *Id.*
7. *Id.* at [7].
8. *Id.*
9. *Id*. at [8].
10. *Id.*
11. *Id.* at [6].
12. *Id*. at [9].
13. *Id.* at [6].
14. *Id*. at [10]. In order to maintain anonymity, the opinions refer to the arbitrator at issue as "M" instead of by name.

other pending arbitration proceedings in which Chubb was a party. Not surprisingly, Halliburton objected to Arbitrator M's appointment as the "neutral" arbitrator.[15]

While the arbitration between Halliburton and Chubb was pending, Arbitrator M accepted another appointment from Chubb as an arbitrator in a separate arbitration proceeding with Transocean regarding the same Deepwater Horizon incident.[16] In that matter, Chubb contended, among other things, that Transocean's settlement of the underlying claims was unreasonable and entered without Chubb's consent.[17]

In addition, Arbitrator M subsequently accepted another appointment as an arbitrator by another insurer during the pendency of the Halliburton arbitration in yet another insurance arbitration involving Chubb and the same Deepwater Horizon incident.[18] Throughout this time, neither Chubb nor Arbitrator M disclosed to Halliburton that Arbitrator M had accepted insurer appointments as an arbitrator in the two other pending insurance disputes involving the same Deepwater Horizon incident.[19]

When Halliburton learned of the other appointments, it requested that Arbitrator M recuse himself because there was a perception that he might not be impartial under the circumstances due to his failure to disclose his involvement as an insurer-appointed arbitrator in these other disputes involving Chubb and the same Deepwater Horizon incident. Arbitrator M declined to do so unless Chubb agreed that he should.[20] Chubb did not agree that he should recuse himself, so Halliburton brought a lawsuit in the English courts to remove Arbitrator M as the chair of the arbitration panel.[21]

On February 3, 2017, the High Court denied Halliburton's request to remove Arbitrator M, stating:

> M is a well-known and highly respected international arbitrator. He has extensive experience of insurance and reinsurance law, both English and New York law. . . . He has sat as a member of an arbitration tribunal in over thirty references concerning the Bermuda Form over many years. He enjoys a reputation as an international arbitrator of the highest quality and integrity.
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> . . .
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> [Halliburton's request] seems to proceed from the false premise that party appointed arbitrators cannot be expected to comply with their own duties of impartiality and need the chairman to ensure that they

15. *Id.* at [10]–[19].
16. *Id.* at [13].
17. *Id.* at [9].
18. *Id.* at [15].
19. *Id.* at [13]–[15].
20. *See id.* at [16].
21. *Id.* at [19]–[20].

> do not exercise bias in favour of their appointees, a proposition which is as offensive to the international arbitration community in general, and to [the party-appointed arbitrators] in particular, as it is erroneous.[22]

Halliburton appealed the High Court's ruling to England's Court of Appeals.[23]

On March 1, 2017, while Halliburton's appeal regarding the removal of Arbitrator M was pending, the arbitration tribunals in the two other disputes involving the Deepwater Horizon incident in which Arbitrator M was an arbitrator entered judgment in favor of Chubb.[24]

On December 5, 2017, while Halliburton's appeal regarding the removal of Arbitrator M was still pending, the arbitration panel proceeded to enter judgment in favor of Chubb in the Halliburton arbitration by a 2–1 vote with Arbitrator M and Chubb's party-appointed arbitrator voting in favor of Chubb.[25] Halliburton could not appeal the arbitration panel's decision because the parties have no appellate rights under the Bermuda Form policy drafted and issued by Chubb.[26]

On April 19, 2018, England's Court of Appeals affirmed the High Court's ruling in favor of Chubb with respect to the removal of Arbitrator M. The court reasoned that:

> [Although] M ought as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure to Halliburton at the time of his appointments in [the other related matters]. . . . M is a "well known and highly respected international arbitrator" with very extensive experience as an arbitrator. . . . [Thus,] we agree with the [High Court] judge's overall conclusion that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that M was biased.[27]

In short, Chubb's repeated party appointments of Arbitrator M and Arbitrator M's failure to disclose subsequent party appointments by Chubb and another insurer in other pending arbitrations involving the same Deepwater Horizon incident would not give a "fair-minded and informed observer" reason to believe that there "was a real possibility that [Arbitrator] M was biased."[28] So, even though the Court of Appeals

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22. Halliburton Co. v. Chubb Bermuda Ins. Ltd. [2017] EWHC (Comm) 137, [9], [30] (Eng.).

23. *See Halliburton Co.* [2018] EWCA Civ. 817.

24. *Id.* at [23].

25. *Id*. at [24].

26. *Halliburton Co.* [2017] EWHC (Comm) 137, [5(4)].

27. *Halliburton Co.* [2018] EWCA Civ. 817, [94], [98], [100] (quoting Justice Popplewell in *Halliburton Co.* [2017] EWHC 137 (Comm)).

28. *Id*. at [100].

concluded Arbitrator M should have disclosed the subsequent pending appointments in the other arbitrations in which Chubb was involved, if he had done so it would not have mattered. Halliburton still would not have had a valid basis to object to Arbitrator M's continued participation as the "neutral" chair in Halliburton's arbitration because Arbitrator M is a "well known and highly respected international arbitrator"—i.e., it was a remediless breach of duty by Arbitrator M.[29]

Central to the Court of Appeals' analysis is the premise that arbitrators, whether appointed by a party or otherwise, have:

> [a] duty to act independently and impartially . . . owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially.[30]

In addition, the Court of Appeals assumed that the mere fact that an arbitrator has accepted multiple appointments concerning the same or overlapping subject matter for the same party and apparently has reached results favorable enough to the party that the party repeatedly appoints him "does not of itself give rise to an appearance of bias. . . . 'Something more is required' and that must be 'something of substance.'"[31] That "something more" was lacking in the Halliburton matter, in the Court of Appeals' opinion.

The Court of Appeals was also not particularly troubled by the fact that Arbitrator M might have been exposed to information and evidence in Chubb's other arbitration proceeding regarding the Deepwater Horizon incident that could shape Arbitrator M's view of Halliburton's claim without Halliburton being aware what that the evidence was or even given a chance to respond to it.[32] Although the Court of Appeals recognized this was a "legitimate concern," the court dismissed it, stating:

> Arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator's impartiality. Objectively this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question and that is equally so where there is a common party.[33]

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29. *Id.* at [98] (quoting Prince Jefri Bolkiah v. State of Brunei Darussalam (No 3), [2007] UKPC 62, [2008] 2LRC 196 at [18]).

30. *Id*. at [26] (quoting the *Halliburton Co.* [2017] EWHC (Comm) 137, [19]).

31. *Id.* at [53] (quoting Dyson LJ in AMEC Capital Projects Ltd. v. Whitefriars City Estates Ltd. [2005] 1 All ER 723, [20]).

32. *Id.* at [49]–[50].

33. *Id.* at [51].

Halliburton has petitioned England's Supreme Court to allow an appeal. The Supreme Court has an opportunity to review the lower courts' analysis and conclusion, but it remains to be seen whether the Supreme Court will hear the case or what its decision will be if it does.

In the meantime, the case presents the questions of whether: 1) English arbitrations under Bermuda Form policies provide a venue and dispute resolution process in which American policyholders can feel confident that justice will be served, and 2) England's lower courts' analysis and conclusion would be affirmed under U.S. law. As things stand now, the answer to both questions is "no."

II. Bermuda Form Policies and London Arbitrations in Contrast to Judicial Proceedings in the United States

The Bermuda Form is an excess liability policy form that was created by ACE Insurance Company Limited (ACE) in 1985.[34] ACE was a Bermuda-based insurance company that was created by Marsh & McLennan, an insurance broker, and J.P. Morgan, a bank, in response to the liability insurance crisis in the mid-1980s when the market for excess liability insurance became very challenging due, among other reasons, to the explosion of long-tail claims related to asbestos and environmental contamination. Although it originally was sold just by ACE and XL Insurance Limited (XL), another Bermuda-based insurance company, the Bermuda Form is now sold by other insurers as well, and it is commonly sold to corporate policyholders in the United States.[35]

The Bermuda Form was created by insurers to address their dissatisfaction with U.S. courts' interpretation of policy provisions commonly found in existing liability policies. Specifically, insurers perceived that the courts in many states were pro-policyholder. To address that concern, New York law is specified as the controlling law under Bermuda Form policies, and disputes are resolved in binding arbitration in London (or less commonly, Bermuda).[36] New York law is generally perceived as the most favorable for insurers in the United States. Nonetheless, the Bermuda Form also modifies New York law in the areas where insurers view New York law as unfavorable to insurers, such as New York's rules regarding the interpretation of insurance policies. In addition, there are no appellate rights regarding the arbitrators' decisions under Bermuda Form policies in order to ensure that U.S. courts will not have any involvement in the resolution of the parties' disputes.[37]

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34. In 2016, ACE acquired Chubb, but ACE adopted Chubb's name, so the surviving company is named Chubb.

35. *See* RICHARD JACOBS, LORELIE S. MASTERS, & PAUL STANLEY, LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION: THE BERMUDA FORM 1, 10–12 (2d ed. 2011).

36. *Id.* at 127.

37. *Id.* at 6.

Under the Bermuda Form, the arbitration is comprised of a three-arbitrator panel with each party picking one of the arbitrators and the two chosen arbitrators selecting the third arbitrator, who acts as the "neutral" chair of the panel.[38] Insurers typically select an English barrister or a retired English judge as their party-appointed arbitrator so they will not be influenced by the U.S. courts' perceived bias in favor of policyholders.[39] It is not uncommon for both the insurer's party-appointed arbitrator and the "neutral" arbitrator to work in the same chambers because English barristers are viewed as independent contractors even though they may work in the same office.[40]

An English arbitration proceeding is an unfamiliar and exotic legal process for most American companies. For example, although parties exchange documents, written discovery such as interrogatories and requests for admission is not conducted.[41] Depositions are also not conducted, so the first opportunity counsel has to question the opposing party's witnesses is in the arbitration proceeding itself.[42] In addition, there are no live direct examinations of witnesses.[43] Direct examinations of witnesses are "conducted" by way of written statements that are drafted by the attorneys, solicitors, and/or barristers and then submitted to the arbitrators. The only live examination of witnesses is on cross examination.[44]

English arbitrations differ from U.S. court litigation in a number of other important aspects as well. One, arbitrators are chosen and paid by the parties.[45] Although English law provides that arbitrators should be independent and impartial once appointed, if an arbitrator's livelihood is dependent upon receiving appointments and obtaining results satisfactory to the party appointing the arbitrator, then it is a legal fiction to pretend that party-appointed arbitrators are independent and neutral. Stated differently, how likely is it that Chubb and other insurers would continue to appoint Arbitrator M decade after decade if the results they were receiving in the arbitrations with him were unfavorable? Indeed, why have party-appointed arbitrators at all if they are truly independent and neutral? Why not simply

38. *Id.* at 591.

39. *Id.* at 273–74.

40. *Id.* at 279–80.

41. *See id.* at 310 (outlining the standard requirement for disclosure, which does not include requests for admission); *id.* at 331 (stating powers available in English litigation, such as discovery by interrogatory, are restricted in the arbitration setting); *id.* at 335 (noting that arbitrators' power to order "questions [to] be put to and answered by the respective parties" is most commonly used for merely clarifying a party's case, not to elicit information for use at the hearing) (internal quotations omitted).

42. *Id.* at 284.

43. *Id.* at 285.

44. *Id.* at 284.

45. Arbitration Act 1996 c. 23, §§ 16, 28 (Eng.).

have an arbitration organization, as opposed to the parties, appoint one or more arbitrators if they are all neutral?

Two, English arbitrations are subject to very limited judicial control and review. Although regular English arbitrations allow for judicial review of rulings regarding English law, there are no appellate rights under Bermuda Form policies, including the policy at issue in the Halliburton case, with respect to the arbitrators' decision.[46] In a court proceeding, in contrast, there are numerous checks and balances on the decision makers. First, the parties are entitled to a jury trial with the jury comprised of people who do not know the parties.[47] Second, if a party is dissatisfied with the jury's verdict, then the party can ask the trial court to set aside the verdict or grant a new trial.[48] Third, the party can appeal both the trial court's legal rulings and the jury's verdict.[49]

Three, English arbitration proceedings and the results thereof are confidential. Thus, a repeat player in English arbitrations, such as Chubb, is aware of the results obtained in past arbitrations including, for example, which arbitrators ruled in its favor. Non-repeat players in arbitrations, such as the typical American policyholder, do not know the results of the past arbitrations. This creates a significant information asymmetry between insurers and policyholders. Court proceedings, in contrast, are public. Thus, both parties have equal access to judicial opinions and they are able to research the proclivities and ideologies of the judges before whom they appear.

Four, the standard for what constitutes potential bias or the potential for the appearance of bias that would justify recusal appears to be quite different in an English arbitration than in a typical U.S. court proceeding if the High Court's and Court of Appeals' rulings are reflective of English law and practice. As an initial matter, judges in the U.S. are not selected by the parties to resolve their disputes so the judges' livelihoods do no depend upon the results they procure for the party appointing them.[50] If a judge were financially dependent upon one of the parties in a case, then it would be unquestioned in the U.S. that the judge would need to recuse himself. Indeed, if a judge has any involvement with any party, then the judge should recuse himself.[51] Similarly, if a juror even knows one of the parties or attorneys in the case, then that juror typically is dismissed.

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46. *See* Halliburton Co. v. Chubb Bermuda Insurance Ltd. [2017] EWHC (Comm) 137, [5] (Eng.).

47. FED. R. CIV. P. 38; *see* FED. R. CIV. P. 47 (allowing parties to examine potential jurors and excuse party-selected jurors for cause).

48. FED. R. CIV. P. 50.

49. *Id.*

50. *See* 28 U.S.C. § 137 (2016).

51. *See id.* § 455 (listing various reasons a judge should recuse himself).

Under English law, an arbitrator is only removed if "circumstances exist that give rise to justifiable doubts as to his impartiality . . . ."[52] The test under that language is "whether [a] fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[53] It is an objective test. On its face, this test does not seem very different than U.S. law, and one would expect Arbitrator M to be disqualified because he repeatedly has been appointed by Chubb and he accepted appointments by Chubb and another insurer related to the same underlying matter without disclosing them. Yet, repeated party appointments by the same party, even in the same type of case, in itself does not provide a basis for a reasonable apprehension of lack of impartiality according to England's Court of Appeals.[54] "Something more is required," and it must be "something of substance."[55] It is unclear what exactly the "something more" of "substance" must be if a history of numerous appointments by the same party in disputes involving the same policy language in exchange for money and then failing to disclose contemporaneous appointments by an opposing party in connection with the same underlying incident are not enough.

Finally, English arbitrations are as, if not more, expensive as litigating in U.S. courts. In an English arbitration, the parties have to hire English solicitors and barristers, as well as the three arbitrators, which means the arbitration process is top heavy with English solicitors and barristers who charge much higher rates than most U.S. attorneys. And, most American policyholders typically also have U.S. attorneys working on the matters as well. Then, the parties, witnesses, counsel, and arbitrators must travel to and house themselves in London, one of the most expensive cities in the world, for the duration of the arbitration proceeding. It is a very expensive way to resolve disputes.

III. Why American Companies Historically Have Purchased Bermuda Form Policies

Regardless of what England's Supreme Court decides, why would an American policyholder who wants a fair process in which to resolve insurance coverage disputes buy a Bermuda Form policy to cover losses that can total hundreds of millions of dollars and potentially bankrupt the policyholder if the dispute resolution process under Bermuda Form policies is decidedly slanted in favor of the insurer? There may be one or more answers to that question depending upon the particular policyholder.

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52. Arbitration Act 1996 c. 23, § 24(1)(a) (Eng.).

53. Halliburton Co. v. Chubb Bermuda Ins. Ltd. [2018] EWCA Civ. 817, [39] (Eng.).

54. *Id.* at [81]–[82] (noting it would be "absurd" if the remuneration a party-appointed arbitrator receives for an appointment would be a basis for disqualification).

55. *Id.* at [53].

One, there are some aspects of the Bermuda Form policy language that actually favor policyholders. For example, the Bermuda Form expressly covers claims for punitive damages.[56] Few liability policies in the U.S. expressly cover punitive damages, and many U.S. state courts have concluded liability policies should not even be allowed to cover such claims for public policy reasons.[57]

Two, ACE and XL, the primary sellers of Bermuda Form policies for many years, were well-capitalized companies.[58] Consequently, policyholders could be confident that, if necessary, their insurers had the financial resources to pay claims totaling hundreds of millions of dollars.

Three, many policyholders likely were not even cognizant of the one-sided nature of the dispute resolution provisions of Bermuda Form policies because they had not read the policies. Indeed, most policyholders do not receive copies of insurance policies before they purchase them, and even if they have copies of the policies, they have not read them or understood them.[59]

Four, for many years the premium price and lack of alternatives made Bermuda Form policies an attractive option. The Bermuda Form was first created and sold when the liability insurance market was in crisis, and there were skyrocketing premium prices for traditional excess liability insurance with only limited availability.[60] Bermuda Form policies were the best, if not only, option for some policyholders.

Finally, policyholders historically could count on the appointment of independent, neutral arbitrators in English arbitrations. If that were not the case, then there would be a lengthy list of cases like Halliburton's in which the policyholder was challenging the appointment of the neutral arbitrator in English courts. There is not. Prior to the Halliburton case, American policyholders generally could expect that an unbiased person would be appointed as the neutral arbitrator. If that is no longer the case, then it is

56. *See* JACOBS, MASTER, & STANLEY, *supra* note 35, at 44.

57. *See, e.g.*, Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432, 433, 441–43 (5th Cir. 1962) (explaining that the policy did not expressly cover or exclude coverage for punitive damages and holding that it was against public policy for insurance to cover punitive damages because allowing coverage would undermine the deterrent and punishing effects of a punitive damages award); CHRISTOPHER C. FRENCH & ROBERT H. JERRY II, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, & EXERCISES 878 (2018) ("Courts are split on the question of whether public policy allows punitive damages to be insured as a matter of public policy.").

58. *See, e.g.*, ACE, ACE LIMITED'S 2014 ANNUAL REPORT 3 (2014) (reporting the annual income for 2014 was $3.3 billion), http://www.annualreports.com/HostedData/AnnualReportArchive/c/NYSE_CB_2014.pdf [https://perma.cc/VCV7-A4ZM].

59. *See, e.g.*, Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 660 (2013); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1120 (2006); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provision*s, 83 HARV. L. REV. 961, 968 (1970).

60. *See* JACOBS, MASTERS, & STANLEY, *supra* note 35, at 1, 10.

unlikely that any of the first four reasons discussed in this Part of the Essay would continue to justify the purchase of Bermuda Form policies.

IV. Viewing the English Courts' Decisions through the Prism of the United States Legal System

It is hard to predict what England's Supreme Court will do in the Halliburton case, but it is not hard to predict the outcome of the case under U.S. law. For numerous reasons, the lower courts' rulings would be reversed, and Arbitrator M would be disqualified and removed.

First, although arbitrators, including party-appointed arbitrators, are supposed to be independent and impartial under English law, it defies reality or logic to believe that an arbitrator who is repeatedly appointed by a party in exchange for money is impartial with respect to that party. Indeed, if the results that Chubb received in past arbitrations in which Arbitrator M was appointed were unfavorable, then Chubb would not repeatedly appoint Arbitrator M. That fact alone should be enough to raise a reasonable and justified appearance of impartiality by Arbitrator M.

Second, even if Arbitrator M is not consciously biased in favor of Chubb despite repeated appointments by Chubb, there is, at a minimum, an appearance of subconscious bias by Arbitrator M in favor of Chubb.[61] If Arbitrator M does not have at least a subconscious bias in favor of Chubb, then is it just a coincidence that Arbitrator M consistently reaches decisions that favor of Chubb, including all three of the Deepwater Horizon arbitrations that recently were concluded?

Third, contrary to the High Court's and the Court of Appeals' observations, whether Arbitrator M is a well-respected international arbitrator is irrelevant in the case. What is relevant is whether it *appears* that Arbitrator M lacks impartiality with respect to Chubb's and Halliburton's positions. For the reasons discussed above, there certainly is a reasonable basis to conclude that there is an appearance of bias by Arbitrator M regardless of whether that appearance reflects reality. The appearance of impartiality is the foundation of a legitimate and fair dispute resolution proceeding. Without the appearance of impartiality by the decision maker, then the dispute resolution proceeding and result therein will not be viewed as legitimate.

Finally, although the other Deepwater Horizon arbitrations purportedly were going to be decided based upon different legal issues, Chubb denied coverage to its other policyholder, Transocean, in one of those arbitrations on some of the same grounds that it did in the Halliburton matter—the settlements allegedly were unreasonable and entered without Chubb's

61. Some of the earliest work in the area of unconscious bias can be traced to Anthony Greenwald and Mahzarin Banaji. *See generally* Anthony Greenwald & Mahzarin Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

consent.[62] Consequently, it is irrefutable that some, if not many, of the facts and legal issues in the various matters potentially were the same. Because Bermuda Form English arbitration proceedings are confidential, however, Halliburton would have no way of knowing what evidence was presented in the other arbitration proceedings that might have impacted Arbitrator M's decision making with respect to Halliburton's claim, and Halliburton had no opportunity or ability to respond to that evidence. That is not fair and would not be countenanced by U.S. courts.

V. Conclusion

England's Supreme Court has an opportunity to correct the lower courts' errors when they allowed Arbitrator M to be the neutral chair in the Halliburton arbitration proceeding. Neutral arbitrators should not simultaneously be party-appointed arbitrators in other proceedings that involve some of the same parties and the same underlying matter. For the past thirty years, American policyholders have been able to count on English arbitrations to have a neutral and fair tribunal chair. If that will no longer be the case, then there are several other cities, such as Singapore, Zurich, Paris, or Toronto, that undoubtedly would be pleased to replace London as the preeminent international arbitration center to resolve insurance disputes.

62. Halliburton Co. v. Chubb Bermuda Ins. Ltd. [2017] EWHC (Comm) 137, [6] (Eng.).