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Lord Neuberger
of Abbotsbury

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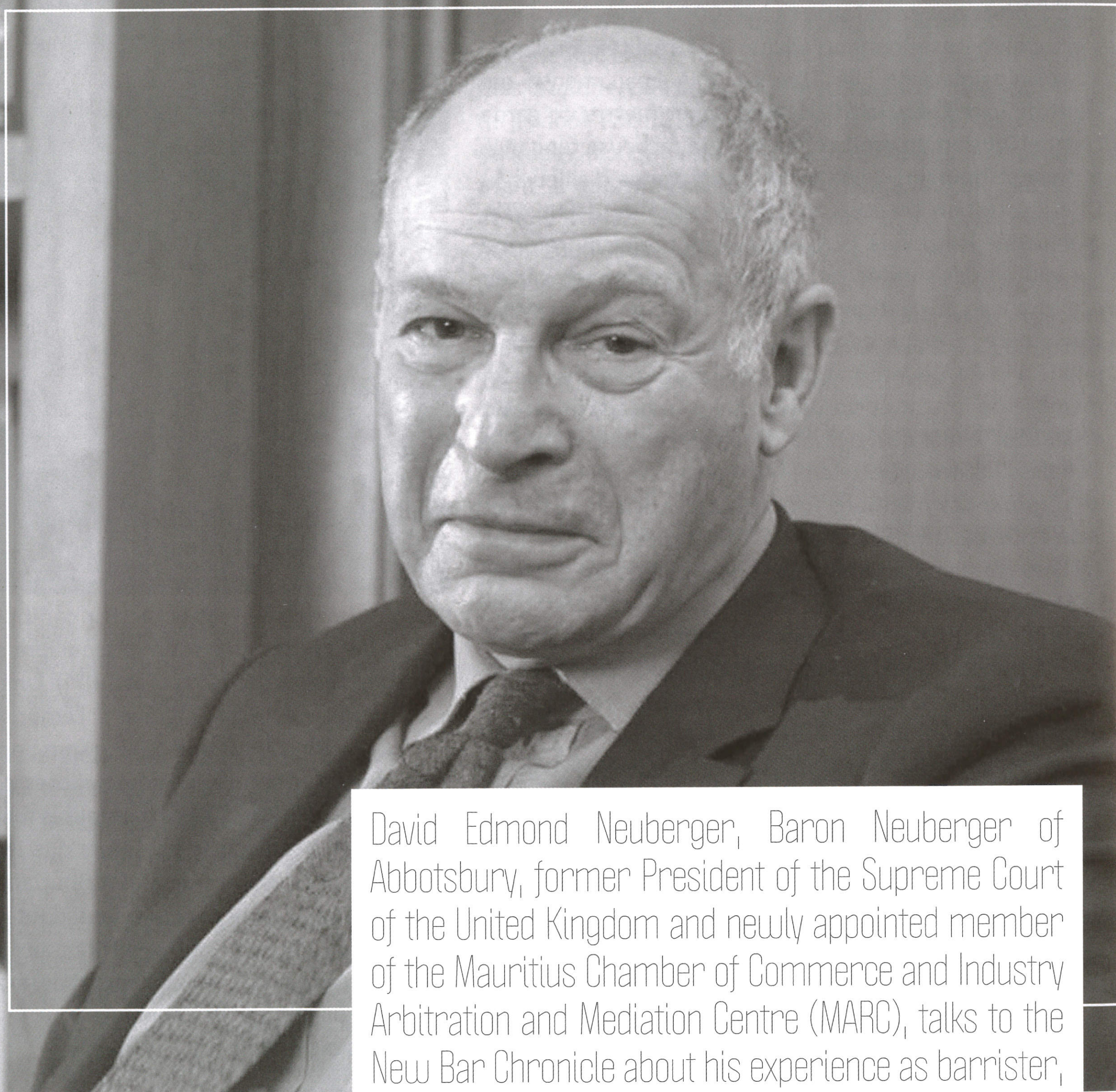


David Edmond Neuberger, Baron Neuberger of Abbotsbury, former President of the Supreme Court of the United Kingdom and newly appointed member of the Mauritius Chamber of Commerce and Industry Arbitration and Mediation Centre (MARC), talks to the New Bar Chronicle about his experience as barrister, judge and arbitrator. He gives us an insight into the way in which judges think and shares a couple of helpful tips to counsel on preparing their cases and sharpening their advocacy skills.

"Many cases are lost by bad advocacy as are won by good advocacy"

After gaining a degree in Chemistry, you started your professional career as a banker. What prompted you to move to the bar after a couple of years in banking?

Until I was 24, it never occurred to me that I might become a lawyer. Initially, I studied chemistry, but after a degree and a year's research, I realised that I lacked the necessary commitment or inspiration to be a successful scientist. I then turned to investment banking, but it did not take me long to realise that, if I was a poor scientist, I was a worse banker. I was only 24, but I saw my friends embarking on successful careers, while I was still searching for something that appealed to me. I was beginning to wonder if I was fit for anything. I then happened to meet up with someone I had known at school who had just started off at the bar, and we exchanged experiences. His description of life as a barrister struck such a chord that I decided almost on the spot that that was the career for me - and, albeit after a few false starts, it was. What attracted me, I think, was the combination of independence, intellectual challenge, and performing in court. And, as I embarked on learning the law, I quickly came to appreciate that I enjoyed trying to work out the law and solve legal problems in a way that I hadn't begun to do when it came to scientific or financial issues.

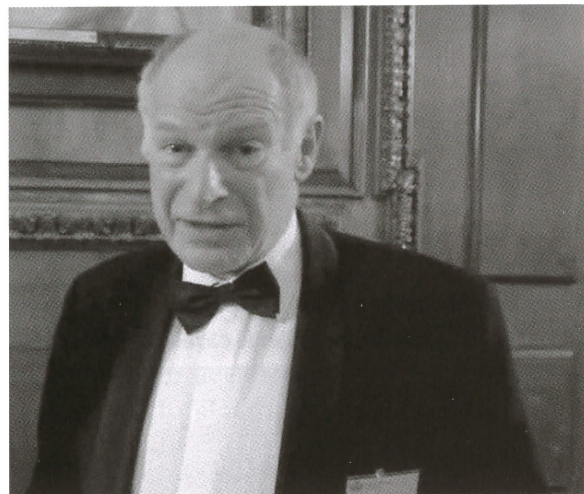
You were called to the Bar in 1975, were appointed Judge in 1996, and after your retirement as President of the UK Supreme Court in 2017, you have become an international arbitrator. Tell us about your most memorable case as (i) a barrister; (ii) a judge and; (iii) an arbitrator?

It is the unusual which tends to stick in the memory. As a barrister, I specialised in land law. Although I really enjoyed my practice and I was involved in cases involving points of interest and even importance in legal terms, land law is not noted for producing cases which would be of interest to non-lawyers. Partly because I always appeared in English courts, partly because I never did another human rights case and partly because I was rarely led. One case which stands out is James v UK, where I was second junior counsel for the Duke of Westminster who was complaining to the European Court of Human Rights about legislation which enabled tenants to buy their freeholds. I did not realise it at the time but it was an important and still frequently cited case on the extent of the right to property. As a trial judge, I had to deal with many new areas of law, but the most unfamiliar was patent law, in which, thanks to my scientific background, I developed some expertise. My first big patent case was Kirin-Amgen v Hoechst, which lasted 30 days and went to the House of Lords, who were complimentary about my judgment, but didn't think I had got it all right by any means. In the Court of Appeal, a favourite case was A v Home Secretary, which involved the difficult and interesting question of whether a court could admit evidence obtained by torture; at least one reason for liking the case is because I dissented, and the House of Lords subsequently agreed with my conclusion. In the House of Lords, Supreme Court and Privy Council, I was privileged to have many interesting cases, but the case with the highest public profile was undoubtedly Miller v Secretary of State which raised important constitutional issues arising out of the UK's decision to leave the EU. Now that I am an arbitrator, my cases are subject to strict confidentiality rules, so I cannot say anything about my arbitrations.

> "A lawyer should bear in mind two particular things which are unique to the Privy Council as against the Mauritian courts, namely (a) the Privy Council is not bound by previous decisions... and (b) the panel will not have any Mauritian judges on it."

You have been quoted to state that: "A white, male, public-school judge presiding in a trial of an unemployed traveller from eastern Europe accused of assaulting or robbing a white, female, public-school woman will, I hope, always be unbiased. However, he should always think to himself what his subconscious may be thinking or how it may be causing him to act." How does a judge ensure that his/her own background and experience (professional or other) does not unconsciously influence his/her decisions?

Every human being suffers from unconscious bias, and every judge (although sometimes one wonders)



"My first big patent case was Kirin-Amgen v Hoechst, which lasted 30 days and went to the House of Lords, who were complimentary about my judgment, but didn't think I had got it all right by any means"

is a human being. The issue of unconscious bias throws up all sorts of issues, many of them difficult and interesting. Within the confines of this Q&A session, I can only offer a few thoughts. First, while many are bad, unconscious biases aren't all bad by any means. For instance, judges are rightly expected to be in touch with "the real world", and yet being in touch with the real world involves a series of implicit assumptions many of which are subconscious. Secondly, no-one is going to be able to get rid of, or even fully allow for, all their less good subconscious biases, but that is no excuse not to try. Thirdly, almost by definition, it is very hard to know what one's unconscious biases are, but one has to know (or at least suspect) what they are before one can deal with them. Fourthly, one should do one's reasonable best to work out what one's own biases are, by being self-aware and noticing them when one can, and also by thinking of what biases are likely to be inherent bearing in mind one's upbringing and milieu. Fifthly, as usual, don't be obsessive: if judges spend too long worrying about what their unconscious biases are and how to allow for them, they will get distracted from their primary role of running the case and deciding the issues.

Given that you have practised at the Bar, been on the Bench, and currently act as arbitrator, what according to you makes an effective barrister? What constitutes effective advocacy?

The first point I would make involves invoking the possibly over-used iceberg analogy. Although judges and clients see the advocate on his or her feet, the great majority of the work which produces good advocacy is unseen and consists of preparation, whether deciding which points to take, how to plead the case, which witnesses to call, and quite how to put one's argument. Secondly, the melancholy truth is that, at least in my view, as many cases are lost by bad advocacy as are won by good advocacy. Thirdly, judges are not necessarily the best assessors of good advocacy, as the best advocates persuade the court not by making the court recognise the quality of their advocacy, but by persuading the court that the law is in their favour. A judge will actually be wary of someone he or she thinks is a good advocate: hence the famous adage that the best barristers give the impression of being a third class advocate with a first class case. Fourthly, the best advocates in my view are those who make it all look very simple: the complicators may sound impressive, but the simplifiers are more likely to convince. Finally, a ragbag of points: never mislead the court. If you don't know the answer to a question say so; never fail to acknowledge, and always at least try to answer a question raised by the judge. Always be courteous to, but do not be afraid to disagree with the judge. And don't repeat a point unless you are unsure whether the judge has understood it.

Increasingly, the pressure on counsel conducting advocacy is to be concise. For instance, the Hong Kong Court of Final Appeal limits the length of skeleton arguments. As a member of that court, what can you say has been the effect of such practice directions on advocacy?

I am all in favour of keeping written and oral arguments to a minimum, but there are problems with prescribing maximum lengths. Thus, some cases justify a lot more argument than others, and some judges like fuller written cases than others. But there are some rules which are worth mentioning. Do not repeat points in writing, and only repeat points orally if you really doubt the court has understood them. Particularly on appeals, and above all on appeals to the top court, the use of previous judicial decisions should be kept to a minimum. If there is a recent Privy Council decision on the point, you hardly ever need to cite another case as well. While I would keep oral argument to a minimum, I am strongly against marginalising it in the way that is done in many US appellate courts. Oral argument can often tease out an answer or solution which would simply be unnoticed if the submissions were all or largely in writing. The give and take of oral argument can be both very stimulating and very valuable. The advent of mandatory skeleton arguments in the UK 25 years or so ago has altered advocacy and has also made the judges' lives more intense. The oral advocate's task is more difficult, partly because they have less time on their feet, partly because they have less opportunity to influence the court, and partly because different judges will have done different amounts of pre-reading. As for the judges, they are expected to do much more pre-reading. Hence, hearings last much less time and the proportion of reserved, as opposed to ex tempore, judgments has shot up.

In the past, you have stated that the bench is made up of Pre-Raphaelites and Impressionists judges (the former tending to read everything and the latter often just skim through skeleton arguments). How does counsel ensure that he/she reaches out to each judge on the bench?

While this is a difficult question, an advocate's position is not always as hard as it may seem. The Impressionists have tended to get away with it because they have learned how to catch up quickly during the hearing. Otherwise, they would presumably have abandoned their impressionist tendencies. And the Pre-Raphaelites are inherently patient (otherwise they wouldn't be able to plough through all the papers) so they will probably put up with the advocate going through the case for the benefit of the Impressionists. Quite apart from this, most judges will ask questions, and, when a judge asks a question, the advocate has the opportunity to address that judge individually, which is obviously of particular value in getting that judge "on board". Sometimes, it will be obvious form the questions or from what you know about the bench which of the judges is or are the important one(s) to concentrate on – although any advocate will know that this can be risky.

What is your advice to counsel when he/she believes that the bench is not on the same wavelength as him/her on a critical issue?

Pure repetition sometimes works, but, at least after one repetition, further repetition will normally tend to irritate and will be very unlikely to persuade. So, if you have repeated your argument and you feel that the bench is still against you, you should try and find another way of approaching the point or putting the argument. And sometimes when the court seems to be, even is, against you, the judge or judges sometimes change their minds – particularly if they reserve judgment. As a judge, I was sometimes aware that I led one party to think I agreed with them during the hearing (often because I did agree with them), and then caused them to be disappointed, or even to feel that they had been misled during the hearing.

"If judges spend too long worrying about what their unconscious biases are and how to allow for them, they will get distracted from their primary role of running the case and deciding the issues."

You have heard appeal cases from Mauritius as member of the Judicial Committee of the Privy Council. In an interview with the New Bar Chronicle, your predecessor, Lord Phillips stated that litigation in Mauritius is still too marked by interlocutory in-fighting. Is this an observation that you share? What are your general observations regarding cases Mauritian appeals that you have heard?

I think that interlocutory in-fighting is generally to be discouraged, as it is expensive and time-consuming, and is rarely cost-effective, especially when it carries on to an appeal – or even two appeals. Sometimes, it is justified and sometimes it works for one party for tactical reasons. But, in general, like Lord Phillips, I would deprecate it. I did notice that Mauritius tended to produce a disproportionate, albeit not an outlandishly disproportionate number of interlocutory appeals. However, it is only right to add that I was involved in a number of more substantial and interesting Mauritian cases during my time as a Law Lord and a UK Supreme Court Justice. Indeed, when I was promoted to the House of Lords in early 2007, I fondly recall that my very first case was a Privy Council appeal from Mauritius, Bissonauth v. The Sugar Fund Insurance Board.

What recommendations do you have to make to counsel appearing before the Privy Council, in terms of advice given on the prospects of success of appeals, written advocacy, use of authorities and oral advocacy?

My general view as to the legal advice that should be given is the same as I would express when asked about any advice a lawyer is asked to give, and it is not very original: investigate the facts and research the law as well as you can, and give your honest assessment. More specifically, when it comes to advice on a Privy Council case, a lawyer should bear in mind two particular things which are unique to the Privy Council as against the Mauritian courts, namely

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(a) the Privy Council is not bound by previous decisions, although it will take previous authorities into account and will be particularly reluctant to depart from its own previous decisions, and (b) the panel will not have any Mauritian judges on it. Point (a) means that any advice can, indeed in some cases it should, be less tethered to previous cases than if the advice was being given about a decision in the Mauritian Supreme Court, and policy and similar implications can therefore often assume a greater importance. Point (b) can cut both ways – the Privy Council may be less concerned about local Mauritian issues, but, against that, because the panel is aware that it is not expert in Mauritian affairs, it may be diffident in some cases about differing from the Mauritian courts. As for written and oral advocacy, and the use of authorities, in the Privy Council, I refer to my earlier answers and also the earlier part of this answer.

It is often said amongst certain Mauritian counsel appearing before the Privy Council that the Law Lords already have a good idea of where their decision will lie upon reading the written cases. To what extent is that true?

I am afraid that my basic answer is rather predictable: it depends on the case (and indeed on the judge). There undoubtedly have been cases in my experience at all levels when I went into court with a clear view of what I thought, and that view never wavered, but that was not the norm. The more straightforward the case the more likely a judge is to form a reasonably firm view when, or after, reading the written cases. And some judges are more open-minded (to be complimentary) or indecisive (to be ruder) thanothers. However, the truth is that any judge worth their salt will not have irredeemably made their mind up before the oral hearing – even where they have formed a reasonably firm view. As a relatively open-minded (or indecisive) judge, I not infrequently went into court being pretty confident that I knew the answer only to find myself coming out of court a few hours later, having changed my mind. And I hardly ever came out of court without having had some extra insight into the case which I had not appreciated when I went into court. Furthermore, it was not unknown for me to change my mind between starting on a judgment and completing it. And I should add that, while, as I say, I was one of the more open-minded/indecisive judges, I believe that what I have said about my own experience is equally true of all my former colleagues (albeit in many cases less frequently than in my case).

You have practised essentially in a split-profession (barrister/solicitor) jurisdiction (England & Wales). You are now involved as a judge in a jurisdiction where there is a fused profession (Singapore) and another one where there is a split profession (Hong Kong). As arbitrator you come across lawyers from both types of jurisdictions. Mauritius has a split-profession too. What is your take on this debate in a world where specialist is becoming the norm? Is any one of those two more desirable?

In general, the more you do something, the better you become at doing it – although if you go on too long, there is a real danger of becoming stale. So, I think that there is a lot to be said for specialist advocates. And in today's increasingly specialised world, to which you rightly refer, there is much to be said in favour of advocates with a specialised knowledge of the relevant field of law. This does not, of course, mean that there has to a divided profession: a fused profession can include, and very frequently does include, specialised advocates. More broadly, I would suggest that every country has developed its own system in accordance with is traditions and customs, and, so long as that system works, one should be very careful about changing it, simply because another system seems to work in another country. Change can be very disruptive and expensive, and it is easy to see faults in one's present system and overlook actual or potential flaws in other systems. That is not a tirade against change. Change is often necessary, but small, unspectacular, practical changes have a lot to be said for them.

You are currently a full-time arbitrator, practising out of One Essex Court, a set whose members are actively involved in arbitration matters. Is it ever an issue if a member of One Essex Court appears as counsel for a party to an arbitration in which you have been appointed arbitrator?

Members of the same chambers appearing against each other or in front of each other is commonplace in England and rarely caused any difficulties, although non-UK clients sometimes found it a bit surprising. In the international arbitration field, it can lead to difficulties. I recently had the experience of a member of One Essex Court being brought in on a case where I was an arbitrator: I had to draw the other party's attention to this, and no point was taken. In other cases, I have specified in the directions that a party cannot appoint to its legal team a member of One Essex Court unless the other party agrees.

You are a member of the Singapore International Commercial Court. Can you tell us more about the work of this Court? Over what type(s) of cases does it have jurisdiction? Should it be seen as a competitor to centres like the Singapore International Arbitration Centre and the ICC in Singapore?

The Singapore International Commercial Court (SICC) is intended to provide a respected commercial court, to enable people, companies, and other entities to have their business disputes, whether or not based in Singapore, resolved by expert and experienced commercial judges, many of whom are from other jurisdictions. It is also hoped that, when drafting commercial contracts, particularly in Singapore and other countries in the region, parties will agree to have any disputes arising under their contract resolved in the SICC. The SICC will accept any case which is commercial in nature. It will in a sense compete with arbitration institutions, especially those in Singapore, such as SIAC and the Singapore ICC, which you mention. But competition is to be welcomed as it is generally in the public interest, and the SICC is different in that it offers a court rather than a purely private dispute resolution service.

You have been appointed member of the MARC (ndlr: the Arbitration and Mediation Centre operated by the Mauritius Chamber of Commerce and Industry) Court. Can you please tell us more about the role of the MARC Court under the new rules of arbitration introduced by MARC in May 2018?

MARC was set up by the Mauritius Chamber of Commerce and Industry (MCCI) in 1996, and this year it was relaunched with new rules, improved facilities, new Court members and a first annual Mauritius Arbitration Week. The overall aim of MARC is to make it clear in concreteterms, that international arbitration is very welcome in Mauritius. MARC's rules and overall approach to actual and potential international arbitrations, and to all those involved in such arbitrations, is to be as helpful and supportive in the most practical ways possible. In order to achieve this, the members of the MARC Court, led by Neil Kaplan QC, a very experienced and respected international arbitrator, have ensured that the MARC Rules are as simple, clear and user-friendly as possible. MARC's strengths as a centre for arbitration and indeed ADR generally are reinforced by its closeness to the Mauritius business and legal community, as well as its good relationships with the Mauritius government and other stakeholders. Indeed, the umbrella organisation, the MCCI is the oldest private sector institution in the Indian Ocean Region, and pioneered institutional arbitration in the region.

In your capacity as someone who has deep knowledge of the international arbitration world (currently as arbitrator and prior to that as barrister), what are the chances of Mauritius establishing itself as a seat for international arbitration in the region? Should certain specific industries be targeted?

Mauritius has a number of reasons for claiming to be well positioned as a potential global, arbitration centre. Geographically, it is part of Africa, but in terms of its actual location, it is as much part of Asia. Politically, it has a benign and honest system of government, with a relatively neutral, unaligned status internationally, and it scores higher than any other African country and the great majority of Asian countries when it comes to honesty and lack of corruption. Its judges and legal profession are respected and trusted, and its legal system unusually embraces both civil law and common law. Mauritius has a positive, welcoming and open reputation when it comes to international arbitration, with stable and respected arbitration institutions and available premises. And the relaxation facilities available in Mauritius must be veryattractive to people who hope to be able to relax after the demands of an international arbitration.As for industries worth approaching, I would have thought that businesses, particularly international businesses, with interests in Africa and in south and west Asia would be a promising start.

From a dispute resolution perspective, what has Mauritius got to do to benefit from the increase in trade in and out of Africa in the same way as Singapore and Hong Kong did with the increase in trade in Asia?

I think that it is important that you do not just concentrate on Mauritius's reputation for being friendly to and expert in arbitration. Hong Kong and Singapore go much more widely than this. They both have a long and enviable reputation as places which are friendly to business, and in particular to service industries, and they both have a strong legal tradition, in the constitutional sense of upholding and respecting the rule of law, in the practical sense of an expert, honest and respected legal profession, and in the constitutional and practical sense of a strong, respected, independent judiciary. Arbitration is an important aspect of dispute resolution, and dispute resolution is intimately connected with legal services and indeed with service industries generally. And it is a good idea to go out there and speak to potential users about the attractions of Mauritius as an arbitration forum.