

David Heaton

YEAR OF CALL: 2015

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Practice Overview

David practises in commercial, public, EU and competition law and international arbitration. He has appeared in the Supreme Court, Court of Appeal, High Court and the County Court and assisted leading counsel before the Grand Court and Court of Appeal of the Cayman Islands. He has worked on matters in sectors including energy and resources (including oil and gas), banking and financial services (including funds management and cryptocurrencies), telecommunications, online services, software and information technology, shipping, insurance, transport and government.

David is regularly instructed as a member of large teams in heavyweight commercial litigation and arbitration (ICC, LCIA, ICSID and UNCITRAL rules). He has been led by silks within and outside Brick Court, and has appeared unled in the Commercial Court. David's commercial litigation experience includes claims for breach of contract, fiduciary duty and trust (including tracing), civil fraud and conspiracy, bribery, conversion, breach of confidence, fraudulent insurance claims, insolvency, agency, and challenges to validity of corporate actions. He has been involved in jurisdiction challenges, applications for interim and ex parte injunctions, *Bankers Trust* orders and State/investor and other international arbitrations.

Current and recent commercial cases include *Robertson v Persons Unknown* (obtaining asset preservation order over Bitcoin), *Mozambique v Credit Suisse International* (claim for rescission of a State guarantee for bribery), *Bosworth v Arcadia Petroleum Ltd* (Supreme Court jurisdiction appeal) and *Palladyne International Asset Management BV v Upper Brook (A) Ltd* (appeal to Court of Appeal of the Cayman Islands on validity of shareholder resolutions allegedly breaching sanctions).

In public law, David has worked on high profile judicial review claims in areas including privacy and private life, freedom of expression including journalistic protections, discrimination, human and fundamental rights, secret state surveillance, regulation and licensing, data protection, mutual legal assistance, housing and council tax. David has assisted public authorities statutory drafting. He works both for claimants and defendants/interested parties.

Current and recent public law cases include: *R (Privacy International) v Investigatory Powers Tribunal* (Supreme Court appeal on ouster clauses); *R (Liberty) v Secretary of State for the Home Department* (partly successful EU law and ECHR challenge to surveillance powers in Investigatory Powers Act 2016); *Big Brother Watch v United Kingdom* (ECHR Grand Chamber reference in challenge to previous UK bulk interception regime); *R (Independent Workers' Union of Great Britain) v Mayor of London* (Administrative Court challenge under Equality Act and ECHR to London congestion charge for private hire vehicles); and *R (Uber London Ltd) v Transport for London* (Administrative Court challenge and appeal on English language and voice contact requirements imposed by TfL).

on private hire drivers and operators).

David's EU and competition work includes litigation and regular advice on UK and EU sanctions regimes, EU General Court challenges to sanctions listings, advice on EU competition law including its application to public authorities, interpretation of EU instruments, EU General Court claims for annulment of Commission competition decisions, and written observations on preliminary references to the EU Court of Justice. David has worked both for a claimant and defendants on follow-on and stand-alone cartel damages claims before the UK courts.

Current and recent EU/competition cases include: *JPMorgan Chase & Co v Commission* (Case T-106/17: General Court challenge to alleged infringement by rigging EURIBOR; and Cases T420/18 and C-1/19 P: challenge to/interim relief application/appeal on Commission decision to publish infringement decision); *Vodafone Group Services Ltd v Infineon Technologies AG* (stand-alone and follow-on cartel damages claim from smart card chips cartel); and *DenizBank A v Council, VTB Bank PAO v Council and Sberbank v Council* (Cases T-798/14, T-734/14 and T-732/14: General Court challenges to listings in and application of EU sanctions on Russia to Turkish and Russian banks).

David has also advised regularly on the application of the Russian and Crimean sanctions regimes (Regulations 269/2014, 692/2014 and 833/2014), the Libyan sanctions regime (Regulations 204/2011 and 2016/44), the EU Blocking Regulation (Regulation 2271/96), and application of EU competition law to delistings of cryptocurrencies from exchanges.

Before joining Chambers, David was previously an Associate to the Hon Kenneth Hayne AC, former Justice of the High Court of Australia, a solicitor at King & Wood Mallesons in Melbourne in the Banking and Tax groups, and an Associate at the Boston Consulting Group (management consultants) in Melbourne. He graduated first in his LLB class at the University of Melbourne and completed the BCL and an MPhil with distinction at St John's College, Oxford. He speaks German to a high standard and Indonesian to an intermediate level.

David regularly acts pro bono, including via Advocate (formerly the Bar Pro Bono Unit).

Commercial

David has experience in a range of commercial matters, such as banking and finance (including funds management and cryptocurrencies), insurance, civil fraud and conspiracy, shipping, international arbitration, partnership disputes, contractual, fiduciary and trusts issues, and proprietary and tracing claims. David frequently assists with the day-to-day carriage of significant commercial claims and arbitrations. He has acted in an arbitration in relation to a farm-out of an oil concession involving allegations of fraud, breach of contract and termination for repudiation and recently acted in an arbitration between two State-owned oil companies in relation to a breach of contract relating to production of lubricant base oils.

David's current and recent cases include:

- *Robertson v Persons Unknown* — obtaining *ex parte* and maintaining in the Commercial Court asset preservation order over Bitcoin stolen via spear phishing attack and permission to serve out of the jurisdiction, raising issues of the nature of cryptocurrencies as personal property and the proprietary claims available to recover them and jurisdiction (unled)
- *Mozambique v Credit Suisse International* — Commercial Court claim for rescission of State guarantees for loans of over US\$1 billion for alleged bribery and fraud, raising issues of attribution and circumstances in which bribery may lead to rescission or termination of contracts (led by Helen Davies QC and Tony Singla)
- Oil and gas dispute — ICC arbitration involving allegations of fraud, breach of contract and termination for repudiation (led by leading and senior junior counsel outside chambers)

- *Bosworth v Arcadia Petroleum Ltd* — Supreme Court jurisdiction appeal in claim for fraud, conspiracy, breach of fiduciary duty and dishonest assistance/knowing receipt arising from West African oil trading, raising issues before Supreme Court on return from reference to CJEU of the scope of the “individual contract of employment” provisions in Articles 18–20 of the Lugano Convention and procedural issues including alleged issue estoppel / new points on appeal (led by Fionn Pilbrow QC)
- *The Software Incubator Co Ltd v Computer Associates UK Ltd* — CJEU reference from Supreme Court on whether “sale of goods” in the Commercial Agents Directive (86/653/EEC) extends to a sale of software distributed via download and without tangible media (led by Jasbir Dhillon QC)
- Oil and gas partners’ dispute with claim of US\$250 million — LCIA arbitration under UNCITRAL rules involving contractual dispute in relation to lubricant base oil production (acting for Claimant, led by Mark Howard QC, Neil Calver QC and Stephen Midwinter QC)
- *Palladyne International Asset Management BV v Upper Brook (A) Ltd* — claim in Grand Court of the Cayman Islands and appeal to Court of Appeal of the Cayman Islands challenging validity of shareholders’ resolutions as breach of the Libyan sanctions, and unauthorised under Libyan law, in relation to US\$700 million sovereign fund investments via Cayman Islands investment vehicles (assisted Mark Hapgood QC, Richard Millett QC, Brian Kennelly QC and Maya Lester QC in pre-trial applications and at trial in Grand Court of Cayman Islands, assisted Brian Kennelly QC on appeal)
- *Vodafone Group Services Ltd v Infineon Technologies AG* [2017] EWHC 1383 (Ch) (CMC judgment) — stand-alone and follow-on damages claim in Chancery Division arising from Vodafone’s purchase of SIM cards incorporating cartelised smart card chips (acted for Vodafone claimant entities, led by Mark Hoskins QC and Tony Singla)
- *Richards v Metropolitan Police* [2017] EWHC 560 (QB) — successful application in Queen’s Bench Division to strike out vexatious claim and for civil restraint orders appearing for Virgin Media, 19th Defendant (unled)
- *Accident Exchange Ltd v McLean* — civil fraud and conspiracy claim in the Commercial Court in relation to allegedly false evidence being given in other matters (led by Tom Adam QC, Timothy Kenefick and Oliver Jones)
- *Energy Venture Partners Ltd v Commissioner of the Police of the Metropolis* — civil fraud, conversion and confidential information claim in the Commercial Court, including application for an interim injunction (assisted Simon Salzedo QC and Fionn Pilbrow as pupil)
- *Harb v Aziz* [2016] EWCA Civ 556 — contractual claim in Court of Appeal, raising fact appeal and claim of apprehended bias (assisted Charles Hollander QC as pupil)
- *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45 — successful Supreme Court appeal on the scope of the fraudulent claims rule in insurance law (assisted Richard Lord QC and Victoria Wakefield as pupil)
- Quasi-partnership dispute in relation to an online business raising contractual, trust, fiduciary duty and intellectual property issues (assisted Fionn Pilbrow as a pupil)

David has appeared in several County Court trials in smaller debt claims and applications for summary judgment and strike-out, and in applications to wind-up companies in the Chancery Division.

David regularly advises on commercial law issues. Recent instructions have include advice on:

- Actual and apparent authority in the context of contractual variations
- Dealings with unincorporated associations
- Implication of terms of good faith into commercial contracts
- Termination of employment contracts and claims by employees
- Possible sanctions breaches or implications of commercial transactions, including vessel charters, relevant sanctions regimes, geographical scope of sanctions instruments, and
- Interpretation and application of the EU Blocking Regulation (Council Regulation (EC) No 2271/96) in the context of a refusal to supply under existing contracts

Public Law

David has worked on high-profile and important public law cases. He appears both for Claimants and Defendants/Interested parties. He has worked on cases involving EU and ECHR proportionality and rationality challenges, consultation challenges, direct and indirect discrimination under the Equality Act 2010, EU-related judicial review, and human rights claims under the European Convention on Human Rights and EU Charter of Fundamental Rights. Current and recent cases include:

- *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 | [2019] HRLR 13 — successful intervention for Liberty in Supreme Court appeal on whether ouster clause in s 67(8) of the Regulation of Investigatory Powers Act 2000 excluded all judicial review of Investigatory Powers Tribunal decisions (led by Martin Chamberlain QC)
- *Big Brother Watch, 10 NGOs and Bureau of Investigative Journalism v United Kingdom* — Grand Chamber reference in European Court of Human Rights challenge to UK's previous bulk interception regime in Part 1 Chapter 1 of the Regulation of Investigatory Powers Act 2000 (appeared for 10 Non-Government Human Rights Organisations in Grand Chamber hearing, led by Ben Jaffey QC)
- *R (Liberty) v Secretary of State for the Home Department* [2019] QB 481; [2018] EWHC 976 (Admin); [2019] EWHC 2057 (Admin) — wide-ranging and long-running challenge to the secret surveillance powers for national security purposes, including bulk interception and bulk equipment interference (ie bulk hacking), under the Investigatory Powers Act 2016, brought on basis of EU law and ECHR rights to private life and journalistic expression — EU-law challenge to Part 4 of the Investigatory Powers Act 2016 before Divisional Court heard in February 2018 [2018] EWHC 975 (Admin) | [2019] QB 481 | [2018] 3 WLR 1435; procedural judgment arising from Defendants' late filing of skeleton argument [2018] EWHC 976 (Admin); ECHR Articles 8 and 10 challenge to all impugned provisions heard in June 2019 [2019] EWHC 2057 (Admin)
- *R (Independent Workers' Union of Great Britain) v Mayor of London and Transport for London* [2019] EWHC 1997 (Admin) — challenge before Administrative Court to the imposition of the London congestion charge on private hire vehicles as indirect discrimination under the Equality Act 2010 and disproportionate interferences with ECHR Article 8 and A1P1 rights or discrimination under Article 14 (appeared for successful Mayor of London (Defendant) and Transport for London (Interested Party), led by Martin Chamberlain QC and Malcolm Birdling)
- *R (Uber London Ltd) v Transport for London* [2018] EWCA Civ 1213 | [2018] LLR 603 (Court of Appeal); [2017] EWHC 435 (Admin) | [2018] LLR 185 | [2017] ACD 54 (Mitling J) — challenge before Administrative Court to English language requirement imposed by TfL on private hire vehicle drivers and voice contact requirement imposed on private hire vehicle operators, brought on basis of EU-law freedom of establishment and indirect discrimination under the Equality Act 2010, and successful appeal to Court of Appeal as to voice contact requirement (appeared for Transport for London (Defendant), led by Martin Chamberlain QC and Tim Johnston)
- *MOL Hungarian Oil and Gas Company plc v Republic of Croatia* (ICSID Case No ARB/13/32) and *Croatia v MOL Hungarian Oil and Gas Company plc* (PCA Case No 2014-15) — ICSID and PCA arbitrations, addressing issue of admissibility of documents obtained under international, EU and domestic criminal mutual legal assistance treaties and laws, also raising data-protection issues (led by Maya Lester QC)

David advises regularly on public law issues. Recent instructions have include advice on:

- Jurisdictional scope of the right to life under Article 6 of the International Covenant on Civil and Political Rights and Article 2 of the European Convention on Human Rights and related customary international law in the context of the death penalty
- Proper purposes and permissible considerations for licensing decisions and possible application of EU competition law to licensing activities
- Drafting of statutory instruments
- Compliance with, and journalistic exceptions to, objectivity and conflict disclosure requirements under the EU Market Abuse Regulation

- Scope and application of EU and UK Overseas Territory sanctions regimes

David's MPhil thesis examined the legal basis of the UK government's power to make contracts. He has a keen interest in non-statutory executive power.

EU/Competition

David has significant EU law experience, including in sanctions, competition law, and judicial review before EU courts. Current and recent cases include:

- *JPMorgan Chase & Co v Commission* (Case T-106/17, and Cases T420/18 and C-1/19 P) — challenge before EU General Court to alleged competition law infringement by rigging of EURIBOR interest rate benchmark, brought on substantive and procedural grounds, and challenge to Commission decision to publish infringement decision in circumstances of alleged breach of presumption of innocence and associated applications for interim relief and appeal to CJEU (led by Dinah Rose QC, Maya Lester QC and Daniel Piccinin)
- *Vodafone Group Services Ltd v Infineon Technologies AG* [2017] EWHC 1383 (Ch) (CMC judgment) — stand-alone and follow-on damages claim in Chancery Division arising from Vodafone's purchase of SIM cards incorporating cartelised smart card chips (acted for Vodafone claimant entities, led by Mark Hoskins QC and Tony Singla)
- Part 20 Claims against Brugg Kabel AG and Kabelwerke Brugg AG — Part 20 claim against Commission Decision addressees arising from follow-on damages claims by National Grid and Scottish Power in relation to power cables cartel (acted for Part 20 Defendant, led by Maya Lester QC)
- *DenizBank A v Council, VTB Bank PAO v Council and Sberbank v Council* (Cases T-798/14, T-734/14 and T-732/14) — challenges before EU General Court to listings in and application of EU sanctions on Russia (Council Regulation (EU) 833/2014, as amended) to applicant Turkish bank (on basis of ownership by Russian bank) and applicant Russian banks (appeared in General Court oral hearing, led by Maya Lester QC)
- *Islamic Republic of Iran Shipping Lines v Council* (Joined Cases T-14/14 and T-87/14) — application before the EU General Court for annulment of sanctions re-listings on grounds including right to an effective remedy, absence of legal basis, inadequate reasons, rights of defence and fundamental principles of EU law (attended EU General Court hearing, assisting Maya Lester QC as pupil)
- *R (Philip Morris Brands Sarl) v Secretary of State for Health* (Case C-547/14) — challenge in the EU Court of Justice to validity of the Second EU Tobacco Products Directive (assisting David Scannell as pupil)
- *Comic Enterprises Ltd v Twentieth Century Fox Film Corp* — trademark infringement claim and challenge in Court of Appeal to compatibility of "series" trademark registrations with the Trade Marks Directive (assisting Nicholas Saunders as pupil)
- *R (British American Tobacco) v Secretary of State for Health* — judicial review in the Administrative Court of UK plain packaging regulations on EU grounds including proportionality, incompatibility with an EU directive and incompatibility with the EU Charter of Fundamental Rights (assisting David Scannell as pupil)

David advises on a wide range of EU law issues. Recent instructions have include advice on:

- The scope and application of various EU sanctions regimes, including the EU's Russian and Crimean sanctions regimes (Council Regulations (EU) Nos 269/2014, 692/2014 and 833/2014) and the EU's Libyan sanctions regime (Council Regulations (EU) Nos 204/2011 and 2016/44), and their application to transactions such as transfers of funds and transactions with/derivatives relating to precious metals, charterparties, acquisitions of interests in companies and indirect acquisitions of property
- Application of the EU Blocking Regulation (Council Regulation (EC) No 2271/96) in the context of commercial supply contracts
- Application of EU competition law in relation to abuse of a dominant position (Article 101) to delistings of a cryptocurrency (Bitcoin) from an exchange
- Possible application of EU competition law to licensing activities of a public authority

- Compliance with, and journalistic exceptions to, objectivity and conflict disclosure requirements under the EU Market Abuse Regulation
- Interpretation of the EU Interchange Fee Regulation

Arbitration

David has worked on both investor–state and private commercial arbitrations (ICC, LCIA, ICSID and UNCITRAL rules), often involving State-owned entities. His work has encompassed contractual disputes involving interpretation, termination and breach; fraud claims; allegations of repudiatory breach and estoppel; claims for specific performance and other mandatory remedies; quantification of loss requiring complex modelling; admissibility of documents and disclosure in the arbitral context; proof and application of foreign law by expert evidence; and assistance with and presentation of other expert evidence. Current and recent cases include:

- Oil and gas dispute — ICC arbitration involving allegations of fraud, breach of contract and termination for repudiation (led by leading and senior junior counsel outside chambers)
- Oil and gas partners' dispute with claim of US\$250 million — LCIA arbitration under UNCITRAL rules involving contractual dispute in relation to lubricant base oil production (acting for Claimant, led by Mark Howard QC, Neil Calver QC and Stephen Midwinter QC)
- *MOL Hungarian Oil and Gas Company plc v Republic of Croatia* (ICSID Case No ARB/13/32) and *Croatia v MOL Hungarian Oil and Gas Company plc* (PCA Case No 2014-15) — ICSID (investor–State) and PCA (State–investor) arbitrations, addressing issue of admissibility of documents obtained under international, EU and domestic criminal mutual legal assistance treaties and laws, also raising data-protection issues (led by Maya Lester QC)

David's book, *Non-Discrimination and the Role of Regulatory Purpose* (co-authored with Andrew D Mitchell and Caroline Henckels), examines national treatment and most-favoured nation provisions in international investment treaties, which commonly give rise to investor–State arbitrations, and the World Trade Organization (WTO) treaties.

Sanctions

David has a particular expertise and interest in UN, EU and UK sanctions. He has been involved in several major sanctions cases in the EU General Court and the Grand Court and Court of Appeal in the Cayman Islands. He advises regularly on the scope and application of EU and UK sanctions regimes, including Russian and Crimean sanctions (Council Regulations (EU) Nos 269/2014, 692/2014 and 833/2014), Libyan sanctions (Council Regulations (EU) Nos 204/2011 and 2016/44) and the EU Blocking Regulation (Council Regulation (EC) No 2271/96). He has advised on sanctions issues arising in the context of transactions such as large transfers of funds and transactions with/derivatives relating to precious metals, charterparties, acquisitions of interests in companies and indirect acquisitions of property banking and financial transactions. Current and recent cases include:

- *Palladyne International Asset Management BV v Upper Brook (A) Ltd* — claim in Grand Court of the Cayman Islands and appeal to Court of Appeal of the Cayman Islands challenging validity of shareholders' resolutions as breach of the Libyan sanctions, and unauthorised under Libyan law, in relation to US\$700 million sovereign fund investments via Cayman Islands investment vehicles (assisted Mark Hapgood QC, Richard Millett QC, Brian Kennelly QC and Maya Lester QC in pre-trial applications and at trial in Grand Court of Cayman Islands, assisted Brian Kennelly QC on appeal)
- *DenizBank A v Council, VTB Bank PAO v Council and Sberbank v Council* (Cases T-798/14, T-734/14 and T-732/14) — challenges before EU General Court to listings in and application of EU sanctions on Russia (Council Regulation (EU) 833/2014, as amended) to applicant Turkish bank (on basis of ownership by Russian bank) and applicant Russian banks (appeared in General Court oral hearing, led by Maya Lester QC)

- *Islamic Republic of Iran Shipping Lines v Council* (Joined Cases T-14/14 and T-87/14) — application before the EU General Court for annulment of sanctions re-listings on grounds including right to an effective remedy, absence of legal basis, inadequate reasons, rights of defence and fundamental principles of EU law (attended EU General Court hearing, assisting Maya Lester QC as pupil)

Publications

Non-Discrimination and the Role of Regulatory Purpose (2016, Edward Elgar, with Andrew D Mitchell and Caroline Henckels)

'*Carnduff, Al Rawi*, the "Unfairness" of Public Interest Immunity and Sharp Procedure' (2015) 34 *Civil Justice Quarterly* 182

'Bias and Previous Determinations: Four Recent Decisions' (2015) 34 *Civil Justice Quarterly* 160

'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function' (2010) 31 *Michigan Journal of International Law* 559 (with Andrew Mitchell)

(2009) 33 *Melbourne University Law Review* (Editor-in-Chief with Luke Pallaras and Anna Zhang)

Education & Qualifications

Professional Experience and Qualifications:

2015: Called to the Bar of England and Wales

2012–13: Associate, Boston Consulting Group, Melbourne

2011–12: Associate (Judicial Assistant) to the Hon Justice Hayne AC, High Court of Australia (Australian final appellate and constitutional Court)

2010–11: Solicitor / Graduate, King & Wood Mallesons, Melbourne — Rotations in Banking and Tax teams

2010: Admitted as a Barrister and Solicitor of Supreme Court of Victoria and High Court of Australia

Education:

2014–15: MPhil (Distinction), St John's College, University of Oxford — Thesis on "The Power of Government to Make Contracts", supervised by Professor Anne Davies

2013–14: Bachelor of Civil Law (Distinction), St John's College, University of Oxford

2009: Summer Academy on International Trade Regulation, World Trade Institute, University of Bern

2004–09: Bachelor of Laws (First Class Honours, top-ranked student), Bachelor of Arts (Major in German),

Diploma of Modern Languages (Indonesian), The University of Melbourne, Australia

Scholarships and Prizes:

University of Oxford / St John's College, Oxford:

2015 Eldon Law Scholarship (joint recipient — most promising Oxford graduate intending to practise at the Bar)

Clifford Chance Civil Procedure Prize (BCL), Sir Roy Goode Prize (best St John's College results in BCL)

2013 Sir Robert Menzies Memorial Scholarship in Law (Australian scholarship for BCL and MPhil)

University of Melbourne, Australia:

National Scholarship for Bachelor of Arts/Bachelor of Laws at University of Melbourne (scholarship to undertake undergraduate studies)

Supreme Court Prize 2009 (first-ranked student of 404 in Bachelor of Laws) and EJB Nunn Scholarship

Subject prizes in Legal Ethics, Jessup Moot, Constitutional and Administrative Law (Second Place), Property II, History and Philosophy of Law I

Exhibition Prizes in German 1, German 2 and German 3

Advocacy:

2014 JustCite Procedural Justice Moot, University of Oxford, Runner Up

2008–09 Jessup Moot Court Competition, Australian Champion Team and Run-Off Rounds in World Finals

2006–07 ELSA EMC² WTO Moot Court Competition, World Champion Team

2006 Sir Harry Gibbs Constitutional Law Moot, Melbourne, Best Written Submissions