Standard Bulletin

Special Edition: Sanctions

Setting the Standard for
Service and Security

August 2012

In this special edition of the *Standard Bulletin* we provide an update in respect of sanctions. We are grateful to our contributors for their articles and input.

Foreign policies are commonly now being reflected in the international community's appetite for the use of 'smart' sanctions aimed at individuals and entities. So-called 'smarter' sanctions are now being aimed at the shipping, energy and financial industries, including insurers.

As a flexible tool, they can be used to increase or decrease pressure on sanctioned regimes; they can seek to deter and/or punish or encourage and/or reward, as appropriate.

The relaxation of sanctions in relation to Libya, the Ivory Coast and Burma/Myanmar demonstrate flexibility.

The strengthening of sanctions against Iran and Syria in particular reflects the international community's frustration and resolve, but also illustrates the desire to seek diplomatic solutions.

The flexibility of sanctions is a benefit for politicians but makes compliance and risk management for members and insurers an increasingly burdensome task.

However, the far-reaching consequences for members of a breach of sanctions can include reputational damage, restrictions on trade and licensing, loss of insurance and foreclosure by mortgagees, in addition to financial penalties and increasing reporting requirements.

It remains vital to be aware of the layers of sanctions within different states and regions, how they interact and differ, and what penalties can be imposed. Press reports have been issued which indicate that the authorities are increasingly focussing on class societies and ship registers. However, it would be unwise to believe that this demonstrates a lack of attention to the issue of sanctions in the balance of the shipping and insurance industries; this has been demonstrated by the recent designation of the National Iranian Tanker Company and associated companies and ships by the US authorities, and President Obama's **Executive Order** of 31 July 2012 in relation to the National Iranian Oil Company and Naftiran Intertrade Company.

We recommend members closely investigate and ensure compliance with domestic and international sanction regimes; to do otherwise is to invite investigation and potential prosecution, coupled with reputational damage.

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The Standard

Europe's 'Crude' sanctions against Iran

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The Council of the European Union issued further sanctions against Iran on 24 March 2012. Council Regulation (EU) No. 267/2012 has far-reaching implications for the maritime community and, in particular, in relation to the carriage of crude oil, petrochemical and petroleum products.

Key provisions

The latest Regulation supplements existing EU sanctions. It includes a ban on the purchase, import or transport from Iran of crude oil, petrochemical and petroleum products; a ban on the sale, purchase, transportation or brokering of gold, precious metals and diamonds to, from or for the Government of Iran; as well as further freezing of assets of designated individuals.

Prohibition on the importation of crude oil or petroleum products

Articles 11 and 13 contain a prohibition on the import of crude oil, petroleum products or petrochemical products into the European Union if they originate in Iran or have been exported from Iran. It is also prohibited to purchase or transport such products that have originated from Iran or are being exported from Iran. Similarly, it is prohibited to provide any kind of financial assistance that includes insurance and reinsurance related to the import, purchase or transport of such products whether directly or indirectly.

This creates difficult problems for operators involved in the carriage of oil, petrochemical and petroleum products. It will require due diligence for such cargoes being imported into the EU to ensure that they do not originate from Iran.

Exclusions

Under article 14, the prohibition relating to the import of petrochemical products does not apply to contracts executed before 1 May 2012, provided those contracts were concluded before 23 January 2012. Similarly, the prohibition relating to the import of crude oil or petroleum products does not apply to contracts that were concluded before 23 January 2012 and that are executed before 1 July 2012.

Prohibition on key equipment and technology

The Regulation also prohibits the sale, supply, transfer or export of listed key equipment or technology that is directly or indirectly provided to any Iranian person, entity or body for use in Iran. This equipment and technology relates to the oil and gas industry, particularly to the exploration and production of crude oil, and the refining and liquefaction of natural gas. Annex VI contains a useful explanation as well as details of the equipment and technology that are captured by the Regulation. Limited exceptions can apply.

These provisions elaborate upon the provisions contained in Regulation 961/2010 of 25 October 2010, and also present issues for owners and charterers discharging containerised cargo in Iran. It places the onus on operators carrying cargo to Iran to ensure that they are not discharging cargo that could fall within the definitions of key equipment or technology contained within the Annex.

Restrictions on transfer of funds and financial services

Any financial transactions with Iranian entities by an EU person may require prior authorisation by the competent authority within a member state; in the UK, this is HM Treasury. The requirements remain as below:

The Regulation also contains numerous other provisions relating to the provision of financial loans or credit, and restrictions upon the acquisition, extension or creation of any joint venture with any Iranian person engaged in the:

- exploration or production of crude oil and natural gas
- refining of fuels
- liquefaction of natural gas or
- petrochemical industry.

There are also prohibitions relating to the provision of other goods and services such as those listed on the common military list and the transfer or export of gold, precious metals and diamonds.

€10,000 or less	No requirements to notify or obtain prior approval from the competent authority unless there is a series of transactions that may appear to be linked.
More than €10,000 but less than €40,000	Notice of such payments must be given to the competent authority for any transactions within this level.
€40,000 or above	Such payments must be notified to the competent authority in advance of payment and authority obtained, unless they relate to food stuffs, healthcare, medical equipment or humanitarian purposes.

Iranian person

Article 1 of the Regulation defines an Iranian person, entity or body as:

- the state of Iran or any public authority thereof
- any natural person in, or resident in, Iran
- any legal person, entity or body having its registered office in Iran
- any legal person, entity or body, inside or outside Iran, owned or controlled directly or indirectly by one or more of the above-mentioned persons or bodies.

Care should be taken to identify the beneficial ownership of contractual partners, particularly in light of press reports of obfuscation by Iranian shipping entities.

Application

The Regulation applies to any person, entity or body:

- within the territory of the EU, including its airspace
- on board any aircraft or ship under the jurisdiction of a member state
- to any person inside or outside the territory of the EU who is a national of a member state
- to any legal person, entity or body, inside or outside the territory of the EU, which is incorporated or constituted under the law of a member state
- to any legal person, entity or body in respect of any business done in whole or in part within the EU.

Commentary

Whilst the EU maintains that the Regulation is not a trade ban, it is clear that it has wide-reaching consequences for anyone wishing to trade with Iran. Whilst its application is only directly relevant within the EU and for European persons, the nature of the Regulation could affect entities domiciled outside of the EU. This is due in a large part to the prohibition on provision of insurance services by an EU entity to any entity, wherever located, in the export of oil, petroleum products and petrochemical products from Iran.

The Regulation demonstrates the EU's steadfast approach to using sanctions as a political tool to exert pressure on foreign governments. Whilst sanctions can be amended or abrogated, it is clear that sanctions against Iran and other countries such as Syria are here to stay and present challenges to the wider maritime community. The US and UN continue to impose sanctions on Iran and Syria, amongst other states, which have impacted the entire maritime and insurance industries. Timely and coherent advice should be sought to ensure compliance with the plethora of sanctions and prevent reputational damage.

Lifting Iranian Bunkers from outside the EU

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Each month, about 3.5 million metric tons of bunker fuel are sold in Singapore, a key bunker hub between markets in East Asia and those in the Middle East and Europe. Whilst exact figures as to how much of the bunkers sold originate from Iran are not readily available, traders estimate that in May 2012, Iran supplied at least 8% of the fuel entering Asia for use in power stations, industry and shipping.

Regulation 267/2012 and Iranian bunkers

Regulation 267/2012 of the European Union Foreign Affairs Council came into effect on 24 March 2012 (the Regulation). It prohibits the trade and transportation of crude oil, petroleum products and petrochemical products from Iran by all EU-owned or flagged ships (EU ships) worldwide and by any ship trading within EU waters. The prohibition extends to any related financing, insurance and technical assistance involved in these operations. Interim exceptions temporarily suspended the application of the Regulation.

Although the Regulation makes no specific reference to bunkers, it is likely that these will fall within the generic description of crude oil or petroleum products; if bunkers originate from Iran or are blended with Iranian products (hereafter 'Iranian bunkers'), the prohibitions in the Regulation are likely to apply. Whilst the wording of the Regulation is not entirely clear, it is believed that Iranian bunkers should have been consumed before the expiry of the grace period to avoid any possibility of a breach of the Regulation. It is not clear how EU authorities will treat residual bunker stems on board a ship that had contained Iranian bunkers, given the natural tendency for heavy oils to 'cling'. It is hoped that previous stemming of these bunkers will not necessitate segregation and that they will not be treated as having cross-contaminated other stems on board or the ship's pipes, lines, pumps and tanks (thus requiring cleaning or further certification).

Penalties for breach of the provisions of the Regulation applicable to the UK are set out in the *Iran (European Union Financial Sanctions)* Regulations 2012 and include a fine and/or custodial sentence of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity.

Shipowners in EU waters and non-EU waters
The Regulation prohibits EU shipowners from stemming or transporting Iranian bunkers in any part of the world. Non-EU shipowners also are prohibited from stemming or transporting Iranian bunkers within EU waters.

The Regulation does not prevent non-EU shipowners from stemming Iranian bunkers outside the EU, say from Singapore, provided that their ship does not trade with such bunkers within EU waters.

However, there are still legal implications for such non-EU shipowners. Most International Group (IG) clubs' rules contain express provisions that may restrict, exclude or terminate cover following a breach of sanctions. The effect of those rules may be to withdraw or exclude insurance cover, or limit or preclude recovery in relation to liabilities incurred whilst a ship is performing a prohibited voyage. Therefore, to the extent that a shipowner undertakes such a voyage, his liabilities may not be insured by his IG club. As noted above, the stemming of Iranian bunkers by non-EU shipowners outside EU waters will not place them in breach of EU law. However, such an action may trigger club sanctions and compromise his club cover (just as it would for an EU shipowner).

Pool and reinsurances
The Regulation already applies directly to EU-registered clubs. However, not all IG clubs are EU-regulated. Non-EU clubs are not directly subject to the insurance prohibitions in the Regulation. However, the right of such non-EU clubs to recovery under the IG's pooling arrangements from clubs that are EU-regulated will be impaired. Also, the rights of recovery under the IG excess of loss reinsurance contract and other reinsurances taken out for the benefit of the club members will also be impaired. Clearly, such impairments will also apply to EU-regulated clubs. Most IG clubs have now incorporated provisions in their rules to exclude or limit cover where, as a result of sanctions, the pool and/or reinsurers are themselves subject to prohibitions against payment; claims for reimbursement may be reduced.

Article 42 defence and protective measures
What preventive measures can a prudent member take so as not to breach the Regulation as far as the stemming of Iranian bunkers is concerned?

Article 42 expressly provides that the Regulation will not give rise to liability upon persons or entities if they did not know and had no reasonable cause to suspect that their actions would infringe the prohibitions; actual or ostensible knowledge is key.

Therefore, it would be prudent for shipowners or their charterers to make enquiries and maintain records regarding the origin of bunkers before they are stemmed. When a member charters out their ships, they should request the charterers (who usually supply bunkers) to ensure that no Iranian bunkers are stemmed. There is no standard wording to pass from owners to charterers in relation to the provenance of bunkers supplied. This would be driven by many factors, including the relationship between the parties, their contractual terms, the law and jurisdiction of the relevant charter, and the course of previous dealings that they have had. That said, a simple requirement from owners to charterers that the latter confirm in writing that each stem of bunkers supplied is not of Iranian origin in whole or in part should be sufficient. The EU-driven requirement is to make reasonable enquiries; owners do not need to be exhaustive in such enquiries.

Shipowners should also ensure that all time charterparties expressly oblige charterers not to supply Iranian bunkers. Where the member is supplying bunkers to his own or a chartered-in ship, he should seek an undertaking from the bunker supplier not to supply Iranian bunkers. Charterers may wish to seek similar assurances from their sub-charterers, bunker suppliers or indeed from the owner of a newly chartered-in ship in relation to any residual bunkers on board at delivery. It is believed that a written assurance would be sufficient grounds to found a defence pursuant to Article 42 that the member was not in breach of the Regulation.

In Singapore, for instance, shippers have the option of buying from major Western companies that have their own refineries in Singapore and that could provide assurances that are acceptable to members. Some shipowners and charterers in Singapore are already known to seek as a matter of good practice guarantees from bunker suppliers that the bunkers supplied are not Iranian bunkers or blends thereof. It remains to be said what assurances can and will be offered by bunker suppliers and charterers.

Conclusion
The EU Regulation is far-reaching. It impacts upon both EU and non-EU ships, regardless of whether the ship is entered with an EU-regulated or non-EU-regulated club. It also applies whether the ship is sailing to destinations within or outside the EU. Members should accordingly take measures to ensure that their cover is not compromised by the Regulation even when lifting Iranian bunkers from outside the EU.

The practical advice for shipowners remains that if they are arranging bunker stems in areas where traditionally Iranian bunkers have been supplied (say Fujairah, India, Pakistan and Singapore), or where there may be some other reason to believe bunkers may be of Iranian origin, such as in states that are continuing to import Iranian oil and/or petroleum (such as Japan, China and India), then they should ask questions, seek undertakings from the bunker suppliers and, if in doubt, make alternative stem arrangements.

Iran calling...? Reducing the risks

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Introduction

Shipowners will be acutely aware of the risks involved in permitting their ships to call at Iranian ports. Those risks are real, and the penalties for being in breach of the numerous sanctions regimes are severe. However, what sometimes gets lost in all of the warnings is that the sanctions regimes do not prohibit all trade with Iran. For careful (and brave) shipowners, there is money to be made in accepting voyage orders to call at Iranian ports. This article addresses some of the steps that shipowners must take before accepting such voyage orders and outlines the additional protections that should be put in place before any voyage to Iran commences.

Two very important general points should be made about what follows. Firstly, the steps set out below will reduce the risks involved for shipowners considering permitting their ships to call at Iranian ports, but will certainly not eliminate the risks: for the reasons set out in this article, it is not possible to eliminate the risks in full. Secondly, if shipowners are considering permitting their ships to call at Iranian ports, then it is strongly recommended that legal advice is obtained at an early stage: this article is not a substitute for that legal advice.

Step 1 – necessary due diligence

Who is the charterer?

The starting point for shipowners considering permitting their ships to call at Iranian ports is to identify exactly who is seeking to charter the ship for the particular Iranian voyage. This is because if the ship is required to call at Iran, then it is likely that the charterer is either an Iranian entity, or has some connection with an Iranian entity or person. That entity or entities or Iranian person should be checked very carefully against both the US and EU list of sanctioned companies/people. These lists can be found at **http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm** and **http://www.treasury.gov/ofac/downloads/t11sdn.pdf**, though as stated above, given the consequences of being in breach of sanctions, it is strongly recommended that lawyers are instructed to carry out those checks. If the charterer(s) appears on either of those lists then shipowners will be in breach of the sanctions if they allow their ship to be chartered to the sanctioned entity.

What is the cargo?

If the charterer is not a sanctioned entity, then the next step for shipowners is to identify exactly what cargo the charterer wants to be carried on the voyage. Previous articles in this publication have set out the types of cargoes that are completely prohibited, the types of cargoes that may only be imported or exported under licence, the particular issues surrounding 'dual-use cargo', and the different restrictions that apply for imports and for exports (see **http://www.standard-club.com/docs/STANDARDBulletin-SanctionsDecember2010.pdf**). The relevant provisions of the US and EU sanctions regimes must be consulted to determine whether the cargo the charterer wants to be carried is a sanctioned cargo or not. If the cargo is listed, then shipowners will be in breach of sanctions if they permit their ships to call at Iranian ports while carrying that cargo. Shipowners should also be aware that they will be in breach of sanctions if they carry a sanctioned cargo to a neighbouring country, knowing that the ultimate destination is Iran – the use of 'front countries' is a real risk.

Who are the cargo interests?

The next step for shipowners is to identify all of the cargo interests. If the ship is required to call at Iran, then it follows that at least one of the cargo interests (shipper, receiver, consignee, buyer, seller, etc.) is going to be an Iranian entity. That entity must be checked against both the US and EU list of sanctioned companies/persons, in just the same way as the charterer is checked. If any of the cargo interests appear on the lists, then shipowners will be in breach of sanctions by allowing the cargo to be carried on their ship.

Of course, many bills of lading are 'To Order' bills, so it can often be difficult for an owner/carrier to know in advance the identity of the end receiver. In these situations, an owner/carrier should obtain as much information from the charterer/shipper as possible, as to the identity of the proposed end receiver, and check these names against the US and EU lists mentioned above. However, there is nothing stopping such cargo being sold to an undisclosed entity during the sea voyage and this is a risk that is difficult to cater for (see below).

What is the Iranian load/discharge port?

Although the sanctions do not prevent ships from calling at any particular geographical location, some Iranian port operators appear on the US and EU list of sanctioned companies, and are therefore sanctioned entities. This effectively prevents ships from calling at any Iranian port, as where the port operator is a sanctioned entity, any payment (for example of port dues) made to them will be a breach of sanctions. Therefore, shipowners must identify the charterers' intended Iranian port(s) of call before agreeing to undertake the voyage, in order to identify the particular port operators. The port operators must then be checked against both the US and EU list of sanctioned companies, and if they appear on the list, shipowners will be in breach of sanctions by allowing their ship to call at that port.

Who are the Iranian load/discharge port agents?

Just as the charterer, cargo interest or port operator may be a sanctioned entity, so too may be the particular Iranian port agents. Therefore, the port agents must also be identified and checked against both the US and EU list of sanctioned companies.

Step 2 – additional protections

If all of the above checks come back clear, then it will probably (but by no means certainly) be the case that shipowners will not be in breach of sanctions by permitting their ship to call at the specified Iranian port(s) to carry the specified cargo for the specified voyage. We say 'probably' the case, rather than certainly the case, for the following reasons:

1. The sanctions regimes are changing regularly, and changes happen with little or no prior notice. An entity or person that was not sanctioned when the checks were originally carried out may become sanctioned by the time the voyage commences; or a cargo that was not previously prohibited may become prohibited during carriage.
2. The reality of carrying cargo by sea is that unforeseeable events sometimes occur during carriage. For example, the ship may suffer a breakdown and need to divert unexpectedly. If the ship had to divert, even for issues of safety, to an Iranian port of refuge that was operated by sanctioned port operators, or if the agents or repairers at the port were sanctioned entities, then shipowners would find themselves in breach of sanctions.
3. It is not uncommon for certain cargoes to be sold afloat, and without the knowledge of shipowners. If the cargo was sold to a sanctioned entity in this way, then shipowners would be in breach of sanctions, possibly without even being aware that they were in breach.
4. It is possible that the sanctions regimes will be made even more stringent in due course and that those more rigorous sanctions will then be given retrospective effect. This would result in a voyage that was not subject to sanctions at the time it was agreed or undertaken becoming a sanctioned voyage after the event. If an issue then arose in respect of the completed voyage (for example, a cargo claim just before the one-year time limit), that claim would be affected by the sanctions introduced after the voyage had been completed.

As such, careful shipowners should also take the following further steps to protect their position.

Incorporate provisions into the charterparty allowing shipowners to refuse to comply with voyage orders at any stage of the voyage.

As a voyage that is not subject to sanctions can become a sanctioned voyage overnight, shipowners should insert a provision in the charterparty allowing them to refuse to follow voyage orders at any stage of the voyage, including when the cargo has been loaded and is being carried, if to do so would otherwise place them in breach of sanctions. Paragraph (b) of the BIMCO Sanctions Clause for time charterparties sets out wording to achieve this. In particular, that clause entitles the shipowner to discharge the cargo being carried at any safe port. That wording can be found at https://www.bimco.org/Chartering/Clauses/Sanctions_Clause.aspx and it is recommended that the clause be included as a term of any fixture by shipowners to permit their ships to call at Iranian ports. Paragraph (d) of the BIMCO Clause (requiring charterers to procure that Paragraph (b) of the clause be incorporated into all sub-charters and all bills of lading) should also be inserted into the relevant charterparty.

Ensure that an *alternative* 'all risks' insurance policy is taken out for the voyage.

If a voyage is not subject to sanctions, then the shipowners' P&I cover with the club will remain intact. However, for all of the reasons mentioned above, shipowners may inadvertently find themselves in breach of sanctions, and consequently without cover. Therefore, an alternative 'all risks' cover – including P&I and H&M cover – should be entered into before every voyage calling at Iranian ports is commenced. Although a point for negotiation between shipowners and charterers, it would not be uncommon for the obligation to arrange alternative insurance to be on charterers in this situation, and also for their account.

Regarding the alternative insurance, the following important points should be noted in particular. Firstly, the insurance company providing the alternative insurance would have to be based outside the US/EU, otherwise the alternative insurer would not be able to cover sanctionable voyages, just as the club cannot. Secondly, even if an appropriate non-US/EU insurer willing to offer 'all risks' cover was found, it is unlikely that the alternative insurer would be able to provide adequate levels of cover for pollution incidents. This is because the level of compulsory pollution insurance cover is so high that the necessary reinsurance required is currently unavailable outside the EU/US. Thirdly, in the event that alternative cover was taken out, and the voyage was not subject to sanctions, then in the event of a typical P&I loss (for example, a cargo claim), there may be issues of double insurance to consider. Finally, whatever the insurance arrangements, no US/EU insurer or bank would be able to provide security, for example, in the event of an arrest, without the authorisation of the relevant authorising body (in the UK, that would be Her Majesty's Treasury), and that is the position whether the Iranian entity is sanctioned or not. Therefore, it is important that the alternative insurer has the facility to be able to put up adequate security, for example, in the event of an arrest.

Obtain a letter of indemnity from charterers.

In addition to procuring an all risks insurance policy from charterers via alternative insurers, shipowners should also obtain a letter of indemnity from charterers, indemnifying them against all of the risks and consequences of permitting their ship to call at Iranian ports. To the extent that shipowners have any doubts at all about the ability (or willingness) of charterers to honour the letter of indemnity, then they should also require that it be countersigned by a first class bank. Such a letter of indemnity could contain some of the provisions, on the opposite page, though as mentioned above, specific legal advice should be sought on the point.

Conclusions

As we set out at the start of this article, permitting a ship to call at Iranian ports carries significant risks for any shipowner. This article highlights the fact that even the most careful of shipowners can – at best – only reduce those risks to some extent, but never eliminate them completely. If shipowners are minded to permit their ships to call at Iranian ports, to capitalise on the 'rich pickings' in terms of revenue, then they do so at their own risk, and they should be under no illusions, those risks are real. Even if they do not manifest themselves immediately, they may come back to haunt later. If shipowners nonetheless want to run the risks of calling at Iran then the steps outlined above, together with sound legal advice at every stage, will help reduce the risks to the extent it is possible to do so, but they can never be eliminated. In short, beware!

[ON CHARTERERS' LETTERHEAD]

LETTER OF INDEMNITY

[insert date]

To: [Registered Owners name and address]
(collectively the owners/operators/managers of the [insert name of ship])

Dear Sirs,

Ship: [insert name of ship]; charterparty dd [insert date of charterparty]

Voyage: [insert load and discharge ports]

Cargo: [insert description of cargo, name of shipper and consignee]

We hereby request you to proceed to [insert name of loading port] and there to load the above cargo on board the above Ship for transportation to [insert name of discharge port].

We warrant that we have obtained all necessary consents for the lawful transportation of the above cargo by you and that your compliance with our request shall not be unlawful or contravene any sanctions.

In consideration of your complying with our above request, we hereby undertake as follows:

1. To indemnify you, your servants and agents and to hold you, your servants and agents harmless in respect of any and all penalties, claims, losses, damages, costs (including legal costs), expenses and liabilities of whatsoever nature which you or they may sustain by reason of your compliance with our above request including (but not limited to) all claims whatsoever brought by the owners of the cargo and/or the holders of any bills of lading and/or sub-charterers.
2. In the event of any action or proceedings being commenced against you or any of your servants or agents in connection with any of the above matters, to provide you or them on demand with sufficient funds to defend the same.
3. If the Ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the Ship or such other ship or property (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of the Ship or such other ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.
4. This indemnity shall be governed by and construed in accordance with English law and we hereby submit to the jurisdiction of the High Court of Justice of England and irrevocably nominate [INSERT NAME OF LONDON SOLICITORS] to accept service of proceedings on our behalf.

Yours faithfully

For and on behalf of
[insert name of charterers]

For and on behalf of
[insert name of first class bank]

OFAC penalties

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Since April 2003, the US Treasury Department's Office of Foreign Assets Control (OFAC) has published information on its website relating to civil penalties and informal settlements. Since 2008, penalties and settlements totalling $1.689bn have been imposed. US citizens who have bought Cuban cigars have attracted the ire of the US authorities. However, penalties of a few hundred dollars pale into significance when compared with the penalties imposed on corporates. US and foreign banks in particular have been heavily penalised.

		Breach of Regulations in relation to:	$
19/12/2005	ABN Amro Bank	Iran, Libya	80m
11/12/2007	Chevron	Iraq	30m
31/07/2008	Minxia Non Ferrous Metals	Cuba	1.2m
06/08/2009	DHL	Iran, Sudan, Syria	9.444m
24/08/2009	Australia & New Zealand Bank Group	Sudan, Cuba	5.75m
1/10/2009	Gold & Silver Reserve Inc	Iran	2.95m
16/12/2009	Credit Suisse	Iran, Sudan, Libya, Burma, Cuba, Liberia	536m
22/12/2009	Lloyds TSB Bank	Iran, Sudan, Libya	350m
05/02/2010	Balli Group	Iran	15m
19/03/2010	Innospec	Cuba	2.2m
15/07/2010	Agar Corporation	Sudan	2m
18/08/2010	Barclays Bank	Sudan, Iran, Burma, Cuba	298m
25/08/2011	JP Morgan Chase Bank	Cuba, WMD, Iran, Sudan, Liberia	88.3m
14/10/2011	Sunrise Technologies & Trading Companies	Iran	2.9m
24/02/2012	Online Micro LLC	Iran	2.95m
12/06/2012	ING Bank NV	Cuba, Burma, Sudan, Libya, Iran	619m

OFAC has wide powers and its investigations can lead to requests for additional information, the issuance of a cautionary letter, or the refusal, suspension or modification of permissive licences. Additionally, OFAC can issue a 'cease and desist' order, make a finding of a violation, impose a civil monetary penalty on a subject person or refer the matter for criminal investigation/prosecution.

When determining whether a violation of US sanctions law has taken place, OFAC will consider the following areas, which in turn may influence the level of any penalty imposed:

1. Wilful conduct, for example, with knowledge that action would be a breach of US law.
2. Reckless conduct, including failure to exercise minimal caution.
3. Concealment of conduct in order to mislead OFAC or embarking upon a pattern of conduct in violation of US law.
4. Level of management or supervisory involvement.
5. Level of actual or ostensible knowledge.
6. Harm to US sanctions programme objectives.
7. Commercial sophistication, size and financial condition of the subject person.
8. Volume of transactions and history of any previous breaches of sanctions over the previous five years.
9. Existence, nature and adequacy of risk-based OFAC compliance programme.
10. Remedial response and level of co-operation with OFAC, including whether a violation was voluntarily disclosed.

OFAC has issued guidelines upon the level of penalties that OFAC can impose. A failure to maintain adequate records or comply with a request for information can result in a penalty up to $50,000. Civil monetary penalties are assessed on a case-by-case basis, but commonly they are calculated as a proportion of a 'base' penalty amount. The base penalty can be increased if OFAC considers the sanctionable conduct was egregious, for example, involving a particularly serious violation of the law requiring a strong enforcement response. OFAC encourages voluntary self-disclosure; this allows OFAC to deploy its resources efficiently and permits companies and individuals to militate against potential penalties. The following chart provides further guidance:

Base penalty matrix

		Egregious case	
		NO	YES
Voluntary self-disclosure	YES	1. One-half of Transaction Value (Capped at $125,000 per violation $32,500 per Trading with the Enemy Act violation)	3. One-half of Applicable Statutory Maximum
	NO	2. Applicable Schedule amount (capped at $250,000 per violation/$65,000 per Trading with the Enemy Act violation)	4. Applicable Statutory Maximum

Mitigating or aggravating factors will impact upon the final level of the penalty. For example, substantial co-operation (albeit in the absence of voluntary self-disclosure) will generally reduce the base penalty by between 25 and 40%. Also, a first violation will generally attract a reduction of 25%. When assessing risks, OFAC's risk matrix considers various factors that will attract a high-risk category, including:

- large/fluctuating client base in an international environment
- large number of high-risk customers
- overseas branches or multiple correspondent accounts with foreign banks
- international transactions
- management disengagement from OFAC compliance risks.

ING BV has recently agreed to settle its potential liability for violations of multiple US sanction programmes. The company agreed to pay $619m. The base penalty under OFAC's guidelines was approximately $666m, but the statutory maximum penalty was approximately $1.329bn. Members should continue to be wary of the non-monetary impact an OFAC investigation and penalty assessment can have upon their business, including reputational issues and distraction of key management personnel. When combined with the possible level of penalties, members are well advised to exercise high levels of caution when dealing with sanctioned regimes/individuals/entities.

Syrian and Sudanese sanctions

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Syria

US sanctions

On 18 August 2011, President Barack Obama issued an **Executive Order** implementing wide sanctions against Syria.

The Executive Order prohibits US individuals or entities from the following:

- directly or indirectly exporting services to Syria or engaging in any transaction relating to Syria-origin petroleum or petroleum products
- assisting a non-US entity/individual to take action that would have been prohibited if they were US citizens
- undertaking new financial investments in Syria
- dealing in any capacity with the Syrian Government and/or any party designated by the US Treasury Department.

The most restrictive provision of the new order prohibits the export of services to Syria. 'Exportation of services' as defined by the US Office of Foreign Assets Control, is understood to include any service rendered by a US person, the benefits of which are received in the sanctioned country.

Exports (direct and indirect) to Syria of US-made goods and technology remain prohibited. There are limited exceptions for food, certain medicines and humanitarian items. The import into the US of Syrian goods or services not related to the petroleum industry is not prohibited.

On 1 May 2012, President Obama signed **Executive Order 13608**, which effectively paves the way for measures to be taken against non-US citizens and companies involved in efforts to evade US sanctions in respect of Syria and Iran.

The Executive order provides the US Government with additional means to impose serious penalties on foreign individuals or entities who are found to have evaded US or international sanctions against the Syrian regime.

Offenders will be subject to restrictive measures, including but not limited to exclusion from US financial and commercial systems and denial of entry into the US.

EU sanctions

On 9 May 2011, the EU Council adopted restrictive measures on certain persons, entities and bodies identified as being responsible for the violent attacks on the civilian population in Syria. This has been amended a number of times by separate Council regulations adding additional names to the list and imposing further asset freezes.

As in the case of certain Iranian sanctions, the application of these sanctions can be said to apply to all EU citizens and entities. It is important to remember that the restrictive measures apply not just in relation to the named parties but also to companies owned or controlled by them.

Below is a summary of the main restrictions:

1. The sale, supply, transfer or export of equipment that can be used to suppress protests in Syria.
2. The provision of technical assistance related to goods and technology for the military in Syria.
3. The import of crude oil or petroleum products into the EU if they originated in Syria or have been exported from Syria.
4. The purchase of crude oil or petroleum products if they are located in or originated in Syria.
5. The transport of crude oil or petroleum products if they originate in Syria, or are being exported from Syria to any other country (including countries outside the EU).
6. The sale, supply or transfer of key equipment and technology for key sectors of the oil and natural gas industry.
7. The provision of any financing or financial assistance, as well as insurance and reinsurance for the prohibited activities set out at 3, 4, 5 and 6 above.
8. The sale, supply, transfer or export of new Syrian currency in the EU to the Central Bank of Syria.
9. The granting of any financial loan or credit to, the acquisition or extension of a participation in, and the creation of any joint venture with any Syrian person, entity or body engaged in the exploration, production or refining of crude oil.
10. The participation, knowingly and intentionally, in activities the object or effect of which is to circumvent the above-listed prohibitions.

The above are subject to certain exemptions relating to contracts signed before certain dates. Further details should be sought in respect of contracts signed before the regulation came into force. Criminal liabilities may flow if a person or entity breaches these sanctions. The criminal penalties will be determined by each EU state. Under English law, a person committing such an offence may face up to two years imprisonment and/or a fine. Where the offence is committed by a corporate body with the consent or connivance of any director, manager, secretary or similar officer, that person is additionally guilty of such an offence.

On 24 April 2012, the Council of the EU published Council Decision 2012/206/CFSP, which imposes further restrictive measures against Syria.

The Decision imposed a prohibition on the sale, supply, transfer and export of technology, equipment and goods that can or might be used for internal repression. The provision of technical assistance, brokering services, financing and financial assistance in respect of these items is also prohibited. In addition, the sale, supply, transfer and export of luxury goods is now prohibited.

At this stage, the decision is only effective against EU member states and does not affect companies or individuals residing in these countries. In order for the provisions to have effect on these parties, an implementing Regulation must be published. This Regulation will also provide further details as to exactly what goods will fall within the prohibitions set out above.

Recent EU Regulations have extended the list of sanctioned entities to include the Syrian Ministry of Defence, Ministry of Interior, Syrian International Islamic Bank (SIIB) and Syria Company for Oil Transport (SCOT).

Sudan

US sanctions

The Office of Foreign Assets Control maintains a list of Specially Designated Nationals (SDNs) targeting the Sudanese Government, government officials and entities associated with them. Under Executive Order 13067, dated 7 November 1997 all property and interests of the Government of Sudan located in the US or within the control of a US person are blocked. This blocking includes individuals and entities that are owned or controlled by, or act on behalf of, the Government of Sudan anywhere in the world, as well as individuals and entities determined by the US Treasury Department to be included in the term "Government of Sudan".

These individuals and entities are incorporated into OFAC's list of SDNs. The SDN list, however, is not exclusive. Any US individual or organisation engaging in transactions with foreign nationals must take reasonable care to make certain that such foreign nationals are not owned or controlled by or acting on behalf of a SDN, regardless of whether or not they appear on the SDN list.

Additional action was taken with Executive Order 13400 of 26 April 2006 when the US imposed strict sanctions against persons responsible for the violence in Darfur. Four individuals were identified in the Annex of EO 13400 which gave the Secretary of the Treasury authority to further block the property and interests of property of persons determined to meet certain criteria. Furthermore US persons are prohibited from engaging in any transactions or activities related to the petroleum or petrochemical industries in Sudan without authorisation from OFAC. This prohibition extends to the entire territory of Sudan, including Southern Sudan. The prohibition also includes facilitation by US persons of such transactions or activities undertaken by non-US persons.

EU sanctions

The European Union adopted Council Regulation (EC) No 131/2004 on 26 January 2004. This regulation prohibits the supply of technical or financial assistance aimed at facilitating military operations in Sudan and included restrictions on the supply of military equipment.

UN sanctions

By the adoption of UNSCR 1591 (2005) on 29 March 2005, the UN imposed certain travel restrictions and asset freezes on a list of designated individuals.

The targets of these freezes and bans have been chosen by the Security Council Committee established pursuant to the resolution. The same targets were deemed to be hampering the peace process constituting a threat to stability in Darfur and the region, committing human rights violations and violating measures set out in previous Resolutions (related primarily to an arms embargo).

Sanctions – The impact on club cover

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As the articles in this *Standard Bulletin* have made clear, EU Council Regulation 267/2012 prohibits the export and transport of Iranian crude oil and petroleum products with effect from 1 July 2012. Some members based and operating outside of the EU may believe that these EU regulations have no bearing on what they do, so long as they export and/or transport the products to countries outside the EU. In a sense that is true, as such a member may not be in breach of EU sanctions.

However, pursuant to the provisions of Articles 11 1(d) and 12(2) of the Regulation, the club is, as from 1 July 2012, prohibited from providing insurance cover to any member(s) in respect of voyages transporting crude oil or petroleum products if they originate in Iran, regardless of whether the final destination of the cargo is within or outside of the EU. This is because the club itself is based and operates within the EU. The position is the same for all insurance providers based or operating within the EU. It also impacts on the reinsurance facilities available to insurers based outside the EU, if their reinsurance for example is placed with the London market (as is the International Group's general excess of loss reinsurance contract). Furthermore, the carriage of such crude oil or petroleum products will trigger the club's cover provisions relating to sanctions.

Extracts from the relevant exclusion provisions under the club's rules are as follows:

a. Rule 4.8: *"No claim is recoverable if it arises out of [the ship] … being employed in an unlawful, prohibited or sanctionable carriage, trade, voyage or operation, or if the provision of insurance … is unlawful, prohibited or sanctionable…"*
b. Rule 6.22: *"The member shall in no circumstances be entitled to recover from the club that part of any liabilities which is not recovered by the club from [pooling agreement partners or reinsurers] … by reason of any sanction, prohibition or adverse action against them by a state or international organisation…"*

c. Rule 17.2(5): *"A member shall cease to be insured by the club in respect of any ship entered by him if … the ship is employed by the member in a carriage, trade or on a voyage which will thereby in any way howsoever expose the club to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever by any state or international organisation, unless the managers shall otherwise determine."*

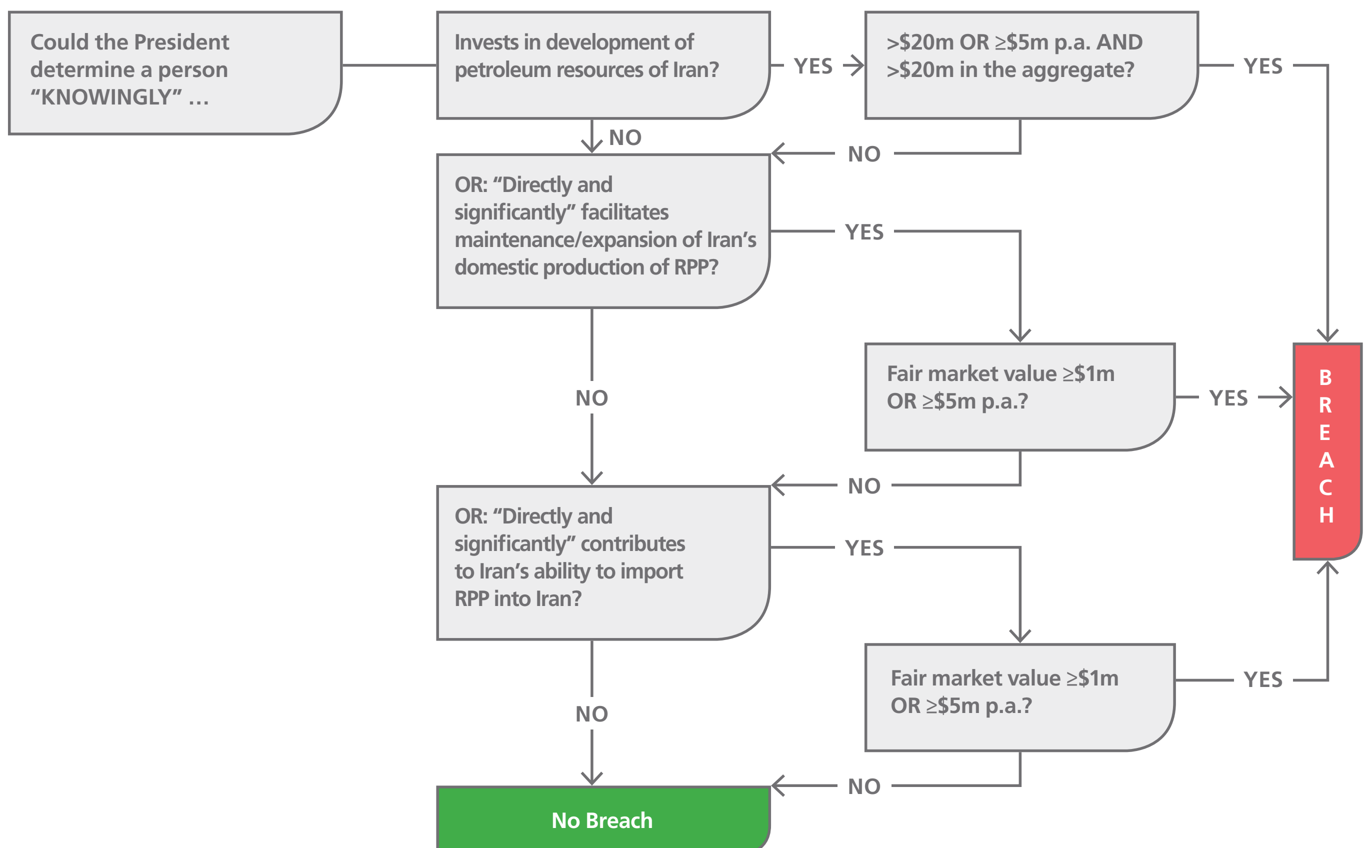
Similar rules apply under the Standard Offshore Rules. Rule 17.2(5) means cover for a ship automatically ceases when the relevant breach of sanctions puts the club at risk of being penalised.

The Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA) enacted by the US Government permits the Secretary of State to designate non-US persons for their interactions with Iran. CISADA applies a strict liability regime to contracts which directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products, including insurance contracts. If a person (or company) becomes designated then certain prohibitions apply, which essentially deny that person (or company) the use of the US financial system. These prohibitions could be applied to the club as the insurer of a member involved in such trade. Clearly, the application of such prohibitions would be devastating to the club as it accounts in US dollars.

Rules 4.8 and 6.22 have the effect of disallowing or reducing a claim arising out of a sanctionable trade. These rules for example apply when a non-EU member lawfully carries Iranian crude or petrochemical products. Each carriage will have to be looked at on a case-by-case basis, but given the direct prohibition against providing insurance for such trade, club cover will not respond.

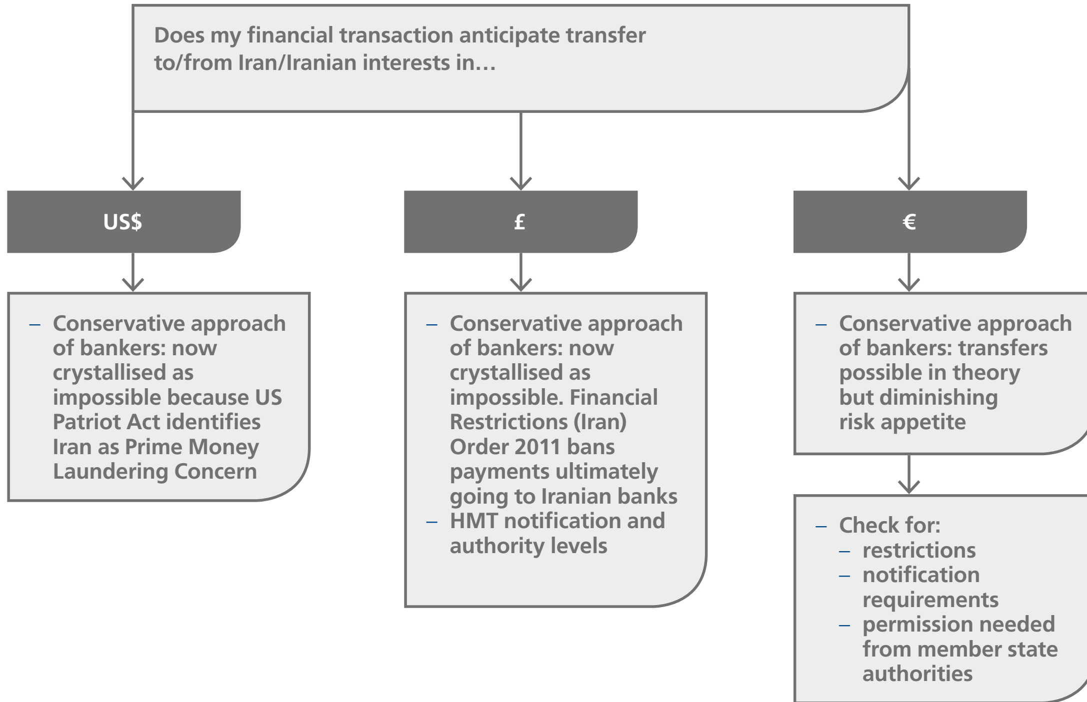
In light of the above, member(s) who may lawfully continue to carry such cargoes and who wish to do so should make alternative liability insurance or financial security arrangements with insurers or state/sovereign guarantee schemes or other financial providers that are not subject to the prohibitions contained in the Regulation. If members are intending to perform such voyages, they are recommended to notify the club in advance of performance and upon completion of the voyage.

US CISADA
Overview



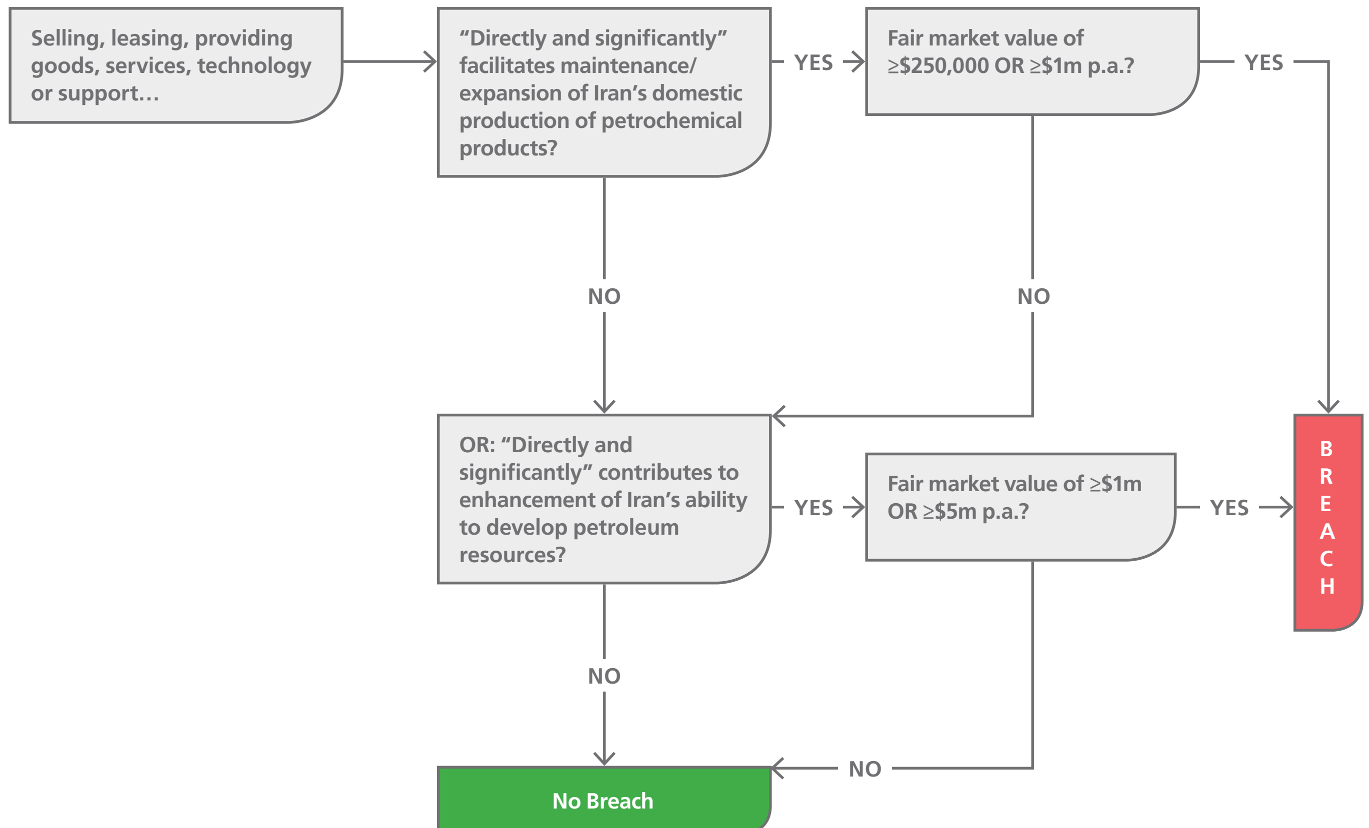
Movement of monies

The transfer of funds, even with very tenuous links to sanctioned trades, entities, individuals or countries, has become increasingly difficult.



US Executive Order 13590

Overview



Facilitation, circumvention and personal offences under EU sanctions, and a review of penalties for breach of sanctions

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Introduction

EU-based companies that have any involvement in a transaction that infringes EU sanctions need to be aware that, even in circumstances where they have not committed a 'primary' offence, they are still at risk of committing a 'secondary' offence if they have facilitated or enabled an infringement of a prohibition under EU sanctions by another party, or they are involved in activities to circumvent the prohibitions.

Given that exposure may arise even where the entity that has committed the 'primary' offence is not itself liable, for example because it is not an EU person and all relevant activities take place outside the EU, it demonstrates how important it is that all EU companies understand the risks to which they are exposed by the activities of their trading partners.

In this article, we look at the circumstances in which EU-based companies are exposed to these risks, the limited defences that are available and the potentially severe consequences for those companies that get it wrong.

We focus on the EU sanctions against Iran and Syria, but the points are generally applicable in the case of other sanctions regimes.

What are the risks?

Circumvention

An EU-based company that participates knowingly and intentionally in activities the object or effect of which is to circumvent the prohibitions will in most instances have breached EU sanctions (as well as UK implementing legislation, which tends to include similar language).

From our discussions with the regulators in the UK, it is clear that they will adopt a broad view of what constitutes "circumvention" such that companies that have any concerns should be vigilant to ensure that they are not involved in any such activities.

As a result, EU-based companies that have any suspicion that their counterparties are devising structures, or concealing information, in order to get around the various sanctions in place should take immediate advice from the club or lawyers.

Facilitation/enabling/assisting offences

A UK-based company or individual that *"intentionally participates in activities knowing that the object or effect of them is (whether directly or indirectly) to enable or facilitate the contravention of a prohibition or requirement"* will in most instances have breached the UK legislation that implements the EU sanctions (and thereby committed a criminal offence).

Again, from our discussions with the UK regulators, they take a wide view of these prohibitions. Given the wide scope of these offences, a UK-based company that has any direct (or indirect) involvement in a transaction that breaches sanctions is exposed if it has the requisite knowledge.

In addition, a company or individual that within the UK assists another person to commit a criminal offence may be guilty of an English common law offence, and anyone who encourages or assists crime may be guilty of an offence under the Serious Crime Act 2007.

We understand that US sanctions law contains a similarly wide offence of 'facilitation'.

Who is potentially exposed?

Parent company liability

Parent companies whose subsidiaries or associated companies (even outside the EU) infringe the sanctions could be caught by these anti-circumvention and facilitation offences, depending of course on the facts. Indeed, mere control may be sufficient to establish liability, and this is especially likely where the parent company approves or has directed the subsidiary's conduct.

Officers of a company

National implementing legislation may also provide for personal liability of officers of companies that infringe the EU sanctions.

For example, where an offence is committed with the consent or connivance of any director, manager, secretary or other similar officer of the company (or is attributable to any neglect on the part of any such person), that person, as well as the company, is guilty of an offence.

What defences are available?

EU sanctions (and national implementing legislation) may provide for a *'no knowledge'* defence. This is generally available where the relevant individual did not know, and had no reasonable cause to suspect, that their actions would infringe the prohibition in question.

This *'no knowledge'* defence does not mean that a blind eye can be turned. But it does mean that if appropriate due diligence has been undertaken, and no suspicion reasonably aroused, then no offence is committed even if it turns out that there has been an infringement. What constitutes appropriate due diligence will of course depend on the particular facts of the case.

What penalties may be imposed?

The EU sanctions provide for implementation of *'effective, proportionate and dissuasive'* penalties by Member States. In the case of the UK, the penalties for infringements include potentially unlimited fines, as well as up to two years' imprisonment.

What penalties have been imposed to date?

In 2009, Mabey & Johnson Ltd was found guilty by the English courts of breaching UN sanctions on Iraq in and around 2001 to 2002. The offence involved the manipulation of the UN's 'Oil for Food' programme, creating inflated invoices, which included a 'kickback' to the Iraqi Government at a time when making funds available to the Iraqi Government was prohibited.

For the sanctions offence, Mabey & Johnson was fined £2m and was required to pay a £1.1m confiscation order, reparation payments of over £600,000 and the prosecution costs. In addition, Mabey & Johnson was found guilty of a bribery offence, which is outside the scope of this article.

In a separate prosecution, three former employees of Mabey & Johnson were found personally liable for their role in making the illegal payments in breach of UN sanctions. A former managing director was sentenced to 21 months imprisonment, disqualified from acting as a company director for five years and was ordered to pay the prosecution costs of £75,000. A former sales director was sentenced to eight months imprisonment, disqualified from acting as a company director for two years and was ordered to pay prosecution costs of £125,000. Another former sales manager was also imprisoned for eight months but this was suspended for two years. The penalties imposed on these individuals are, however, small in comparison to those imposed in the US.

In 2010, the Weir Group PLC was found guilty by a Scottish court of offering similar 'kick-backs' to the Iraqi Government in breach of UN sanctions against Iraq. The Court had some regard to the penalties imposed in the Mabey & Johnson case and levied a fine of £3m against Weir. When sentencing, the Court highlighted the need to deter future offences that would damage the interests of the UN by breaching resolutions agreed by the UK. The Court, however, after arriving at its initial fine of £4.5m, allowed a significant discount to Weir for entering into an early plea of guilty.

In 2010, the UK Financial Services Authority (FSA) fined the Royal Bank of Scotland Group £5.6m under the Money Laundering Regulations 2007. Although not accused of committing a direct breach of sanctions imposed against a state, members of the Group had failed to have in place adequate screening against the sanctions list of customers, and particular payments, resulting in an unacceptable risk that the Group could have facilitated transactions involving sanctions targets. The original fine was £8m, but this was later reduced when the Group agreed to settle early in the FSA's investigation. The level of fine set shows that, under the matrix of UK legislation, high penalties can be imposed for entities that merely expose themselves to the possibility of facilitating the financing of sanction targets.

Conclusion

All of those involved in the international movement of goods could potentially be involved in enabling or facilitating prohibited transactions (or in circumvention practices), where their counterparties engage in prohibited transactions. Organisations with a possible exposure include shipowners, charterers, ship suppliers, shipbrokers, insurers, insurance brokers, operators, technical managers, providers of bunkering or ship supply services (or any other services to ships), parent companies, banks and other providers of financial assistance.

Organisations should therefore ensure that appropriate due diligence is carried out and, if necessary, legal advice is taken, to reduce the risk of falling foul of the sanctions regimes. In considering the potential for sanctions legislation to be triggered, organisations must carefully consider the parties, the cargo and the ports involved as well as the extent to which existing contracts include sufficient protection (including appropriate warranties, indemnities and liberties).

EU Regulation 267/2012 in regard to crude oil, petroleum products and petrochemicals

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The restrictive measures against Iran outlined in EU Regulation 267/2012 include, amongst others, the prohibition on the import into the EU of all crude oil and petroleum products under Article 11 and Annex IV, as well as the prohibition on the purchase or transport of such products, if they originate or are being exported from Iran.

The range of products obtained from the refining and secondary/tertiary processing of crude oil is included in Annex IV to the Regulation and specific mention is given to waxes, petcoke and bitumen products. Products not specifically mentioned, but which undoubtedly fall into the general description of 'petroleum oils', include well-known clean petroleum products (CPPs) such as naphtha, gasoline/mogas, kerosene/jet fuel, diesel/gasoil and base lube oils.

The cargo prohibition in Annex IV does not generically refer to LNG and LPG (liquefied petroleum gas) cargoes. Annex V to the Regulation, of which further reference is made below, does however refer to ethylene, propylene and butadiene, elements of which may be found in LPG cargoes. So if such cargoes are being contemplated for loading, it would be prudent to request product analysis details and to ascertain whether the cargo does contain any of the prohibited products identified in Annex V. Having said that, the UK Competent Authority for Customs Classification has advised that cargoes with a six-digit customs tariff bearing the number 271111 (LNG) or 271112 (LPG) are not caught by the Regulation.

Other CPP products derived from refinery processes and sometimes shipped aboard tankers include condensates, raffinates, reformates, alkylates, pygas, vacuum gasoil (VGO), cycle oil and others.

Insofar as dirty petroleum products (DPPs) are concerned, product descriptions include well-known terms such as intermediate fuel oil (IFO), heavy fuel oil (HFO) and high/low sulphur versions of same (HSFO and LSFO). Other descriptions for DPPs can include: low sulphur waxy residual (LSWR), rubber process oil (RPO), carbon black feedstock (CBFS), hydrocracker bottoms (HCB) and others.

It is recommended that expert advice be sought if any doubt exists regarding product description and whether the description falls within Annex IV.

Article 13 and Annex V also provide for the complete prohibition of the import into the EU of petrochemical products, as well as the prohibition on the purchase or transport of such products, if they originate or are being exported from Iran.

Whilst some products are specifically named in Annex V, many ambiguities and omissions exist. For example, specific mention is made of the olefins, ethylene and propylene, whilst no reference is made of the industrially important butenes. Further, whilst butadiene is specifically mentioned, Crude C4, from which butadiene is derived, and shipped in commercially significant volumes, is not.

The major components or precursors for the manufacture of polyvinyl chloride polymer (PVC) (which is a widely used plastic, used in construction, electrical cable insulation and many other applications in which it replaces rubber) are ethylene dichloride (EDC) and vinyl chloride monomer (VCM), neither of which are specifically mentioned in Annex V. However, we consider that these compounds are still prohibited and fall foul of Annex V - they fall under *"other halogenated derivatives of hydrocarbons"* for EDC (HS code 2903 89 90) and *"unsaturated chlorinated derivatives of acyclic hydrocarbons – other"* for VCM (HS code 2903 29 00).

A major volume co-product of the manufacture of EDC/VCM is caustic soda, and Iran is a major source of this product. Whilst EDC and VAM are prohibited, caustic soda (sodium hydroxide) is not listed in Appendix V and can be traded. Further, whereas Annex V specifically mentions certain alcohols (methanol, propan-1-ol, propan-2-ol, (n and iso-propanol) and butan-1-ol (n-butanol)), the commercially important alcohols ethanol and secondary and tertiary butanol are not listed.

The products listed in Annex V vary in their form; some are liquefied gasses that require carriage at either (or both) high pressures or very cold temperatures in specialised gas carriers, some are volatile flammable liquids requiring chemical carrier transport, and others are solids that are typically shipped in freight containers. Many are pre-cursor products used in the manufacture of plastics and indeed polyethylene itself (HS code 3901) is included.

What falls within Annex V is far from clear, as is the EU's intention behind listing some products but not others. This category is more complex than the petroleum products group under Annex IV, simply because of the greater number of petrochemicals commercially shipped by ocean carriers and the widespread use of trivial and trade names. For example, 'Cellosolve' is a well-known trade name for a range of compounds falling under the description 'Mono Butyl Ethers of Ethylene Glycol'; arguably this compound would fall foul of Annex V even though it is not specifically named within the Regulation.

It is again recommended that expert advice be sought if any doubt exists regarding product description and whether the description falls within Annex IV or V.

The US tightens sanctions against Iran and those dealing with Iran

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In its continued effort to place pressure on Iran, the US recently announced new sanctions directed at Iran's petroleum and petrochemical industries. These new sanctions were announced via an Executive Order signed by President Barack Obama on 31 July 2012, authorising 'Additional Sanctions with Respect to Iran' (hereinafter EO). The sanctions are aimed at foreign financial institutions and foreign persons, and thus, have potential ramifications for those engaged in transactions having a connection to Iran's petroleum and petrochemical industries.

Sanctions authorised against 'foreign financial institutions'
Section 1 of the EO authorises the Secretary of the Treasury, in consultation with the Secretary of State, to impose financial sanctions on 'foreign financial institutions'. Such institutions are defined to include a variety type of banking institutions, but notably 'insurance companies' are not included within the entities described. It appears that this aspect of the EO is aimed primarily at foreign banks that engage in the sanctionable conduct described in Section 1.

'Foreign financial institutions' can be sanctioned if they are found to have 'knowingly conducted or facilitated any significant financial transaction' with the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), and/or any entities owned or controlled by, or operating for or on behalf of NIOC or NICO. Additionally, such institutions can be sanctioned if they knowingly conduct or facilitate significant financial transactions for the purchase or acquisition of petroleum, or petroleum or petrochemical products, from Iran through any channel (not just through NIOC or NICO).

According to the Office of Foreign Assets Control (the agency responsible for implementing sanctions within the Treasury Department), this provision is aimed at deterring Iran or any other country or institution from establishing workaround payment mechanisms for the purchase of Iranian oil to circumvent the oil sanctions authorised under the National Defense Authorisation Act (NDDA). A 'foreign financial institution' found to have engaged in any of the sanctionable activities can effectively be excluded from the US financial system, by having its correspondent or payable-through accounts prohibited or restricted by the Treasury Department. Notably, (similar to the NDDA), sanctions can be imposed under Section 1 only if the President determines that there is a sufficient supply of petroleum and petroleum products in the world market (apart from Iran) to permit a significant reduction in the volume of products purchased from Iran. In this way, the EO seeks to balance the desire to reduce Iran's petroleum revenues with the desire to maintain price stability in the global market.

Sanctions authorised against any person for transactions with NIOC or NICO

Section 5 of the EO authorises the Secretary of the Treasury, in consultation with the Secretary of State, to impose sanctions on any person (defined to include an individual or entity) who materially assists, sponsors or provides financial, material, or technological support for, or goods or services in support of, NIOC, NICO, or the Central Bank of Iran, and/or the purchase or acquisition (regardless of the channel) of US bank notes or precious metals by the government of Iran.

This aspect of the EO is not limited to US persons, and as such, renders sanctionable the conduct of foreign persons who engage in the specified activity. The Secretary of the Treasury, in turn, is authorised to block the property within the US of any person found to have engaged in the sanctionable conduct. This would include the ability to block the transfer of US dollar transactions through the US correspondent banking system. Consequently, by way of example, a foreign entity that 'materially' provides goods or services to NIOC or NICO may find its US dollar transfers blocked by OFAC, even if that transfer is not a direct dealing with NIOC or NICO.

Sanctions authorised against any person for petroleum-related transactions

Perhaps the most material aspect of these new sanctions for foreign persons is contained in Section 2. Section 2 conveys primary sanction authority on the Department of State and authorises it, in consultation with the Department of Treasury and other agencies, to impose sanctions on any person (not just US persons) who knowingly engages in a 'significant transaction for the purchase or acquisition' from Iran of petroleum or petroleum or petrochemical products.

Sanctions are also authorised against the successor of a person who engaged in such activities; those who own or control a person who engaged in the specified activity, and had knowledge that person engaged in those activities; and those who are owned or controlled by, or under common ownership or control with, such a person, and knowingly participated in the sanctionable activities. In this way, the EO seeks to target not only the person who engaged in the sanctionable conduct but also its subsidiaries and affiliates if they knew about or participated in the sanctionable activity.

Notably, as with the Section 1 sanctions, before sanctions can be imposed under Section 2, there must be a determination by the President that there is sufficient world market supply such that a significant reduction in the volume of purchased Iranian products is permissible.

There are several aspects of this sanction program that warrant careful consideration by foreign persons who engage in transactions involving Iranian petroleum and petrochemical products.

First, 'significant transaction' is not defined, and it is unclear exactly what will constitute a 'significant' transaction. The Treasury Department has indicated that a number of factors are considered in determining 'significance,' including size, number, and frequency; type, complexity, and commercial purpose; and the ultimate economic benefit conferred on the sanctions target. However, as explained, the State Department (not Treasury) will be primarily responsible for enforcing the Section 2 sanctions. While likely, it is not known definitively if the State Department will apply the same factors in assessing whether a transaction is significant.

Second, it is not entirely clear what type of transactions fall within the scope of the sanctionable activities. A plain reading of the EO suggests that it is aimed at preventing or limiting only the underlying sales transactions but not necessarily transactions incidental to the sale such as transportation or insurance. Nonetheless, given the EO's purpose, the State Department could attempt a broad construction of the provision such that it encompasses services such as transportation or insurance which, although incidental, are necessary to effect the underlying sale. One could argue that such a construction would be inappropriate, particularly as other Iranian sanctions programme have expressly referred to insurance and shipping services, making the absence of such references indicative of an intent not to include same within this programme. However, efforts to obtain clarification from the State Department have not yet provided any further guidance, and it remains to be seen how far this programme will reach. It would not be surprising if a broad construction is given to this provision, given the aggressive stance of the US directed at Iran.

Individuals or entities determined to have engaged in sanctionable conduct will be subject to the same sanctions that may be imposed under the ISA. These include prohibiting transfers of payments through US financial institutions to, from or on behalf of sanctioned persons, and the blocking of any such transfers. As such, a person found to have engaged in sanctionable conduct can find its ability to effect transactions in US dollars prohibited and/or its US dollar transactions stopped and held in the US.

Non-monetary economic sanctions on entities under the US Iran Sanctions Act

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In addition to monetary fines, the US has imposed non-monetary economic penalties on entities that violate the US Iran Sanctions Act.

These non-monetary penalties include barring companies from receiving US export licences, US Export Import Bank financing, and loans over $10m from US financial institutions. Such sanctions were recently imposed on 12 January 2012, on three foreign energy companies, including Zhuhai Zhenrong Company (Zhenrong), Kuo Oil (S) Pte. Ltd. (Kuo) and FAL Oil Company Limited (FAL). Zhenrong was found to have brokered the delivery of gasoline, worth over $500m, to Iran in 2010 and 2011, with individual deals that were worth significantly more than the $1m sanctions threshold. Kuo is an energy trading firm based in Singapore. The US authorities determined that Kuo supplied $25m in refined petroleum to Iran between late 2010 and early 2011. FAL is an energy trader based in the UAE, which provided $70m in refined petroleum to Iran over multiple shipments in late 2010.

These types of sanctions are the result of the combination of the Iran Sanctions Act of 1996 (ISA) as amended by Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA) and Executive Order 13590, which further expands ISA restrictions. Executive Order 13590 was issued on 21 November 2011 and addresses the supply of goods, services, technology or support to Iran that could directly and significantly contribute to the maintenance or expansion of Iran's domestic production of petrochemical products or its ability to develop petroleum resources. The most significant aspect of Executive Order 13590 is that it is intended to have extraterritorial effect, as it is not restricted to 'US persons', but rather applies to any 'person', defined as 'an individual or entity'.

There are other sanctions available under the amended ISA that were not imposed on the three entities above but have been applied to other entities. These other sanctions include blocking of property or interests in property; prohibitions on foreign exchange transactions subject to US jurisdiction; barring of contracts with the US Government; denial of primary lender designations for financial institutions; prohibitions of transfers of credit or payments; and an import embargo on goods from the sanctioned entity. The US has imposed at least one of the sanctions above on several non-US companies including: Allvale Maritime Inc. (Liberia), Associated Shipbroking (Monaco), Petrochemical Commercial Company International (UAE, Jersey, Turkmenistan, etc), Royal Oyster Group (UAE), Société Anonyme Monégasque D'Administration Maritime Et Aérienne (SAMAMA) (Monaco) and Speedy Ship FZC (UAE).

On 31 July 2012, the US authorities announced that two non-US banks (Bank of Kunlun in China and Elaf Islamic Bank in Iraq) were being sanctioned under CISADA for knowingly facilitating significant transactions for designated Iranian banks.

Date of sanction	Entity	Activity that caused a breach of regulations	Sanction
29/03/2011	Belarusneft (Belarus)	Over $500m investment with an Iranian company	Ban on receiving aid from the Export-Import Bank of the United States, from getting US Government export licences and private US bank loans of more than $10m in any 12-month period, and from winning US Government contracts
24/05/2011	Petrochemical Commercial Company International (PCCI) (Jersey/Iran); Royal Oyster Group (UAE); Speedy Ship FZC/ Sepahan Oil Company(UAE)	Supplied refined petroleum products to Iran and engaged in deceptive practices to ship these products to Iran and evade US sanctions	Prohibited from US foreign exchange transactions, US banking transactions and all US property transactions
24/05/2011	Tanker Pacific Management (Singapore); Société Anonyme Monégasque D'Administration Maritime Et Aérienne (SAMAMA) (Monaco); Allvale Maritime Inc. (Liberia)	Involved in September 2010 transaction that provided a tanker valued at $8.65m to the IRISL	Barred from securing financing from the Export-Import Bank of the United States, from obtaining loans over $10m from US financial institutions, and from receiving US export licences
24/05/2011	Associated Shipbroking (Monaco)	Involved in September 2010 transaction that provided a tanker valued at $8.65m to the IRISL	Prohibited from US foreign exchange transactions, US banking transactions and all US property transactions.
24/05/2011	Petróleos de Venezuela (PDVSA)	Delivered at least two cargoes of reformate to Iran between December 2010 and March 2011, worth approximately $50m	Prohibited from competing for US Government procurement contracts, from securing financing from the Export-Import Bank of the United States, and from obtaining US export licences
12/01/2012	Zhuhai Zhenrong Co. (China)	Brokered the delivery of gasoline, worth over $500m to Iran in 2010 and 2011	Barred from receiving US export licences, Export-Import Bank of the United States financing, and loans over $10m from US financial institutions
12/01/2012	Kuo Oil (S) Pte. Ltd (Singapore)	Supplied $25m in refined petroleum to Iran between late 2010 and early 2011	Barred from receiving US export licences, Export-Import Bank of the United States financing, and loans over $10m from US financial institutions
12/01/2012	FAL Oil Company Ltd. (UAE)	Provided $70m in refined petroleum to Iran over multiple shipments in late 2010	Barred from receiving US export licences, Export-Import Bank of United States financing, and loans over $10m from US financial institutions

The variety of sanctions that can and have been imposed on these entities appears to be calibrated to achieve a particular objective or send a specific signal to that entity. It is further proof that US authorities are determined and vigilant in seeking to force companies to comply with US sanctions. The above table is a list of some of the entities that have been sanctioned under the ISA from 2011 to 2012.

We hope that these articles have been informative. If you require any further details please contact the individual authors, your usual club contact or our legal director, Kieron Moore.

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Charles Taylor