

of the party and which will render performance under the contract radically different from that which was originally contemplated by the parties. It is highly arguable that to require a shipowner to comply with an order that might result in the shipowner having sanctions imposed upon him and/or in having his insurance cover withdrawn or cancelled is a sufficiently radical change of circumstances to justify application of the doctrine of frustration. This is, however, a difficult area of the law and each case will turn upon its own particular facts and circumstances. The message here is that if you are faced with this potential problem, urgently seek legal advice.

#### WHAT ABOUT NEW TIME CHARTERS?

The safest option is to expressly exclude Iran as a trading place. Even then, a shipowner should exercise diligence to ensure his ship is not being chartered to a prohibited Iranian person or entity by first checking both of the online lists maintained by OFAC [<http://www.ustras.gov/offices/enforcement/ofac/sdn>] and the UK Treasury [<http://www.hm-treasury.gov.uk/d/iran.hgm>].

A shipowner should also exercise the same degree of diligence in respect of persons or entities named in bills of lading that a charterer or a sub-charterer wants to have issued, especially if the cargo in question is (or might arguably be) prohibited or sanctioned cargo if destined for Iran but is instead destined for a place close to Iran geographically. If Iran is not going to be excluded as a trading place, then a shipowner will need to exercise the same degree of diligence regarding the identity of the proposed charterer.

In addition, it will be prudent for a shipowner to incorporate into the charter the BIMCO Sanctions Clause for Time Charter Parties, July 2010, or the Intertanko Sanctions Clause, March 2010, or some hybrid form incorporating the best bits of the BIMCO and Intertanko clauses.

The opening paragraph of the BIMCO Sanctions Clause states: "The Owners shall not be obliged to comply with any orders for the employment of the Vessel in any carriage, trade or on a voyage which, **in the reasonable judgment of the Owners**, will expose the Vessel, Owners, managers, crew, the Vessel's insurers, or their re-insurers, to any sanction or prohibition imposed by any State, Supranational or International Governmental Organisation ...".

The test is "in the reasonable judgment of the Owners"; in other words, it allows a shipowner to pause and take expert and/or legal advice and then to form a reasonable judgment based upon the advices received. The BIMCO Sanctions Clause goes some way towards providing a shipowner with protection if he feels that a voyage order is unlawful, but whether or not a shipowner has formed a "reasonable judgment" may in appropriate circumstances be open to challenge.

The opening sentence of the Intertanko Sanctions Clause states: "Any trade in which the vessel is employed under this Charterparty **which could expose the vessel, its Owners, Managers, crew or insurers to a risk of sanctions** imposed by a supranational governmental organisation or the United States, [insert other countries] shall be deemed unlawful and Owners shall be entitled, at their absolute discretion, to refuse to carry out that trade ...".

The language of this clause requires a shipowner to establish that the voyage order "could expose" him or his ship or his crew or his insurers to the risk of sanctions – a state of affairs that might in appropriate circumstances be challenged by the charterer.

The message here is insert one or other of the clauses or seek advice on the drafting of a bespoke sanctions clause. If having done so, you do receive a voyage order that you feel might expose you, the ship, your crew or your insurers to any sanction or prohibition, take urgent legal advice.

## ADDITIONAL SANCTIONS – CANADA, AUSTRALIA, SOUTH KOREA AND JAPAN



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#### BACKGROUND

On 9 June 2010, the United Nations Security Council (UNSC) passed Resolution 1929 imposing further UN sanctions on Iranian entities. This was in response to the proliferation risks posed by Iran's nuclear programme and its continued failure to co-operate with the International Atomic Energy Agency.

This was swiftly followed by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), enacted by the US on 1 July 2010, and the EU Foreign Affairs Council Decision on 26 July 2010, which heralded tougher sanctions and more aggressive economic measures against Iran.

Since July 2010, Canada, Australia, South Korea and Japan have also established unilateral sanctions against Iran. This article seeks to give a brief overview of the various sanctions imposed. Members are advised to seek local legal advice if they require specific guidance on the applicability of these sanctions to their trade or operations.

## CANADA

#### Is there domestic legislation implementing existing UN sanctions?

Yes. The Regulations Implementing the United Nations Resolutions on Iran implement the decisions of the UN Security Council (including Resolution 1929) in Canadian domestic law.

#### Is there any domestic legislation extending the scope of the sanctions against Iran?

Yes. On 26 July 2010, it was announced that Canada was imposing further sanctions on Iran under the Special Economic Measures Act (SEMA). The Special Economic Measures (Iran) Regulations were therefore drafted to implement many of the measures that the UN Security Council called upon, but did not obligate member states to implement, under Resolution 1929.

### What are these sanctions aimed at?

Sanctions prohibit all of the following:

- (i) Dealing in the property of designated persons
- (ii) Exporting or otherwise providing to Iran arms and related material not already banned, items used in refining oil and gas and items that could contribute to Iran's proliferation activities
- (iii) Providing or acquiring financial services to allow an Iranian financial institution (or a branch, subsidiary or office) to be established in Canada, or vice versa
- (iv) Making any new investment in the Iranian oil and gas sector
- (v) Establishing correspondent banking relationships with Iranian financial institutions, or purchasing any debt from the government of Iran, and
- (vi) Providing a ship owned or controlled by, or operating on behalf of the Islamic Republic of Iran Shipping Lines (IRISL) with services for the ship's operation or maintenance.

### Who do these sanctions target?

The SEMA applies to any person in Canada and any Canadian outside Canada.

### Will penalties be imposed for a breach of these sanctions?

The SEMA does provide for penal sanctions, including fines and imprisonment.

## AUSTRALIA

### Is there domestic legislation implementing existing UN Sanctions?

Yes. They are implemented through regulations made under the Charter of the United Nations Act 1945, the Customs Act 1901 and the Migration (United Nations Security Council Resolutions) Regulations 2007.

### Is there any domestic legislation extending the scope of the sanctions against Iran?

Yes. The Minister for Foreign Affairs and Trade announced on 29 July 2010 autonomous sanctions measures against Iran, which supplement Resolution 1929.

### What are these sanctions aimed at?

The autonomous sanctions cover the following restrictions/prohibitions:

- (i) Restrictions on financial transactions involving designated individuals and entities that:
  - (a) contribute to Iran's nuclear and missile programmes, or
  - (b) assist Iran to violate its sanctions obligations.
- (ii) Restrictions on visas to travel to Australia by individuals who:
  - (a) contribute to Iran's nuclear and missile programmes, or
  - (b) assist Iran to violate its sanctions obligations.
- (iii) Prohibition on exporting to Iran:
  - (a) all arms and related materiel not otherwise prohibited by the Charter of the United Nations (Sanctions – Iran) Regulations 2008 (see the Iran UNSC sanctions homepage)
  - (b) items mentioned in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies List of Dual-Use Goods and Technologies and Munitions List not otherwise referred to in item (a) above
  - (c) items mentioned in the Australia Group control list of chemicals, biological agents and related equipment.

### Who do these sanctions target?

Depending upon the terms of the sanctions, they apply to:

- (i) Any person in Australia
- (ii) Any Australian anywhere in the world
- (iii) Companies incorporated overseas that are owned or controlled by Australians or persons in Australia
- (iv) Any person using an Australian Flag ship or aircraft to transport goods or transact services subject to UN sanctions.

### Will penalties be imposed for a breach of these sanctions?

Breaches of these sanctions are serious criminal offences and may be punished with fines and/or imprisonment.

## SOUTH KOREA

### Is there domestic legislation implementing existing UN Sanctions?

Yes. The South Korean government has reviewed specific measures to implement Resolution 1929.

### Is there any domestic legislation extending the scope of the sanctions against Iran?

Yes. The specific measures announced by the South Korean government on 8 September 2010 go beyond Resolution 1929.

### What are these sanctions aimed at?

The specific measures cover various areas, including finance, trade, transportation, travel, and energy.

Finance:

- (i) Designation of entities and individuals subject to financial sanctions



- (ii) Prior authorisation scheme for financial transactions
- (iii) Prohibition of the opening of new branches
- (iv) Prohibition of the establishment of new correspondent banking relationships
- (v) Termination of existing correspondent banking relationships
- (vi) Prohibition of the sale or purchase of national bonds
- (vii) Prohibition of the provision of insurance and reinsurance.

Trade:

- (i) Reduction of export guarantees
- (ii) Prohibition of the export of strategic items, including dual-use items.

Transportation and travel:

- (i) Strengthening of inspections
- (ii) Prohibition of the provision of services to ships or cargo aircraft
- (iii) Prohibition of the access of cargo aircraft to domestic airports
- (iv) Travel ban on the designated individuals.

Energy:

- (i) Prohibition of new investment in petroleum resources/gas development.

**Who do these sanctions target?**

The sanctions apply to South Korean entities and persons.

**Will penalties be imposed for a breach of these sanctions?**

No penalties have been specified yet.

# JAPAN

**Is there domestic legislation implementing existing UN Sanctions?**

Yes. Following the adoption of the UNSC Resolution 1929, Japan announced on 3 August 2010 the implementation of several measures under the Foreign Exchange and Foreign Trade Act (Foreign Exchange Act).

**Is there any domestic legislation extending the scope of the sanctions against Iran?**

Yes. Further measures were announced on 3 September 2010, which expand upon the 3 August measures.

**What are these sanctions aimed at?**

These measures include:

- (i) Asset freeze of 88 entities and 24 persons (designated by the Ministry of Foreign Affairs), including the Islamic Republic of Iran Shipping lines and its subsidiary entities
- (ii) Asset freeze of 15 Iranian banks (designated by the Ministry of Foreign Affairs) with the effect that correspondent banking relationships with these banks are halted
- (iii) Prohibition on trade-related transfers of funds from Japan to Iran, and all transfers of funds from Iran to Japan, relating to Iran's nuclear activities or Iran's activities pertaining to the supply of large conventional weapons
- (iv) Prohibition of the provision of insurance/reinsurance services by Japanese companies if activities covered by such insurance/reinsurance services could contribute to Iran's nuclear activities or to Iran's activities pertaining to the supply of large conventional weapons.

**Who do these sanctions target?**

The sanctions apply to Japanese entities and persons.

**Will penalties be imposed for a breach of these sanctions?**

No penalties have been specified yet.

