

# IRAN SANCTIONS – IMPACT ON TIME CHARTERING



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## Developments in 2010

**There have been significant legal developments this year concerning Iranian sanctions, which shipowners, operators and charterers must take account of in time charters where Iran is a permitted trading place.**

### THE UN

In June, the UN adopted a fourth round of sanctions against Iran (UNSC Resolution 1929 of 2010) aimed (primarily) at ensuring the peaceful nature of Iran's nuclear programme. The sanctions seek (amongst other things) to prohibit Iran's access to an expanded list of goods, materials and technologies (including dual purpose items) that could be used to assist in developing nuclear and other weapons of mass destruction.

### THE US

On 1 July, the US passed into law the US Comprehensive Iran Sanctions, Accountability, and Divestment Act 2010 (CISADA), which seeks (amongst other things) to prohibit both US and non-US persons or entities from transporting to Iran:

- (1) Refined Petroleum Products (RPP)
- (2) Goods, services, technology or support that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of RPP, including assisting in the construction, modernisation or repair of petroleum refineries (RPP Facilitating Goods).

CISADA creates problems for non-US shipowners, operators and charterers at two levels. Firstly, although not legally binding upon them, it nevertheless threatens sanctions against non-US shipowners (etc.) who do transport RPP and RPP Facilitating Goods to Iran. The sanctions include the freezing of assets/funds in the US or preventing US dollar transactions. It will also undoubtedly affect hull and P&I insurance covers as well. Secondly, what constitutes RPP Facilitating Goods is not well defined and is likely also to include dual-use goods.

### THE EU

On 27 October, Council Regulation No. 961/2010 was published and has direct legal effect on all EU persons or entities. It prohibits

(amongst others) EU shipowners, ships, operators or charterers from transporting Annex I, II, III or IV listed goods (in broad terms the same goods as prohibited by UNSC Resolution 1929 of 2010) from any port or place to Iran. In addition (however), it (significantly) prohibits EU shipowners, ships (etc.) from transporting Annex VI listed goods to Iran – defined as key equipment and technology for the following key sectors of the Iranian oil and gas industry:

- (a) Exploration of crude oil and natural gas
- (b) Production of crude oil and natural gas
- (c) Refining
- (d) Liquefaction of natural gas.

It is not clear whether this prohibition is worldwide or restricted to transport from an EU port or place – a potentially very important drafting ambiguity.

### HOW MIGHT THESE SANCTIONS AFFECT A CURRENT TIME CHARTER (GOVERNED BY ENGLISH LAW) WHERE IRAN IS NOT AN EXCLUDED TRADING PLACE AND THERE IS NO EXPRESS SANCTIONS CLAUSE?

A shipowner or operator<sup>1</sup> cannot be ordered to perform an unlawful voyage or carry unlawful cargo (see, for example, NYPE 46 Lines 24-25, "to be employed in carrying lawful merchandise ..." and Shelltime 4 Line 112, "for the purpose of carrying all lawful merchandise ..."). Merchandise will be unlawful if it contravenes laws at the port of loading, the port of discharge, the Flag of the ship or the governing law of the charter.

The following goods for transport to Iran are likely to constitute unlawful merchandise:

- (1) For most (if not all) shipowners or operators, UNSC Resolution 1929 of 2010 prohibited goods
- (2) For EU shipowners, ships or operators, Regulation No. 961/2010 Annex I, II, III and IV listed goods irrespective of whether they are also prohibited by UNSC Resolution 1929 of 2010
- (3) For EU shipowners, ships or operators, Regulation No. 961/2010 Annex VI listed goods if shipped from an EU port or place
- (4) For EU shipowners, ships or operators, possibly Regulation No. 961/2010 Annex VI listed goods if shipped from any port or place.

The following goods are either unlikely to amount to unlawful merchandise or the position is not clear:

- (1) RPP or RPP Facilitating Goods even though prohibited by CISADA unless, in the case of EU shipowners, ships or operators, they are also Regulation No. 961/2010 Annex VI listed goods shipped from an EU port or place
- (2) Arguably, Regulation No. 961/2010 Annex VI listed goods shipped from port or places outside the EU.

If the goods amount to unlawful merchandise, the order can be refused. However, the practical difficulty is identifying whether the goods are on the prohibited lists or not, particularly in the case of dual-use goods – no easy task! The lists need to be consulted and, if necessary, an expert evaluation will have to be carried out. This is likely to take time.

There is high legal authority to the effect that a shipowner or operator has the right to pause and investigate whether an order is lawful or not, particularly in a war-like situation (which arguably raises similar issues to international sanctions), the test being: "How would a man of reasonable prudence have acted in the circumstances?" (*The Houda* 1994 2LLR 541 – Court of Appeal).

The message here is that if you are in doubt, then pause and seek urgent expert and/or legal advice.

### WHAT IF THE GOODS ARE LAWFUL, BUT NEVERTHELESS BY CARRYING THEM, A SHIPOWNER OR OPERATOR MIGHT BE EXPOSED TO CISADA SANCTIONS AND/OR HAVE HIS INSURANCE COVER WITHDRAWN?

It might be possible in these circumstances to argue that a shipowner is legally excused from carrying the goods by relying on the common law doctrine of frustration, which seeks to mitigate the strict terms of a contract if there has been a subsequent change of circumstances through no fault

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.