

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]
