

US AND EU TRADE SANCTIONS LEGISLATION – SUMMARY OF DEVELOPMENTS

Introduction

This summary is intended to provide an overview of the EU and US Iran Trade Sanctions legislation provisions which are most likely to be relevant to Members either directly or because of their effects on the Association. It also touches at the end upon other sanctions targets by the US and the EU.

Other trade sanctions legislation may apply to or otherwise affect a Member, depending on a number of factors including the legislation applied by their flag state, the countries in which the Member is incorporated or otherwise operates and the countries in which they intend to trade their ship or the nature of the trades involved.

In the circumstances Members should not act in sole reliance on the information or links provided in this summary and should make their own inquiries and seek advice from the relevant Government departments of such states and countries if concerned that their activities may be affected by trade sanctions legislation.

1. Iran – European Union (EU) Sanctions – Regulation 961/2010

The text of the Regulation is available at:

http://www.hm-treasury.gov.uk/d/council_regulation_eu_961_251010.pdf

Trade and financial restrictions involved

This Regulation confirms previous restrictions imposed by the United Nations and earlier EU Regulations. These included the freezing of assets of targeted entities and a trade embargo or licence system involving goods that can be associated with the proliferation of sensitive nuclear activities, or with the development of weapons delivery systems.

Regulation 961/2010, however, imposes further restrictions. These include:

- An extended list of targeted Iranian entities. The prohibition of provision of funds or economic resources (either directly or indirectly) to targeted entities remains in force. The definition of funds and economic resources in Article 1 of the Regulation is sufficiently wide to include bills of lading and **the payment of P&I claims, or the provision of the security such as Club Letters of Undertaking** to targeted companies.
- The sale, supply or transfer (directly or indirectly) to an Iranian entity worldwide or for use in Iran, of goods that can be associated with the proliferation of sensitive nuclear activities or with the development of weapon delivery systems (and which were previously subject to a licence system) is now essentially prohibited. It is believed that this includes the carriage of such

cargo. The type of cargo is listed in Annex I to III of the Regulation. The list is lengthy and complex. The import or transport from Iran of such cargo listed in Annex I to III of the Regulation is also prohibited.

- A new list of items which require prior authorisation for the sale, supply or transfer (directly or indirectly) to an Iranian entity worldwide or for use in Iran. The items are listed in Annex IV of the Regulation and concern specialist manufactured equipment.
- There is now also a prohibition on the sale, supply or transfer (directly or indirectly) to an Iranian entity worldwide or for use in Iran, of key equipment or technology for the Iranian oil and gas industry. The type of cargo which constitutes key equipment or technology for the Iranian oil and gas industry is listed in Annex VI of the Regulation. Again the list is lengthy and complex.
- Payments in excess of EUR 10,000 to and from Iranian entities (even if not targeted entities) are subject to notice to the relevant EU Government Departments.
- Payments in excess of EUR 40,000 to and from Iranian entities (even if not targeted entities) are subject to prior approval from the relevant EU Governments Departments.

Which Members are subject to the Regulation?

As further set out in Article 39, the Regulation applies to:

- (i) transactions carried out (in whole or in part) in the EU irrespective of whether the Member is an EU subject or not, and
- (ii) transactions carried out worldwide, if the Member is an EU subject.

The term “EU subject” is defined in Article 30 of the Regulation to include vessels under the jurisdiction of an EU Member state, or companies incorporated or constituted under the law of a Member state.

However, even if they are not themselves subject to the Regulation, Members should bear in mind that it does apply to the Association, including the restrictions (above) in regard to the provision of funds or economic resources (either directly or indirectly) to targeted entities or making payments in general to Iranian entities.

Links and further information:

The list of targeted entities is set out in Annex VII of the Regulation. However, the list of targeted entities may be extended from time to time. The consolidated list of targeted entities applicable to the Association (and UK members) as updated by the UK Treasury department can be found at:

<http://www.hm-treasury.gov.uk/d/sanctionsconlist.pdf>

or

http://www.hm-treasury.gov.uk/fin_sanctions_index.htm

A guidance note issued by the UK Treasury on Regulation 961/2010 is available at:

http://www.hm-treasury.gov.uk/d/public_notice_reg961_271010.pdf

Members of other EU States are encouraged to check the equivalent websites of the Member States whose laws they are subject to in order to ascertain the targeted entities listed in Annex VII of the Regulation and any updates.

For further information on the Regulation and interpretation of its provisions, Members are also encouraged to consult the web sites of the leading maritime law firms who provide regular updates and to consider seeking specialist advice.

2. Iran - US Sanctions - Comprehensive Iran Sanctions, Accountability and Divestment Act 2010 (CISADA) and OFAC List of Specially Designated Nationals

The text of CISADA is available at:

<http://www.treasury.gov/resource-center/sanctions/Documents/hr2194.pdf>

Which Members are subject to CISADA?

CISADA applies to US Nationals. US Nationals are broadly defined as “US Citizens, permanent resident aliens, any person in the US or any company organised under the law of the US (including foreign branches of such companies)”.

However, CISADA also authorises the US Government to impose sanctions on any person (whether a US national or not) that engages in certain listed types of trade (see below) dealing with or for the benefit of Iranian interests.

Concerns have been raised over whether compliance with CISADA by Members who are EU subjects would be in breach of their member State law giving effect to an earlier EU ‘blocking’ Regulation which opposed the application of previous US Iran Sanctions legislation to non-US Nationals. Conflicting legal advice has been received so far and such Members are encouraged to seek advice from their Governments.

Sanctions triggers or restrictions in CISADA which are particularly relevant to Members include:

(i) *Supporting the export of refined petroleum products (RPP) into Iran*

Sanctions are triggered when the US authorities determine that a person “knowingly” sells or provides to Iran RPP (or sells, leases, or provides to Iran goods, services, technology, information or support that could “directly and significantly” contribute to Iran's ability to import RPP) with a "fair market value" of US\$1m or more (or US\$5m or more in a year) including underwriting (either directly or via reinsurance), financing or broking such sale lease or provision, **OR providing ships or shipping services to deliver RPP to Iran.**

See: Section 5(a) (3) Iran Sanctions Act 1996 - as amended by CISADA Section 102(a) (1)

(ii) *Facilitating the domestic production of refined petroleum products in Iran.*

Sanctions are triggered when the US authorities determine that a person “knowingly” sells, leases or provides to Iran goods, services, technology, information or support, with a "fair market value" of US\$1m or more (or US\$5m or more in a year) that “directly and significantly” facilitates the maintenance or expansion of Iran's domestic production of RPP, including any direct and significant assistance with respect to the construction, modernisation or repair of petroleum refineries. Although not expressly stated and no guidance has been issued by the US authorities, it is believed that this include the carriage of such cargo.

See: Section 5(a) (2) Iran Sanctions Act 1996 - as amended by CISADA Section 102(a) (1)

Meaning of the words used in Sections 2 (i) and (ii) of this summary:

“Refined petroleum products” are defined by the Act in section 102 (f) to include “diesel, gasoline, jet fuel (including naphtha-type and kerosene type jet fuel) and aviation gasoline”.

“Knowingly” is defined within CISADA as not only having actual knowledge with respect to conduct, a circumstance or a result but also where the person “should have known of the conduct, circumstance or the result”. Therefore “knowingly” will be treated as actual or imputed knowledge. US authorities so far have not provided any firm assurances regarding the level of due diligence required by companies to try to ensure compliance. See further Section 4 below.

“directly and significantly” is not defined within CISADA. US officials readily admit that this section creates some ambiguity and uncertainty regarding what types of cargoes might lead to CISADA sanctions. However, they are not believed so far to be willing to provide any sort of assurances or “safe harbour” guidance regarding permissible transactions.

“fair market value” is also not defined within CISADA. US officials have indicated that “fair market value” refers to the value of the services being provided but conflicting advice has been received on how this is assessed in the case of shipping. Some advice indicates that the value refers to freight or hire earned on the transport. Other advice indicates that the value is based on the value of the underlying cargo.

Compliance with OFAC List of Specially Designated Nationals

As with the EU sanctions legislation, the US Treasury Department has for a number of years been listing entities which are targeted under its national sanction regimes and this list has grown substantially over the last years. They are referred to as Specially Designated Nationals. The list is administered by OFAC (the US Office of Foreign Assets Control).

The list requires only to be observed by US Nationals who are prohibited from carrying out trade or financial transactions with the listed entities. However, Members who are not US Nationals should note that there is a potential indirect effect since some links in the banking system used by Members and insurers (including this Association) are likely to screen beneficiaries/originators of payments against the US OFAC list of Designated Nationals (even if the currency is not in US dollars) and payments may be stopped.

Links and further information

The US Treasury publishes an online summary of its Iran sanctions program, with links to authorities and guidance, at:

<http://www.ustreas.gov/offices/enforcement/ofac/programs/iran/iran.shtml>

The OFAC list of Specially Designated Nationals is available at:

<http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

For further information on CISADA and interpretation of its provisions, Members are encouraged to also consult the web sites of the leading maritime law firms who provide regular updates and if necessary to obtain specialist advice.

3. Compliance by Members subject to CISADA and EU Regulation 961/2010

Members are exposed to sanctions if they know or “should have known” that their actions infringe the prohibitions set out or implied in CISADA or Regulation 961/2010. The focus of the prohibitions (as far as Members are concerned) in CISADA and EU regulation 961/2010 is on the prohibition of any dealings with targeted entities and of certain trades involving Iran. Accordingly, Members are required to be in a position to show that they did not know or should not have known that the particular trade or transaction risked incurring sanctions. In order to be in such a position, it is anticipated that Members would be expected to have in place a reliable system for the screening of the particular cargo to be carried and of the identities of their counter-parties in order to show that they carried out sufficient due diligence. It also follows that Members should keep records of the screening and other inquiries carried out.

The nature and extent of the due diligence required in respect of such screening, however, depends on a number of circumstances and is likely to depend on the particular trade in which the Member is involved. Different screening obligations regarding the identity of the counterparty and cargo to be carried are expected to apply for example to Members involved in the carriage of project cargo, refined petroleum products or manufactured goods, compared with Members involved in the container liner trade or dry bulk trade.

A number of industry bodies, including the International Group of P&I Associations, have asked the US and EU authorities for further guidance on the screening standards required. To date, no such guidance has been provided and, for the time being, Members are encouraged obtain specialist legal advice if in doubt about the interpretation or the extent of screening required, or contact the relevant US and EU authorities directly.

4. Iran Sanctions legislation and its effect on Association cover

- (i) Members trading with Iran and/or Iranian entities should be aware that the assistance which the Association is able to provide may be limited. Limitations include the following:
- As set out above, the Association is unlikely to assist with the provision of security or payment of claims for the benefit of targeted entities (either directly or indirectly).
 - Current guidance from the UK Treasury indicates that the provision of security to non-targeted entities is not subject to prior authorisation. However, authorisation would still be required for any payment (or reimbursement of payment made) to an Iranian entity which exceeds EUR 40,000. Such authorisation may be subject to further investigations into whether the payment contributes to prohibited activities. It would be improper for the Association to provide security without reference to such restrictions on payment under it and the likelihood of a claimant accepting such “conditional” security must be uncertain at best.

- (ii) Cover may be lost - where the Members' conduct or potential breach of applicable sanctions legislation, or his ship's trading puts the Association itself at risk of incurring sanctions by reason of providing insurance and reimbursing a related claim.
- For example, under CISADA, it is believed that the Association is exposed to sanctions by the provision of insurance cover to Members who are in breach of provisions in CISADA with regard to the carriage of refined petroleum products and other certain cargo to Iran.
- (iii) Cover may be reduced by shortfalls in re-insurance. The re-insurers or pooling partners of the Association may be subject to sanction regimes to which it is not subject but which bar them from making payments. In such a situation, Members are entitled to recover the net amount actually recovered under such reinsurance or pooling arrangements together with that portion of the risk retained (if any) by the Association.

5. Other Sanctions Legislation applicable to individual Members and the Association.

Although this summary is designed to focus on sanctions involving Iran, Members should be aware that there are sanctions regimes in force designed to exert pressure on other States or individuals in such States. Members are advised to familiarise themselves with the full range of sanctions applied in the jurisdictions whose laws they are subject to. Compared with the Iran Sanctions, the other regimes tend to be "person based" rather than "trade based". In other words they impose an almost complete embargo on dealing/trading with certain individuals/companies, involving also the freezing of their assets and other economic resources.

In so far as the Association is concerned, the non-Iranian sanctions regimes which apply directly to it involve those which the EU/UK has implemented and details of these are available at:

http://www.hm-treasury.gov.uk/fin_sanctions_currentindex.htm

The consolidated list of targeted entities applicable to the Association (and UK members) can be found at:

<http://www.hm-treasury.gov.uk/d/sanctionsconlist.pdf>

or

http://www.hm-treasury.gov.uk/fin_sanctions_index.htm

In the event of a claim being brought against a Member by any such targeted entities under these other Sanctions regimes, the Association would unlikely to be able to provide (directly or indirectly) security or to make payments for the benefit of such targeted entities.