UK DEFENCE CLUB

Soundings

Navigating the murky waters of Iranian Sanctions

"The US will re-impose secondary sanctions which impact on non-US companies that carry out certain activities with Iran, following the expiry of sanction waivers with wind-down periods of either 90-days (deadline of 6 August 2018) or 180-days (deadline of 4 November 2018)." **– The Office of Foreign Assets Control ("OFAC")**

This article highlights some of the charterparty difficulties and implications for Members arising out of the recent announcement regarding "snap back" of US extra-territorial sanctions on Iran.

JCPOA

From 16th January, 2016, in exchange for relief from US, EU and UN sanctions, Iran agreed to limit its nuclear programme and allow monitoring by the International Atomic Energy Agency. This agreement was formalised in the Joint Comprehensive Plan of Action, JCPOA, which was signed by the United States, Russia, China, the United Kingdom, France, Germany and Iran.

A significant change brought about by the JCPOA was the suspension of most EU sanctions against Iran, as well as US secondary sanctions applying to non-US persons and entities relating to shipping, ship building, energy and petrochemicals, among others. This allowed for non-US companies to trade with Iran within certain prescribed limits, such as avoiding certain cargoes and sanctioned entities, without the fear of being exposed to sanctions.

"Snap-back" of sanctions

The JCPOA was framed in a manner that allowed the signatories to step away from it and resume sanctions if Iran failed to keep up its side of the agreement - the "snap-back" provisions. On 8th May, 2018, President Trump announced his intention to withdraw the US from the JCPOA and re-impose US secondary sanctions, with a view to bringing Iran back to the negotiating table and to impose

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stricter terms than those implemented by the JCPOA, which the US believes have not gone far enough in restricting Iran's nuclear activity.

Wind-down period

OFAC has stated its intention to allow parties, including non-US persons and US-owned or US-controlled non-US entities to wind down operations with Iran. The re-imposition of secondary sanctions will be final following two separate "wind-down periods", depending on the trade concerned. In brief, contracts related to money, metals and cars will need to be wound down within 90 days (i.e. by 6th August, 2018), while contracts related to shipping, oil, banking and insurance will need to be wound down within 180 days (i.e. by 4th November, 2018).

Although clarification is awaited, it appears that the wind-down periods are only for winding down existing business. OFAC has stated that it is not going to tolerate any new business entered into within this wind-down period.

After the 90-day or 180-day wind-down period US sanctions will return in full force. This means that if non-US companies fail to wind down their business dealings with Iran by the relevant deadline, they might face the risk of US enforcement, with significant impact on their US activities.

Specific and general licenses issued in connection with sanctions relief provided under the JCPOA will also be revoked. On 27th June, 2018 the US revoked General Licence H and replaced it with a new wind-down licence. Furthermore, OFAC's Specially Designated National List, Foreign Sanctions Evaders List, and Non-SDN Iran Sanctions Act List will be updated sometime between now and 5th November, 2018, re-instating sanctions against some 400 entities that were removed from the SDN List or other lists when the JCPOA was implemented.

OFAC has warned that it will take a strict approach when considering potential enforcement or punitive action:

> "[W]hen considering a potential enforcement or sanctions action with respect to activities engaged in after August 6, 2018, or November 4, 2018, as applicable, OFAC will evaluate efforts and steps taken to wind down activities and will assess whether any new business was entered into involving Iran during the applicable wind-down period."

Members are therefore warned against committing to new business after 8th May, 2018, even if all contractual obligations flowing from these new commitments would be completed within the applicable wind-down periods. In any event, Members should seek independent legal advice, and liaise with the relevant authorities where necessary.

EU stated plans

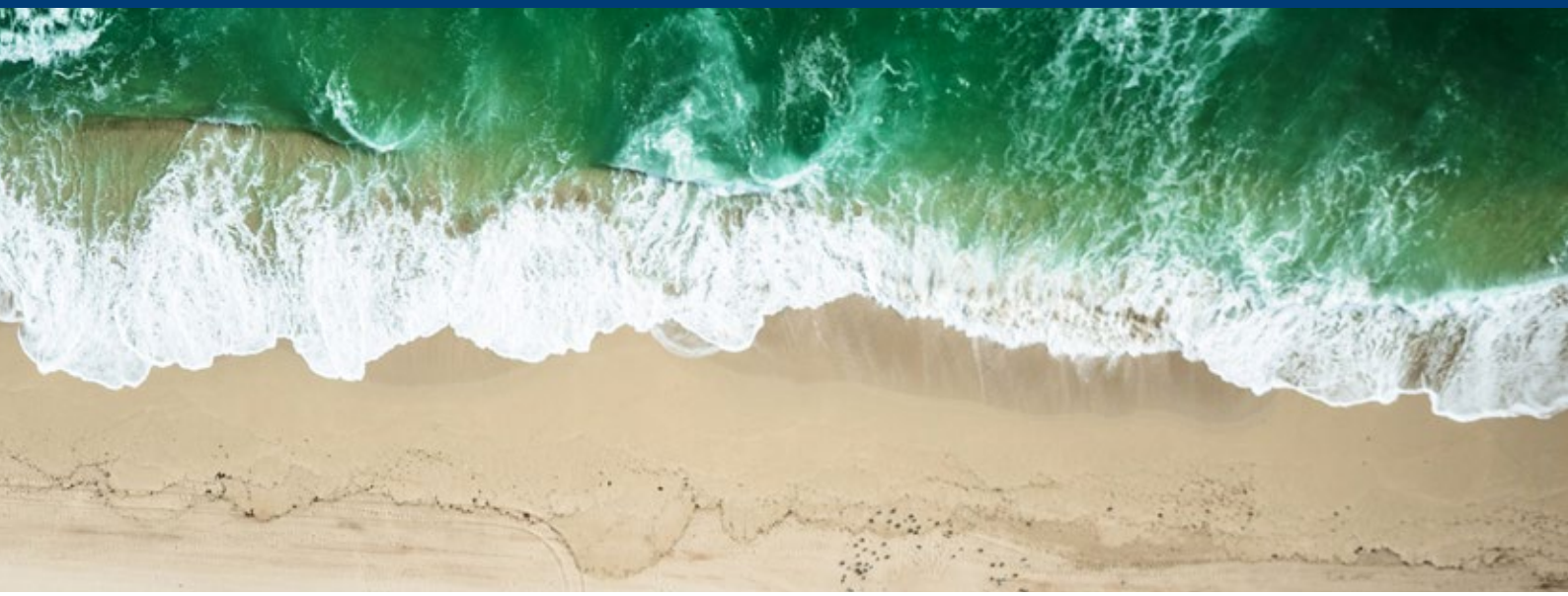
In contrast to the US position, the EU and other signatories have reaffirmed their continued support for the JCPOA. As yet, there has been no alteration in European policy or legislation in respect of Iran. However, a major concern for European companies and financial institutions is that they could face US secondary sanctions and be prevented from engaging in business with Iran by the imposition of heavy fines and/or criminal charges in the US.

The EU is therefore considering its response and a proposed amendment to the EU Blocking Regulation is currently being considered. This seeks to protect EU companies from the extraterritorial effects of US secondary sanctions against Iran by prohibiting anyone within EU Member States from complying with the extraterritorial effects of US sanctions or recognising any judgment giving effect to them. A number of commentators have expressed doubts about the effectiveness of the EU Blocking Regulation as a means to persuade EU companies (and banks) to proceed with trade which could infringe US secondary sanctions.

The different approaches taken by the US and the EU on sanctions against Iran complicates an already complex area and further risks confusion and inadvertent breach of sanctions.

Practical implications

The re-imposition of US secondary sanctions concerns owners and charterers alike, particularly given the extra territorial impact. Breach of such sanctions could adversely affect Members' insurance policies.



Members are advised to consider carefully any future planned calls to Iran and to exercise utmost due diligence to ensure that neither the cargoes carried nor any parties involved in the transactions trigger US sanctions. Equally, Members should exercise caution in relation to any transactions entered into, at or with local ports, including the purchase of bunkers at Iranian ports.

It is recommended that Members undertake appropriate checks to ascertain the identity of all the Iranian parties involved in a transaction or chain of transactions. It is not sufficient simply to confirm that an entity with which one is transacting business is not on the US SDN List. Even if a company is not listed on the SDN List, an effort should be made to determine the company's ownership, to ensure that it is not more than 50% owned in the aggregate by persons/entities who are on the SDN List.

It is therefore important to seek appropriate legal advice and liaise with the relevant authorities where necessary.

Charterparty implications

The following provides guidance to Members on some key issues to be considered concerning commitments under existing charterparties and when concluding future contracts.

Existing charterparty obligations

Charterparties or voyage orders involving Iranian ports that were entered into or given before 8th May, 2018 and which should be completed within the applicable wind-down period are unlikely to be considered new business. Members should therefore be able to fulfil such obligations without being in breach of sanctions, though the usual checks and due diligence should nevertheless be made and caution exercised.

Members should also be careful to avoid stemming bunkers at the relevant Iranian port and should exercise caution when entering into any port transactions in Iran.

Members should, however, be wary of accepting orders or agreeing to new charterparties involving Iran after 8th May, 2018, even during the wind-down period. If a charterer orders a Member's ship to proceed to a port to which it is no longer possible to proceed, as a result of the sanctions that have been put in place, such orders may be illegitimate and the Member may be entitled to demand revised orders from their charterers. However, this is currently a grey area as there is a lack of clarity as to what will be deemed to be new business by OFAC. It may be dependent on factors such as the date of the underlying purchase contract and whether there has been on-going trade to Iran under the existing charter. Owners need to be careful not to place themselves in breach by refusing orders that are in fact legitimate.

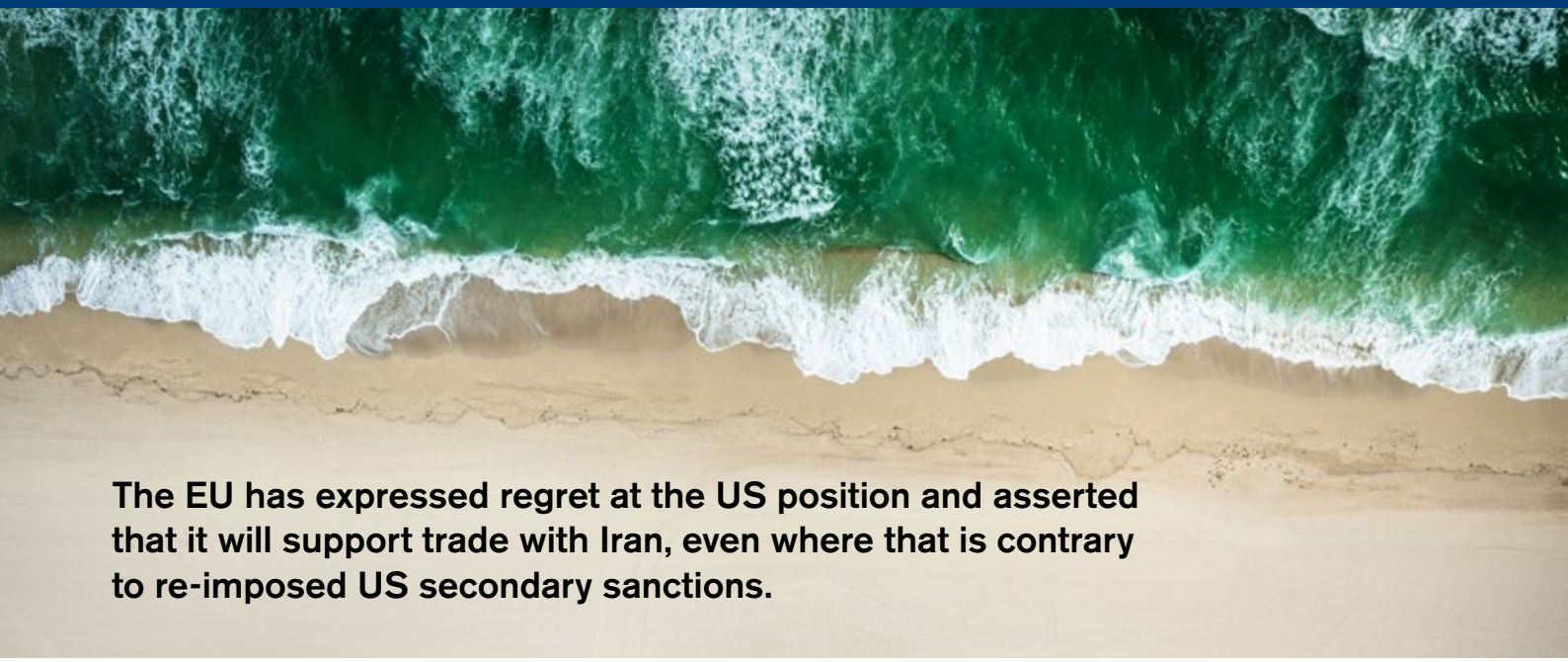
In addition, Members are reminded to bear in mind their parallel obligations under applicable bills of lading. Even if they are entitled to refuse their charterer's orders, they may still be obliged to deliver cargo to third party holders of bills of lading at the original destination in Iran.

If Members are concerned that the performance of existing contractual obligations might be prohibited by the US sanctions regime, withdrawing from these or refusing performance may not be straightforward. Legal advice should be sought on the terms and application of the contractual provisions within the matrix of international sanctions.

Frustration and illegality

Depending how matters progress, questions of frustration might also be raised. The doctrine of frustration, under English law, allows a contract to be discharged with no further obligation to either party if there has been a sufficient change in circumstances, without fault by either party, which would render performance of the contract something "radically different" to that originally contemplated. Supervening illegality may give rise to grounds for frustration.

In cases of pre-existing voyage charters or orders given under time charters prior to 8th May, 2018, the wind-down period should permit those pre-existing obligations to be fulfilled. If charters or voyage orders are accepted after 8th May, 2018, on the other hand, then it will be difficult for Members to argue subsequently that there is supervening illegality or a change in circumstances because the parties should have been aware of the sanctions situation as at that time. So frustration may not be a relevant consideration



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in such circumstances. It may, however, be considered in relation to long term COAs which envisage regular trade to Iran. In those cases, each new voyage could potentially be seen as new business, which would expose owners to the risk of sanctions if they comply. It may therefore be arguable that such contracts have become frustrated.

However, illegality and frustration are notoriously difficult arguments to make and Members should seek legal advice before seeking to rely on either. If owners refuse a charterer's orders when they are not entitled to do so, then they may place themselves in breach of the charter and be liable to charterers for damages. Since charterers will also be exposed to sanctions if owners comply with such orders, a commercial solution would be for parties to agree alternative orders where practical in such situations.

Future charterparties – protective measures

If Members are entering into new charterparties, consideration should be given to expressly excluding Iran as a permitted destination or including a protective clause such as those developed by BIMCO or Intertanko. It may be appropriate to amend these clauses or draft bespoke clauses to deal with specific trades or circumstances. The BIMCO clause permits owners to refuse orders that may "in the reasonable judgement of the owners" expose the ship to sanctions risks or to stop performing existing orders and require charterers to issue alternative orders if sanctions are applied once orders have been given.

Members should be careful that any trading restrictions are reflected in any sub-charters, to avoid exposing themselves down the charter chain to a risk that they cannot pass up to their owners. Similarly, Members should ensure that any liberty to refuse potentially sanctioned orders is reflected or incorporated in any bills of lading.

There are also certain clauses Members should avoid which might otherwise expose owners to greater compliance obligations than would be the case. For example, Members should resist agreeing any warranty or undertaking to comply with OFAC sanctions, or any indemnities for breaching an OFAC compliance clause. Accepting a clause of this kind could lead to a significant compliance burden on Members who would be expected not only to understand but to comply with the complex matrix of US sanctions.

Concluding remarks

At this point in time, the re-imposition of sanctions against Iran is still in a pre-implementation stage and clear positions are yet to be adopted. In May 2018, US Secretary of State Mike Pompeo warned that Iran would be hit with "the strongest sanctions in history" (which will presumably mean a stricter regime than the one in place before January, 2016) and warned EU companies of the risks of continuing to deal with Iran.

Meanwhile, the EU has expressed regret at the US position and asserted that it will support trade with Iran, even where that is contrary to re-imposed US secondary sanctions. However, Members are warned that any connection with the US will subject them to the US regime, including the use of US dollars in any transactions with Iran, which will have to pass through the US banking system, so the EU's statement should be treated with caution.

In any event, as the situation remains in flux, Members are strongly advised to approach their on-going commitments with an Iranian nexus with the utmost caution on a case-by-case basis and to closely monitor developments.

Members should contact the Managers directly for advice and guidance in relation to case specific issues.

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