

International Marine Claims Conference

Sanctions Update

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28 September 2011

Format

- Introduction
- Iran, Libya and Syria not Somalia/terrorism
- Arash v Groupama Transport – English Court of Appeal decision
- JH Sanctions clause
- Survey/questions

Introduction

- Sanctions – not new, Cuba, FRY
- Sanctions busting activity – sect. 41, Marine Insurance Act 1906/English law generally
- Increasingly common trends for insurers:
 - The targeting of insurance as a mechanism of international trade.
 - Lack of consistency across the world.

US Iran sanctions

- Comprehensive Iran Sanctions, Accountability and Divestment Act 2010
- Insurance of refined petroleum product deliveries to Iran
- Extra-territorial effect – power to seize assets of foreign companies within the US/US\$ transactions
- Due diligence to ensure that not providing insurance which could contribute to Iran's ability to import refined petroleum products

US Iran sanctions

- Note
 - CISADA applies to non US assets within the US
 - No blanket prohibition on the provision of insurance to Iranian interests

EU Iranian sanctions

- EU Council decision 26 July 2010
- Proposed prohibition on insurance for Iranian government/entities or “*subject to Iran jurisdiction*”
- Replaced by EU Council decision 961/2010 on 27 October 2010
 - Direct effect in the UK
 - No further legislation required
 - HM Treasury is the UK competent authority

EU Regulation 961/2010 - general

- Applies to everyone in the EU doing business in whole or in part within the EU
- Applies to any “*Iranian person, entity or body*”
 - includes “*any legal person, entity or body, inside or outside Iran, owned or controlled directly or indirectly*” by an Iranian entity.
- Prohibition on sale of arms and limitations on nuclear and oil and gas industries

EU Regulation 961/2010 - general

- Article 21 – transfer of funds to and from Iran
 - Applies to premium and claims
 - Prior notice required for payments between €10,000 and €40,000
 - Prior approval required for payments over €40,000

EU Regulation 961/2010 - general

- No payments to “banned” entities under annexes VII and VIII, including:
 - Islamic Republic of Iran shipping lines
 - Bank Mellat
 - Bimeh Iran
- NITC not a banned entity

EU Regulation 961/2010 - general

- Provision of security to Iranian interests (eg collision or salvage security)
- Need to watch:
 - Article 16 – blanket prohibition on the provision of funds to banned entities;
 - Provision of a guarantee to the oil and gas industry - “financial assistance”
- Arguable a guarantee could be treated as “an insurance”

Insurance provisions

- Article 26(1):

“It shall be prohibited

(a) to provide insurance or re-insurance to:

(i) Iran or its Government, and its public bodies, corporations and agencies;

(ii) an Iranian person, entity or body other than a natural person; or

(iii) a natural person or a legal person, entity or body when acting on behalf or at the direction of a legal person, entity or body referred to in (i) or (ii)

(b) to participate, knowingly and intentionally, in activities, the object or effect of which is to circumvent the prohibition in point (a)”

Insurance provisions

- Relevant exceptions:
 - Permitted to insure the owner of a vessel “*chartered*” by an Iranian entity (not otherwise banned) – query bareboat charters
 - Permitted to insure vessels docking, loading in Iranian waters
 - Article 26(4) “*does not prohibit compliance with [insurance or reinsurance] agreements concluded before the regulation came into force*”, but those agreements cannot be extended or renewed

Insurance provisions

Defences

- Article 29
 - Claims by Iranian persons for enforcement of contractual obligations affected directly or indirectly in whole or in part by the regulation shall not be satisfied if made by Iranian entities.
- Article 32
 - Defence if “*did not know and had no reasonable cause to suspect, that their actions would infringe these prohibitions*”

EU Libya/Syria

- Libya
 - 16 September 2011 - UN resolution 2009/2011 unfreezes assets of the Libyan people and lifts sanctions against the National Oil Company and Zuietina Oil Company
- Syria
 - May 2011 - Regulation freezing assets associated with President Bashar al-Assad's regime and prohibition on provision of economic resources

EU Libya/Syria

- No general prohibition on insurance for Syria, but EU Regulation 878/2011 (2 September 2011) prohibits:
 - Import/transport/purchase of Syrian oil/petroleum products
 - Provision of insurance in relation to same
- Exemption in respect of obligations arising under contracts concluded before 2 September, executed before 15 November 2011, provided notice is given to the competent authority

The insurers' conundrum – international

- Multi-jurisdiction risks/policies, with insurers subject to “non-home” jurisdictions
- Insurers may find themselves
 - required to pay in one jurisdiction
 - but exposed to sanctions in another

The insurers' conundrum – international

- JH Sanctions clause (JH2010/009):

Sanction Limitation and Exclusion Clause

No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, United Kingdom or United States of America.

The insurers' conundrum - domestic

- EU Regulation – direct effect in member states, but enforced by “competent authorities”
- UK competent authority is HM Treasury/Asset Freezing Unit
- Decision whether to prosecute rests with Crown Prosecution Service
- Significance that a decision of the English Commercial Court that some particular activity is not prohibited by the EU Regulation does not guarantee that the insurer would be immune from prosecution by the criminal authorities

Arash Shipping v Groupama Transport

- H&M insurance of NITC – 12 months at 9 May 2010 with a review clause providing for “automatic renewal” if the credit balance better than 50%
- Article 26(4) permitted the original 12 month policy to run beyond 27 October 2010, but *“prohibited the extension or renewal of insurance ... agreements concluded before [27 October 2010] but ... does not prohibit compliance with agreements concluded before that date”*
- At March 2011, the credit balance was better than 50%

Arash Shipping v Groupama Transport

- Key issues:
 - Whether renewal pursuant to an existing contractual obligation would breach Article 26(4);
 - Whether GT were entitled to cancel under an Iran sanctions clause which permitted insurers to cancel “*if the assured has exposed or may in the opinion of the insurer, expose the insurer to the risk of being or becoming subject to any sanction, prohibition...*”
- HM Treasury advice to Arash:

“We do not consider automatic renewal to be permitted under Article 26(4)...”.
- GT willing to renew if they had clearance to do so from HM Treasury

Arash Shipping v Groupama Transport

- HMT invited to participate in proceedings – declined

“these proceedings concern a contractual dispute between two private commercial entities and the decisions taken by the parties in relation to their contractual obligations”

- HMT invited to be bound by the outcome of Commercial Court proceedings – declined:

“the Treasury is not the prosecuting authority in relation to offences committed under the Iran (European Union Financial Sanctions) Regulations 2010 and so is not in a position to give the assurance your client seeks. That said, it would be expected that the prosecuting authority would take the terms of any judgment into account”

Arash Shipping v Groupama Transport

- Burton J, first instance
 - Any form of renewal (automatic or not) in breach of article 26(4)
 - Cancellation valid because Underwriters
 - Burton J might be wrong that renewal was permitted; and
 - Underwriters “*would be entitled, particularly in the light of the express position of HM Treasury, to conclude that the English prosecuting authorities might not follow [Burton J’s decision] and ... would certainly not be bound by, my decision*”

Arash Shipping v Groupama Transport

- NITC appeal to Court of Appeal
- EU Commission response to request for guidance from NITC:
 - *“... it would therefore appear that the renewal of the contract under consideration is prohibited under [the Regulation] unless this can be construed as a mere continuation of the original contract”*
- Court of Appeal hold insurers entitled to cancel:
 - HMT did not consider renewal permitted
 - EU commission did not appear to think renewal permitted
 - No Court of Appeal judgment could remove risk of Underwriters being in breach

Arash Shipping v Groupama Transport

- Tomlinson LJ:
 - *“I think it is appropriate to indicate that my own preliminary view is that Burton J is plainly correct. Article 26 prohibits the provision of insurance after the operative date. Article 26(4) makes clear that this is not intended, save where Article 16(3) is engaged, to prohibit compliance with insurance agreements made before the operative date. However Article 26(4) also spells out that extension or renewal of an insurance or re-insurance agreement made before the operative date is caught by the prohibition on the provision of insurance or re-insurance.”*

Summary

- Brave new sanctions world
- Increased targeting of insurance
- Competing international regimes
- England:
 - In the hands of HM Treasury/Crown Prosecution Service
 - Civil courts can help, but not final arbiter

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