

AND IRAN SO FAR AWAY... IRANIAN SANCTIONS LAWS & DUE DILIGENCE

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SANCTIONS, IRAN & DUE DILIGENCE

Famous Quotables

“To be is to **do**.” - Socrates

“To **do** is to be.” - Jean Paul Sartre

“**Do** be **do** be **do**...” - Frank Sinatra

“De **do do do**, de da da da.” – 1980 hit single by The Police

“All created things are impermanent. Strive on with **diligence**.” - Buddha

“He who labors **diligently** need never despair; for all things are accomplished with labor and **diligence**.” - Menander

“Learning is not attained by chance; it must be sought for with ardor and **diligence**.” – Abigail Adams

“**Diligence** is the mother of good luck.” - African American proverb

“Please **do** your **due diligence**!” – Me right now and various American Club Circulars



USA – OFAC Sanctions

- **Primary Embargoes:** Cuba, Iran, Sudan, Syria & Myanmar (Burma)
- **SDN List:** “Specially Designated Nationals and Blocked Persons” List of roughly 5,000 foreign nationals – terrorists, drug traffickers and others (less than 100 known U.S. residents)

European Union Sanctions

- Iran – crude oil, petroleum & petrochemical products; natural gas, graphite, raw or semi-finished materials (such as steel and aluminum)
- Sanctioned persons or entities - EU version of SDN listing

List of prohibited activities with Iran - OFAC & EU

- Export and delivery of refined petroleum products (RPP) to Iran such as gasoline, jet fuel, diesel, etc. to Iran
- Investments related to petroleum resources
- Goods and services related to domestic production of Iran's petroleum products, petroleum resources and petrochemical products
- Import / transport of crude oil, petroleum and petrochemical cargoes
- Bunkering from Iranian suppliers / sources
- Provision of shipping services for goods that could materially contribute to Iran's nuclear technology, ballistic missile program and proliferation of WMD
- Graphite, raw or semi-finished metals such as steel products, aluminum, steel, coal
- Dealings with the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO) & the Central Bank of Iran

SANCTIONS, IRAN & DUE DILIGENCE

**Additional OFAC Iranian Sanctions take effect on July 1, 2013
National Defense Authorization Act (“NDAA 2013”) targets
foreign persons doing any of the following:**

- Transactions with persons and/or entities on SDN list
- Transactions related to the energy, shipping, shipbuilding or port operation industries in Iran
- Transactions with persons involved in energy, shipping (NIOC, NITC, IRISL) , shipbuilding or port operation
- Transactions involving precious metals and certain materials (coal, graphite, raw or semi-finished metals such as aluminum or steel)

What is “Due Diligence”?

- “Due diligence” is investigation and analysis of information to ensure a transaction or activity is not in violation of sanctions
- Not precisely defined in U.S. sanctions legislation, but essentially includes an analysis of whether the person or entity had in place sufficient controls, procedures and safeguards to reasonably protect against the possibility of engaging in sanctionable conduct
- Based heavily on facts and circumstances of each case and an assessment of the sanctions risk

Sanctions Penalties v. Foreign Persons

- Denial of access to U.S. banking system / USD transactions, no business with the U.S.
- Blocking / freezing property / assets
- Preventing foreign person, principals or shareholders from entering the U.S.
- Potential civil or criminal penalties
- Prohibiting entry of vessel to U.S. ports for up to 2 years

Intent / Culpability

- Sanctions generally target conduct done “knowingly” or “intentionally” – has actual knowledge or should have known of the conduct, the circumstances or the result
- Some degree of culpability required
- No established test or criteria, but when assessing what a person “should have known,” U.S. authorities usually examine whether the person exercised “due diligence”

Why Do Due Diligence?

- Ignorance of the law is not a defense to a breach of sanctions regimes
- Compliance / strict liability
- Penalties can be severe
- Blocked assets, monetary fines & damage to reputation
- Due diligence prevents sanctions
- Due diligence acts as a mitigating factor

U.S. State Department guidelines on due diligence

- Confirming that an entity owned or controlled by Iran is not involved in the transaction
- Reviewing SDN listing on a regular basis
- Investigating corporate structure/ownership of unknown contract partners
- Verifying that crude oil, petroleum or petrochemical cargoes did not originate from Iran
- Verifying that cargo destined for Iran is not prohibited or sanctionable

Due Diligence – Compliance Program

- Designate a compliance officer
- Establish sanctions compliance procedures and document retention policy
- Conduct a risk assessment
- Train personnel
- Audit the program (internally / externally)
- Stay abreast of legal developments / changes

Risk Assessment – General Considerations

- Consider the nature of the transaction
- Can it facilitate sanctioned activities (e.g., energy industry, shipping industry, nuclear development program, etc.)?
- Consider the sums involved (incongruous freight / hire rate with prevailing market rate)

Who are your contractual counter-parties?

- Charterers
- Related companies
- Shippers
- Suppliers
- Receivers
- End user
- Insurers (charterer's P&I, cargo, etc.)
- Banks / financial institutions to be used in transaction
- Paying agents
- Vessels (certain vessels are sanctions targets)

Due Diligence - Investigation Resources

- OFAC SDN List at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> and search function at <http://sdnsearch.ofac.treas.gov/>
- EU sanctioned parties listing at http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm
- Compliance software
- Internet search engines
- Press clippings
- Questionnaires
- Recent movements by chartered vessels
- Asset investigation services
- Seek and obtain legal advice

Due Diligence – Other Sources

- Peers in the shipping industry
- Brokers
- Contact a lawyer
- Call your mom
- Or ask Gus and Maria



Risk Assessment – Cargo Considerations

- What is the precise nature of the cargo that is the subject of the transaction?
- Is the cargo the subject of any OFAC or EU sanctions?
Consult with lists / Club Circulars
- What is the ultimate use of the cargo?
- What are the potential uses for the cargo?
- Is the cargo insured and, if so, by whom?

Risk Assessment – Geographic Considerations

- Where is the cargo being loaded?
- Where is the cargo being discharged? Consult listing of banned exports from Iran
- Bill of Lading - concealing origin of cargo could lead to two-year ban on vessel entry into U.S. ports

Due Diligence – Other Practical Considerations

- Institute an internal protocol for such due diligence investigations / sanctions compliance procedures
- Implement a program to regularly check the published listings of sanctioned parties with whom trade is prohibited or restricted
- Save your research
- Maintain your due diligence investigation evidence in a separate file
- Preserve due diligence documents for at least 5 years
- While violation of sanctions is subject to strict liability, reasonable due diligence investigation is a mitigating factor

Contact the American Club's Compliance Center

- After completing your due diligence investigation, contact your Club
- Context of inquiry to Club – coverage considerations
- Inquiry to Club is not a substitute to Member's due diligence investigation
- Club may offer non-binding guidance



Required Information to be provided to Club

- List the contract parties: charterer, sub-charterer(s), shipper, receiver, end-user
- Whether any parties are SDNs
- Specific type(s) of cargo(es)
- Port(s) of loading and discharge
- Types of B/Ls and/or C/Ps to be used
- Terminal operators in Iran – Tidewater
- Vessel names and IMO nos. (STS, FSO, IRISL, NITC)

Contact the American Club's Compliance Center

- Give ample advance notice - too late if fixture recap has been concluded, cargo loaded or B/L issued
- Club assesses inquiry and may consult with its OFAC / EU counsel for advice / guidance
- Club will endeavor to respond ASAP and by latest within 24 hours based on information provided
- Club's response is limited to interplay of Club Rules with contemplated transaction and whether coverage is available
- Club's reply should not be construed as legal advice

Sanctions - Relevant American Club Rules

Longstanding Rules

- Class I.3.1.3 - Risks and losses excluded for “[a]n insured vessel . . . being employed in an unlawful trade . . .”
- Class I.3.2.10 - Willful Misconduct - excluded from coverage - “an act intentionally done or a deliberate omission” - “an act done or omitted in such a way as to allow an inference of a reckless disregard of the probable consequences”

Sanctions - Relevant American Club Rules

Rule changes implemented several years ago whereby cover will be terminated if a member engages in trades likely to expose Club to sanctions

- Class I.3.1.4 - following enactment of CISADA - excludes coverage for any voyage and/or service relating to the sale, exportation, provision, transportation or delivery to Iran, directly or indirectly, of refined petroleum products (RPP)
- Class I.3.1.5 - preclusion of cover where reinsurers are subject to sanctions - includes IG reinsurance scheme and any other reinsurers of the Club - came into play after EU sanctions ban on oil, petroleum and petrochemical products and insurance thereof

Charter Party Considerations

- What are the trading limits in the charter?
- Nature of performance - FSO / Iranian bunkers or petroleum products
- What warranties does your charterer give you?
- BIMCO Sanctions Clause for Time Charter Parties - July 9, 2012
- BIMCO Designated Entities Clause - April 29, 2013
- Bunkers - request your time charterers to ensure in writing that no Iranian bunkers will be / have been stemmed
- Dispute resolution / arbitration clause and choice of law - supervening illegality / frustration

Final Thoughts / Considerations

Iran sanctions laws applicable to the American Club may be different from the sanctions laws applicable to Members. Therefore, with respect to voyages to and from Iran, Members should answer the following 3 questions to ensure that no Iran sanctions laws will be violated:

1. Is the activity of transportation to/from Iran by the Member prohibited under sanctions laws (US /EU) directly applicable to the Member?
2. Would the activity of transportation to/from Iran by the Member constitute activity that could lead to the imposition of U.S. sanctions against the Member (sanctionable activity)?
3. Is there American Club cover for the voyage in question to/from Iran?

DUE DILIGENCE - CONCLUSION

- Ambiguity in sanctions interpretation creates risky landscape
- Invites liability that can be easily avoided with minimal measures, e.g. due diligence investigation
- Establish clear compliance objectives
- Then measure the performance of your contract partner against those objectives
- Instituting a compliance program and proper due diligence can provide a significant layer of protection to your operations
- Contact your Club to ensure cover is not prejudiced
- When in doubt, seek and obtain legal advice / guidance