

SANCTIONS AGAINST IRAN: IMPLICATIONS FOR POLLUTION LIABILITY COVER

Introduction

Sanctions legislation – at a national and regional level – continues to pose challenges for shipowners as the range of prohibited activities has been extended. The difficulties are compounded by the complex nature of the regulations and in some cases by uncertainty as to their precise scope or effect.

Another key issue has been the extension of the regulations to prohibit the provision of marine insurance or reinsurance services in respect of targeted trade. The impact on Club cover is therefore a significant issue for owners, and others involved in the transport of goods, even if the regulations do not directly affect them or the voyage itself.

Sanctions are a subject in their own right with many aspects which are not directly concerned with pollution and go well beyond the scope of this paper. No attempt is made here to comment on US sanctions legislation, or to provide any general overview of regulations in force in the EU or UK. Information on these is available from various sources including FAQ publications issued by the International Group of P&I Clubs.

Attention here is focused on the implications of sanctions for pollution liability cover. That is partly because the risk of liability for pollution is of relatively great financial significance, and partly because it is subject to compulsory insurance and certification requirements. The effect on P&I cover against pollution may in turn give rise to issues as to whether charterers' orders to trade to Iran, or to load goods of Iranian origin, are lawful under the terms of the governing charterparty, even if the parties are otherwise unaffected by sanctions legislation.

By way of background, EU Council Regulation 267/2012 of 23 March 2012 is the main instrument in a series of sanctions measures which the EU has adopted against Iran since 2009. Initial measures imposed restrictions on dealings with designated Iranian entities, including the provision to them of insurance and reinsurance services, and led to changes in the rules of all International Group Clubs in relation to sanctions risks.

The Regulation of 23 March 2012 introduced further measures restricting trade that would or could support the furtherance of Iran's nuclear aspirations. In particular it prohibits the import into an EU member state of Iranian oil and its transportation (whether into the EU or not) by any EU shipowner or on board any EU registered vessel. Even if the Regulation does not directly affect the transport of the oil, it will prohibit the provision of insurance or reinsurance services in relation thereto by any EU regulated insurer.

In December 2012 the Regulation was amended by Council Regulation 1263/2012, which considerably extends the range of prohibited activities to include trade or transport of natural gas and various other goods, as well as the provision of insurance, reinsurance and other services in relation thereto.

Here the focus is on the carriage of oil of Iranian origin, and the implications of sanctions in the context of potential liabilities of the shipowner and insurer under the Civil Liability Convention 1992.

Legal and insurance framework

The Civil Liability Convention 1992 ("CLC 92" or "CLC") is currently in force in over 120 coastal states. Among them are Iran, China (including the vessel's flag state administration in Hong Kong), and a number of coastal states a vessel would pass en route between them, including the UAE, Oman, India, Sri Lanka, Malaysia, Singapore and Indonesia. Most but not all of these states are also Fund member states – a notable exception being China (where the 1992 Fund Convention applies only in the Hong Kong SAR).

In order to assure due payment of claims, CLC requires the owner of every tanker registered in a contracting state, and carrying 2,000 dwt or more of oil in bulk as cargo, to maintain insurance or other financial security to cover his liability under the Convention, up to his liability limit. (Art.VII.1). For tankers of 140,000 gt and above the liability limit is SDR 89.77 million, currently equivalent to approx US\$140 million.

In practice about 95% of internationally trading tankers meet this obligation by means of entry in one of the 13 Associations which are members of the International Group of P&I Clubs. A small minority are either covered by a non-IG insurer, or are owned by parties such as governments or major oil companies which have elected to self-insure.

The popularity of the IG Clubs, particularly among the owners of internationally trading tankers, may be attributed to a number of factors. Among these is the relatively high level of cover available by dint of the Clubs' shared pooling and reinsurance arrangements. The cover they provide for oil pollution risks is currently subject to a limit of US\$1 billion. This, of course, is far higher than the liability limit set by CLC, and it is higher than the level of cover which any other insurer is known to be able to provide.

In practice the prospect of an owner being held liable for claims of this magnitude in a CLC jurisdiction is extremely small, due partly to the difficulty which claimants would face in "breaking" his right of limitation, and partly to the fact that additional compensation from the IOPC Fund has normally been sufficient to remove any incentive for them to attempt to do so. However, the high level of insurance cover is considered desirable as the risk of unlimited claims, however small, cannot be excluded; and as there are non-CLC states (notably the USA) where the cost of pollution incidents is notoriously high, and rights of limitation are more easily lost.

A certificate attesting that insurance or other security is in force must be issued by the appropriate authority of a contracting state (normally the vessel's flag state administration) and must be carried on board. Any claim for pollution damage may be brought directly against the insurer named in the certificate. In such a case the insurer may avail himself of the defence that the damage resulted from the owner's wilful misconduct, but he cannot avail himself of any other defence that he might have been entitled to invoke in proceedings against

him by the owner. Accordingly, an insurer named in the certificate cannot rely on any other exclusions in the insurance policy that might have been available as a defence to an indemnity claim by the owner. He can however always rely on the ship's liability limit, even if the owner cannot do so. (Art. VII.8).

The Convention also provides for contracting states to take steps to ensure that the compulsory insurance requirements are satisfied by any ship, wherever registered, calling at or leaving their ports or offshore terminals (Art. VII.11). Compliance is in practice enforced mainly by port entry control.

In these circumstances, an oil tanker without a CLC certificate is effectively unable to trade, save to the United States and a limited number of other jurisdictions where the Convention does not apply.

Impact of Regulation on P&I Cover

Regulation 267/2012 contains a general prohibition on the provision of insurance and reinsurance related to the import, purchase or transport of crude oil and petroleum products, and petrochemical products, of Iranian origin. This prevents an EU-regulated insurer from providing such cover, even if the shipowners or operators are outside the EU and beyond the reach of sanctions legislation. It would also be contrary to the Regulation for the Clubs to provide the owner with claims handling services or other benefits commonly provided in conjunction with P&I cover.

Although some IG Clubs are not EU-regulated, they are in practice prevented by the Regulation from providing cover on normal terms because their pooling and reinsurance arrangements, which are shared with other IG member associations, depend very heavily on EU-based Clubs and other sources of reinsurance capacity.

Against this background all IG Clubs have adopted sanctions rules. Their precise terms vary from Club to Club, but their general effect is to restrict or exclude recovery where the relevant voyage is in breach of sanctions laws, or where payment of a claim, or the provision of any other insurance or reinsurance services, would put (or risk putting) the Club in breach of such laws.

The Regulation does not prohibit the provision of insurance or reinsurance cover to non-Iranian entities in respect of shipping operations which do not involve transport of Iranian oil or other prohibited goods. The current insurance arrangements of such entities remains fully in force, and there has been no suggestion that an Iranian oil lifting would result in termination of cover. The position is simply that no recovery could be made in respect of any claim relating to such a voyage.

The fact that an indemnity of the owner would be excluded does not affect the validity of the CLC certificate. In practice P&I cover is subject to various exclusions which potentially affect the member's right of indemnity, but which do not prevent the issue of CLC certificates because it is clear that such exclusions could not affect the insurer's liability to direct claims under Art.VII.8 of the Convention.

IG Clubs have adopted the position that in the event of an oil pollution incident occurring during the transport of Iranian oil, payment of a direct claim by an EU Club pursuant to a Blue Card and CLC certificate would be prohibited by sanctions legislation. It does however remain that they could be compelled to pay in such a case as a result of a decision of a competent court directing the Club to pay. There would then be a risk to the owner that the Club may seek reimbursement from him of any amounts which it has been liable to pay under CLC. Although Club rules do not necessarily specify that the owner is liable to pay an indemnity in such circumstances, there are grounds in English law on which such a claim could be made after an insurer has discharged the owner's liability to third parties despite the absence of cover.

Charterparty clauses

Many charterparties contain clauses in common use which require tankers to carry on board certificates of insurance as required by CLC, and in some cases to maintain P&I insurance with an International Group Club including cover at the maximum available level against pollution risks

For most tanker owners these charterparty requirements are not unduly onerous, as of their own volition they have arranged entry of their ships in IG Clubs for the standard cover against oil pollution risks.

Although the sanctions exclusions in Club cover would not affect the validity of CLC certificates, they would impair rights of recovery from the Club in respect of any claims above the CLC liability limit, and to this extent the vessel would not be protected by standard oil pollution liability cover whilst carrying oil of Iranian origin.

Non-EU Clubs and other non-IG insurers are currently unable to provide cover at an equivalent level to standard IG Club cover, mainly due to the absence of sufficient reinsurance facilities. In these circumstances, unless some other equivalent insurance facility is devised, it would appear to be impossible for such cover to be obtained.

This gives rise to the question whether charterers can validly order vessel to undertake voyages which would not be subject to the usual terms of cover. They might argue that standard clauses of this kind are agreed for their own benefit, but owners could reasonably say in response that these provisions reflect a common intention of both parties as to the appropriate insurance arrangements. On that basis it must be open to question whether it is open to a charterer simply to the owner's insurance warranties in order to justify orders to undertake a voyage which would not be covered.

These and other questions remain at the moment without any clear answer. What has been called the "sanctions landscape", and in particular the focus on marine insurance arrangements, is likely to become increasingly complex for Clubs and shipowners for the foreseeable future.