The Swedish Club

Libya Sanctions – FAQ

25 January 2012

In this Member Alert, the Club considers the sanctions currently in place against Libya, and the effects that these sanctions may have on both the shipping industry in general, and on Members in particular. Members should note that whilst the relevant sanctions regimes have been amended, and several key entities removed from the various asset freeze lists, the regimes are still in place. Sanctions will apply in respect of dealings with those persons/entities who remain on the asset freeze lists.

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3. FREQUENTLY ASKED QUESTIONS

3.1 What steps can Members take to avoid falling foul of sanctions legislation?

It is essential that Members carry out thorough investigations where there is a possibility that interests related to a country against which sanctions are in force may be involved in a transaction. This is still the case with Libya even though the sanctions are now starting to be lifted. They have not yet been lifted wholesale. The Club suggests that the following points, in particular, are considered:

a) Identify all parties involved in the transaction. This may include Charterers, customers, suppliers, receivers, ultimate end users and financial institutions. Members should also make themselves aware of any third parties or middlemen, as well as the ultimate beneficial owner of the vessel/s in question. All of these parties must be investigated thoroughly.

b) Identify the precise nature of the cargo to be transported. Members should also investigate the ultimate use to which the cargo will be put. Pleading ignorance of this is unlikely to provide a defence to a breach of sanctions legislation.

c) Regularly check the published lists of parties with whom trade is prohibited or restricted. The relevant websites are listed later on in this Alert.

d) Ensure that all contracts, for example charterparties, are drafted to permit the refusal by Owners of orders that require trading with entities who are targeted by sanctions legislation, and permit a refusal of cargo which will put any party at a risk of a breach of sanctions legislation.

If in any doubt as to whether a particular contractual arrangement will result in a breach of any sanctions legislation, the Club recommends that Members seek legal advice.

3.2 What resources are available to enable Members to stay up to date on sanctions legislation?

Resource centre for UN sanctions: http://www.un.org/sc/committees/1970/index.shtml

US Department of the Treasury Resource Centre for Libya Sanctions: http://www.treasury.gov/resource-center/sanctions/programs/pages/libya.aspx

The texts of all of the EU Regulations can be accessed through the UK Treasury website:
http://www.hm-treasury.gov.uk/fin_sanctions_libya.htm

The UK Treasury also maintains a list of all designated persons and entities under the EU sanctions regime, which is regularly updated:
http://hm-treasury.gov.uk/d/libya.htm

3.3 What options are available to Owners if following Charterers' orders will put them in breach of sanctions legislation?

Charterers may order a vessel to take action which may put Owners in breach of one or more provisions of the sanctions legislation currently in force. However, the question of whether Owners will be entitled to refuse Charterers' orders is not a straightforward one.

The imposition of sanctions is likely to have an impact on Charterers as well as Owners. It may, therefore, be worth highlighting the risk that Charterers would fact by ordering the vessel on such a voyage. This could be sufficient to lead to an agreement between Owners and Charterers to revise the voyage orders. Charterers may, nevertheless, restate their original orders. If there is no express exclusion in the charterparty preventing them from doing so, Owners are left with a number of arguments.

It may be possible to argue that Charterers' order should be considered illegal: the majority of charterparties only permit vessels to carry lawful merchandise in lawful trades. Under English law, for example, a voyage order would be illegal not only if it is contrary to English law, but also if it illegal under the law of the vessel's flag state or the law of the "place of performance" of the charterparty. US sanctions, for example, require the freezing of the assets and funds of listed persons/entities. As a result, it could be argued that if hire payments are to be made for the benefit of such persons/entities and are routed through the US then the payment of hire is effectively prohibited by US legislation.

The Club recommends that Members seek legal advice if they are at all concerned that particular voyage orders may result in sanctionable conduct.

3.4 What steps should Members take when negotiating charterparties to avoid falling foul of sanctions legislation?

Although it is impossible to guarantee protection at all times from all sanctions legislation, there are some measures which Owners can take when negotiating new charterparties which will go some way to protecting them.

Firstly, should Owners wish to avoid calling at Libyan ports, the Club suggests that Libya be excluded from the trading limits in the charterparty. Libyan port authorities have been removed from the lists of entities with whom it is prohibited to do business, however Members may still wish to give consideration to this issue.

Owners can also protect themselves by incorporating specific wording into the charter (and, where appropriate, the sub-charter) to provide a mechanism to deal with a situation when orders are given by Charterers that would breach sanctions legislation. BIMCO and Intertanko have both published a standard form of wording for time charters, which can be found on their respective websites.

The Intertanko clause has a broad scope and is generally drafted in favour of Owners, as all that is required for a trade to be deemed unlawful is that it "could" expose the "vessel, its Owners, Managers, crew or insurers" to a "risk" of sanctions. There is, however, the possibility that parties could disagree as to whether the "trade" in question could lead to such a risk. Owners may wish to expressly amend the clause to provide that it is for Owners to decide, in their reasonable judgment, whether such risks exist. Charterers, on the other hand, may wish to restrict the scope of the clause to trade which "does", in fact, expose Owners to risk.

BIMCO states that the objective of its clause is to "provide owners with a means to assess and act on any voyage order issued by a time charterer which might expose the vessel to the risk of sanctions. The test is one of 'reasonable judgment' by the owners in determining whether the risk of the imposition of sanctions is tangible".

The Club strongly recommends that such a clause be included in new charterparties, although legal advice should be obtained to ensure that the clause is in keeping with the other terms of the charterparty in question.

3.5 How will sanctions legislation affect the making and receipt of payments?

Prior to recent amendments to the sanctions regimes, the issue of making payments and getting paid was complicated by asset freezes and legislation limiting parties' abilities to deal with Libyan banks.

This is now likely to be less of an issue given that many of the prohibitions have been lifted in order to make assets and funds more readily available to the Libyan people.

However, the sanctions against Libya have not yet been lifted completely. There are still provisions in place which prohibit dealings with certain listed parties. As such, the Club still advises Members to be cautious when entering into commercial transactions with Libyan parties. If the party in question is at all connected to a listed party, then it may not be possible to make the payments necessary to complete the transaction.

Provisions in the sanctions legislation may well complicate the issues of paying and getting paid under charterparties and related contracts. They could, for example, result in funds passing through the US banking system being frozen, or penalties being imposed as a result of unauthorised payments being made.

In considering such issues, it is necessary to distinguish between cases where a Libyan party is refusing or is unable to pay, and cases where the funds are available but payments are prevented by sanctions provisions. In the former case, this is a private contractual matter, and should be resolved between the parties. In the latter case, the party who is expecting the payment should first investigate whether the transaction in question is covered by an existing licence, issued by the relevant authority, which will enable them to receive payment.

If the transaction in question is not covered by an existing licence, then the party may be able to apply for such a licence. In the UK, for example, an application should be made to HM Treasury. Under the EU Regulations, the competent authority of a Member State (as specified in Annex IV to the Regulation) may authorise the release of frozen funds or economic resources, or allow certain funds or economic resources to be made available, in very specific circumstances. These circumstances are specified at length in the Regulations.

If it is not possible to circumvent the problems, it may be necessary to look for other ways of making and receiving payment. This could be done, for example, via a source which is not a designated person or entity. Alternatively, funds could be routed through the banking system of a country which does not require funds to be frozen. Other options are corporate restructuring or routing the payments in a different way so as to circumvent the sanctions regimes. However, caution must be exercised as putting measures in place specifically to circumvent sanctions legislation may itself result in a breach of that legislation.

The Club recommends that Members seek legal advice if they are at all concerned about their ability to make or receive payments in respect of a particular transaction.

3.6 What are the penalties for a breach of sanctions legislation?

The penalties for breaching any of the sanctions legislation in place can be severe, although the precise penalties differ depending on exactly which provisions are breached. It is also important to remember the detrimental effect which a breach of one or more sanctions could have on a Member's reputation within the industry.

3.7.1 United Nations (General Observations)

Each Member State must make provisions for the penalties which are to apply to citizens and companies incorporated within its jurisdiction.

The enforcement measures and penalties put in place by the UK are considered as an example at 3.7.4, below.

3.7.2 United States

Breach of sanctions legislation carries both civil and criminal penalties. As regards the former, a party who violates a provision may be fined the greater of US$250,000 or an amount which is twice the amount of the transaction that forms the basis of the violation.

As regards criminal penalties, a person who "wilfully commits, wilfully attempts to commit, or aids or abets in the commission of" a violation may be convicted of a criminal offence and, on conviction, be fined not more than US$1,000,000. In addition, if the violation is committed by a natural person, that person may be subject to both a fine and/or imprisonment of up to 20 years.

Further, if property or assets belonging to blocked persons come into US jurisdiction, they may be frozen. Such measures could cause the effective forfeiture of cargo, freight or even vessels.

3.7.3 European Union

Although the EU Regulations are directly effective, each Member State must lay down rules on penalties which apply to infringement of the Regulations.

3.7.4 United Kingdom

Here we consider the various enforcement measures and penalties put in place by the UK, as an example of how the UN and EU sanctions regimes have been implemented.

UN Resolution 1970 was brought into English law by way of the Libya (Financial Sanctions) Order 2011 which came into force on 27 February 2011. This makes any breach of the UN sanctions legislation by any UK national, or by any company incorporated in the UK, punishable by imprisonment, a fine, or both.

As regards the EU sanctions regime, the relevant UK statutory instruments provide for criminal penalties, including up to two years' imprisonment and/or unlimited fines. The UK implementing legislation also specifically states that where a corporate entity commits an offence, culpable individuals (for example, directors) can be punished.
