Libya Sanctions
- Operational, Practical and Charterparty Issues

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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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2. OPERATIONAL, PRACTICAL AND CHARTERPARTY ISSUES

2.1 The effect on services central to the shipping industry

The sanctions imposed against Libya are less restrictive than those imposed against Iran and indeed are now becoming even less restrictive. However, they are still capable of having an adverse effect on various parts of the shipping industry.

The US Executive Order prohibits the provision of "funds, goods or services by, to, or for the benefit of" any person whose property and interests in property are blocked by the Order. The EU Regulations prohibit any party to provide, either directly or indirectly, "technical assistance or brokering services" related to equipment specified in the Regulations. Further, it is stated that no funds or economic resources shall be made available, whether directly or indirectly, to or for the benefit of the persons and entities listed in the Regulations.

Despite recent changes, these lists are still extensive. The key issue is whether the transaction in question concerns goods, persons or entities (or a combination of these) which are specifically named or listed in the sanctions legislation. If so, then providing any sort of service which will enable the sale and/or purchase of the goods, or which will benefit one of the persons or entities (whether directly or indirectly) is likely to run the risk of incurring penalties under sanctions legislation.

All parties involved in commercial shipping transactions, not just Owners and Charterers, should fully investigate the transaction and the parties that they will be dealing with.

2.2 Owners' position where Charterers' orders amount to a breach of sanctions

Where Charterers wish to order a vessel to any country against which sanctions are in force, to discharge goods specified in any sanctions legislation, whether Owners will be entitled to refuse such orders is not a straightforward question. As sanctions are likely to impact on Charterers as well as Owners, it may be that highlighting the risk that Charterers would face by ordering the vessel on such a voyage would be sufficient to lead to an agreement between Owners and Charterers to revise the voyage orders.

If, however, Charterers restate their original orders, and there is no express exclusion in the charterparty preventing them from doing so, Owners would be left with a number of arguments.

It may be possible to argue that such an order should be considered illegal as the vessel is only permitted to carry lawful merchandise in lawful trades. Under English law a voyage order would be illegal not only if it is contrary to English law but also, it is thought, if it is illegal under the law of the vessel's flag state or the law of the "place of performance" of the charterparty. Looking at US sanctions for example, which may require the freezing of assets and funds, it could be argued that if hire payments are routed through the US then the payment of hire is effectively prohibited by US legislation. Further, such funds could be frozen on receipt by a US bank even where the parties themselves are not US persons.

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

2.3 Frustration of the Charterparty

The doctrine of frustration allows a party to treat a contract as discharged if there has been a sufficient change in circumstances, through no fault of that party, which would render performance under the contract "radically different" to that which was originally contemplated.

It could be arguable that requiring an Owner to comply with an order that could result in the imposition of sanctions is a sufficiently "radical" change of circumstances to frustrate the contract. However, it is the Club's view that such a finding would be rare, as it is the nature of the contract itself which results in the imposition of sanctions, and Members should not seek to rely on such an argument without seeking legal advice.

An argument which may have more chance of success is that of supervening illegality, which is a recognised cause of frustration. Where freight or hire is to be routed through the US, for example, there might be grounds for arguing that the charterparty has been frustrated in light of the risk that such payments would be frozen.

However, this is a difficult area of law and the English courts at any rate are generally reluctant to find that contracts have been frustrated. The Club recommends that Members seek legal advice if they are in any way concerned that Charterers' orders may result in sanctionable conduct.

2.4 Issues affecting payments

Prior to the 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.

If such issues arise, it may be necessary to look for other ways of making and receiving payment, for example via a source which is not a designated person or entity. However, caution must be exercised as deliberately making payments in such a way so as to circumvent sanctions regimes could itself amount to a breach of those regimes. 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.

2.5 Negotiating future charterparties

There are measures which Owners can take in negotiating new charterparties which will go some way to protecting them from the effects of sanctions legislation.

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. BIMCO and Intertanko have both published a standard form of wording.

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 state that the objective of their 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 charterparties, although legal advice should be obtained to ensure that the clause is in keeping with the other terms of the charterparty in question.

2.6 Cargo issues

There has been an on-going debate about so-called "dual use" cargoes. These cargoes consist of items that could be said to have both civil and military uses. Such cargoes could include raw materials, computer and mechanical components, manufacturing items and electronic systems. A particular cargo could therefore be prohibited by certain sanctions legislation, even though the use to which those particular goods will be put is not itself sanctionable.

Generally, carriers are not the end user of the goods carried, and in the past they have not needed to know the ultimate use to which any particular cargo will be put. However, in the context of trade with countries which are the target of sanctions legislation, carriers must now make diligent and reasonable enquiries as to the parties they deal with, and the possible end use of their cargos.
