Iran sanctions – challenging the system

An interview with Maryam Taher (M. Taher & Co, London) on recent developments in relation to the EU's Iran sanctions regime. In the second part of the interview we ask her about her practical experience of acting for overseas shipping interests with cases in the Iranian legal system.

Iranian entities such as the shipping lines, notably the IRISL, and banks, such as Banks Mellat and Saderat, have been key targets for international sanctions that are intended to put pressure on Iran to end its nuclear and ballistic missile programmes.

EU SANCTIONS

i) The Bank Mellat and The Bank Sanderat cases

The judgments of the General Court in *The Bank Mellat* and *The Bank Sanderat* cases have dramatically transformed the legal landscape in relation to the EU's sanctions regime against Iran. Maryam Taher says that the Court was

"heavily critical of the Council for not giving proper reasons for imposing sanctions against the banks and a general failure to produce evidence to substantiate its case. It is a fundamental principle of European law that before imposing measures against an entity or an individual the Council must provide specific reasons as to why it considered it was necessary to adopt those measures so that those affected have the opportunity to respond."

She explains that the General Court held that the Council must assess the relevance and validity of the information and evidence submitted to it by a Member State or by the High Representative of the Union for Foreign Affairs and Security Policy. The Court observed in *The Bank Mellat* case that there was nothing in the Court file to suggest that the Council checked the relevance and the validity of the evidence submitted to it concerning the bank before making its decision to list the Bank. The Council has appealed *The Bank Mellat* judgment.

We suggest to her that one of the problems is that it is sometimes necessary for the Council to rely on information or evidence in open court provided by the security services, so that it is difficult to test the reliability of such evidence without compromising the safety of agents. She replies that while she understands why such evidence must remain confidential the EU Court has to consider the issue of classified and confidential evidence. "The Court's approach at present is that it does not uphold a designation based on evidence that the EU Council will not disclose. Unless a mechanism is found to consider such evidence, the Court's present approach is right as otherwise implications on the targeted individual or entity's right of defence would be grave. The absence of WMD in Iraq shows that even a sophisticated intelligence agency can get it wrong." She says that the Supreme Court in England has recently considered this problem in *The Bank Mellat* case (see opposite).

ii) Effectiveness is not the only issue

We suggested that sometimes it might be necessary for the authorities to use a broader, but perhaps effective, approach on the basis that a wider net is more likely to catch companies quietly looking to subvert the sanctions regime. Maryam Taher emphasises that the courts have made clear that the Council must have regard not simply to effectiveness. As the Advocate General remarked in his opinion in *Tay Za* which she reads in full:

"I do not believe that everything may be sacrificed on the altar of the effectiveness of the restrictive measures. By this I mean, that the very thing that gives the European Union its added value, that distinguishes it from the authoritarian regime it fights against, is the implementation and defence of a union governed by the rule of law. It would be easier, and certainly more effective, to establish a system of sanctions applicable to the whole of the Union of Burma. By taking the approach of targeted sanctions, the EU has opted for a system of sanctions which may be less effective but which is undeniably fairer. Of course, if they are to produce the desired effects, the sanctions have to be as effective as possible. Absolute effectiveness, however, must fall by the wayside, the very fallibility of the restrictive measures testifying to the fact that, in the legal system of the European Union, it is the rights of individuals that are paramount." (*Pye Phyo Tay Za v. Council*)

She says that the words of Advocate General Mengozzi, encapsulates why it is vital that the EU should maintain its reputation as possessing a civilised system, even though the temptation might be to take a more authoritarian approach.

She explains the Advocate General's comments have been cited by the Court in other cases challenging EU sanctions. Her firm has issued proceedings in respect of over 130 entities and individuals now before the European Court. Many of the entities are shipping companies. However, one of the cases, a group action, has ended because "most of the shipping lines involved have gone bankrupt as a result of the sanctions."

iii) Different considerations in relation to individuals

In relation to the individuals subject to the restrictive measures, Maryam Taher points out that Advocate Mengozzi emphasised in his recent opinion in *Case C-376/10 P Pye Phyo Tay Za*, that different considerations apply to the designation of natural persons and legal persons. He warns against the dangers of applying any kind of "presumptions" of ownership or control to individuals, as opposed to companies. He noted that the aim of restrictive measures is to target those who are responsible for nuclear proliferation (in the case of Iran), which may necessitate including subsidiary companies in certain circumstances. By contrast, natural persons, unlike legal persons, should be targeted on the basis of their own responsibilities, and not (for example) because of their position in a family or in a company.

iv) Problems for IRISL

Maryam Taher says that the situation has been exacerbated by a number of misconceptions.

"For instance it has been widely reported that IRISL is an Iranian state-owned company. In fact, the company is only 20 per cent controlled by a state regulated pension fund."

But is it not possible that an authoritarian regime might exercise subtle and devious means of control over companies to achieve its aims by stealth? She replies:

"IRISL is an independent company which is making every effort, not even unwittingly, to be used to breach the sanctions regime". The EU Council has alleged that "IRISL has been identified as being engaged in, deliberately associated with, or provided support for Iran's proliferation-sensitive nuclear activities; or development of nuclear weapon delivery systems. IRISL has stated in its Application that such an allegation is incorrect, unsubstantiated and unjustified and that it has never carried or would knowingly carry any cargo that may give rise to proliferation concerns or undertake any other activity supportive of nuclear proliferation. IRISL has also stated that it has never been asked by the government to do so."

In her view it is unfortunate that a major shipping line might be paralysed as a result of such unsubstantiated allegations.

SUPREME COURT OF THE UK: BANK MELLAT CASE

Maryam Taher explains this landmark case. *The Bank Mellat* case is the first ever closed hearing in the history of the Supreme Court of the UK.

1. The UK Government made an Order under the Counter Terrorism Act 2008 prohibiting those operating in the financial sector in the UK from doing business with Bank Mellat. The UK Treasury made the Order on the grounds that Bank Mellat was alleged to have provided banking services to a UN listed organisation connected to Iran's proliferation sensitive activities and had been involved in transactions related to financing Iran's nuclear and ballistic missile programme. The substantive appeal concerned whether directions made by the Treasury under Schedule 7 of the Counter-Terrorism Act 2008 were in breach of natural justice and/or Article 6 ECHR and/or the procedural obligation in A1P1 ECHR.

2. The Court of Appeal gave a closed decision refusing to set aside the UK Government's Order/ direction.

3. The High Court and Court of Appeal rejected the Bank's arguments that the Order was disproportionate, discriminatory, and procedurally unfair ([2012] QB 101).

4. Prior to the Supreme Court hearing, the General Court of the European Union annulled the Bank's designation by the EU on the grounds that the reasons given for its designation were too vague and unsupported by evidence.

5. Bank Mellat appealed against the Court of Appeal's decision in which secret evidence was considered but not disclosed to the Bank.

6. On 21 March 2013, the UK Supreme Court heard Bank Mellat's appeal against the Court of Appeal's decision. Bank Mellat had challenged the UK Government's application for the Supreme Court to consider the closed judgment of the High Court.

7. The Supreme Court gave a preliminary ruling, holding by a majority of 6 to 3 that it had jurisdiction to consider the closed judgment and to hold a closed hearing if necessary. It decided with reluctance, also by a majority, that it could not be confident of doing justice in the appeal without considering the closed judgment.

8. The Supreme Court held a closed hearing on 21 March for the first time in its history where Bank Mellat, although represented by a special advocate, itself could neither see the material nor attend the closed hearing.

9. The Court has not decided yet whether to give both a closed and open judgment.

COMMENT

By contrast, at present, there is no procedure for dealing with secret evidence in the European Court. Therefore, the EU Court will not allow the EU Council to uphold a designation on the sanctions list of an entity or individual on the basis of secret evidence that is not disclosed to the Court. We understand the Court is looking into whether it should amend its rules going forward.

"Their reasoning is circular. In the Council's view the development of Iran's proliferation-sensitive activities depends on the services provided by shipping companies such as IRISL and its subsidiaries for transporting the equipment and materials which are required for that purpose. What they say therefore is that the Iranian State wishes to carry nuclear material to its plants and needs a shipping line to carry that material – it, therefore, follows that they will naturally use the Iranian shipping line! This is pure fantasy. If the Iranian government wishes to bring an import from, say, Eastern Europe why would it draw attention to this by shipping the cargo in an Iranian vessel as opposed to the usual; namely a vessel from the exporting state? The Council has produced no evidence that IRISL has been part of a systemic attempt to import prohibited materials. Sanctions sometimes may be essential. They sometimes may work. For them to be effective they must be smart and targeted."

v) Classification as an emanation of Iranian State

The Council has presented its case against the various entities in Iran, such as Bank Mellat and IRISL, on the basis that these entities should be classified as emanations of a non-EU State and arms of the Iranian Government and as such, therefore, not entitled to invoke fundamental rights and freedoms, enshrined in the European Convention on Human Rights. These lines of arguments were dismissed by the Court in the recent *Bank Mellat* and *Bank Sanderat* cases. The General Court held that the Bank was not an emanation of the State but also, "very importantly, went on to hold that EU law contained no rule preventing legal persons that are emanations of non-Member States from taking advantage of fundamental rights protection and guarantees."

Maryam Taher says: "The fact that IRISL is a private company and not a Government entity has been confirmed by the judgment of the European Court of Human Rights referred to by the Court in its January 2013 judgment in *Bank Mellat* at [41]. The European Court of Human Rights held that IRISL is financially and legally independent of the State and that it is run as a commercial business – at [80] and [81]."

HM Treasury consents

We asked how the system of HM Treasury consents was working in practice. Maryam Taher responds that:

"The system is working well. The Treasury has been quite helpful. The speed of issuing a licence has improved significantly. It is necessary for us to obtain a licence from the UK Treasury authorising us to receive monies from sanctioned organisations as such transactions would otherwise be prohibited under the sanctions regime. The Treasury Licence allows us to pay disbursements, such as Counsel's and arbitrators' fees and Court fees, on behalf of the sanctioned clients. The Treasury Licence contains conditions that need to be met, for example, when we submit an invoice to a sanctioned client or when we receive monies covered by the licence then it is necessary to inform the Treasury within a certain period. We understand the underlying purpose of the Treasury's requirements – to freeze assets and resources of sanctioned entities and individuals that in the Council's view might otherwise be used to assist prohibited activities under the sanctions regime. It is the authorities' way of keeping an eye on what the monies are used for. There are exceptions in the sanctions for listed individuals in respect of payments necessary for the daily needs of individuals such as food, transport, mortgage payments and medical care."

Acting for overseas shipping interests in the Iranian legal system – an impossible challenge?

As well as acting for Iranian organisations in challenging aspects of the EU sanctions regime, Maryam Taher has also been involved in conducting a number of cases for foreign interests in Iran. These have included cases involving grounding, piracy and general average. She admits to being very apprehensive about the outcome of these cases at the outset.

"The first priority was to establish a good team of local Iranian lawyers that could be managed from London. We now have a very experienced team in Tehran led by a lawyer who has served as a judge too, so he is very familiar with the workings of the Iranian Courts. Having had our fingers burnt several times before forming the present team, we are now very happy with this team. We are very pleased with our successes before the Tehran and Bandar Abbas courts."

i) Panel of Experts

However, Iranian Courts, similar to many other jurisdictions, have not developed the same level of specialist Admiralty expertise as in London. For instance the application of international instruments such as the York-Antwerp Rules would not be familiar territory to the courts. The Iranian system provides for the court to seek the advice and assistance of a panel of experts when necessary. The judge is entitled to refer the matter, in the first instance, to one expert then to panels of 3, 5 and up to 15 experts until the parties and the judge are satisfied with the report provided by the experts. Each party also has a right to apply to the court to refer the matter to experts.

In one of her cases in the Tehran Court the other side forcefully submitted that certain provisions of the Iranian Civil Code applied in respect of the jurisdiction issue despite the fact that the contract provided for English law and jurisdiction. The judge referred the matter to a panel of experts. "The experts report supported our argument," Maryam Taher says.

But does not referring the matter to panels of experts slow the case down? Maryam Taher replies:

"Obtaining expert evidence in the form of, for example, expert

witness statements is common in other courts too, including our system here. The appointed expert carries out detailed site visits from, for example, when the vessel arrived and discharged her cargo, interviews all concerned including the port authorities, warehouse operators etc and speaks many times to both parties before preparing his report – there is a certain period of time for the expert (s) within which to prepare and file their report to the Court but they can apply to the Court for an extension of time if necessary. One of our recent cases for a major P&I Club client, in respect of which the Court in Bandar Abbas appointed an expert, the entire Court process took only 5 months - a very speedy outcome indeed."

ii) General impressions

Generally she was impressed by the Iranian legal system in operation:

"While we had heard of situations that local lawyers often pleaded their cases in terms of local interest, national identity and religious duty the judges were professional and seemed most concerned about the reputation of their Courts and were determined that foreign interests received a fair hearing. During the hearing of one of our cases when I was present in Court together with our correspondent lawyer, when there was confusion on a certain point, the judge even allowed me to informally explain a point regarding the interpretation of one of the provisions in an international convention, once he checked that the lawyer on the other side had no objection. I do not have a right of audience in Iranian courts."

However, notwithstanding being allowed her informal intervention in court, she was obliged to conform to a strict dress code in court. Although she did not wear the traditional chador (literally 'tent') she was obliged to wear a very long thick black coat, trousers, thick socks and a large black scarf covering all her hair - and all of this in the middle of a very hot August.

UPDATE

Following the interview, Maryam Taher provided an update on recent developments:

"IRISL's case was heard on 23 April 2013 in the General Court in Luxembourg. We are awaiting the decision of the Court hopefully before the end of the year. The individuals' case will be heard on 30 May 2013. Other clients have been sanctioned because they are said to be "owned" or "controlled" by IRISL. Simply stating "owned or controlled" will not do in our view. That this is insufficient is clear from the judgment of the Grand Chamber of the Court of Justice in *Melli Bank Plc* and from *CF Sharp Shipping*. In our view, the Council must perform a case by case evaluation of the degree to which entities are owned and controlled by a parent which is itself identified as being engaged in nuclear proliferation."

COUNCIL REGULATION 1263/2012

Maryam Taher briefly explains the further restrictive measures contained in Council Regulation 1263/2012

Services to Iranian vessels

Article 37a of the Regulation now prohibits, with effect from 15 January 2013, the provision of various services to oil tankers and cargo vessels which are Iranian flagged or are owned, chartered, or operated, directly or indirectly, by an Iranian person, entity or body.

Bunkers

The Amending Regulation has expanded the exceptions to the prohibitions on the import, purchase and transport of Iranian crude oil and petroleum products. There are, however, limited exceptions provided by Article 12(1) of the Regulation in relation to bunker oil originating or exported from Iran as long as it is produced or supplied by a country other than Iran and has been purchased for vessel propulsion. In the event that a vessel has entered into Iranian waters under force majeure, the regulation permits purchase of Iranian bunker oil for vessel propulsion. The 20 days' notice requirement to the relevant competent authority has been removed in relation to these new exceptions.

Vessels used to store Iranian oil

Article 37b expressly prohibits (subject to limited exceptions on certain specific pre-23 January 2012 contracts and oil or petroleum products exported from Iran prior to that date) making vessels designed for the purpose of storage of oil and petrochemical products available to any Iranian person, entity or body or to anyone if the vessel is to be used for the carriage or storage of Iranian oil or petrochemical products.

There are also other provisions relating to:

Key equipment and technology for key sectors of the oil and gas industry.

Key naval equipment and technology: See Article 10a.

Natural gas: see Article 14a.

Graphite and raw or semi-finished metals: see Article 15a.

The Amending Regulation also unified a series of financial restrictions regarding dealings with the Iranian banking sector across the European Union and provided slightly more liberal restrictions than the previous position: see Article 30a.

CONCLUSION

The Amending Regulation further tightens the EU's sanctions against Iran as it significantly reduces permissible trade. The restriction on money transfers between the EU and Iran introduces new legal, compliance and practical barriers to trade with Iran. We understand there will be further restrictions introduced in June this year [2013].