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Around the World: Clash of the Sanctions*

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What should a company do when an entity on the E.U.’s sanctions lists for Iran successfully challenges its inclusion on that list, but remains on the U.S.’s OFAC List of Specially Designated Nationals and Blocked Persons (the “SDN List”)?

This question is one brought into clearer focus by the 13 decisions of the General Court of the European Union handed down on Friday, September 6, 2013, and the 2 decisions handed down on September 16, 2013.¹

These 15 decisions arose from applications made by 34 separate sanctioned entities or individuals, all but three of which are also included on the SDN List. While four of the applications, including two relating to Bank Melli Iran, and one to Europäische-Iranische Handelsbank (spelled Europaeische-Iranische Handelsbank on the SDN List) were unsuccessful, in the other cases the General Court struck down the listings.

The list of successful applicants (also showing their jurisdictions of incorporation) is:

- Bank Refah Kargaran, Iran
- Bushehr Shipping Company Ltd, Malta
- Export Development Bank of Iran, Iran
- Good Luck Shipping Company, UAE
- Hafize Darya Shipping Lines, Iran
- IRISL Club, Iran*
- IRISL Europe GmbH, Germany
- IRISL (Malta) Limited, Malta
- IRISL Marine Services and Engineering Company, Iran
- ISI Maritime Limited, Malta
- Irinvestship Limited, UK
- Khazar Shipping Lines, Iran
- Leading Maritime Pte Ltd, Singapore
- Marble Shipping Limited, Malta
- Naser Bateni
- Persia International Bank PLC, UK
- Post Bank of Iran, Iran
- Safiran Payam Darya Shipping Lines, Iran
- Shipping Computer Services Company, Iran
- Shomal Cement Company, Iran

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¹ Case T-8/11, Bank Kargoshaei and others v. Council of the European Union, 2013 (ECJ EUR-Lex (September 16, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=141422&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1386786>, and Case T-489/10, Islamic Republic of Iran Shipping Lines and others v Council of the European Union, 2013 (ECJ EUR-Lex (September 16, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=141406&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1386786>).

- Islamic Republic of Iran Shipping Lines, Iran
- Iran Insurance Company, Iran
- Irano Misr Shipping Company, Iran
- Soroush Saramin Asatir Ship Management Company, Iran
- South Way Shipping Agency Company Limited, Iran*
- Valfajr 8th Shipping Line Company, Iran

The list of unsuccessful applicants was:

- Bank Kargoshaie, Iran
- Bank Melli, Iran,
- Bank Melli Iran Investment Company, Iran
- Bank Melli Iran Printing and Publishing Company, Iran
- Cement Investment & Development Company, Iran
- Europäische-Iranische Handelsbank, Germany
- Iranian Offshore Engineering & Construction Company, Iran*
- Mazandaran Cement Company, Iran
- Melli Agro-Chemical Company PJS, Iran
- Shomal Cement Company, Iran

The bases for success varied from applicant to applicant. In the cases of Post Bank Iran, Iran Insurance Company, Good Luck Shipping and the Export Development Bank of Iran, the General Court held that the Council of the European Union was unable to provide sufficient evidence that these entities provided support to Iran's nuclear program.²

In the cases of Naser Batani, Persia International Bank, and Iranian Offshore Engineering & Construction Company, the General Court held that the reasons for listing given by the Council of the European Union did not, in and of themselves, substantiate a listing: for Mr. Batani, this was his directorship of a designated entity;³ for Persia International Bank, it was

* indicates omission from the SDN List

² Case T-13/11, *Post Bank Iran v. Council of the European Union*, 2013 (ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?docid=140733&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=5274300>; Case T-12/11, *Iran Insurance Company v Council of the European Union*, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140723&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=5275098>; Case T-57/12, *Good Luck Shipping LLC v Council of the European Union*, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140732&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=5275571>; and Cases T-4/11 and T-5/11, *Export Development Bank of Iran v Council of the European Union*, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140727&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=5275941>. This decision is currently only available in French.

³ Cases T-42/12 and T-181/12, *Naser Batani v. Council of the European Union*, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=>

its 60% ownership by a designated entity;⁴ and in the case of Iranian Offshore Engineering & Construction Company it was three denials of export licenses.⁵

For Bank Refah Kargaran, the General Court held that the Council was unable to provide any evidence to support its basis for listing—that this bank had taken over the operations of another listed bank.⁶

As yet, it is unclear whether the European Council will appeal any or all of these decisions to the Court of Justice of the European Union. It has two months in which to do so. As stated in the General Court’s press release of September 6:

“The Court’s annulment of the acts concerned will not take immediate effect. The effect of any acts that have been annulled will be maintained until expiry of the period for bringing an appeal . . . or, if an appeal is brought, once that appeal is dismissed. During that period, the Council may remedy the infringements established by adopting, if appropriate, new restrictive measures with respect to the persons and entities concerned.”⁷

For the moment therefore, the successful applicants remain listed, and are therefore subject to the sanctions.

In the recent past, the European Council has tended to appeal judgments of this kind, and/or also issue new regulations containing more detailed, or different grounds to re-list applicants who have successfully challenged their listing. For example, on May 28, 2013 the General Court struck down the listings of certain Tunisian individuals under the Tunisian sanctions regime;⁸ and then on July 30 (just before the expiry of the two-month appeal period), the same individuals were re-listed under Council Implementing Regulation (E.U.) No.

140726&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=5276389. This decision is currently only available in French and German.

⁴ Case T-493/10, Persia International Bank PLC v. Council of the European Union, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140735&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=5276843>.

⁵ Case T-110/12, Iranian Offshore Engineering & Construction Company v. Council of the European Union, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140724&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=5277319>. This decision is currently only available in French and Spanish.

⁶ Case T-24/11, Bank Refah Kargaran v. Council of the European Union, 2013 ECJ EUR-Lex (September 6, 2013), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=140730&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5277656>.

⁷ Press Release, General Court of the European Union, No 99/13, The General Court annuls the acts of the Council freezing the funds of seven companies and one person in connection with the restrictive measures taken against Iran with the aim of preventing nuclear proliferation (Sept. 6, 2013), available at http://curia.europa.eu/jcms/jcms/P_103674/.

⁸ The three cases are: Case T-187/11, Mohamed Trabelsi and others v. Council of the European Union, 2013 ECJ EUR-Lex (May 28, 2013), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011TJ0187:EN:HTML>; Case T-200/11, Fahed Mohamed Sakher Al Matri v. Council of the European Union, 2013 ECJ EUR-Lex (May 28, 2013), available at [http://eur-lex.europa.eu/Notice.do?val=729048:cs\(=en&list=729048:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=al+matri~\);](http://eur-lex.europa.eu/Notice.do?val=729048:cs(=en&list=729048:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=al+matri~);) and Case T-188/11, Mohamed Slim Ben Mohamed Hassen Ben Salah Chiboub v. Council of the European Union, 2013 ECJ EUR-Lex (May 28, 2013), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:145:0038:01:EN:HTML>.

735/2013.⁹

If such a judgment of the General Court is not appealed and the entity or individual in question is not re-listed, the effect of the General Court's judgment is retrospective, in that it will effectively operate to remove the entity or individual's name from the listing regulation with effect for the entire period from its promulgation until the date of the General Court's decision.

In the case of the successful applicants linked to IRISL, on October 10, 2013 the E.U. published Council Regulation 971/2013.¹⁰ This new Regulation not only effectively overturned the Court's decision, by extending the criteria for inclusion on the sanctions list, but also broadened the criteria specifically to include all subsidiaries of IRISL, as well as agents of IRISL, insurance and service providers to IRISL and its subsidiaries and agents, using the wording "a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL) or a natural or legal person, entity or body acting on its behalf, or a natural or legal person, entity or body providing insurance or other essential services to IRISL, or to entities owned or controlled by it of acting on its behalf."

None of this alters the inclusion or otherwise of an entity or individual in OFAC's SDN List. Companies need to remain vigilant in screening counterparts, customers and others for inclusion in that list, as well as in the E.U.'s own lists (best accessed through H.M. Treasury's (from what we can see) vigilantly-maintained list in the U.K.—especially as H.M. Treasury's list also includes individuals and entities listed through the U.K.'s domestic legislation).¹¹

In these times of significant enforcement efforts regarding sanctions laws on both sides of the Atlantic,¹² it has never been more important to navigate the divide between the U.S. and E.U. sanctions regimes.

The complexity of successfully achieving this was amply illustrated by a recent OFAC enforcement decision against American Express Travel Related Services Inc. ("TRS").¹³ TRS was fined \$5,226,120 in July 2013 because its overseas offices allegedly facilitated bookings of travel to and from Cuba. According to OFAC's "Enforcement Information," there were a number of aggravating factors in reaching the final penalty at the time of the apparent violations, including alleged inadequacies in TRS's compliance program to detect and prevent Cuba Travel bookings, particularly from countries that had adopted antidote measures.

The "antidote measures" in question are rarely-enforced E.U. Regulations from 1996 that prohibited compliance with the U.S.'s then sanctions against Cuba, Libya and Iran.¹⁴ These

⁹ See Council Regulation (EU) No 735/2013 (OJ L 204, 31.7.2013, p. 23).

¹⁰ See Council Regulation (EU) No 971/2013 (OJ L 272, 12.10.2013, p. 1).

¹¹ Available at <http://hmt-sanctions.s3.amazonaws.com/sanctionsconlist.htm>.

¹² See Gibson Dunn, 2012 Year-End Sanctions Update, available at <http://www.gibsondunn.com/publications/Pages/2012-YearEnd-Sanctions-Update.aspx>, and Gibson Dunn, 2013 Mid-Year Sanctions Update, available at <http://www.gibsondunn.com/publications/Pages/2013-Mid-Year-Sanctions-Update.aspx>.

¹³ Available at: http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20130722_american_express_trs.pdf.

¹⁴ Council Regulation No. 2271/1996. The only known enforcement of these regulations occurred in Austria

regulations were implemented differently across the E.U.'s Member States. Some countries chose to enforce these laws by means of administrative penalties only; others, including the U.K. through its *Extraterritorial US Legislation (Sanctions against Cuba, Iran, Libya) (Protection of Trading Interests) Order* (SI 3171/1996), chose to make compliance with the U.S. sanctions in question a criminal offence.¹⁵

In fining TRS OFAC considered it to be an aggravating factor that TRS allegedly had taken bookings in countries where to do otherwise would itself have been an offence. OFAC made clear its choice that it would rather American companies break laws in E.U. member states than U.S. laws. The choice is not one to be wished on any company.

A further invidious choice awaits a company faced with a contractual counterparty which becomes designated in both the E.U. and the U.S. It might be thought that it would be possible to rely on arguments such as *force majeure*, frustration or illegality to decline to fulfil any contractual obligations with such an entity. A recent series of decisions in the English courts, however, have required that a company take all possible steps to comply with an existing contract with a sanctioned entity (including making any available licence applications to H.M. Treasury) before being able to walk away.¹⁶

Under this case law, a company wishing to comply with an E.U. law to stop trading with a sanctioned entity must first make an application to the relevant E.U. or member state authorities (in the case of the U.K., H.M. Treasury) to allow it to continue to trade with that sanctioned entity. This is not a happy result. Moreover, an application for permission to continue to trade with a sanctioned entity be behaviour which OFAC or other U.S. enforcement agencies considers problematic. Further, what is the company to do if its licence application (made in the hope of a refusal) is granted? Must it then make a licence application to OFAC? What if that application is then refused?

The most effective methods for navigating these difficult waters are: rigorous due diligence on acquisition targets, contractual counterparties and customers before taking key transactional decisions; maintenance of a vigilant watching brief over changes to sanctions laws and listings; and where necessary, entering into discussions with the enforcement authorities in relevant jurisdictions in order to benefit from any guidance they can offer.

in 2007 when an Austrian bank (recently acquired by a U.S. private equity house) was charged for closing down accounts held by Cuban nationals. See Austria charges bank after Cuban accounts cancelled, Reuters, Apr. 27, 2007, <http://www.reuters.com/article/2007/04/27/austria-bawag-idUSL2711446820070427>, and BAWAG restores Cuban accounts after public uproar, Reuters, May 4, 2007, <http://www.reuters.com/article/2007/05/04/austria-bawag-cuba-idUSL0450488520070504>

¹⁵ Extraterritorial US Legislation (Sanctions against Cuba, Iran, Libya) (Protection of Trading Interests) Order, S.I. 1996/3171.

¹⁶ See *Bank Melli and Persia International Bank v. Shere Shipping and others* [2013] EWHC 2321 (Comm), and *Melli Bank plc v. Holbud Limited*, [2013] EWHC 1506 (Comm).