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Interpreting BIMCO's Standard Sanctions Clause for Time Charter Parties in Light of U.S. Sanctions Against Iran

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List of Abbreviations

OFAC	Office of Foreign Assets Control (U.S. Treasury Department)
JCPOA	Joint Comprehensive Plan of Action
BIMCO	Baltic and International Maritime Council
IRISL	Islamic Republic of Iran Shipping Lines
NITC	National Iranian Tanker Company
IRGC	Iranian Revolutionary Guard Corp.
UNSCR	United Nations Security Council Resolution
CEFOR	Central Union of Marine Underwriters
BIS	Bureau of Industry and Security (U.S. Commerce Department)
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I. *ABSTRACT*

The paper will examine how an American judge or arbitrator might resolve a dispute involving U.S. sanctions against Iran and a standard sanctions clause by the Baltic and International Maritime Counsel (BIMCO), a trade association representing vessel owning interests. The author will show that the phrase "expose to sanctions" is facially ambiguous as to whether it indicates sanctions violations or a risk of sanctions, and will argue for the former interpretation based on the surrounding language and purpose of the clause to prevent impending sanctions violations. Principles of interpretation in commercial law apply, including *pacta sunt servanda* and the parole evidence rule, requiring strict enforcement of terms. The plain meaning rule applies, which gives language its ordinary meaning according to the words, their usage, and context. Given the likelihood of foreign dispute resolution, the author will briefly address the issue of mandatory foreign laws in arbitration and recommends further study of English law on this topic.

i. BIMCO Sanctions Clause for Time Charter Parties (2010)

This paper will interpret the Baltic and International Maritime Counsel's (BIMCO) standard sanctions clause, which, like other standard sanctions clauses in shipping, contains the vague and ambiguous phrase "expose to sanctions." The clause does not name Iran or any other particular country, but the commentary explains that expanding nuclear sanctions against Iran inspired its authors, a trade association representing vessel owning interests, to draft it with the help of Protection and Indemnity (P&I) insurers in 2010.[1] The multilateral nuclear sanctions that inspired the clause were waived under the nuclear deal, although the U.S. has announced its withdrawal from the treaty and its own unilateral snapback after a three to six month "wind-down." In that period, BIMCO added the all-purpose "standard" sanctions clause to its most recent update of the New York Produce Exchange Form (NYPE 2015), which also still includes the traditional requirements of "lawful" trades and cargoes. Most of the clause consists of detailed instructions in the event that sanctions suddenly render cargo illegal mid-voyage. The ambiguous clause of interest is a short, broad, and somewhat ambiguous statement of the owner's right to refuse orders that, in their "reasonable judgment…will expose [them, the vessel, or their insurers] to any sanction." That first paragraph reads as follows:

> (a) The Owners shall not be obliged to comply with any orders for the employment of the Vessel in any carriage, trade or on a voyage which, in the *reasonable judgement* of the Owners, *will expose* the Vessel, Owners, managers, crew, the Vessel's insurers, or their reinsurers, *to any sanction* or prohibition imposed by any State, Supranational or International Governmental Organisation.[2]

The current environment of political chaos and escalating threats begs the question, what types of voyages "will expose" a vessel to sanctions? Ordinarily, "expose to sanctions" might mean either "violates sanctions," or "poses a risk of sanctions." Does the clause better describe a right to avoid transactions that violate sanctions, or that pose a risk of sanctions more broadly? Political turbulence and escalating threats, against the backdrop of a strict embargo, terrorism

[1] Sanctions Clause for Time Charter Parties, Baltic and International Maritime Council ("BIMCO"), 9 July 2010. See explanatory notes at ¶ 1.
[2] Emphasis added.

sanctions, and escalating conflict in the Middle East might frighten owners whose vessels are on global charters. They might treat the sanctions clause as an option to temporarily exclude Iran from trading limits because it "will expose" a vessel to sanctions. To Charterers, it would seem unfair to deny legitimate voyages within trading limits on the basis of risks, when the sanctions clause does not mention risks.

The author will advocate for charterer's interpretation that the clause refers to impending violations, not abstract risks. The owner's interpretation would improperly imply external risks when that word is absent. The susceptibility of "expose" to at least two reasonably available meanings means the clause is ambiguous, and thus requires interpretation based on its surrounding language. Based on the rest of the language in the clause, the right refers to potentially illegal transactions, not geopolitical risk. This is true in comparison with other standard sanctions clauses, which explicitly reference risk, and other common terms that do the same, like war clauses.

The clause lacks an explicit reference to risk, but the drafters' commentary on a separate webpage may contribute to the impression that "expose" implies it.

> The objective of the new 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 judgement' by the owners in determining whether the risk of the imposition of sanctions is *tangible*.[3]

Unfortunately, this fails to clarify whether the language in the contract, "expose to sanctions," means "violates sanctions" or refers to a risk. Here, the commentary poses the inquiry as whether orders "might expose the vessel to the risk of sanctions." By characterizing the risk as "tangible," it recreates the original problem of deciphering vague, ambiguous language. Does a "[tangible] risk of the imposition of sanctions" against the vessel describe an inability to verify that an impending transaction is in full compliance with sanctions, where liability could lead to sanctions against the vessel? Or does "tangible" describe trade in an area where sanctions add substantial compliance and due diligence requirements, and thus create a remote but unacceptable risk of fines for unintentional violations?

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[3] Id. at ¶ 4.

The two interpretations of the clause could have dramatic effects on the course of litigation insofar as the burden of proof. Due diligence often goes on undocumented, which may be a barrier to proving that an owner's refusal was reasonable, particularly if "expose to sanctions" indicates that an impending transaction raises a due diligence or compliance issue. On the other hand, if "will expose to sanctions" involves a political risk, a tweet might satisfy the twin burdens of proof and persuasion.[4]

The fact that the clause in question purports to be a "standard" clause may inspire a search for an objective, customary meaning that the standard clauses share. Other standard sanctions clauses published by vessel owners and insurers also use the phrase "expose to sanctions." However, there are only two clauses available for time charter parties, and standards for marine insurance involve a different type of contract and area of law. The other clause for charter parties, Intertanko's sanctions clause, allows owners to refuse orders in their "absolute discretion" that "could expose" the vessel "to a risk of sanctions."[5] The differences in language are stark in comparison with BIMCO's clause, requiring the owner to exercise "reasonable judgment" as to whether orders "expose a vessel to sanctions." The paucity of choices and differences in language suggest that there is no universal standard for sanctions clauses in time charters. As usual, the interpretation of the ambiguous phrase "expose to sanctions" relies on its ordinary meaning given the surrounding language in the clause, here the verb-modifier "will" and the "reasonable judgment" limit to discretion.

i. Advantages of sanctions clauses in avoiding sanctions violations

Parties that consider themselves at a low risk of sanctions violations may view the clauses as boilerplate surplus, a necessity for insurance purposes. Standard sanctions might seem

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[4] Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 827 (2006).

[5] Intertanko Sanctions Clause, March, 2010. The full text of that clause reads: "Any trade in which the vessel is employed under this Charterparty which *could expose* the vessel, its Owners, Managers, crew or insurers *to a risk of sanctions* imposed by a supranational governmental organisation or the United States, { insert other countries } shall be deemed unlawful and Owners shall be entitled, at their *absolute discretion*, to refuse to carry out that trade. In the event that such risk arises in relation to a voyage the vessel is performing, the Owners shall be entitled to refuse further performance and the Charterers shall be obliged to provide alternative voyage orders." Emphasis added.

redundant since other general clauses in charterparties already regulate illegality due to foreign laws. Standard trading limits and cargo exclusions already require "lawful trades" and "lawful goods" or "lawful merchandise."[6] General compliance clauses frequently refer to the vessel's country of registry and the marine insurer's main place of business.[7] Simple amendments to standard trading exclusions, compliance terms, and choice of law and venue provide further protection. Avoiding Iranian trades as easy as filling in the blank with "Iran" in trading limits and exclusion clauses. Parties that want to include Iran within trading limits can add U.S. law to compliance clauses, or simply elect a choice of U.S. law and forum.[8]

The main problem with relying on other standard clauses not specific to sanctions is that they do nothing to help avoid impending violations. This is important whether or not parties include Iran within trading limits. General cargo and compliance clauses do not generally allow an option for cancellation and instructions to avoid impending violations. Instead, they allocate contract liability after damage has occurred. The risk of criminal liability only creases the longer parties delay in modifying or cancelling transactions to avoid violating sanctions. Similarly, making a choice of U.S. law or arbitration similarly operates as a threat that the contract will be decided according to U.S. law after a dispute has already begun. Standard clauses like trading limits, compliance clauses, and choice of law clauses are not satisfactory alternatives to sanctions clauses because they do not provide similar mechanisms to quickly modify a voyage or cancel a charterparty to avoid violating sanctions.

The other problem with relying on general clauses in a sanctions event is that their interpretation may be subject to dispute. Problematically, confusion about who has authority to give orders to avoid a crisis can add to the confusion and delay.[9] In the context of sanctions violations, once parties become aware of a potential violation, or should become aware of it,

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[6] See e.g., § 3 New York Produce Exchange ("NYPE 2015") and BOXTIME 2004 (both published by BIMCO); M/V Coral I v. Conti-Lines, Society of Maritime Arbitrators, SMA No. 3287, August 7, 1996 WL 34449925 (S.M.A.A.S.) (facts included pre-penalty notice from OFAC warning that it violated sanctions).

[7] Belfri v. Crescent Oil and Shipping, Society of Maritime Arbitrators, January 25, 1995 WL17878778 (S.M.A.A.S).

[8] See e.g., § 54 Law and Arbitration Clause, NYPE 2015 (default choice of U.S. maritime law with arbitration under current rules of the Society of Maritime Arbitrators, including rules for shortened procedure if amount in dispute is under $100,000 in dispute or as agreed). See also BIMCO Standard Dispute Resolution Clause (2016), ¶ b (also specifies that if not a maritime contract, then New York state law applies).

[9] See e.g., Kuwait Petroleum Corporation v. I & D Oil Carriers Ltd ("The Houda"), Court of Appeals, 1994, Lloyd's LR Vol. 2 [1994] at 541 (involving war clause); Gotthard Gauci, Risk Allocation in the Charterparty Relationship, An Analysis of English Caselaw Relating to Cargo and Trading Restrictions, 28 J. Mar. L. & Com. 629, 631 (1997).

liability applies for "knowingly" facilitating a transaction.[10] After the fact, calculating lay-time, off-hire, delay and damages based on general language can produce expensive litigation with unpredictable results. If lay-time and hire clauses do not explicitly deal with sanctions, exotic clauses like restraint of princes can become decisive in interpreting how the general clauses allocate responsibility for the losses.[11] Sanctions clauses avoid the possibility of expensive disputes over the interpretation of exotic or general terms.

The usefulness of the clause depends entirely on the quality of due diligence. The best hope for a company that accidentally transacts with a designated entity or violates the trade embargo is to report violations with proof of reasonable due diligence. To prove that an unintentional violation was not negligent, it must show that the facts eluded its honest efforts at discovery. A defendant that accidentally transacts with a designated entity is subject to civil liability for negligent violations if facts surrounding the transaction should have apprised it of a possible violation. OFAC presumes knowledge of all sanctions blacklists and aspects of the trade embargo and it expects shipping companies to scan the IMO vessel numbers of contract parties for designated entities. It did not recognize name and flag changes as an excuse for transacting with then-blacklisted state-owned entities IRISL and NITC.[12] The mere fact that a company uses sanctions clauses is not evidence that due diligence took place. Reliance on the clauses as a substitute for due diligence would be self-blinding.

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[10] See e.g., Comprehensive Iran Sanctions and Divestment Act of 2010 (CISADA) § 101(6), § 22 USC 851 ("The term knowingly, with respect to conduct, a circumstance, or a result, means that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result"); 31 CFR §560.215(b)(2), Iran Trade and Sanctions Regulations (ITSR) ("knowingly means that the person engages in the transaction with actual knowledge or reason to know"); see also 31 CFR §561.314, Iran Financial Sanctions Regulations (same as CISADA § 101(6)) above).

[11] Nordic American Shipping v. Bayoil, Society of Maritime Arbitrators, SMA No. 2972, April 26, 1993 WL 13653011 (S.M.A.A.S).

[12] U.S. Treasury Department Office of Foreign Assets Control ("OFAC") Enforcement information for July 17, 2014, (civil liability settlement for shipping recreational lawn chairs with the Islamic Republic of Iran Shipping Lines (IRISL) under sanctions in 2009), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140717_tofasco.pdf (last accessed May 13, 2018).

ii. Background Iran Nuclear Deal, Remaining Sanctions, Snap-back & "Wind-down"

The nuclear deal facilitated Iran's return to global shipping markets, despite the challenges that remaining sanctions created.[13] The accord protects shipping, insurance, petroleum, the automotive sector, and civilian aviation[14] along with "associated transactions" that are "necessary and ordinarily incident to the underlying [exempt] activity" like insurance, transportation and financial services."[15] The European Union permits all forms of civilian trade apart from dual-use items.[16] The U.S. waived sanctions on global shipping companies and marine insurers, as well as Iranian state-owned banking, oil, and shipping entities.[17] It created a new license for U.S. foreign subsidiaries[18] and exempted certain luxury exports from the trade embargo.[19]

Sanctions that remained in place throughout the nuclear deal, not to mention the impending snap-back, creates pressure to retain or adopt sanctions clauses. The U.S, U.K., and E.U. have a variety sanctions related to human rights, terrorism, and Iran's ballistic missile activities. Ever-expanding U.S. sanctions lists reinforce the need for due diligence to avoid transacting with sanctioned entities. U.S. blocking sanctions on the basis of terrorism, human

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[13] Joint Comprehensive Plan Of Action (hereinafter "JCPOA"), signed 14 July 2015 in Vienna, United Nations S/Res/2231 July 20, 2015, Annex A. Suzanne Maloney, Sanctions and the Iranian Nuclear Deal: Silver Bullet or Blunt Object? Social Research: An International Quarterly, Volume 82, Number 4, Winter 2015, pp. 887-911; Christopher Beall, The Emerging Investment Landscape Of Post-Sanctions Iran: Opportunities, Risks, And Implications On Us Foreign Policy, 39 Fordham Int'l L.J. 839 2015-2016; Danielle Myles, Iran Sanctions: Good on paper, 34 Int'l Fin. L. Rev. 22 2015-2016; Farshad Shamgholi, Sanctions against Iran and Their Effects on the Global Shipping Industry, Lund University (2012); Cody Coombs, Blue Morning-Glories In The Sky: Correcting Sanctions To Enforce Nuclear Nonproliferation In Iran, 19 Ind. Int'l & Comp. L. Rev. 419 2009; Robert Carswell, Economic Sanctions And The Iran Experience, 60 Foreign Aff. 247 1981-1982; Melody Fahirmirad, "The Iran deal: how the legal implementation of the deal puts the United States at a disadvantage both economically and in influencing the future of Iran's business transactions," 37 Northwestern Journal of International Law & Business, 301 2016-2017.

[14] JCPOA Annex II § 4.4.1 Sanctions relief from (TRA Sections 211(a) and 212(a); IFCA Sections 1244(c)(1) and (d); 1245(a)(1)(B), (a)(1)(C)(i)(I)-(II), (a)(1)(C)(ii)(I)-(II) and (c), 1246(a) and 1247(a); Section 5(a) of E.O. 13622 and Sections 2(a)(i) and 3(a)(i) of E.O. 13645).

[15] JCPOA Annex II Footnote 3.

[16] Common Military List of the European Union, 2016 O.J. C 122, adopted March 14, 2016; Missile Technology Control Regime Guidelines, Equipment, Software, and Technology Annex, MTCR/TEM/2016/Annex, October 20, 2016; Nuclear Suppliers Group Guidelines for Dual-Use Equipment, Materials, Software, and Related Technology, June 2015; see also e.g. David Crawford & Joe Lauria, Wall Street Journal, "Germany stops shipment to Iran," May 20, 2010.

[17] JCPOA Annex II, §§ 4.1-4.9, § 4.2.1, & Attachment 3; Annex V; 31 CFR §560.215(a) note, OFAC ITSR Regulations.

[18] General License H, 31 C.F.R. 560, Iranian Transactions and Sanctions Regulations (ITSR), OFAC.

[19] JCPOA Annex II, § 5.1.3.

rights violations, and ballistic missile activities have word-wide extraterritorial effect. The decades-long U.S. trade embargo and newer generation of financial sanctions add to the risk that otherwise legitimate contracts may remaining sanctions. U.S. persons are still forbidden from transacting with Iranian parties or in Iranian-origin good and vice versa, including the American financial system or dollar currency in Iranian transactions. Vessel-owners, charterers, insurers, and banks must be careful to avoid American-origin goods and exclude employees with American citizenship. Payments involving Iran suffer from delays and finance remains a challenge. Guarantees by foreign states offer some solicitude to European and Asian investors.

How provisions on a multi-lateral snapback in the nuclear deal apply to the upcoming unilateral snap-back is beyond the scope of this paper to address in full. A full multilateral snap- could revive the oil embargo and global banking sanctions if Iran breached the nuclear deal through "significant nonperformance." The accord protects signed contracts from the "retroactive effect" of a snap-back, including "investments," "debts" and "payments due," but requires parties modify performance so that "the activities contemplated under and execution of such contracts are consistent" with renewed sanctions.[20] Significantly, the U.N. resolution implementing the accord provides that if a snapback occurs, renewed sanctions "shall not prevent a designated person or entity from making payment due under a contract entered into prior to [their] listing." It specifies that "no claim shall lie at the instance of the Government of Iran, or any person or entity in Iran… where its performance was prevented by reason" of a snap-back," but it does not bar claims against non-Iranian parties.[21]

Both American and European regulators envisioned a "wind-down" period for existing contracts. Although the U.S. would not "retroactively impose sanctions for legitimate activity after Implementation Day," OFAC insisted that "the JCPOA does not grandfather contracts signed prior to snapback." It warned that transactions "could be sanctionable to the extent they implicate activity for which sanctions have been reimposed."[22] European "[s]anctions will not apply with retroactive effect" and "would not retroactively penalize investment made before the

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[20] JCPOA (2015), §§ 36 & 37.
[21] United Nations Security Resolution 2231 (2015), §§ 28 & 29.
[22] Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day, OFAC, (issued January 16, 2016 and amended December 15, 2016) (hereinafter "JCPOA FAQs"), MM 4 & 5 at 41-42, available https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf.

date of the snapback."[23] The "execution of contracts" under the JCPOA "will be permitted…in order to allow companies to wind down their activities."[24]

To achieve a multilateral snapback, the parties must exhaust a lengthy dispute resolution, involving one to several months of conciliation, arbitration, and finally, referral to the U.N. Security Council for consideration.[25] Skeptics feared that the technical details of the dispute resolution concealed a "poison pill," which would allow the U.S. to initiate the dispute resolution process only to abuse its permanent member status on Security Council and veto any resolution needed to prevent a snap-back.[26] Trump's unilateral withdrawal from the probably moots this issue.

May 8 marked the beginning of the unilateral U.S. snap-back, beginning with "wind-down period" of three to six months before sanctions reapply to Iran's state-owned shipping and tanker lines, including the revocation of General License H for foreign subsidiaries of U.S. companies. U.S. sanctions waivers will expire in August and November, 2018, unless the parties (or some of them) come to agreement before then.[27] In the worst case, preexisting humanitarian exemptions for food, medicine, personal communication devices and informational materials will probably the nuclear deal.[28] If the parties do come to agreement, licenses that were revoked will probably come back into place with new ones licenses for winners that Trump picks.

Two years of uncertainty preceded Trump's decision, due to the necessity of quarterly extensions for expiring sanctions waivers. Upon withdrawal, President Trump attacked the deal itself. Prior to that, he accused Iran of not complying with the terms or "spirit" of the deal, despite nearly a dozen confirmations by the International Atomic Energy Agency (IAEA) of that

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[23] Information Note on EU sanctions to be lifted under Joint Comprehensive Plan of Action (JCPOA), implementation guide, 23 Jan. 2018, at 8.
[24] Council Regulation (EU) No 2015/1861, O.J. L. 274, 18.10.2015, Preamble § 7.
[25] JCPOA (2015), §§ 36 & 37.
[26] Eric B. Lorber & Peter Feaver, Do the Iran deal's 'snap-back' sanctions have teeth? Foreign Policy, 21 July 2015.
[27] Presidential National Security Memorandum, 'Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon,' 8 May 2018. See also Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May, 8 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA), OFAC (issued 8 May, 2018) (hereinafter "wind-down FAQs"), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf. "Wind-down FAQs" prevail over conflicting answers to OFAC's "JCPOA FAQs" from 2016 (note 23 infra).
[28] 31 CFR §§ 560.530, § 560.538, §560.540, § 560.544, § 560.545, and General License D, Iranian Transactions and Sanctions Regulations, OFAC.

Iran was in compliance with its obligations. The vulnerability of the nuclear accord to the whims of erratic executive added a major political risk to already heightened due diligence and compliance needs. Brent oil reached a three year high when it climbed above $75 per barrel due to the most recent quarterly crisis over the expiry of sanctions waivers.[29] The appointment of the new secretary of state Mike Pompeo and the notorious John Bolton to National Security Advisor pointed towards an imminent escalation with Iran. Ahead of Trump's self-imposed May 12 deadline, the oil markets' estimation was that a snap-back of U.S. sanctions was "too close to call," "about 50 percent."[30] "We'll see," said Trump ahead of his decision on sanctions waivers. The constant repetition of this mantra led some to think, "[h]e really doesn't know what's going to happen, does he?" After all, coy threats are a hallmark of Trump's negotiating style.[31] But Trump made good on his campaign promise to withdraw from the nuclear deal. Unsatisfied with the efforts of Congress and European leaders to "fix" the deal, he "nixed it" on the advice of Israeli Prime Minister Benjamin Netayahu.[32]

On May 8, a "wind-down period" of three months began for certain cargoes and six months for the full suite of nuclear sanctions on Iranian shipping, oil, banking, and insurance. All shipping sanctions will reapply a "wind-down" period of either three or six months. A few sanctions come back into effect on 6 August, like sanctions on the automotive sector and certain cargoes like steel, aluminum, coal, graphite, and software for integrating industrial processes. November 4th is the more crucial deadline when sanctions on Iran's shipping, insurance, banking, petroleum and "energy sector" come into force. Shipping sanctions will resume against "Iran's port operators, shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates," along with other state-owned entities like the Central Bank of Iran (CBI), the National Iranian Tanker Company (NITC), National Iranian Oil Company (NIOC), and Naftiran Intertrade Company (NICO). The sanctions forbid "the purchase of petroleum, petroleum products or petrochemical products from Iran" and "the provision of underwriting services, insurance, or reinsurance." General License H

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[29] Sarah Macfarlane, Oil breaches $75 on risk to Iran deal, WSJ, 24 April 2018.
[30] Alex Longley, Grant Smith & Christopher Sell, Oil Market Faces Tense Wait as Iran Sanctions Too Close to Call, Bloomberg, April 19, 2018.
[31] Katie Rogers, 'We'll See,' Trump Says on North Korea. And Iran. And Nafta. And So on., NYT, 2 May 2018. See also Peter Baker & Julie Hirschfeld Davis, Trump Signals Openness to a 'New Deal' to Constrain Iran, NYT, 24 April 2018.
[32] Presidential National Security Memorandum, 8 May 2018 (supra note 20).

will also be revoked on November 4. Prior to this time, the agency recommends parties will have to "wind-down" all business.[33]

Iran has filed over a dozen complaints accusing the U.S. of violating the nuclear deal by sabotaging foreign investment through sanctions and continual threats. President Trump apparently violated the accord by discouraging foreign businesses from trading with Iran on a variety of occasions.[34] Under Article 26 states that aside from an official multilateral snap-back, "the U.S. Administration, acting consistent with the respective roles of the President and Congress, will refrain from re-introducing or re-imposing [nuclear] sanctions" and "will [also] refrain from imposing new nuclear-related sanctions."[35] Although President Trump has stated he favors a new deal, in the meantime the "wind-down" requirements are obviously a major breach of the deal. Beyond the brief background here, the outcome of Iran's claims and the legal effect of President Trump's ostensible withdrawal from the nuclear are outside the scope of this project.

II. Common Law Rules & Principles for interpreting vague boilerplate

Charterparty disputes fall under the admiralty jurisdiction of federal and state courts with the normal requirements of personal jurisdiction.[36] Contract disputes involving sanctions are rare in U.S. courts.[37] There is apparently no precedent interpreting the clause in question. Proponents of the clause might view the lack of litigation as a positive signal that it is self-enforcing and amenable to private dispute resolution. Unfortunately, the absence of judicial precedent leaves the clause open to interpretation.

Disputes over interpretation are typical in commercial litigation. The law is somewhat fluid in this area, in that it consists of general principles and canons of interpretation that are malleable to different circumstances.[38] This paper will apply the traditional common law

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[33] OFAC wind-down FAQs (supra note 20).
[34] Robin Wright, The scramble to salvage the Iran nuclear deal, The New Yorker, 22 April 2018.
[35] JCPOA (2015), § 26.
[36] See e.g., NICHOLAS J. HEALY, DAVID J. SHARPE, DAVID B. SHARPE & PETER WINSHIP, CASES AND MATERIALS ON ADMIRALTY (5th ed. 2006).
[37] See e.g., Metawise Group, Inc. v. Brazil Amazon Trading, Inc. (M.D.Fla 2006).
[38] ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY (4th ed. 2007); CONTRACT STORIES (Douglas G. Baird ed. 2007); Marvin A. Chirelstein, CONCEPTS AND CASE ANALYSIS IN THE LAW OF

principles that operate in most jurisdictions, like New York, which strictly enforce commercial contracts according to the plain meaning and parole evidence rules. California and others have a more flexible attitude towards contextual evidence like pre-contractual negotiations.[39] Generally speaking, vessel owners and charterers are sophisticated business parties, so the normal principle of *pacta sunt servanda*, the plain meaning rule, and the parole evidence rule apply.[40] These principles strictly enforce the contract according to the ordinary meaning its language conveys, regardless of representations made in previous negotiations that were not included in the contract. Even if parties discussed sanctions prior to signing the charterparty, the parole evidence rule excludes previous oral agreements in favor of the written terms of the contract. The presumption is that anything excluded from the written terms was never agreed with the intent to be legally binding. The parole evidence rule does not prevent evidence of a collateral, i.e. separate, oral agreement, or a subsequent agreement like modification or waiver.

Despite these fairly straightforward rules, disputes over interpretation can have uncertain results and large expenses. Decision on summary judgment is the fastest, most cost-effective result, however it is not available if there is a dispute over the material facts. Commercial entities often waive jury trials for the same reason that they sign arbitration clauses in neutral jurisdictions, that is, they fear the costs and risks of jury trials. If litigated to trial, a case costs between $70,000 and $100,000 on average, where discovery often represents the lion's share.[41] Based on the pleadings and discovery, almost all cases still settle prior to final judgment.

Under the plain meaning rule, the surrounding text and context are the primary source of meaning for words that that on their own are ambiguous. The principle *expresio unius est exclusio alterius* and the presumption against superfluity tend to construe variations in language as deliberate choices rather than inadvertent surplusage. As applied to commercial boilerplate, these principles contend with the reality of lengthy jargon, redundancy, and conflict between standard clauses in the same contract. Proof that a term takes the customary significance of a trade usage requires two types of proof, first that the trade usage exists and second that the parties intended to incorporate it. Evidence of a substantial course of dealings may show that the

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CONTRACTS (6th ed. 2010); Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, Text and Context: Contract Interpretation as Contract Design, 100 Cornell L. Rev. 23, 25 (2014).

[39] Alan Schwartz & Robert E. Scott, Contract Interpretation Redux, 119 Yale L. J. 926, 932 (2010).

[40] L.J. Staughton, Interpretation of Maritime Contracts, 26 J. Mar. L. & Com. 259 (1995).

[41] Shawn Bayern, Contract Meta-Intepretation, 49 U.C.D. L. Rev. 1097, 1120 (2016).

parties intended an ambiguous term to have a particular meaning. Course of dealings evidence carries less weight than trade usages and is difficult to distinguish from a series of waivers in individual circumstances. A court will exclude interpretations that would create unfair surprise to the parties given the circumstances and thus frustrate the parties' reasonable expectations. Interpretations that contemplate illegality are not available.

Illegal contracts are not enforceable, and neither are interpretations of contractual language in a way that would contemplate violating the law.[42] The principle *ex turpi causa non oritur action* instructs courts to leave the losses where they lie as between co-conspirators with "dirty hands."[43] Illegality is only a "shield" in that it serves as a defense to a claim of contract breach. In other words, a party may argue that illegality prevented performance. Another type of contract claim involving illegality involves fraud.[44] In general, sanctions designations themselves are not reviewable by U.S. courts, although arbitrary and capricious fines by agencies are.[45]

Another type of unenforceable contract involves indefinite contracts. The common law indefiniteness doctrine requires a minimum of certainty in contract terms to merit enforcement. In the extreme, ambiguity in one of the essential terms of a contract will render it unenforceable because a contract does not exist. It "must be sufficiently complete such that a court is able to determine the fact of breach and provide an appropriate remedy."[46] A contract is unenforceable if a material term like price or quantity is absent or so uncertain as to be inscrutable. Failure to agree on the core issues suggests that the parties did not intend to make legally binding promises. The intent of the parties to create legally binding promises is a core requirement as a preliminary matter to find that an enforceable contract exists. As with strict adherence to the parole evidence and plain meaning rules, denying enforcement of contracts due to uncertainty favored long-term goal of clarity over short-term injustices. Even in spite of an apparent intent to create a legally

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[42] Ernest G. Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.J. 565 (1920-1921).
[43] Sea Glory v. Al Sagr at ¶ 303; Shahehsaz v. Johnson, 2017 WL 1354849 (2017).
[44] E.g. Metawise (supra note 36).
[45] See eg Iran Sanctions Act of 1996, § 11, 50 U.S.C. 1701 note, 175; Administrative Procedure Act, § 5 U.S.C. § 706(2)(A) (judicial review for agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law) APA; Epsilon Electronics, Inc. v. OFAC, 857 F.3d 913 (D.C. Cir. 2017).
[46] Robert E. Scott, A Theory of Self-Enforcing Indefinite Agreements, 103 Colum. L. Rev. at 1641, 1647-1649 (2003).

binding contract, the inadvertent inclusion of ambiguous terms could be fatal to contract formation. Failure to specify which of two ships named *Peerless* would carry the cargo, one leaving Bombay in October and another in December, resulted in the seller's inability to recover payment for goods delivered.[47]

In the extreme, an overly vague or uncertain clause may reflect a choice of a self-enforcement.[48] A vague standard may be a deliberate choice in favor of a self-enforcing clause that assigns one party risk and discretion in a matter.[49] Undisclosed special circumstances within one parties' knowledge or needs are not within the scope of the other's assumption of risk.[50] Commercial parties commonly use unenforceable contract clauses in favor of methods of self-enforcement, like reputation or reciprocity. Rights of refusal are contractual "hostage" or "bonding" mechanisms, like collateral, termination options, or liquidated damages, that facilitate self-enforcement by leaving the decision within the discretion of a party.[51] For example, bespoke contracts for long-term relationships may deliberately leave some terms open as a method of assigning risk by omitting a hard price ceiling or floor.[52]

More commonly, vague standards are a design feature to allow a judge's hindsight perspective of all the facts. To be sure, no contract is entirely complete. It is impossible to foresee all possible states of the future and impracticable to negotiate over every unlikely but foreseeable contingency. Vague standards often succeed in negotiations for the simple reason

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[47] Raffles v. Wichelhaus ("The Peerless"), 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). Ironically, "Peerless" was a popular vessel name at the time, see A.W. Brian Simpson, Contracts for Cotton to Arrive: The Case of the Two Ships Peerless, in CONTRACT STORIES (Baird ed. 2007) at 34-35. See also Chirelstein, CONCEPTS AND CASE ANALYSIS, 39 (2010) (supra note 39), and Charles J. Goetz & Robert E. Scott, The Limits of Expanded Choice: An Analysis of the Interactions between Express and Implied Contract Terms, 73 Cal. L. Rev. 261, 267-268 (1985).

[48] Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine, 110 Colum. L. Rev. 1377, 1390-1391 (2010); Scott, Self-Enforcing Indefinite Agreements, at 1644-1646 (supra note 45).

[49] See e.g., Paradine v. Jane, [1647] EWHC KB J5, in Robert E. Scott, The Death of Contract Law, 54 U. Toronto L.J. 369, 373 (2004).

[50] See e.g., Hadley v. Baxendale [1854] EWHC J70, in Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 Va. L. Rev. 967, 1013 (1983); Chirelstein, CONCEPTS AND CASE ANALYSIS, 209 (2010); Richard Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law, in CONTRACT STORIES, 1 (Baird ed. 2007) (supra note 39).

[51] See e.g. Oliver E. Williamson, Credible Commitments: Using Hostages to Support Exchange, 73 American Economic Review, 519 (Sep. 1983); Ronald J. Mann, Verification Institutions in Financing Transactions, 87 Georgetown L.J. 2225 (1999).

[52] Robert E. Scott, Conflict and Cooperation in Long-Term Contracts, 75 Cal. L. Rev. 2005, 2039-2040 (1987); Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089, 1093-1094 (1981).

that by avoiding detail, they remove stumbling blocks to agreement over remote risks. Commercial parties frequently avoid costly negotiations through resort to vague boilerplate standards, like "good faith," "best efforts," or "commercial reasonableness."[53] They may prefer relatively flexible terms to the prospect of being hamstrung by rigid rules and pricing problems in unforeseen circumstances.[54] Broad standards may also be the best the parties can achieve in terms of agreement over a highly controversial or technical issue.[55]

Courts will "fill the gaps" left by minor amiguities or inadvertent mistakes given an otherwise enforceable contract. [56] In contrast with bright-line rules, vague standards require a decision maker to engage in at least a minimal degree of interpretation to assess whether the facts meet the standard.[57] Over time, the common law creates precedent that give commercial parties notice of the effects of certain conduct beyond the content of statutes. Cases and published arbitral awards from other jurisdictions add to the reservoir of meaning by identifying factual circumstances on either side of the blurry line created by vague terms.[58] If disputes are infrequently litigated, it can take decades or even centuries for judicial rulings to settle the meaning of ambiguous boilerplate.[59]

If an individual word or phrase is vague, the surrounding text and context supply it with meaning given the intent to create binding promises. A court's task will be to decide if an ambiguous term or vague standard has a relatively clear meaning based on the surrounding text, commercial context and the parties' intent. The principle of *pacta sunt servanda* and the parole evidence rules privilege the written terms as the objective expression of the parties' intent. Under the plain meaning rule and the principle of *noscitur a sociis*, that a word is known by its companions, the surrounding language and appearance of the same phrase elsewhere in the contract can resolve uncertainties about its meaning.[60] The necessity of resorting to the

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[53] Scott & George G. Triantis, Anticipating Litigation in Contract Design, 824-825 (2006) (supra note 4).
[54] Mark P. Gergen, The Use of Open Terms in Contract, 92 Colum. L. Rev. 997, 1000, 1005 (1992); Robert E. Scott, The Case for Formalism in Relational Contract, 94 Nw. U. L. Rev. 847, 862-863 (2000).
[55] Scott, The Death of Contract Law, at 374-375 (supra note 48).
[56] Richard A. Posner, the Law and Economics of Contract Interpretation, 83 Tex L. Rev. 1581, 1583, 1585 (2005).
[57] Scott, Self-Enforcing Indefinite Agreements (2003) at 1641-1644 (supra note 27).
[58] Jody S. Kraus & Robert E. Scott, Contract Design and the Structure of Contractual Intent, 84 N.Y.U. L. Rev. 1023 (2009).
[59] Stephen J. Choi, Mitu Gulati & Robert E. Scott, The Black Hole Problem in Commercial Boilerplate, 67 Duke L.J. 1 (2017).
[60] Scott & Triantis, Anticipating Litigation in Contract Design (2006) at 848-851 (supra note 4).

surrounding contract to interpret overly vague standard commercial boilerplate may reflect a design failure insofar it lacks a universal meaning in different contracts.

The natural, objective meaning of the language in the contract enjoys a place of privilege. To promote the standard, uniform interpretation of commercial boilerplate, courts will search for its plain, objective meaning. The plain meaning rule favors the ordinary meaning of the written language in the contract over unexpressed, idiosyncratic understandings. Traditionally, determining the "objective" intent of the parties entailed discerning the meaning a reasonably informed outsider would ascribe to language that the parties used. The parole evidence and plain meaning rules still further this agenda by making it difficult to prove the parties understood a term contrary to its ordinary meaning or apparent meaning within the contract. The policy of strictly enforcing the plain meaning of terms furthers the long-term goal of majoritarian justice by holding parties accountable to their promises according to conventional understandings of language over unexpressed, idiosyncratic meanings.

II. Interpreting "will expose to sanctions" to mean "could violate" them

The problem with the word "expose," and perhaps its allure, is that a violation could be almost certain or merely possible. This vague sense of uncertainty about the likelihood of a violation lends itself to questions about what types of risks the clause implies.

One could argue that "expose" means "subject to risk from a harmful action or condition."[61] "Expose" implies risk, so "expose to sanctions" is just a shorter way of saying "expose to the risk of sanctions," or "poses a risk of sanctions." Although other standard clauses explicitly reference risk, the omission of the word "risk" in BIMCO's clause is a meaningless difference in jargon. It would frustrate the legitimate expectations of the owners to read the clause in an overly legalistic manner. The answer to the question that the drafters posed, "whether the risk of the imposition of sanctions is tangible," is emphatically yes under the Trump administration. Owners might refuse all trade with Iran until a major change in U.S. policy in support of the nuclear deal.

[61] See e.g., the second definition for "expose" in *Merriam-Webster Dictionary* (2018).

Charterers could argue "expose to sanctions" means substantially the same as "violates sanctions," or "would be in violation of sanctions," the standard phrase that OFAC recommended for global insurance policies. Charterers would argue that the lack of a reference to "risk" within the clause itself is a deliberate omission that brings it closer to the standard that OFAC recommended, "would be in violation of sanctions." To read the word "risk" into a clause by implication is contrary to the principles of *pacta sunt servanda*, the plain meaning rule in contract interpretation, and the principle *expresio unius est exclusio alterius*, that small differences in language represent deliberate choices as to their meaning in a contract. Charterers would argue that the clause only involves risk to the extent that it creates compliance problems. Additional due diligence, not abstract political risks, determine whether or not a violation actually exists.

The fact of linguistic ambiguity makes it impossible to resolve the dispute on the basis of the plain meaning of the phrase "expose to sanctions" alone. The phrase "expose to sanctions" is so vague that on its own that it creates at least two reasonable alternatives as to its meaning. Do voyages that expose a vessel to sanctions violate them or merely involve a risk related to sanctions? Strictly speaking, a term is unenforceable when neither meaning is more likely than another. For this reason, "expose to sanctions" has no enforceable meaning outside its linguistic context.

Typically, one vague word or phrase will not empty an entire sentence of meaning. Language modifying a vague standard presumptively represents deliberate efforts to specify its meaning. The rest of the text in the clause is the best evidence of one vague or ambiguous word's meaning. Litigation over vague standards in commercial boilerplate is common, as in "good faith," "best efforts," or "commercial reasonableness."[62]

In theory, if a sanctions clause were a key term of a contract, it could be unenforceable for ambiguity under the indefiniteness doctrine. This might be the case in investment contracts where parties perform certain activities under preliminary agreements, as in gas exploration contracts leading to concessions. Another example might be "contingent" contracts for airline parts under the nuclear deal, which are explicitly conditional on being granted a special license.[63]

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[62] Scott & Triantis, Anticipating Litigation in Contract Design (2006), at 824-825 (supra note 4).
[63] General License I ¶ a, 30 CFR 560, Iranian Transactions and Sanctions Regulations, OFAC.

In contrast, the standard-form sanctions clause here is likely to be a minor term that only comes to the attention of parties after a dispute arises over costs or delay. There is unlikely to be any question of whether the parties intended to be legally bound by the charter. Enforcement via arbitration is available at least for a final reckoning to settle accounts. Whether a clause is self-enforcing in the sense that it gives complete risk and discretion to a party will depend on the language in the clause. Given the language of the clause and the commercial shipping context, it would create unfair surprise to protect all refusals from scrutiny in a dispute.

The susceptibility of the phrase "expose to sanctions" means that it relies on its surrounding language to acquire the certainty of meaning required for enforcement. For whatever reason, the clause makes no without mention of risk. The omission is not necessarily a barrier to implied risks. Typically, implied risks are endogenous rather than exogenous, that is, arising from within the contract rather than beyond the parties' control. [64] The interpretation that the clause describes liability for impending sanctions violations implies endogenous risks like due diligence and compliance within the parties' control. In contrast, the risk that President Trump takes any particular action on Iran in the future is an exogenous risk.

The resumption of blocking sanctions against Iranian state-owned shipping entities, like IRISL, NITC, or the Port of Bandar Abbas, will wreak havoc in global shipping markets. Whether a designated entity not connected to the voyage nevertheless "exposes a vessel to sanctions" depends on the orbit of the vague word "expose." Again, the plain meaning rule is easy to manipulate and unlikely to resolve the question in any meaningful way. An implied risk theory might allow an owner to refuse trading with Iran due to a snap-back even if the transaction avoided designated entities, if the clause covers "tangible" exogenous risks. The charterer would argue, rights of refusal do not exist in absence of a conflict with statutory requirements, a "tangible" or real problem involving compliance or due diligence.

To the extent that the clause does imply some amount of risk, the verb-modifier "will" before "expose" conveys an actual conflict with sanctions, even if some uncertainty exists. "Reasonable judgment" leaves room for doubt and honest mistakes, but not knee-jerk reactions to remote risks. Together, the word "will" and the "reasonable judgment" requirement weigh in

[64] Scott, Contract Design and the Shading Problem, 99 Marq. L. Rev. 1 (2015); Gilson et al, Text and Context: Contract Interpretation as Contract Design, 100 Cornell L. Rev. 23 (2014).

favor of interpreting the clause as referring to actual violations. The only implied risks should be the typical endogenous kind, that is, factors within the parties control.

The language in the rest of the clause confirms that its purpose is to avoid impending violations, not attenuated risks. The general right of refusal in paragraph (a) precedes a much longer paragraph providing instructions in the event of sudden sanctions. In the rare circumstance that "the Vessel is already performing an employment to which such sanction or prohibition is subsequently applied," the Charterer has 48 hours to modify orders before the Owner may dispose of the cargo. Taken as a whole, the purpose of the clause appears to be preventing illegal deliveries before they take place. It serves as an emergency break when due diligence suggests an impending transaction might violate violations.

Voyages that would obviously expose a vessel to sanctions include all impending violations of sanctions, whether they were intentional or unintentional. A vessel would be liable for unintentionally committing or facilitating, that is causing, a violation if it "should have known" or "had reason to know" of a potential violation.[65] Ordinarily due diligence is within the contractual charterer's responsibilities in a time charter, but there may nevertheless be strict liability for vessel owners particularly if there were obvious facts within the reach of the master creating notice of a violation. The facts might include a voyage involving U.S. origin goods to an Iranian destination. A common violation involves delivery of offshore equipment to rigs within Iranian waters near the complicated maritime boundaries of the Persian Straits.[66] For sensitive cargo like dual-use items, the regulatory standard of care is high. The presence of unusual circumstances may be "red flags" creates additional due diligence responsibilities.[67] Until additional due diligence resolves the uncertainty, the voyage obviously "exposes" the vessel to sanctions and thus triggers a right to refuse or at least delay voyage orders until the required additional round of due diligence takes place to confirm the identity of all beneficiaries.

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[65] See foonote 10 supra, definition of "knowingly" in Iran sanctions statutes and regulations.
[66] See e.g., OFAC Enforcement Information for February 1, 2013, available at https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20130201_offshore_marine.pdf; Enforcement Information for July 19 2013, https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20130719_stanley_drilling.pdf; Enforcement Information for October 31, 2014 (Indam), https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20141031_indam.pdf.
[67] U.S. Dept. of Commerce Bureau of Industry and Security (BIS), "Red flag indicators," https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/deniedpersons-list/23-compliance-a-training/51-red-flag-indicators.

It is important to note that many dual-use items are not obviously dangerous, like metallic powder, but have little-known applications in nuclear research.[68]

A refusal to trade with Iran is highly advisable if the charterer categorically fails to perform the requisite due diligence and lacks adequate compliance mechanisms to engage in trade with Iran. OFAC requires "reasonable" due diligence and "adequate" compliance mechanisms, including screening vessel IMO numbers for presence of designated entities. Regulations for General License H requires foreign subsidiaries that trade with Iran exclude US parent from trading with Iran. All foreign companies that trade Iran must ring-fence American staff and avoid the US financial system in transactions, including dollar currency, foreign branches of U.S. banks, and correspondent accounts in U.S. banks. A charterer's abject failure to abide by these due diligence and compliance requirements should trigger the right to refuse voyages to Iran because they obviously "expose" a vessel to sanctions.

There could be some disagreement about whether to resume voyages once due diligence has verified that the transaction complies with all relevant U.S. sanctions, including the trade embargo and financial restrictions. Here, the "reasonable judgment" requirement might play an important role depending on the circumstances. If after owner discovered a "red flag," charterers verified that it complied with sanctions through additional due diligence, it would seem unreasonable to resume a dually-verified transaction. The "reasonable judgment" clause would seem to prohibit Charterers from demanding that the owners choose new buyers in another destination. Charterers would argue that it is incumbent on owners to resume a voyage after verification that the transaction is in full compliance with all sanctions, embargo, and license requirements.

Another problem might arise if owners are generally fearful that there is a due diligence failure somewhere in the chain of charter assignments. Perhaps it would fear that the demise charterer is negligent of its sanctions due diligence and compliance responsibilities. Due diligence for trade embargo purposes is of crucial importance in the presence of ties linking the vessel owner to the U.S., most obviously in the case of a U.S. vessel or U.S. citizen crew. Although foreign subsidiaries of U.S. insurers may engage with Iran under General License H, their parents may not. Owners may be concerned that charterers operating under trade embargo exemptions and sanctions waivers under the nuclear deal will expose the vessel to sanctions

[68] Commerce Control List, 15 C.F.R. Part 774, Supplement No. 1 (2016).

through due diligence failures and a lack of adequate compliance mechanisms. They may fear that the maze of regulations surrounding trade with Iran creates an insurmountable risk of sanctions violations. Charterers might resist Owner's uncompensated demands to use the sanctions clause as a way to exclude Iran from trading limits based on the risk of hypothetical due diligence failures by anonymous future assignees.

i. Elusive industry standards & course of dealings evidence

Actual, subjective party intent is typically elusive in litigation over minor terms in standard forms. Nonetheless, a course of dealings may reflect a shared understanding of the clause's meaning or function. Infrequent dealings are vulnerable to the argument that they represent a series of individual waivers. It could be that parties develop a course of dealings around Iran. Previous journeys there could be evidence that the parties adopted a narrow understanding of the clause as a stop to impending sanctions violations, not a broad right to avoid remote political risks. An owner might reply that it merely waived its refusal rights before, and now it reasonably exercises them to avoid the increased risk of sanctions during the "wind-down."

Any term that purports to be a "standard" clause creates the temptation to argue that an objective, universal meaning beyond reproach from the plain meaning rule. The standard clause might inspire parties to search for its meaning in other standards, with the expectation that standard clauses express the same thing. For an ambiguous standard term to incorporate the significance of a trade usage, first a party must provide proof that an objective, universal customary meaning exists, and second, proof that the parties intended to incorporate it. Modifications to the surrounding text have significance unless they are meaningless "encrustations" of legal jargon developed through rote usage. Through the process of a vague term becoming a standard, nameless authors "tinker" with the clauses to modify it for special circumstances or new types of contracts. A court would have to determine whether slight variations to the language are the meaningless vestiges of "tinkering" with legal jargon or whether they represent deliberate attempts to change the meaning of the terms.[69]

[69] Choi et al, Black Hole of Interpretation, at 11 (supra note 56).

Here it will be difficult to prove that there is any objective core to the phrase "expose to sanctions" with the certainty of terms required for enforcement. A vague term like "expose to sanctions" obviously lacks the conventional status and specificity of trade usages like "FAS" or "FOB," even though it is both nominally and functionally a standard term time charter-parties. It would seem impossible to argue that the shipping community ascribes any particular customary meaning to the term "expose to sanctions" with the specificity and universal acceptance of a trade usage, particularly in isolation from the surrounding language. The surrounding language is necessary to divine a clearer meaning. There appears not to be a unified standard for the industry to begin with. The choice in standard sanctions clauses for time charter parties is between two substantially different standards. One, Intertanko's clause, gives a right of refusal in owner's "absolute discretion" when orders "could expose the vessel to a risk of sanctions."[70] BIMBCO's allows refusal only when, in the owner's "reasonable judgment," orders "will expose the vessel to sanctions."

Nevertheless, parties may go to the expense of proving that the standard clause does indeed represent an objective standard, customarily understood to mean something more specific within the shipping industry than the language would ordinarily communicate. The fact that the clause purports to represent a standard could lead parties on a costly chase for evidence of a true industry standard whose meaning has the unassailable status of a trade usage. If a customary meaning does exist in shipping, reasonable expectations require incorporating it where a clause clearly references that standard. Litigation may be expensive with no certain outcome.

Standard sanctions clauses in shipping contracts have spread and evolved rapidly over the last decade, particularly in marine insurance. They became available for charter parties after U.S. regulators demanded marine insurers adopt sanctions exclusions in global policies. Marine insurers were among the first targets of U.S. sanctions against Iran to curb the provocative nuclear activities of the former President Ahmadinejad. The U.S. blacklisted the Islamic Republic of Iran Shipping Lines (IRISL) and the National Iranian Tanker Company (NITC) for allegedly facilitating covert nuclear activities. As a result, the insurers of Iran's huge tanker and container fleets were forced to terminate cover. Later, the U.S. fortified the trade embargo with secondary sanctions on foreign financial institutions, leading up to the European oil embargo of 2012.

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[70] Intertanko Sanctions Clause (2010) (supra note 6).

Early on, the Treasury Department issued guidance for global insurers through its Office of Foreign Assets Control (OFAC), the agency primarily responsible for enforcing U.S. sanctions and embargoes. In response to a frequently-asked question on global insurance policies, OFAC conceded that nuclear sanctions created risks for global policies "by definition" of their coverage. The agency recommended inserting "an explicit exclusion for risks that would violate U.S. sanctions law" as "[t]he best and most reliable approach" to avoiding sanctions violations. It recommended the following short and sweet clause from an open cargo policy: "whenever coverage provided by this policy *would be in violation* of any U.S. economic or trade sanctions, such coverage shall be null and void."[71] Without a sanctions exclusion clause, the insurer would need a special policy to continue global policies. The "legal effect" of the clause was to "prevent the extension of a prohibited service (insurance or risk assumption) to sanctioned countries, entities or individuals." The benefit was that it "essentially shifts the risk of loss for the underlying transaction back to the insured," presumably "the person more likely to have direct control over the economic activity giving rise to the contact with a sanctioned country, entity or individual."

In what was then a spectacular fine of $350 million, OFAC made an example of Lloyd's for "stripping" or "repairing" payment records to conceal sanctions violations.[72] In 2010, Lloyd's published a new standard sanctions clause for marine insurers that went beyond the simple phrase OFAC recommended a few years before. As part of a court-ordered effort to improve its compliance mechanisms, Lloyd's strengthened its cancellation rights by excluding all claims and cover that "would expose" it or a reinsurer "to any sanction prohibition or restriction" under not only U.S. but also U.N., E.U., or UK. [73] Lloyd's "would expose" was more broader and more indefinite than OFAC's recommended "would be in violation" insofar as it allows for some uncertainty as to the likelihood of a violation.

Concurrently, "expose" became a key word in sanctions clauses for time charter parties. Vessel owners copied Lloyd's language allowing refusal for orders that "expose" a vessel to sanctions, rather than OFAC's "would be in violation of sanctions." Copying the vague word

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[71] OFAC Frequently Asked Questions ## 102 & # 103, Compliance for the Insurance Industry, Nov. 16, 2007 (emphasis added), available at https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_compliance.aspx#insurance.

[72] OFAC Settlement Agreement, (MUL-4745344) (29 Dec 2009).

[73] Sanctions Limitations and Exclusions Clause, Lloyd's Joint Cargo Committee, JC 2010/014, August 11, 2010.

"expose" mirrored the owners P&I terms, which terminated "if a member engages in trades likely to expose the Club to sanctions." Differences in the surrounding language vary the degree of discretion with the verb-modifiers "will" or "could" and references to risk. Here, the clause allows vessel owners to refuse sanctions that in their "reasonable judgment" "will expose" a vessel to sanctions. In contrast, clause in the tanker trade "absolute discretion" to refuse voyage orders "which could expose the vessel… to a risk of sanctions." Intertanko's language "could expose" went even further than Lloyd's "would expose" because there is requirement that the trade even creates a risk of sanctions violations. Since first publishing them in 2010, the two vessel owning associations have not altered the standard clauses.

The choice of standard sanctions clauses time charters remains one of these two vague terms giving more or less freedom to the owner to refuse voyage orders that "expose" a vessel to sanctions. Again, those two clauses have very different language. Intertanko's sanctions clause for time charter parties explicit references to risk and absolute discretion, allowing refusal to orders that "could expose to a risk of sanctions." The phrase in BIMCO's clause, "will expose to sanctions," lacks any to risk or discretion, instead requiring the owner use its "reasonable judgment."

Meanwhile, marine insurers have fortified their discretion to avoid sanctions by explicitly references "risks" of ever-extenuating and increasingly abstract varieties. Interpreting commercial boilerplate in the fast-moving world of sanctions, where a decade-old vintage may be outdated. Whereas vessel owners may refuse voyages that "will expose a vessel to sanctions," their insurers may terminate coverage that would, could, or may expose a vessel to a risk of becoming subject to a sanction. For instance, Skuld's P&I terms for 2018 terminate "the Member has exposed or may expose the Association to the risk of being or becoming subject to a sanction, prohibition, restriction or other adverse action."[74] Thus marine insurers have gone far beyond Lloyd's former standard denial of coverage for claims that "would expose" it "to any sanction."

Charterers might argue that if any standard exists for sanctions clauses in shipping, it is simple principle from an open cargo policy that OFAC recommended excluding claims that for "would be in violation any U.S. economic or trade sanctions." Although insurance is a separate

[74] § 3.3.e Skuld P&I Rules (2018).

field, global time charters are subject to some of the same risks as global policies due to the risk of unintentionally transacting with sanctioned entities or incurring liability in accidents involving them. The fact that the agency has kept the advice on its website and references it in penalties is evidence that the standard remains the same exists and of its contents. [75] Under this interpretation, legitimate trade with Iran is not vulnerable to refusal merely because it involves higher due diligence, compliance, or license requirements. A vessel owner should not be able to refuse legitimate trade with Iran due to hypothetical risks that go beyond what the law requires, what regulatory agencies recommend, and reasonable expectations that a standard clause actually expresses the standard.

The Owner's argument in response would be that FAQs from ten years ago are outdated in the world of sanctions. Whatever the standard was in 2007, by 2010 a new private standard emerged that had changed to include the word "expose" and the risk that it implies. The vessel owning association published its own version of the standard clause around the same time that Lloyd's published its standard clause, denying claims that "would expose" it to sanctions. At the same time, the owners of tankers published a clause with a right of refusal for voyages that "could expose" the vessel "to a risk of sanctions." "Will expose" and "could expose to risk" are meaningless variations on the central concept of Lloyd's standard "would expose," which already implies risk. This is in line with the drafters' interpretation that "will expose to sanctions" means creates a "tangible" risk of "the imposition of sanctions." Even if a new industry standard never coalesced around the term "expose to sanctions," the term still represents a deliberate divergence from the previous 2007-vintage OFAC standard, "would be in violation." Failing to include the word "risk" might have been an attempt to do away with unnecessary jargon.

A number of problems could arise in litigation over whether an ambiguous "standard" clause is actually standard or differs from the norm. In addition to proving that a standard exists

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[75] See e.g. OFAC Enforcement Information for June 26, 2017 (AIG penalty), at ¶ 7 (reiterating relevance of FAQs):

> This enforcement action highlights the important role that properly executed exclusionary clauses and robust compliance controls play in the global insurance industry's efforts to comply with U.S. economic sanctions programs. As outlined in OFAC's Frequently Asked Questions regarding Compliance for the Insurance Industry, the best and most reliable approach for insuring global risks without violating U.S. sanctions law is to insert in global insurance policies an explicit exclusion for risks that *would violate U.S. sanctions laws*. (Emphasis added).

in the first place, proving that the parties intended to incorporate is a separate challenge. If the clause differs from a universal standard, the argument would be that the differences merit strict enforcement like the rest of the charterparty and evince a deliberate attempt to diverge from the standard. It is difficult enough to prove that a standard exists at any given time. The arguments and proof become much more complicated if the standard is changing quickly or if there are multiple competing standards. Here, where it is not clear that a standard exists at all, a party might object to comparing language with or importing it from another clause outside the contract. It would argue that strict enforcement requires a court consider the language that the parties agreed on in the contract. What that clause represents in comparison with alternative variations of the clauses in other contracts is irrelevant. The parole evidence and plain meaning rule ask what a party would understand after reading the contract, not after reading all the alternative standard clauses of a certain variety. The only other clauses that are relevant are other clauses in the same contract.

If there is a standard, it appears to be changing quickly, making a customary meaning ephemeral at any given moment. Rather, sanctions are an area of rapidly changing, steadily growing, and increasingly duplicative boilerplate. Whether the word "expose" became ubiquitous in standard sanctions clauses in shipping by design or by accident remains unclear. The phrase "will expose to sanctions" apparently adapts some of the language that marine insurers use to avoid exposure to risks. The inclusion of P&I insurers in the drafting clause supports the inference that the clause sought to modify standard terms from insurance for the use in charterparties. Failure to spell out "to risk" could be an inadvertent mistake or attempt to avoid duplicative language based on the understanding that "expose" already implies risk. Perhaps the drafters considered that explicit language referencing risk was unnecessary since "expose" necessarily implies risk based on dictionary definitions.

Whatever its origin, the word "expose" appears insufficient to open the clause to all forms of implied risks either due to its plain meaning or customary trade definition. The common denominator of the industry standards, "expose to sanctions," is a vague term that relies on its surrounding language for interpretation. There is apparently no customary trade meaning associated with the truncated phrase "expose to sanctions" with the certainty of terms necessary for enforcement. Although "expose to sanctions" is the common denominator of standard clauses published by trade organizations in the shipping industry, differences in the surrounding

language and explicit references to risk or discretion can create stark changes in meaning. Standard sanctions clauses in maritime contracts, including P&I insurance and charter parties, vary the meaning of the vague word "expose" with verb-modifiers like may, could, would, or will.

If a standard does or ever did exist, the clause in question occupies an awkward limbo between the nuanced, evolving alternatives. More accurate would be to say that for charterparties, there is a choice between two different clauses. They are only standard in the sense that they are published as default terms. There are significant differences in language between both the clause in question and the alternative clause for charterparties, in addition to the "standard" insurance clauses, making it doubtful that a single standard exists for charterparties or for shipping at all. The plain meaning of "will expose" is closest to variations like the standard clause that OFAC recommended in 2007 or Lloyd's clause from 2010, which respectively employ the phrases "would be in violation of sanctions" and "would expose to sanctions." In contrast, the alternative clause for tanker charters allows refusal in the owner's "absolute discretion" for orders that "could expose the vessel to a risk of sanctions." Newer marine insurance clauses also include more explicit references to risk and absolute discretion.

Interpreting "expose to sanctions" thus is less a task of deciphering an industry standard, which is a moving target in the fast-paced world of sanctions. More likely, it is an exercise in ordinary contract interpretation. The plain meaning rule, the *principle expressio unius est exclusio alterius* and the presumption against superfluity tend to view small differences in language as deliberate choices, not meaningless surplus. In the same contract, "will" or "would expose to sanctions" conveys more certainty than "may" or "could expose to sanctions." As a refusal right, it facilitates self-enforcement, but the "reasonable judgment" appears to limit discretion to reasonable differences of opinion and honest mistakes.[76] The choice of language is more even-handed than the tanker trade version, which makes it palatable to charterers and helps BIMCO maintain its reputation publishing reasonably fair standard form shipping contracts and clauses.

[76] See e.g. Oliver E. Williamson, Hostages to Support Exchange (1983) and Ronald J. Mann, Verification Institutions in Financing Transactions (1999) (supra note 51); see also Goetz & Scott, Relational Contracts (1981), at 1093-1094 (supra note 55).

ii. Drafters' commentary on "tangible risks"

In their attempt to demystify the clause, the drafters explained the task is to determine "whether the risk of the imposition of sanctions is tangible." Unfortunately, this recreates the original problem of interpreting vague language by conditioning the use of the clause on a "tangible" risk.

Owners would argue that "tangible" means they can cancel due to any sanctions risk, regardless of how small, incalculable, or unverifiable it may be. A voyage might pose a "tangible" risk of sanctions in the sense that it is subject to a very small, perhaps incalculable, but nevertheless significant risk of violating sanctions. The risk that trade with Iran violates financial restrictions or other sanctions is "tangible" in the sense that it involves risks that are categorically different from voyages to other countries that are not the target of a forty-year embargo and ongoing sanctions campaign. Owners might refuse all voyages to Iran pending a reversal of U.S. policy on Iran in favor of the nuclear deal.

Alternatively, a "tangible" risk of a violation might mean uncertainty adhering to a transaction, creating a risk of violating sanctions that is remote and perhaps incalculable but impossible to ignore. For instance, if due diligence has not taken place for the purposes of sanctions compliance, the risk that a delivery involves a designated entity may be very low but nevertheless "tangible." The same would be true if parties are unable to confirm that cargo strictly confirms with regulatory requirements. For embargo exemptions like medical equipment, food, and personal communications technology, there are preapproved lists with very narrow technical definitions. Any differences between the cargo and the narrow regulations create a "tangible" risk of a violation.[77]

Charterer might argue against using the drafters' interpretations at all, since the commentary is are not included in the clause as it appears in the contract and thus parole evidence. The *contra proferentem* rule prevents interpreting ambiguous language in the interests of the drafter, here, the vessel owning association. Under the *contra proferentem* rule, it would

[77] See e.g. OFAC Enforcement Information for Aug 16 2011 (CMA CGM), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/08162011.pdf; Enforcement Information for Sept 13, 2016 (PanAmerian Seed Co), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160913_panam.pdf.

be unfair to allow vessel owners to use ambiguous contract language as a trap-door to broader rights in their own self-interest. If the clause allowed refusal for merely "tangible" external risks, it would be an unenforceable illusory or gratuitous promise. It would be difficult to imagine a breach of this right. Even deliveries of cargo with a minority portion of U.S. components to ports outside Iran could pose a "tangible risk" of violating restrictions on transshipments. Owners might be hard pressed to find a transaction in global shipping that does not pose a "tangible" risk of sanctions. If the clause implied all remote external geo-political risks related to sanctions, contractual rights might change on monthly, weekly, or even daily basis based on the President's mood. Such a clause would fail the indefiniteness doctrine. It would also frustrate expectations that voyages are feasible within trading limits unless sanctions or other laws forbid it.

Is it possible that the rights of refusal are self-enforcing and unenforceable, that is, not subject to judicial review? Rights of refusal are a method of self-enforcement, like vetoes, collateral, and other contractual "hostages" or "bonding" mechanisms.[78] The argument would be that the clause is self-enforcing insofar as it gives complete discretion to one party to assess external risks. Counsel might argue that the clause gives Owners complete discretion to judge whether a voyage will expose a vessel to a "tangible risk" of sanctions. Time charters rely on self-enforcement, insofar they allocate risks or responsibilities. This helps the parties cooperate over a medium- to long-term commercial relationship.

In general, broad, self-enforcing rights are better suited to options or conditions in preliminary or contingent contracts, not the commercial charter context. Since charterparties clearly evince an intent to be legally bound, "self-enforcement" is a rather academic discussion pertaining to how much any particular clause relies on the hindsight of a judge or arbitrator to decide an issue. A judge will exclude unenforceable interpretations because it would frustrate the reasonable expectations of parties that charter parties are legally binding instruments. A term that is unenforceable under the indefiniteness doctrine invites owners to create delays that they will not be able to recover.

The argument for self-enforcement would probably be stronger regarding the sanctions clause in the tanker industry due to the phrase "may expose" and references to "risk" and "absolute discretion." Here, the language "will expose" and "reasonable judgment" limit

[78] Williamson, Mann (supra note 79).

discretion and invite review for unreasonable assessments of risk. Additionally, the *contra proferentem* principle might have some application. That principle interprets ambiguous clauses against the interests of the drafter, here, the vessel owning association and its constituency. It would be unfair to use the ambiguous phrase "expose to sanctions" as an opportunity to hide a much larger self-enforcing right in the commentary covering any "tangible risk."

iii. Susceptibility to changes in meaning due to similar or overlapping clauses

It could be that the clause means different things in different charterparties. The susceptibility of a standard clause to changes in meaning based on the rest of a contract may be a design feature or flaw. If the word "expose" appears in other relevant clauses in the contract, that might influence the interpretation of "expose" in the sanctions clause.

For instance, the updated New York Time Charter uses the word "expose" elsewhere in conjunction with the explicit references to risk. The new NYPE (2015) also includes a new "War Risks" clause that BIMCO first published in 2013. After a list of carefully defined risks, it includes a right of refusal "where it appears that the Vessel… in the reasonable judgment of Master and/or the Owners, may be exposed to War Risks, whether such risk existed at the time of entering this Charter Party or occurred thereafter."[79] The owner's argument based on *noscitur a sociis* might be that the appearance of "risk" in conjunction with the word "expose" is evidence that it implies or presupposes a risk. The Charterer's argument would be that it is inappropriate to interpret two idiosyncratic clauses together merely because they share a vague, commonly-used word like "expose." Applying the principle *expresio unius* argument, that the expression of one thing excludes the alternatives, "expose to sanctions" means something completely different from "expose to War Risks." The plain meaning of "expose" relies on the immediately surrounding words for specificity, not words in other clauses that qualify "expose" in different ways. The Charterer would argue, the presence of the word "expose" in conjunction with "War Risks" reflects its susceptibility to different meanings and the norm that risks beyond a party's control require explicit treatment.

Another potential challenge with BIMCO's standard sanctions clauses involves overlap with another, more specialized sanctions clause in the updated New York Produce Exchange

[79] See NYPE (2015), § 36(b).

time charter from 2015. The designated entities clause is a due diligence warranty that the parties, sup-parties, and beneficiaries are not blacklisted, with an option to cancel the charterparty for breach. It is not clear from the text how the two sanctions clauses interact. Are they overlapping, in the sense that the rights can be cumulative if both clauses apply? Or are they mutually exclusive, and only one clause may apply at a time? A few principles of interpretation may apply here. The *ejusdem generis* and *rationae materiae* principles supports interpreting similar clauses together, while the principle *lex specialis derogat legi generali* treats specialized terms as overriding more general terms in a conflict.[80] It might defeat the purpose of the clauses to read them as mutually exclusive. It would frustrate the reasonable expectations of parties who expect that including more standard sanctions clauses adds to remedies that are not in conflict with each other. Including both in a standard form, like NYPE 2015, likely represents an intention to provide the most thorough treatment of the issue. In other words, the designated entities clause adds cancellation remedies in new extremes, without limiting the original right to refuse all orders that "will expose the vessel to any sanction."

Unfortunately, the drafting history and ambiguous commentary may add to the confusion. The designated entities clause has become a franchise, but the original sanctions clause never. After the first steps towards agreement on the nuclear accord, BIMCO quickly published "parallel" designated entities clauses for vessel sale and purchase forms, as well as ship management agreements.[81] Perhaps because the right to refuse voyage orders is unique to the time-charter context, BIMCO neglected to reproduce the original sanctions clause or even mention it. The designated entities clause franchise might overshadow the original sanctions clause. In the commentary separate from the text, the drafters merely advised that "the new provision is distinct from the BIMCO Sanctions Clause for Time Charter Parties which applies to sanctions imposed against a state."[82] "Distinct" could imply that both clauses are necessary to provide the best protection against different types of sanctions. Alternatively, "distinct" might add to the misconception that the original sanctions clause is less important than the designated entities clause.

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[80] Scott & Triantis, Anticipating Litigation in Contract Design, at 848-851 (supra note 4).
[81] BIMCO Designated Entities Clause for Sale & Purchase Agreements, 9 Dec. 2013; BIMCO Designated Entities Clause for Charter Parties, 26 Apr. 2013.
[82] BIMCO Designated Entities Clause for Time Charter Parties, ¶ 2 explanatory notes.

Another problem with the commentary is that it creates logical problems for state-owned entities. It is accurate enough in the sense that the new designated entities clause applies to sanctions against "specified persons, entities or bodies." The specialized clause is "distinct" from the original sanctions clause in question, which has a much broader scope insofar as it applies to "any sanction," including the trade embargo, financial sanctions, and other prohibitions that apply to a class of transactions rather than "specified" individuals or entities. But the superficial distinction poses a logical problem for sanctions against state-owned entities, like IRISL, NITC, and NIOC, ostensibly taking effect in November 2018. In a sense, those sanctions are against both a state and "specified entities." Practically, it would be logical that both clauses should apply. That is, an owner should obviously have a right to refuse orders that "will expose a vessel to sanctions," here targeting a designated entity. This right exists separate and apart from the right to cancel a charterparty, which applies when one of the parties becomes a target of sanctions, or a party learns that the other has transacted with a designated entity.

The designated entities clause has a provision on conflict of laws, but whether and how this influences rights of refusal is a question of interpretation. The designated entities clause provides that "[n]otwithstanding anything in this Clause to the contrary, Owners or Charterers shall not be required to do anything *which constitutes a violation* of the laws and regulations of any State to which either of them is subject."[83] Does this clause also apply to the original sanctions clause as well? Could either Charters or Owners argue that the clauses should be read together?

Based on the *ejusdem generis* and *ratione materiae* principles that similar clauses ought to be read together, one might argue that conflict of law term from the designated entities should apply to the general right to refuse orders that violate sanctions. The language in the conflicts of law clause, allowing refusal for "anything which constitutes a violation," is substantially similar to the more general rights of refusal for orders that "will expose to sanctions," especially under the interpretation that it describes illegality rather than risk. Charterer might argue the designated entities clause is more evidence that the standard the contract adopts for sanctions is refusal for "anything which constitutes a violation." The more specialized clause is a restatement of the general right to refuse orders that "expose a vessel to any sanction," all of which express the standard OFAC recommends for global insurers, "would be in violation of

[83] BIMCO Designated Entities Clause for Time Charter Parties, § e. Emphasis added.

sanctions." Owners might argue that the conflict of laws in the designated entities clause should apply to the original rights of refusal. The designated entities clause provides more dramatic remedies. Whereas the rights of refusal in the original clause apply to orders, voyages, and trades, in comparison, the designated entities clause emphasizes that the parties "shall not be required to do anything" that violates sanctions.

The opposite argument could be made based on the principle *expresio unius est exclusio alterius*, that the expression of one thing excludes the alternatives, and the *lex specialis* principle that provisions under a specialized clause do not apply to a more general clause on the same topic. Provisions from the designated entities clause are specialized and do not apply across the board when sanctions issues arise. Charterer's argument that "expose to sanctions" means the same thing as "constitutes a violation" is subject to the same vulnerability as the argument that it means the same thing as "expose to a risk." Under *expresio unius*, different formulations of legal standards in the same contract presumptively represent differences in meaning; each standard is the *lex specialis* for that particular term. Owner's effort to incorporate dramatic remedies and rights from the designated entities clause is especially vulnerable to the *lex specialis* principle.

IV. Further research: Conflict of Laws Issues

Most likely, shipping contracts involving Iranian ports or goods will involve a choice of foreign law and arbitration, particularly after Trump's withdrawal from the nuclear deal. Arbitration clauses are nearly ubiquitous in charter-parties, like other shipping and commercial contracts generally. The fear of disclosing damaging information probably strengthens the appeal of confidential arbitration involving sanctions.

Trump's decision to withdraw from the nuclear deal could lead to a serious conflict of laws problem if the U.S. makes good on his threat to unilaterally reinstating nuclear sanctions against Iran. Europe, Russia, and China have reiterated their support for the nuclear deal and are exploring ways to protect trade with Iran, including foreign guarantees and access to loans and export credits. European officials are reportedly updating the Blocking Regulation to protect European companies that trade with Iran.[84] The "claw-back" regulation forbids compliance with

[84] Matthew Dalton & Laurence Norman, European officials look to blunt impact of renewed U.S. sanctions on Iran," WSJ, 11 May 2018.

foreign trade sanctions when Europe takes the opposite side.[85] In theory, it is the equivalent of an ace in conflict of laws, the explicit statutory obligation that prevents a party from complying with a foreign law. [86] Whether a U.S. court would agree remains untested. Anyway, how much it would actually help European companies is unclear, especially those with a large presence in the U.S. or awaiting U.S. licenses. Following Trump's withdrawal from the nuclear pact, Maersk of Denmark and the Swiss Mediterranean Shipping Company (MSC) opaquely "said they were reviewing their Iran operations." Total is hoping for an extension on the wind-down and will probably sell its interest in a gas development and concession to its partner, a state-owned Chinese bank. [87]

Apart from any language in the contract, whether U.S. sanctions apply to a voyage will be a question of foreign mandatory laws according to the forum's own law on contracts and arbitration. [88] The European Union recognizes foreign mandatory laws in circumstances where the foreign country has a strong connection to the transaction.[89] Extraterritorial jurisdiction remains at least somewhat controversial beyond the basic consensus that a country has jurisdiction over its citizens and territory, and universal jurisdiction for jus cogens violations like piracy or slavery.[90] Unless a bilateral treaty governs the issue, the forum may be hesitant to recognize the extraterritorial effect of U.S. sanctions law based its national security policy in the

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[85] Council Regulation (EC) No 2271/96, O.J. L. 309, 22.11.1996.

[86] See Jurgen Huber, The Helms-Burton Blocking Statute of the European Union, 20 Fordham Int'l L.J. 699 (1997); J. Brett Busby, Jurisdiction to Limit Third-Country Interaction With Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts, 36 Colum. J. Transnat'l L. 621 1998.

[87] Thomas Erdbrink & Rick Gladstone, Iran rallies against U.S. and warns Europe over endangered Nuclear Deal, NYT, 11 May 2018 at ¶ 27.

[88] MERCEDEH AZERDO DA SILVEIRA, TRADE SANCTIONS AND INTERNATIONAL SALES: AN INQUIRY INTO INTERNATIONAL ARBITRATION AND COMMERCIAL LITIGATION (2014); Elliot Geisinger, Phillippe Bartsch, Julie Raneda, & Solomon Ebere, The Impact of International Trade Sanctions on Contractual Obligations and on International Commercial Arbitration, 2012 Int'l Bus. L.J. 405 (2012).

[89] Regulation EC No. 593/2008 (Rome I), O.J. 2008 L 177, Art. 9, Overriding Mandatory Provisions; Xandra Kramer, EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration, in THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (F. Ferrari ed. 2017); Matthias E. Storme, Freedom of Contract: Mandatory and Non-Mandatory Rules in European Contract Law, 15 Eur. Rev. Private L. 233 (2007).

[90] See e.g. Article 11, Hague Principles on Choice of Law in International Commercial Contracts (2015) (conflicts between foreign "overriding mandatory laws" and a forum's own public policy ("ordre public")) ; §§ 24 & § 42, Second Restatement on the Conflict of Laws (1971) (jurisdiction over foreign corporations, and generally, must be "reasonable"); § 401 Jurisdiction, 3rd Restatement on the Foreign Relations Law of the United States (limits to jurisdiction; c.f. three versions under consideration for 4th edition); see also Lieutenant Todd A. Wynkoop JAGC, USN, The Use Of Force Against Third Party Neutrals To Enforce Economic Sanctions Against A Belligerent, 42 Naval L. Rev. 91 (1995).

absence of a strong U.S. connection, like a U.S. vessel, person or cargo.[91] None of this is far off from the common law taboo against enforcing another country's criminal or tax laws, or the doctrine against reviewing sovereign acts of state. The principle of comity, or deference for the final decisions of courts in another jurisdiction, is a strong counterweight here.

Beyond this consensus, there is a range of academic opinions on the appropriate role of public mandatory law in arbitration. Generally speaking it is uncontroversial that whatever choice of law a contract makes, arbitrators must apply the law of the forum, including its rules on choice of law and conflicts of law.[92] A vocal minority of transnational purists maintain that they only are responsible for applying private law of the contract, regardless of conflicting forum laws or foreign laws purporting to have extraterritorial effect. Parties reasonably expect that when they choose international arbitration in a neutral forum, the arbitrator will resolve the conflicts between their private interests, not act as a surrogate for either parochial or exotic law enforcement interests.[93]

How European courts or arbitrators would interpret the term would be a matter of the chosen law of the contract, subject to the mandatory law of the forum. It seems more likely that a European court or arbitrator would interpret "will expose to sanctions" as "could violate sanctions," insofar as it applies to impending sanctions violations rather than risks. In the commercial shipping context, the norm is strict enforcement of the terms and an aversion to implying risk beyond the parties' control.[94] The advantage of the clause, interpreted in this way, is that it allows owners to refuse orders promptly when a compliance issue arises without worrying whether the law of another jurisdiction would recognize the extraterritorial effect of

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[91] Regulation EC No. 593/2008 (Rome I), Art. 9 (supra note 87).

[92] GIUDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS (2014), at 134-136; F.M.B. Reynolds, the Enforcement of Contracts Involving Corruption or Illegality in Other Countries, Sing J. Legal Stud. 371 (1997); Hans van Houtte, Trade Sanctions and Arbitration, 25 Int'l Bus. Law. 166 (1997) J. J. Fawcett, Evasion of Law and Mandatory Rules in Private International Law, 49 Cambridge L.J. 44 (1990); George A. Bermann, Public Law in the Conflict of Laws, 34 Am. J. Comp. L. Supp. 157 (1986).

[93] Hans Smit, "Mandatory Law in Arbitration" in MANDATORY RULES IN INTERNATIONAL ARBITRATION (G. Bermann et al eds. 2011).

[94] Francesco Berlingieri, Flexibility, foreseeability, reasonableness in maritime conventions and other relevant instruments, MarIus 424, 76 (2013); SJUR BRÆKHUS, CHOICE OF LAW PROBLEMS IN INTERNATIONAL SHIPPING (1979); MARTIN DAVIES & ANTHONY DICKEY, SHIPPING LAW (3rd ed. 2004); PROSHANTO K. MUKHERJEE & MARK BROWNRIGG, FARTHING ON INTERNATIONAL SHIPPING (4th ed. 2013); EU MARITIME TRANSPORT LAW (Henning Jessen & Michael Jürgen Werner eds. 2016); THOR FALKANGER, HANS JACOB BULL, LASSE BRAUTASET, SCANDINAVIAN MARITIME LAW (3rd ed. 2015); Regina Asariotis, Contracts for the Carriage of Goods by Sea and Conflict of Laws: Some Questions regarding the Contracts (Applicable Law) Act 1990, 26 J. Mar. L. & Com. 293 (1995).

U.S. sanctions, particularly in the context of such a controversial international dispute. An arbitrator that interprets the clause as describing violations might expect parties to perform if modifications for compliance purposes were reasonably available, like switching currencies or other changes to the normal payment terms. This seems especially likely if the policy of that jurisdiction is in favor of the Iran nuclear deal and trade with Iran.

The United Kingdom is a likely forum for a dispute, as a popular choice of law and forum for maritime litigation and arbitration. How an English judge or arbitrator might interpret the clause under English law is beyond the scope of this paper and recommended as a topic for further study. As a basic matter, illegal contracts are unenforceable at common law, including contracts that intentionally violate foreign laws. Inadvertent illegality under sanctions may be an excuse to performance and defense against breach.[95] It seems likely that a U.K. court would interpret "will expose" as referring to an actual violation rather than a remote risk. Such an interpretation would be in line with strict enforcement of international commercial shipping contracts, where parties generally assume those risks within their control in absence of an explicit reference to risk.[96]

Whether U.K. decisions in the area of marine insurance have any application to charterparty law is also beyond the scope of this paper. Its courts decided a number of marine insurance cases involving sanctions clauses. In *Groupama*, the Court of Appeal enforced a clearly worded option to cancel where the vessel "may, in the opinion of the Insurer, expose the Insurer to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever against Iran."[97] The Commercial Court did not accept minor violations of

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[95] See e.g., Audley Sheppard, "Mandatory Rules in International Commercial Arbitration: An English Law Perspective," in MANDATORY RULES IN INTERNATIONAL ARBITRATION (G. Bermann et al eds. 2011); JILL POOLE, CONTRACT LAW (12th ed. 2014); R.A. Buckley, Illegality in Contract and Conceptual Reasoning, 12 Anglo-Am. L. Rev. 280 (1983); David Gek Sian Chong, Contractual Illegality and Conflict of Laws, 7 SAcLJ 303 (1995); F. A. Mann, Proper Law and Illegality in Private International Law, 18 Brit. Y.B. Int'l L. 97 (1937).

[96] Jonas Rosengren, Contract Interpretation in International Arbitration, 30. J. Int'l Arb. 1 (2013); Yvonne Batz, Reasonableness, Foreseeability and Flexibility: Construction of terms in maritime contracts and remedies for their breach, MarIus 424, 107 (2013).

[97] Arash Shipping Enterprises v. Groupama Transport, [2011] EWCA Civ 620, at 609. The first paragraph of the "Iran Sanctions Clause" read:

> Insurers hereon may, on such notice in writing as the Insurer may decide, cancel the Insurer's participation under this Policy in circumstances the Assured has exposed or may, in the opinion of the Insurer, expose the Insurer to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever against Iran by the State of the Ship(s) flag, or by the

sanctions as an excuse to paying claims or providing coverage, even in the presence of sanctions clauses in *The Nancy*. Rather, the Queen's Bench expected insurers to make modifications to payment terms and apply for licenses to avoid violations.[98] It also required Steamship Mutual to cover third-party pollution damages liabilities as a result of the *Zoorick* grounding on the Yangtze River, refusing to acknowledge the insurer's cancelation mere hours earlier.[99] The High Court exercised its admiralty jurisdiction in the Sea Glory to sever non-essential clauses like payment terms specifying a U.S. bank and requiring parties to seek licenses.[100] Again, since insurance is a highly regulated, specialized area, decisions from that area may not apply to charterparty law. The burdens on insurers towards customers and the public are higher than normal due to the unique moral hazards of insurance.[101] How the new generation of sanctions clauses in marine insurance contracts will operate under English law is another recommended topic for further research.

A technical conflict of laws issue is whether the claims involving sanctions violations are arbitrable in the foreign jurisdiction.[102] The forum's arbitration law on this matter is most determinative in absence of a strong connection to the foreign jurisdiction like citizenship or real estate. As a matter of its own law, the forum may respect the foreign law to prevent arbitrage of national arbitration laws through forum shopping. They may interpret it as mandatory for domestic contracts without having extraterritorial effect to foreign or transnational contracts.

Whether sanctions are arbitrable in foreign contracts is an unanswered question in U.S. arbitration law and beyond the scope of this paper. Domestic arbitration may not involve criminal violations. Iran sanctions require special OFAC licenses for arbitrations involving

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United Kingdom and/or the United States of America and/or the European Union and/or the United Nations.

[98] Sea Glory Maritime Co v. Al Sagr National Insurance Co ("The M/V Nancy"), QBD (Comm Ct), July 17, 2013, Lloyd's Law Reports Vol. 1, 2014 at 14; see also Royal Bank of Scotland v. FAL Oil, QBD [2012] EWHC 3628 (Comm) (Justice Gloster), Lloyd's Law Reports Vol. 1 2013 at 327; IRISL v. Steamship Mutual, QBD (Comm Ct), [2010] EWHC 2661; The "Sahand," High Court, January 31, 2011, described in Lloyd's Maritime Newsletter, May 25, 2011 (822 LMLN 4).

[99] IRISL v. Steamship Mutual ("The Zoorick"), QBD (Comm Ct), [2010] EWHC 2661.

[100] "The Sahand," High Court, January 31, 2011, described in Lloyd's Maritime Newsletter, May 25, 2011 (822 LMLN).

4). See also IRISL v. Steamship Mutual, QBD (Comm Ct), [2010] EWHC 2661.

[101] L.J. Staughton, Interpretation of Maritime Contracts, 26 J. Mar. L. & Com. 259 (1995); see also JACOBS ET AL, LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION, 52 (2011) (supra note 78).

[102] Article V(a), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Iranian parties, especially designated entities, and again at the execution stage for Iranian assets in the U.S. Generally speaking, foreign awards are enforceable if the claims involve violations of U.S. statutes with extraterritorial effect, like the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Sherman Anti-Trust Act, and the Securities Exchange Act (1934). [103] U.S. judicial policy in favor of arbitration limits review of awards on the merits, including an foreign arbitrator's assessment of the extent to which U.S. criminal statutes apply extraterritorially to the facts of a case.[104] Of course, a U.S. court could not enforce an award where the arbitrator refused to recognize U.S. extraterritorial jurisdiction because it is unreasonable and illegitimate.[105] That previously possibility seems all the more likely following Trump's withdrawal from the nuclear deal. However, there would be no apparent conflict with an award for damages where the arbitrator ruled that U.S. sanctions did not apply on the facts and that illegality was not an excuse for breach.

IV. Recommendations & Conclusion

Clarifying the language would strengthen its legal certainty, that is, the likelihood that a court will interpret a clause in a certain way. The interpretation that "will expose to sanctions" refers to impending transactions basically restates statutory duties, where "will" and "reasonable judgment" convey an actual due diligence, compliance, or liability concern. The opposite interpretation, that "expose" implies remote external risks, has obvious advantages to the owners but is likely beyond reach in absence of an explicit reference to risk.

Depending on BIMCO's preference, it could amend the language of the clause to reduce the risk of needless litigation over interpretation. "Would be in violation of sanctions," OFAC's suggested language for global insurance policies, or "which constitute a violation of sanctions,"

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[103] Shearson and American Express v. McMahon 107 S.Ct. 2332 (1987); In re Scherk v. Culver (417 U.S. 505, 1974); and Mistubishi Motors Corp v. Soler-Chrysler Plymouth, Inc., 473 U.S. 614 (1985), in Marc Blessing, Mandatory Rules of Law versus Party Autonomy in International Arbitration, 14 J. Int'l Arb. 23, 24, 38 (1997). See also See Russel J. Weintraub, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING (6th ed. 2011), 110, 112; Charles H. II Brower, Arbitration and Antitrust: Navigating the Contours of Mandatory Law, 59 Buff. L. Rev. 1127, 1132, 1155-1156 (2011); Andrew Barraclough & Jeff Waincymer, Mandatory Rules of Law in International Commercial Arbitration, 6 Melb. J. Int'l L. 205, 207, 221, 239 (2005).

[104] See e.g. Mitsubishi (1985) (id).

[105] See e.g., Pierre-Emmanuel Dupont, The Legality Of Economic Sanctions Under International Law And EU Law: The Case Of Iran, , 4 Indian J. Int'l Econ. L. 48 2011.

as in the designated entities clause, are clearer alternatives. Or, owners may refuse orders that "*could violate* any sanction or prohibition." If BIMCO prefers to include risk, it could adopt the language from the drafters' commentary, "might expose the vessel to the risk of sanctions" and adopt INTERTANKO's "absolute discretion" standard. Owner's have "absolute discretion" to refuse orders that "might expose it to a risk of sanctions." Still, "the risk of sanctions" might refer to possible violations. What language is sufficient to escape this apparent circuity is beyond the scope of this paper.

One concern may be that replacing the word "expose" will detract from its ability to serve as a "standard" shipping clause. INTERTANKO, Lloyd's and marine insurers use the word "expose" in their sanctions clauses. Still, "standard" is a misnomer for a paltry choice between BIMCO and INTERTANKO'S two substantially different clauses for time charters. BIMCO' has two standard sanctions clauses of its own, and consolidating them is worth detracting from the standard to avoid confusion about their relationship. That would provide an opportunity to clarify whether the new conflict of law terms restate or add to the original rights of refusal. Editing the confusing commentary seems wise, but only modifying the text will reliably clarify the relationship to avoid conflict between the overlapping clauses.

Another alternative would be to publish a new standard clause specific to Iran. All-purpose sanctions clauses may lose their appeal in trade with Iran due to the increasing compliance burdens and political risks. Still, it might be difficult to standardize any approach to trade with Iran after Trump's withdrawal. Serious conflict of laws problems approach as Europe prepares its blocking sanctions. "Europeans are going to face the effective U.S. sanctions, " John Bolton insisted .[106] Treasury Secretary Steven Mnuchin agreed. "We will enforce compliance."[107] "German companies doing business in Iran should wind down operations immediately," tweeted the new U.S. ambassador hours into the job. [108] German Prime Minister Angela Merkel lamented the "break in German-American [and] European-American relations." Iranian and European technical experts convened to find practical ways of protecting trade,

[106] Michale R. Gordon, U.S. ready to impose sanctions on European companies in Iran, Bolton says, WSJ, 13 May 2018.
[107] Ian Talley, Washington's Strict new policy on Iran could test ties with allies, WSJ, 13 May 2018.
[108] Richard Noack, Hours into his Job, Trump's ambassador to Germany offends its hosts," Washington Post, 9 May 2018; see also Carl Bildt, Trump's decision to blow up the Iran deal is a massive attack on Europe, The Washington Post, 12 May 2018.

especially oil and banking transactions.[109] On new sanctions, European Union Representative Federica Mogherini said, "We will see…the future is the future."[110] China was more forceful in its support. "We will continue with our normal and transparent practical cooperation with Iran on the basis of not violating our international obligations. [We oppose] the imposition of unilateral sanctions and the so-called long-arm jurisdiction by any country in accordance with its domestic laws." [111]

There is a great deal of uncertainty about how effective blocking regulations would be. "We need to receive those guarantees," said Iranian Foreign Minister Mohammad Javad Zarif gloomily.[112] British Foreign Secretary Boris Johnson was "realistic about the electrified rail, the live wire of American extraterritoriality, and how that can serve as a deterrent to business."[113] French President Macron "is not the CEO of Total," which may sell its interests in Iran. [114] European shipping companies are not taking any risks. Maersk announced it will honor contracts from before May 8 until November 4. MSC will stop calling in Iran, aside from food imports.[115] Torm, a Danish tanker company, "will not lift any cargo from Iran with immediate effect." [116]

Indeed, chaos and uncertainty surrounds trade with Iran. Where before, "there was a tentative putting of foot back in water by banks," now "we are entering the realm of the unknown."[117] U.S. – Iranian relations are like "a bad divorce [that] neither side has ever gotten over."[118] Meanwhile, Trump has "lived up to the billing" of being a "chaos president." He has successfully vanquished the despised quarterly waiver renewal, an irritating and humiliating

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[109] Nikos Chrysoloras & Richard Bravo, EU pledges steps to salvage Iran oil shipments 'within weeks,'" Bloomberg, 15 May 2018.
[110] Remarks by H.R./V.P. Mogherini at the press conference following ministerial meetings of the EU/E3 and EU/E3 and Iran, 15 May 2018.
[111] Rick Noack, China's new train to Iran sends message to Trump: We'll keep trading anyway, Washington Post, 11 May 2018.
[112] Michael Birnbam, Europe adopts a defiant stance in attempt to save Iran nuclear deal, Washington Post, 15 May 2018; Reuters, Iran Foreign Minister sets off on tour to save nuclear deal, 12 May 2018.
[113] Birnbam, Europe adopts a defiant stance 15 May 2018 (supra note 108)
[114] Gabriela Baczynska, Reuters, Macron rules out trade war over Iran deal as firms head for exit, 17 May, 2018.
[115] Gary Dixon, MSC drops Iranian calls after U.S. moves, Tradewinds, 17 May 2018.
[116] Maersk Tankers, Torm refuse new Iran business: industry officials, Platts S&P Global, 14 May 2018.
[117] Max Colchester and Laurence Fletcher, European Nuclear Deal Upheaval Shakes up European Banks' outreach, WSJ, 9 May 2018.
[118] Robin Wright, Trump's new confrontational foreign policy and the end of the Iran Deal, The New Yorker, 21 May 2018.

thorn in his side. The "fantasy" of "regime change" is another possible motivation, which John Bolton advocated last summer prior.[119] Alternatively, perhaps it is "nothing more than animus toward his predecessor" that inspired Trump's withdrawal.[120]

The one thing within the parties' control is the language in their contract. The vague, ambiguous word "expose" that has crept into standard sanctions may add to uncertainty and dispute resolution costs. BIMCO's clause relies on the "reasonable judgment" standard, which like other vague standards like "best efforts" or "good faith" require hindsight judgment in light of all the facts. This approach saves front-end costs of negotiation, only at the risk of potentially large back-end dispute resolution costs.[121] The upside of "expose" is that it captures the uncertainty of commercial reality, but the downside is that it opens the clause to interpretation and expensive dispute resolution over the extent to which it implies risk.

[119] Fareed Zakaria, Trump's only possible Iran strategy is a fantasy, Washington Post, 10 May 2018.
[120] Colum Lynch, Robbie Gramer, Top State Department nuclear expert announces resignation after Trump Iran Deal exit, Foreign Policy, 11 May 2018
[121] Scott & George G. Triantis, Anticipating Litigation in Contract Design, 824-825 (2006) (supra note 4).

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