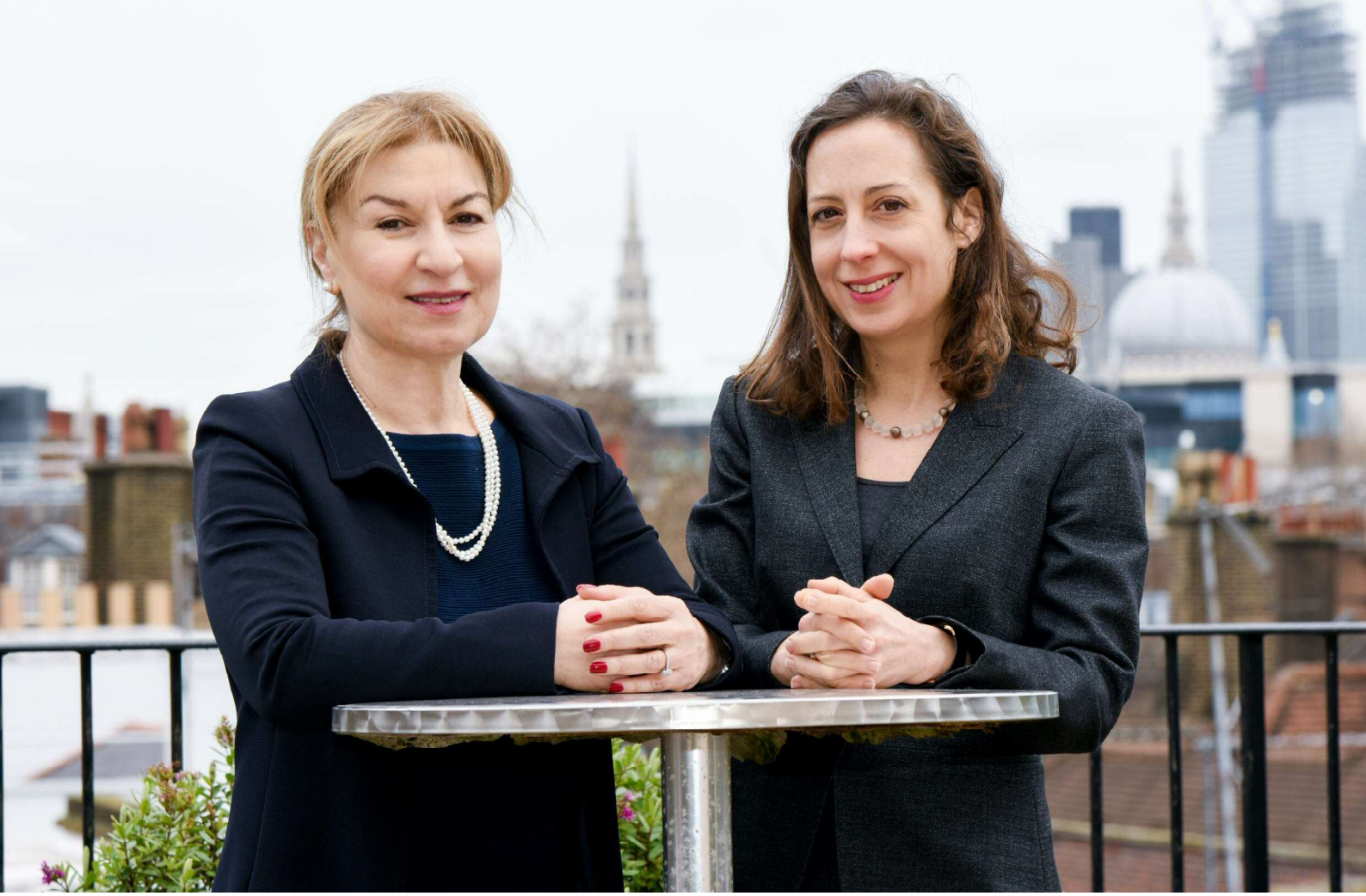


Maryam Taher and Maya Lester QC. Photo by Karl Attard

The cases altered

WorldECR meets with seasoned sanctions lawyers, Maryam Taher and Maya Lester QC.

Almost a year has passed since the Trump administration pulled the United States out of the agreement with Iran that its predecessor had worked so hard to bring to fruition. The Joint Comprehensive Plan of Action ('JCPOA') has since then limped along: the United States has broadened the conditions that must be met before it considers sanctions relief for Iran, while the EU has developed an alternative trading mechanism in order underline its commitment to the JCPOA. In Iran, itself, the value of the currency has plummeted.

Largely through their work representing Iranian (and other) entities and individuals before the UK and EU courts, barrister Maya Lester QC and solicitor Maryam Taher have become well acquainted with the twists and turns of sanctions law and policy.

It is almost six years ago that the EU General Court in Luxembourg gave judgment in the case of the *Islamic Republic of Iran Shipping Lines ('IRISL') and Others v Council of the European Union* (T-489/10) – in favour of the applicants, represented by Maya Lester and Maryam Taher.

It was a significant decision. In July 2010, IRISL – and 17 other people and companies – had been placed on the list of entities said to be involved in nuclear proliferation set out in annex II to Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran. IRISL, the EU had said when it made the designation, had been 'involved in the shipment of military-related cargo, including proscribed cargo from Iran.' The other companies were essentially designated as companies owned or controlled by IRISL or acting on its behalf.

In reaching its decision, the court paid particular attention to two of the applicants' pleas. The first was that the Council of the European Union had breached the obligation to state reasons in two respects: the reasons did not demonstrate why the Council considered that IRISL met the criteria for warranting sanctions – merely reproducing UN Security Council allegations; nor were they communicated to the applicants before they were adopted.

The other plea was that there had been an error of assessment as regards the adoption of restrictive measures against the applicants – which the court also upheld, the presiding judge stating, *inter alia*: 'The desire to ensure that the restrictive measures have the broadest possible preventive effect cannot result in the legislation in force being interpreted contrary to its clear wording.'

It was a clear signal that the EU had

to up its game, and that while sanctions are inherently political, the EU is still bound by its own laws.

Today, Maya Lester reflects that, in fact, many of the early de-listing cases, which included banks, oil companies and others alongside IRISL cases, were successful because, 'Frequently the EU would present very little evidence to support its case – it may be because there was no evidence on its file or there was national security-sensitive information that it wasn't able to disclose.'

The applicants' success rate soon led to the US questioning the robustness of the EU sanctions regime.

'A number of things have happened to change that story,' says Lester. 'One is that the European Court has more or less approved the practice of the EU re-listing companies and individuals who have won their de-listing cases with slightly different reasons. Which means that a lot of those entities that were de-listed are still designated.'

At the outset, the EU had to show that a company had some involvement with nuclear proliferation or connection with it. But the criteria changed so that the EU only had to show instead, some connection with the government of Iran: 'It's much less conduct-based, if you like; more status-based and thus easier to satisfy,' says Lester.

More broadly, she says, the questions she receives now tend to be about US secondary sanctions and about how to navigate between 'the incredibly different legal landscapes of the US and the EU. So, speaking for myself, I'm doing less work now for Iranian clients since they became re-subject to US sanctions, and more for people and entities trying to navigate inconsistent sanctions regimes on Iran.'

Maryam Taher is the name partner of a boutique trade, finance and shipping law firm based in London's iconic Lloyd's Building. She says that, by contrast, her firm's case profile 'has remained the same because we've still got the same clients as well as those from high-profile energy, oil and gas and petrochemical sectors.'

Recently, Taher has been handling 'a very major compensation claim by the IRISL group, seeking damages for very substantial losses while they were wrongfully listed.'

This, she says, is one amongst a number of cases where the court in Luxembourg had upheld a re-listing by the European Union, a legal phenomenon which Taher describes as 'Strange, because at first the various bodies which we represented were listed based on whether they have been involved with, or assisted, the Iranian government in the pursuit of nuclear proliferation or not. After the judges held that they were wrongfully listed, instead of appealing, the EU went on to extend the criteria for listing *inter alia* to entities that they alleged have violated the provision of certain UN Security Council resolutions and subsequently re-listed our clients. We argued that the two sets of sanctions – the old and the new, if you like – were quite different and that it was incorrect to re-list entities under the new ones after their listing had already been shown to be wrongful under the old ones.'

'The European Court has more or less approved the practice of the EU re-listing companies and individuals who have won their de-listing cases with slightly different reasons.'

Maya Lester QC

The procedure does not, she says, provide for any degree of legal certainty.

'Maya and I experienced in the early Iran de-listing cases that many Iranian clients – whether they were small subsidiary companies or major, high-profile shipping lines – had absolutely no faith in the system. They repeatedly said, "What is the point of going to court in the UK or in the European Union when these sanctions are obviously political decisions? They're going to make a decision against us because they obviously don't like us."

'It took me a very long time to convince them that actually, no, you can trust the courts. After our first success in the European Court and a couple in the Supreme Court, the clients started having faith in the system. But now…'

But now, she says, that faith is waning again, and some clients are losing interest in pursuing valid appeal grounds, assuming, in the light of recent judgments, that there's little point in proceeding.

'The advice we've always given is that if you don't challenge things, this conveys the message that you're accepting decisions that we as your lawyers believe are wrong, and that the outcome of Case X will affect or even determine the next Case Y. The clients feel that the courts are shifting towards the EU. I hope that that is not the case, and that we won't get to the stage where people are going to criticise the judges' attitude, because so far, we've had every faith in their independence.'

JCPOA jitters

As regards the extent of the European Union's real and collective commitment to the JCPOA, both lawyers agree that it's hard to gauge.

'I think it varies between the respective member states,' says Lester. 'Iranians are restless, because they've been upholding their end of the agreement and received nothing in return. But the fact is that US secondary sanctions are an incredibly powerful tool because of our reliance on the dollar, and it's very, very hard for the EU to do anything about that. And so, the blocking regulation and INSTEX are, to some extent, symbolic gestures. They are genuine attempts to facilitate lawful trade, but – if the desired effect is to keep Iran-EU trade active – I'm certainly not seeing that yet among operators in the market at all. INSTEX is far from being operational, and I think at first INSTEX is working on a route for trade which is lawful in the US anyway – i.e., humanitarian goods which the US has not prohibited.'

Lester adds that 'squaring up' to the US with INSTEX and the blocking regulations may set a precedent for 'a difficult dynamic across the world if countries are trying to oppose each other's sanctions regimes. But that seems to be the current political climate.'

At the same time, Taher believes

that while on the face of it the INSTEX mechanism looks 'too little too late', that's a misperception: 'A huge amount of effort was being made by the UK and the EU [to keep the United States in the JCPOA before it pulled out]. But even prior to the withdrawal, it was proving difficult to surmount the impact of remaining sanctions on the banking system.

'After 5 May 2018, people had to shift and try to create other workable mechanisms. This is taking a huge amount of time, and that's why the Iranians are very frustrated. They think the EU is not doing enough. But the EU and UK are continuing with their efforts, for two reasons: Firstly, to keep Iran in the JCPOA, and, secondly, to eventually reduce reliance on American dollars. They're hoping that the transactions will be in Europe, in euros, but the banks participating will probably be very small.'

On 25 February, Iran's Foreign Minister Javad Zarif offered his resignation – which has not been accepted by President Rouhani. This, thinks Taher, was in part a protest against hardline elements interfering with foreign policy. But the impact of sanctions has not helped the moderates' cause.

'Daily life has become absolutely impossible and companies who have got overseas employees, for example, are unable to pay them because they're paying them in foreign currencies.'

Not only, she says, is the economy faring worse than it did before the JCPOA, expectations are higher on account of it.

What rankles with Iranians, says Taher, is that the entire agreement was drafted with the presumption that it would be Iran committing any breaches – which, according to the International Atomic Energy Agency, charged with monitoring the agreement, it has not – 'then the US withdraws, and all the complications follow.

'What we saw from our own clients was how determined the Iranians were to stick to every word of the JCPOA. There was a huge amount of investment (after Implementation Day), joint ventures, expansions, new vessels, purchase of aircraft. And immediately after 5 May 2018, all of this was in jeopardy.

'We've worked with a great many in the Iranian oil and gas industry – and now there are terminals and other facilities unfinished, large ventures in which huge numbers of European companies participated as shareholders – the French were involved, the British, the Germans – but then it was complete, complete collapse.'

All of which begs the question as to how it could have been so easy for, arguably, the key architect of the deal, the US administration, to reverse its position.

The answer to that, says Taher, is in the way that it was constructed. 'Had the Iran deal been confirmed by the US Senate,' she says, 'President Trump would not have been able to withdraw from it. Even the Obama administration had acknowledged that the JCPOA wasn't a treaty. It had also admitted that it wasn't "an executive agreement" or even a "signed document". The role of the JCPOA was to reflect "political commitments" between Iran, the P5+1 (the United States, the United Kingdom, France, Germany, Russia, China), and the European Union.

'Had the Iran deal been confirmed by the US Senate, President Trump would not have been able to withdraw from it.'

Maryam Taher

'The participants were fully aware of American domestic scepticism. They were perhaps also aware of the scepticism that existed between those involved in a power struggle in Iran, mainly the government and the hardliners. Therefore, the JCPOA was carefully crafted in order to get around congressional opposition. The president knew he did not have sufficient congressional support to amend domestic law to make the JCPOA legally binding on future presidents.

'So, as a political agreement, the JCPOA was not binding under international law. As regards domestic law: the president already had authority to waive sanctions against Iran, through exercising his statutorily authorised discretion. A future president could (as President Trump did) use that same authority to re-implement the sanctions in the interest of national security.

'This means that one president's use of his statutory discretion to waive sanctions does not prevent a future president from using that same discretion to re-impose sanctions, simply by repudiating the deal. But that does not make it a good policy!'

Still, we are where we are, and whatever happens now, Taher says, the JCPOA will not proceed in the way the '5+' had originally intended.

Apples and oranges

Of course, the Iran sanctions are/were not the only regime imposed by the European Union being litigated in the European courts. So, is there a consistency in the way that the courts have dealt with, for example, Russian, Syrian and Iranian cases?

'To some extent, it's comparing apples and oranges,' says Lester. 'At the beginning there were quite a lot of differences between the way the court was handling different regimes, partly because of the way that different chambers of the court were assigned. For example, the same chambers of three judges hearing all the Syria cases. But the general trend has been that now there's greater coherence.'

Lester adds that, across the board, the court doesn't intervene in what it sees as political executive branch decision making, and therefore the court has focused very much on evidential sufficiency.

'The question that it's going to be asking itself is, "Is there enough evidence [to support the EU's case]?" but not, "How is the Iran sanctions regime furthered by designating X?", or "How can it help the Russian sanctions to include Y?".

It is, of course, difficult to know what trajectory a sanctions practice is likely to next take. All is contingent on multiple unknowns and expectations – or anticipations – are not always met.

The EU blocking regulation is a case in point.

'I think the banks thought there would be a flood of damages cases arising out of it and there haven't been so far,' says Lester. 'If you suffer loss as a result of your counterparty pulling out of Iran and they cite you as a reason for doing so, then you could claim damages. The result of this is that companies are generally not citing sanctions as the reason they pull out of Iran.

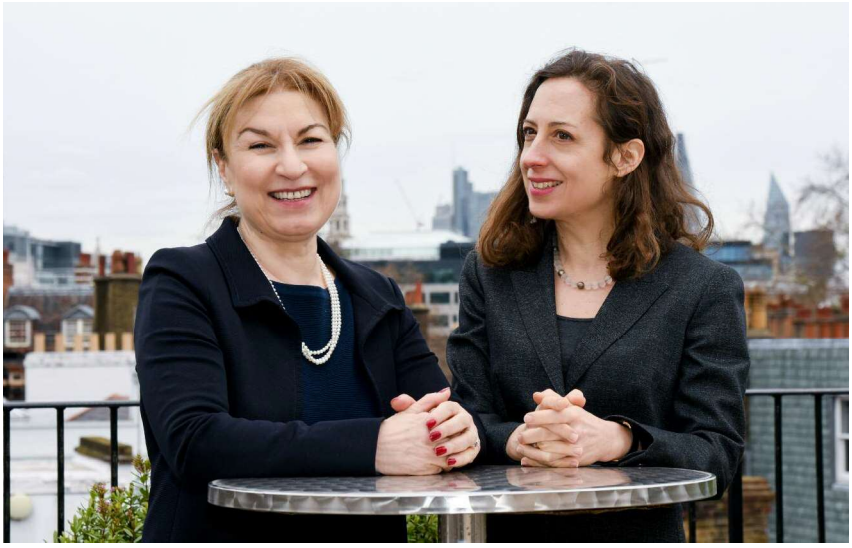
'That's the dynamic – but of course there are still attempts, and I think there will be some cases, litigation and arbitration, where this will be tested: Was an action taken in compliance with US secondary sanctions that are listed next to the blocking reg? Because, if it was, there is a right to damages in national courts of [EU] Member States.'

Taher adds that the blocking regulation 'is not going to change the banking transaction problem. There are a lot of companies leaving Iran because they cannot trade – the financial situation hasn't been sorted out and they cannot wait.

'Some of them wanted to stay but they were waiting and waiting and eventually the compliance person says, "No, hold on, we've got to leave rather than see if the situation is going to sort itself out or not." There's a fight between the compliance person's advice, the practical side of it, and the company's own intentions. As I said, some of the clients which we have advised have been heavily involved – whether from the UK, France or Germany – in the oil and gas industry, and they couldn't carry on any more.'

The sanctions roller-coaster

Advising on, and responding to, changes to sanctions law has been a roller-coaster ride for all those involved. The US volte-face in the case of the JCPOA is one example of how domestic considerations can alter the course of international relations. Brexit is another.



There are currently around 60 de-listing cases scheduled before the European courts. Lester and Taher have, in common with most UK lawyers who undertake EU-focused work, taken the bar exams of another EU Member State (in their case, Ireland) to ensure they have rights of audience in Luxembourg – and continue to be involved in some of that work.

As with everything touched by Brexit, few certainties prevail. If the UK leaves the European Union, explains Lester, 'The Luxembourg de-listing cases [where the European Court of Justice reviews decisions of the European Council] will continue regardless of Brexit.

'But references where national courts ask the European Court of Justice in Luxembourg questions on the interpretation of EU law may cease from the United Kingdom, at least if we have a hard Brexit.'

Another effect of Brexit is that it may generate multiple de-listing cases where a party is challenging a UK listing and an EU listing separately – raising the rather messy spectre of different courts reaching different conclusions.

'And that's not impossible,' says Lester, 'particularly given that there are, for example, different provisions for closed hearings in different jurisdictions. And there may be a different attitude to sufficiency of evidence. There's definitely potential for divergence.'

But also, no doubt, in the ensuing confusion, there will be a continued appetite for the wisdom, helmsmanship and good counsel of those, like Lester and Taher, who are already familiar with sanctions' shifting sands.

For an examination of the EU court re-listing de-listed sanctioned parties, see the article 'Take two' on page 21 of this issue.