

INSTITUTE CARGO CLAUSES 2009

A Comparison of the 1982 and 2009 Clauses with
additional commentary.

INTRODUCTION

1. The introduction of the 1982 Clauses was a radical step that finally liberated cargo policies from the old S.G. Policy (the second schedule to the Marine Insurance Act 1906) which had been described in various judgements as "a very strange instrument" and "absurd and incoherent". This change had been resisted for many years because it was felt that it might lead to uncertainty; the S.G. Policy had been considered by the Courts on many occasions so that the effect of the words, however archaic, was felt to be well understood.

The clear and accurate drafting of the 1982 Clauses put these fears to rest and there has been remarkably little litigation regarding coverage in the intervening years.

However, nothing stays perfect for ever and the Joint Cargo Committee (made up of members of the International Underwriting Association and the Lloyds Market Association) is to be commended for taking on the task of reviewing and updating these clauses which are so important to the International Commercial Community.

2. The process of revision was started in February 2006 when the LMA sent out a questionnaire to interested parties and the Joint Cargo Committee set up a Working Party chaired by Nicholas Gooding. After analysing the responses to the questionnaire the Working Party produced a detailed consultation document (with Guidance Notes prepared by Clyde & Co.) which was distributed to the worldwide cargo markets in May 2008. Revised drafts were circulated in October 2008 before the final version was agreed ready for implementation on 1 January 2009.

The new clauses can be found on the LMA website at www.lmalloyds.com

3. In the Commentary Section that follows:

- The 1982 Clauses are shown first
- The 2009 Clauses follow
- *Our comments are shown in italics*
- Where there are no changes of any significance only the 2009 version has been shown.

In addition to highlighting the changes, we have referred to relevant law cases that occurred since the 1982 Clauses and discuss a number of practical issues that arise frequently.

4. If you have any queries regarding the new clauses or cargo claims generally please contact any of our offices listed on www.rhlg.com.

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INSTITUTE CARGO CLAUSES (A)

General

There has been some updating of the language used in the clauses. In particular:

- The terms 'goods' and 'cargo' have been replaced by 'subject matter insured'.
- The term 'underwriters' has been replaced by 'insurers'.
- The marginal side headings in the 1982 Clauses have been replaced by sub-headings.

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1982

RISKS COVERED

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|----|--------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1. | This insurance covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5 6 and 7 below. | Risks
Clause |
|----|--------------------------------------------------------------------------------------------------------------------------------------|-----------------|

2009

RISKS COVERED

Risks

- | | |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5 6 and 7 below. |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------|

"Except as provided" is replaced by "except as excluded" which gives a clearer indication that the clauses referred to are exclusions. Otherwise, the well tried and tested formula setting out coverage remains intact. The classic exposition of how this type of policy works remains the House of Lords judgment in British and Foreign Marine Insurance Co. Ltd. v. Gaunt, [1912] 2 A.C. 41. The case concerned bales of wool insured against all risks in transit from sheep back in Patagonia to Punta Arenas en route to Europe. Some bales were damaged by water prior to loading on the ocean vessel and the question arose as to whether the insured could show that there had been a loss by a casualty. There was little evidence of the manner in which wetting had occurred, but that did not prevent the insured from succeeding. Lord Birkenhead concluded...

"The damage proved was such as did not occur and could not be expected to occur in the course of a normal transit. The inference remains, that it was due to some abnormal circumstance, some accident or casualty. We are, of course, to give effect to the rule that the plaintiff must establish his case that he must show that the loss comes within the terms of his policies; but where all risks are covered by the policy and not merely risks of a specified class or classes, the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss."

Although the standard 'A' Clauses cover is very wide, certain trades may require additional wording to suit the particular circumstances or the nature of the cargo. Any such additional

wording needs to be carefully phrased if it is to achieve the desired result. In *Coven SPA v Hong Kong Chinese Insurance Co.* the Court of Appeal dealt with a cargo of beans insured from China to Italy under Institute Commodity Trades Clauses (A), which have the same 'All Risks' wording as ICC (A) but including the additional words "shortage in weight but subject to an excess of 1% in the whole shipment". It was agreed that there was no physical loss on the voyage but there was nonetheless a short delivery of some 14% for one parcel of the cargo. It was accepted that the difference was due to a warehouse measurement error and that the loss would not be recoverable under the standard 'A' Clauses wording. However, cargo interests argued that the shortage in excess of 1% was recoverable as a "shortage in weight" mentioned in the special additional wording.

In the Court of Appeal, Lord Justice Clarke rejected this argument, supporting the lower Court. As a matter of construction, he considered that the relevant insuring words meant there must be loss of or damage to the goods. On broader terms, he failed to see that the parties could have intended to insure goods that never existed or that the Assured would demonstrate an insurable interest in cargo that had never left the warehouse, the point at which the policy attached. The Court did not rule out the possibility of insuring this kind of "paper loss", given a willing insurer, but the clearest wording would be needed to give effect to this intention.

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1982

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5 6 and 7 or elsewhere in this insurance.

General
Average
Clause

2009

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

No change, other than the concluding words of the 1982 version are omitted as surplusage.

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1982

3. This insurance is extended to indemnify the Assured against such proportion of liability under the contract of affreightment "Both to Blame Collision" Clause as is in respect of a loss recoverable hereunder. In the event of any claim by shipowners under the said Clause the Assured agree to notify the Underwriters who shall have the right, at their own cost and expense, to defend the Assured against such claim.

"Both to
Blame
Collision"
Clause

2009

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

This clause owes its existence to the law prevailing in the United States in collision cases. Under English law (since the Maritime Conventions Act in 1911) the degree of blame is divided between the vessels in proportion to their degree of fault, as decided by negotiation or an appropriate tribunal. Thus, if Vessel A is held to be 40% to blame and Vessel B 60%, cargo on Vessel A can recover 60% of its damages from Vessel B. Usually that cargo will not be able to recover the 40% balance from the carrying vessel because of the terms of the Contract of Affreightment which will contain exceptions regarding negligent navigation (this position will change in many cases with the introduction of the new UNCITRAL terms). Historically in the USA, if both vessels were to blame, the blame was always divided on a 50/50 basis, irrespective of the degree of fault. Additionally, the cargo on Vessel 'A' was allowed to recover 100% of its losses from Vessel 'B'. Vessel B would then recover 50% of the Cargo A claim from Vessel A, so that Vessel A ended up paying 50% of the damage suffered by its own cargo. This situation was not an attractive one for shipowners so they began to insert a "Both to Blame" Collision Clause in bills of lading which enabled Vessel A to recover that 50% from Cargo A. As a result, it was necessary to insert a both to Blame Collision Clause in the cargo policy to confirm that cargo insurers would respond in respect of that liability to Vessel A.

Since 1975, the US Courts have moved away from the strict 50/50 split and will now apportion blame according to degrees of fault. However the ability for the 100% claim of Cargo A to go to Vessel B and then be recovered in part from Vessel A and then in turn from Cargo A remains, which explains the continuing need for the clause which, happily, is rather shorter than this explanation. The 2009 wording has been adapted slightly in the interests of clarity.

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2009

EXCLUSIONS

4. In no case shall this insurance cover
 - 4.1 loss damage or expense attributable to wilful misconduct of the Assured

No change – the wording reproduces part of Section 55 of the Marine Insurance Act.

It should be emphasised that wilful misconduct is something far beyond even gross negligence. In Thomas Cook v Air Malta (1997) Mr. Justice Cresswell defined the phrase (in a CMR context) as follows:-

"What does amount to wilful misconduct? A person wilfully misconducts himself if he knows and appreciates that it is misconduct on his part in the circumstances to do or fail to do something and yet (a) intentionally does or fails or omits to do it or (b) persists in the act, failure or omission regardless of the consequences or

(c) acts with reckless carelessness, not caring what the results of his carelessness may be. (A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so.)”

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2009

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

This exclusion remains unchanged, and is largely self-explanatory. Ordinary loss in weight can arise from some cargoes shedding part of their water content while in transit. Bulk oils and fats may stick to tank walls and pipelines so that the full original quantity can never be delivered. In appropriate circumstances policies may specify an excess of say 0.5% to cover normal loss but it is important that clear wording is employed.

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1982

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants)

2009

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)

The obscure term "lift-van" no longer appears and the rather archaic term 'servants' is replaced by the word 'employees', with additional clarification that independent contractors are not to be considered as 'employees'.

This important exclusion will apply when:

- *the packing or preparation is carried out by the Assured or their employees or*
- *the packing or preparation is carried out prior to attachment of the risk.*

This brings the treatment of packing into line with the narrower exclusion that had applied to stowage in containers. This is more logical and more favourable to the assured. The new clause sets out the standard by which any insufficiency or unsuitability is to be judged – the packing or preparation must be sufficient "to withstand the ordinary incidents of the insured transit."

*This phrase was examined recently in *Mayban General Insurance v Alston Power Plants Ltd* [2004]. A large and heavy transformer was loaded aboard a small vessel near Liverpool in January 2002 for transportation to Rotterdam and thence by container vessel to Malaysia. Heavy weather, with winds up to Force 8, was encountered on both passages and both vessels were recorded as rolling and pitching. On arrival it was found that the transformer had sustained damage and repair costs in excess of £1m were incurred. The damage was found to be due to the working and fretting of various joints and surfaces caused by the motion of the carrying vessels. Moore-Bick J. did not consider that a total of 30 hours bad weather during a voyage of this kind in January could be regarded as exceptional and he therefore concluded that the loss was caused by the inability of the transformer to withstand the ordinary conditions of the voyage rather than by the occurrence of conditions which it could not reasonably have been expected to encounter.*

Unsuitability of packing or preparation can take many forms but a recent example involved the use of damp timber by the company responsible for palletising the goods, after the inland transit, ready to be placed in containers. As a result severe condensation occurred during the voyage which penetrated the bagged Titanium Dioxide. If the palletising had been carried out by the Assured there would have been no claim, but since the palletising was done by a third party during the insured transit the Assured could recover.

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2009

4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured.

No change.

There is judicial comment to the effect that insufficiency of packing is a form of inherent vice. These potential defences were kept separate, however, to indicate to the Courts that they should be treated separately and therefore that insurers could not use an inherent vice defence to avoid a claim where any insufficiency of packing lay outside the scope of clause 4.3.

*The question of what constitutes inherent vice often causes difficulties in practice. Shortly after the 1982 clauses were introduced, the term was subjected to close scrutiny; in *Soya v White* [1983] Lord Diplock provided the following useful definition:*

“The phrase where it is used in section 55(2)(c) refers to a peril by which a loss is proximately caused; it is not descriptive of the loss itself. It means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.”

*In Section 55 of the Marine Insurance Act it says that the policy may “otherwise provide” with regard to inherent vice and additional cover had been provided in *Soya v White* in respect of loss or damage caused by ‘heat, sweat and spontaneous combustion’. It was held in the House of Lords that the claim arose out of the heated and deteriorated condition of the Soya shipments and it should therefore succeed.*

*In *Noten v Harding* [1990] shipments of leather gloves were sent from India to Holland under All Risks terms but without any special wording. On arrival the gloves were found to be wet, mouldy and stained. The Court of Appeal determined that the gloves had contained excessive moisture at the time of shipment and the loss came within the inherent vice*

exception, Bingham L.J. concluding that “the goods deteriorated as a result of their natural behaviour in the ordinary course of the contemplated voyage”.

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1982

4.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above).

2009

4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above).

The exclusion regarding delay remains unchanged, except for the removal of the word ‘proximately’, which originated from the wording of s.55 of the Marine Insurance Act 1906 but which latterly commentators have identified as a possible source of confusion.

The ‘Just in Time’ approach to logistics and stock control means that production sites hold very small stocks of materials or parts. This is partly due to the remarkable efficiency of container shipping but it does create a serious exposure when the rare problems do occur. The exclusion is drawn in very wide terms and relates to physical as well as financial losses arising from delay.

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1982

4.6 loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel.

2009

4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.

This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

The exclusion has been reduced in scope so that the innocent Assured or assignee is still protected by the policy in the event of financial default or insolvency bringing the voyage to an end. The wording has been taken from the Institute Commodity Trades Clauses (5/9/83) and subsequent clauses relating to specialised trades.

Thus a claim will only fail if, at the time of loading, the Assured was aware or should have been aware that the voyage might be halted by the financial circumstances of the carrier. The Assured is not expected to carry out in depth forensic accountancy checks but must

exercise the common sense standards of a prudent businessman acting in “the ordinary course of business”. Thus the Assured should not turn a blind eye to obvious signs that a carrier is short of funds.

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1982

4.7 loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

2009

4.7 loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

It has become a more dangerous and unstable world in recent years and the 1982 exclusion is frequently supplanted by the Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause 10/11/03. The title alone gives a sufficient indication of its wide effect, particularly with regard to all possible kinds of terrorist attack.

The 2009 exclusion addresses some of these concerns:

- *“Arising from” becomes ‘directly or indirectly caused by or arising from’.*
- *“Weapon of war” becomes the wider ‘any weapon or device’ which would include the so called “dirty bombs” that might be used by terrorists to cause widespread contamination, rather than as part of waging a conventional war.*

The effect is to widen the scope of this clause.

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1982

5.	5.1	In no case shall this insurance cover loss damage or expense arising from, Unseaworthiness of vessel or craft, Unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured, Where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.	Unseaworthiness and Unfitness Exclusion Clause
	5.2	The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.	

2009

5. 5.1 In no case shall this insurance cover loss damage or expense arising from
- 5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein
- 5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.
- 5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.
- 5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.

As with Clause 4.3 the "liftvan" has been dispensed with and 'servants' have become 'employees'.

The exclusion applies if:

- *The assured is privy to (i.e. is aware of) unseaworthiness/unfitness of the vessel or craft at the time of loading.*
- *The container or conveyance is unfit for the safe carriage of the goods and
 - a) *the loading is carried out prior to attachment or*
 - b) *the loading is carried out by the Assured or their employees and they are privy to that unfitness.**

Clause 5.2 protects the position of an innocent party who has had the policy assigned to them as part of a binding sale contract, since it is assumed they are unlikely to be in a position to control or verify the suitability of the vessel or container.

Overall the effect is to narrow the scope of the clause.

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2009

6. In no case shall this insurance cover loss damage or expense caused by
 - 6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
 - 6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat
 - 6.3 derelict mines torpedoes bombs or other derelict weapons of war.

The terms of the War Exclusion Clause remain as before.

In Bayview Motors Ltd v Mitsui [2002] the term 'seizure' was considered in connection with a shipment of cars. A consignment of six cars was shipped on 'All Risks' terms from Japan to the Dominican Republic, after which they were intended (under separate cover) to be sent on to the Turks and Caicos Islands. On arrival the cars were taken by the Dominican Customs to a compound and the Assured were unable to obtain their release. It was subsequently found that Customs personnel had removed the cars and misappropriated them for their own use. Insurers argued that this amounted to 'seizure' and the claim was therefore excluded. Steel J. relied upon the well known definition given in Cory v Burr [1883] that... "Seizure....may be reasonably interpreted to embrace every act of taking forcible possession, either by lawful authority or by overpowering force...."

He concluded that when the customs officers converted the cars by refusing to release them, the cars had already been voluntarily placed in their custody and control in the bonded car park. Misappropriation in this manner did not constitute the taking of forcible possession. Also, there was no taking by lawful authority since the customs officers were not acting as organs of the State lawfully or otherwise. They were acting solely in their own interests and in that independent capacity there was no display or threat of overpowering force. The seizure exclusion therefore did not apply.

With piracy being very much a current topic it is worth remembering that only the A Clauses contain the words "(piracy excepted)" in the capture/seizure/arrest etc. exclusion in Clause 6.2. A claim relating to piracy (whether in respect of physical damage or the payment of ransom as General Average – see paras A65 – 69 of the latest 13th Edition of Lowndes & Rudolf) is therefore covered under the A Clauses but not under the B and C Clauses.

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1982

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| 7. | In no case shall this insurance cover loss damage or expense | Strikes
Exclusion
Clause |
| 7.1 | caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions | |
| 7.2 | resulting from strikes, lock-outs, labour disturbances, riots or civil commotions | |
| 7.3 | caused by any terrorist or any person acting from a political motive. | |

2009

- 7. In no case shall this insurance cover loss damage or expense
 - 7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
 - 7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions
 - 7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted
 - 7.4 caused by any person acting from a political, ideological or religious motive.

The exclusions relating to strikes etc. remain unchanged but the terrorism exclusion has been extended to reflect the wide range of threats that may now be encountered, and the range of motives that may be behind an attack.

The Institute Strikes Clauses (Cargo) 1/1/09 have been amended accordingly to give back to back cover, but it should be remembered that the cover is in respect of physical loss or damage (or expenses incurred to avoid such damage) and does not respond for losses incurred because a shipment is delayed by strike action or a terrorist attack.

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1982

DURATION

8. 8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either Transit Clause
- 8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,
- 8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either
- 8.1.2.1 for storage other than in the ordinary course of transit or
- 8.1.2.2 for allocation or distribution,
- or
- 8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge,
- whichever shall first occur.

2009

DURATION

Transit Clause

8. 8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either
- 8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,
- 8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or
- 8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or
- 8.1.4 on the expiry of 60 days after completion of discharge overside of the subject-matter insured from the oversea vessel at the final port of discharge,
- whichever shall first occur.

For some time it has been commonplace for brokers' wordings to extend coverage to include the process of loading and unloading and this has now been brought in to the standard cover.

In 8.1 "from the time the goods leave the warehouse" becomes "from the time the subject matter insured is first moved in the warehouse.... for the purpose of the immediate loading". Cover does not therefore extend to temporary storage prior to transit on vehicles or to such storage in holding areas within a warehouse.

In 8.1.1 and 8.1.2 "on delivery to" becomes "on completion of unloading."

Clause 8.1.3 is new and clarifies that the insurance also terminates if the goods remain in the carrying vehicle and the Assured or their employees elect to use it for storage, other than in the ordinary course of transit. It should be noted that the 1982 Clause 8.1.2 referred only to the Assured making a decision about storage or distribution whereas the new Clauses 8.1.2 and 8.1.3 refer to the 'Assured or their employees' – management will therefore need to be aware of decisions made at the warehouse floor level because of the impact on coverage.

*In some cases it may be necessary or appropriate to introduce special wording to modify the terms relating to policy attachment or termination. Considerable care needs to be taken to ensure that the wording is clear and meets the requirements of the parties (see *Wunsche Handelsgesellschaft v Tai Piny Insurance* [1998] as an example of confusion regarding "ex factory" and "ex warehouse" terms). Consideration must be given to the terms of the Sale Contract, and it is important that the effect of the Incoterms used in the sale contract are fully understood – this remains one of the most common areas in which mistakes and misunderstandings occur.*

The following websites contain useful information in this regard:

www.iccwbo.org/incoterms/id3040/index.html
www.businesslink.gov.uk (search for "Incoterms")

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1982

8.2 If, after discharge overside from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extend beyond the commencement of transit to such other destination.

2009

8.2 If, after discharge overside from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than that to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.

Some tidying up of the language, but the effect is unchanged.

1982

8.3 This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

2009

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

Some minor changes in the terminology used, but the effect remains the same.

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2009

Termination of Contract of Carriage

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject-matter insured as provided for in Clause 8 above, then this insurance shall also terminate *unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers*, either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,

or

9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Some minor changes in wording:

- 'delivery' in Clause 9 becomes 'unloading' to make it consistent with Clause 8.
- 'named herein' in Clause 9.2 becomes 'named in the contract of insurance'.

In the event of a serious casualty or potentially significant delay it will often be prudent to advise insurers immediately, rather than waiting until a notice of termination is received. This will assist insurers in taking any steps they consider necessary, whether simply monitoring the situation or appointing surveyors to attend.

1982

10. Where, after attachment of this insurance, the destination is changed by the Assured, *held covered at a premium and on conditions to be arranged subject to prompt notice being given to the Underwriters.* Change of Voyage Clause

2009

Change of Voyage

- 10.1 Where, after attachment of this insurance, the destination is changed by the Assured, *this must be notified promptly to insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.*
- 10.2 Where the subject-matter insured commences the transit contemplated by this insurance (in accordance with Clause 8.1), but, without the knowledge of the Assured or their employees the ship sails for another destination, this insurance will nevertheless be deemed to have attached at commencement of such transit.

The new 10.1 avoids using the term ‘held covered’ which has often been misunderstood and instead gives a clear indication of the action the Assured must take, and the coverage implications.

The new 10.2 deals with the so-called “phantom ship” situation in which a vessel, often with false papers, takes the cargo to a different location and sells it. Such cases have become less common in recent years, but this clause ensures that an innocent Assured does not lose coverage because of the effect of section 44 of the Marine Insurance Act regarding a change of voyage (see the “Prestrioka” [2003]).

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2009

CLAIMS

Insurable Interest

- 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.
- 11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the insurers were not.

No change.

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1982

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under this insurance, the Underwriters will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter to the destination to which it is insured hereunder.

Forwarding
Charges
Clause

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their servants.

2009

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.

Only minor changes, including: 'hereunder' has been deleted and 'servants' have become 'employees'.

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2009

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

No change.

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2009

Increased Value

Increased
Value Clause

14.1 If any increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 **Where this insurance is on Increased Value the following clause shall apply:**

The agreed value of the subject matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

No change, except 'herein' becomes 'under this insurance'.

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1982

BENEFIT OF INSURANCE

Not to Inure
Clause

15. This insurance shall not inure to the benefit of the carrier or other bailee.

2009

BENEFIT OF INSURANCE

15. This insurance

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,

15.2 shall not extend to or otherwise benefit the carrier or other bailee.

A definition of the Assured has been inserted for extra clarity.

The term "inure" is replaced with a plain English wording.

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1982

MINIMISING LOSSES

16. It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder Duty of Assured Clause
- 16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss,
and
- 16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised
and the Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

2009

MINIMISING LOSSES

Duty of Assured

- 16 It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder
- 16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss,
and
- 16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised,
and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

No change.

The Duty of Assured clause closely corresponds to the terms of section 78 of the Marine Insurance Act with additional wording regarding the requirement to ensure that rights to claim against carriers and other third parties are reserved. In the “Vasso” [1993] two important aspects of this Clause were considered. The insurance on ICC(A) terms was on a cargo of Iron Ore going from South Africa to China; during the passage ship and cargo were totally lost after sinking. The cargo insurers declined to pay the claim on the basis that it had been the duty of the Assured to apply for a Mareva injunction to freeze the proceeds of the hull policy (to facilitate the recovery against ship); they argued that the Assured were in breach of Clause 16 and Insurers were therefore discharged from all liability under the cover. Hobhouse J. held firstly that the clause does not require the Assured to undertake any step other than one which could reasonably be expected to result in the avoidance or reduction of the loss. In the circumstances of this case the Mareva injunction had little chance of success. Secondly he rejected the idea that Clause 16 could be construed as a warranty, breach of which would be fatal to the cover. If there had been a failure to preserve a right of recovery against a third party the loss to the insurer will be equivalent to the value of that lost right, and the insurer would be entitled to claim for that loss in damages. In some cases the damages may be equivalent to the full amount of the Assured’s claim, if it could be demonstrated that a certain opportunity for a 100% recovery had been lost. In the circumstances of the ‘Vasso’ it was considered that no realistic avenue for recovery had been lost.

1982

17. Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party. Waiver Clause

2009

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

'Insurers' has replaced 'Underwriters' but otherwise no change.

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2009

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

No change.

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2009

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

No change.

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1982

NOTE:- It is necessary for the Assured when they become aware of an event which is "held covered" under this insurance to give prompt notice to the Underwriters and the right to such cover is dependent upon compliance with this obligation.

2009

NOTE:- Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

Minor revisions to reflect the updating of the relevant clauses above but there is no change in the extent or width of the cover provided.

INSTITUTE CARGO CLAUSES (B) & (C) 2009

The B and C clauses have been amended in accordance with the changes in the A Clauses and we have shown below only the Risks Covered Clauses for ease of reference.

INSTITUTE CARGO CLAUSES (B)

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,
 - 1.1 loss of or damage to the subject-matter insured reasonably attributable to
 - 1.1.1 fire or explosion
 - 1.1.2 vessel or craft being stranded grounded sunk or capsized
 - 1.1.3 overturning or derailment of land conveyance
 - 1.1.4 collision or contact of vessel craft or conveyance with any external object other than water
 - 1.1.5 discharge of cargo at a port of distress
 - 1.1.6 earthquake volcanic eruption or lightning,
 - 1.2 loss of or damage to the subject-matter insured caused by
 - 1.2.1 general average sacrifice
 - 1.2.2 jettison or washing overboard
 - 1.2.3 entry of sea lake or river water into vessel craft hold conveyance container or place of storage,
 - 1.3 total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft.

INSTITUTE CARGO CLAUSES (C)

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,
 - 1.1 loss of or damage to the subject-matter insured reasonably attributable to
 - 1.1.1 fire or explosion
 - 1.1.2 vessel or craft being stranded grounded sunk or capsized
 - 1.1.3 overturning or derailment of land conveyance
 - 1.1.4 collision or contact of vessel craft or conveyance with any external object other than water
 - 1.1.5 discharge of cargo at a port of distress,
 - 1.2 loss of or damage to the subject-matter insured caused by
 - 1.2.1 general average sacrifice
 - 1.2.2 jettison.

As before the B and C Clauses contain the following additional exclusion:-

- 4.7 deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons.

If Assureds want cover in respect of deliberate damage this can be obtained by adding the Institute Malicious Damage Clause to the policy, or by reverting to the 'A' Clauses.

As noted in connection with Clause 6 of the ICC (A) there is no cover in respect of piracy related losses under the B and C Clauses.

INSTITUTE STRIKES CLAUSES (CARGO) 1/1/09
INSTITUTE WAR CLAUSES (CARGO) 1/1/09

The Strikes and War Clauses have been amended in line with the A Clauses and we have only shown below the Risks Covered Clauses of each for ease of reference:-

STRIKES CLAUSES

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 3 and 4 below, loss of or damage to the subject-matter insured caused by
 - 1.1 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
 - 1.2 any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted
 - 1.3 any person acting from a political, ideological or religious motive.

As noted in connection with Clause 7 of ICC (A) these clauses only cover physical damage arising from the specified perils and not losses arising from delay or interruption of the transit. Two additional exclusions help to make this clear.

- 3.7 loss damage or expense arising from the absence shortage or withholding of labour of any description whatsoever resulting from any strike, lockout, labour disturbance, riot or civil commotion
- 3.8 any claim based upon loss of or frustration of the voyage or adventure

WAR CLAUSES

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 3 and 4 below, loss of or damage to the subject-matter insured caused by
 - 1.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
 - 1.2 capture seizure arrest restraint or detainment, arising from risks covered under 1.1 above, and the consequence thereof or any attempt thereat
 - 1.3 derelict mines torpedoes bombs or other derelict weapons of war.

The War Risks Clauses also include the exclusion regarding any claim based on loss of or frustration of the voyage.

The period of cover (as before with the 1982 version) is more limited under the War Risks Transit Clause, being from loading on to the oversea vessel until discharge at the final port or place of discharge.