

# The Navigator

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## Revised Institute Cargo Clauses

After a long period of development and worldwide consultation, the Joint Cargo Committee in London has revised the Institute Cargo Clauses (A), (B) & (C) and some ancillary Institute clauses. The 1982 ICC have been successful: Professor Grimes in "The Modern Law of Cargo Insurance" 1996 stated that "(t)here cannot have been a better insurance document in a century." Nevertheless, time and change march on. The WTO estimates that the global movement of goods during 2008 will be worth more than USD 14 trillion, and cargo insurers have played a central role in this trade. Since 1982, there are new realities brought by modern logistics, recent varieties of maritime fraud and theft ('phantom ships'), and the shifting nature of terrorism.

**The following are the main changes in the new 2009 ICC compared with the 1982 ICC. All are in favour of the Assured and effective from 01 January 2009.**

### Duration of Transit

The 1982 ICC cover commences "from the time the goods leave the warehouse" and ends on delivery at destination. This was traditionally known as Warehouse-Gate-to-Warehouse-Gate. Alternatively the Assured (usually at this stage, the consignee buyer who has been assigned the insurance certificate cover by the contract of sale) could elect to send the cargo to an alternative location, which has the effect of ending the transit. Usually this is a distribution point or a storage facility the consignee has selected.

In contrast, the 2009 ICC broadens the duration of cover by attaching from the time the goods are "first moved in the warehouse ... for the purpose of ... immediate loading ... for the commencement of transit". This process from first moving (perhaps even by crane from the 15th floor of a building) to the vehicle driving off is intended to be one of continuous flow. Cover then terminates "on the completion of unloading from the carrying vehicle ..."

This lengthens in time the concept of "in the ordinary course of transit", but in essence the concept remains unaltered: where the consignee is able to establish a control over the cargo's destination, and it arrives there (and is unloaded on arrival), then cover ceases. The new ICC, to avoid any uncertainty, makes it clear that if the cargo is not unloaded straightaway on arrival, but is stored either in the container, or in or on the conveyance, then cover ceases at that point prior to actual unloading.

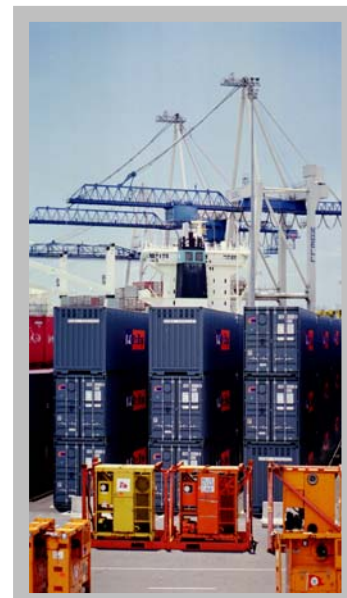
### Packing and Preparation Exclusion

The previous broad exclusion has been narrowed to where the Assured or their employees themselves are responsible for the poor packaging or preparation, at whatever time it is carried out, or where the packaging or preparation is carried out prior to the attachment of the risk. This brings the treatment of packing into line with the narrower exclusion for stowage within containers. Where poor packaging happens after the commencement of transit, by third party packers, the exclusion does not apply. It is as fortuitous to the Assured as the peril of poor stowage on a ship, and as such is an insured risk under the new ICC(A).

In addition, the test has been clarified to the sufficiency or suitability for ordinary incidents of the particular insured transit. The usual practical method is for surveyors to compare the packing etc. with a 'customary to trade' standard, and now that is further defined as 'customary to *that* trade', if there is an identifiable and established practice by experienced exporters.



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## Insolvency and financial default of the owners, charterers etc. of the vessel Exclusion

The 2009 ICC adopt the softer 1983 Commodity Trades Clauses exclusion, thereby allowing two major concessions over the 1982 ICC:

- the exclusion of loss, damage or expense caused by the insolvency or financial default of the owners, managers, charterers or operators of the ship is limited to where the Assured was or should have been aware that there was a risk that the voyage might be frustrated or interrupted on that account
- the exclusion does not apply to a purchaser in good faith under a binding contract to whom the insurance has been assigned

This newer wording is in line with current practice, which in fact changed quite soon after the 1982 ICC e.g. the Institute Frozen Meat Clauses (A) 1/1/86.

Some may remember the issues here in New Zealand and Australia in 1996 when ABC Containerlines was in financial trouble. The "Martha II" was arrested in February in Melbourne by a bank in pursuit of mortgage money, prior to departure to Auckland. The "Cornelius Verholme" was then arrested in April in Auckland Harbour. In that instance Vero Marine assisted our cargo clients with the additional freight to destination where the vessel was arrested at an intermediate port. Whilst there were rumours concerning ABC, they had been general in nature and had been rumbling for some time during re-structuring deals, and reported in the NZ Shipping Gazette. The exclusion should only be applied where the Assured knows, or should know, that the insolvency or financial default may interrupt the voyage.



## Unseaworthiness Exclusion

This has been altered in the Assured's favour towards the position taken by the Institute Commodity Trades Clauses (A) of 1983. The exclusion will not apply if the Assured is not "privity" to the unseaworthiness or unfitness at the time of loading either a container, vehicle or vessel. To be "privity" to something involves actual positive knowledge of it or, being suspicious of the true situation, "turning a blind eye" to it and refraining from enquiry. Whilst this exclusion is not likely to apply to a NZ cargo exporter concerning a container vessel, as they are rarely shipowners or operators loading goods on their own account, it could conceivably apply to charterers of bulk or reefer ships, and certainly the exclusion still places an obligation on Assureds with regards to the condition of vehicles and containers.

## Change of Voyage

This clause is more of interest than importance to NZ exporters. In Asia there has been, in recent years and particularly in the 1990s, a spate of audacious thefts of entire cargos on vessels offering cheap voyage charters: so-called 'phantom ships'. Cargo underwriters are justifiably cautious in giving cover in this area, as often too-good a bargain can mean trouble. Nevertheless, cover is available for cargo where the contemplated journey had already begun, and the goods were later lost by theft (or other risks) during a new and unexpected journey which had taken place without the knowledge or consent of the Assured.

This amendment was principally in response to the highest profile 'phantom ship' cargo theft, "The Prestrioka". In 1999 this vessel loaded in Thailand with 5,500 tons of rice worth USD 1.5m. The vessel was contracted to set sail to Dakar, but simply disappeared with no trace. Underwriters declined the claim, using section 44 of the Marine Insurance Act 1906 (which states that risk does not attach if the vessel deviates from the specified destination). The UK Court of Appeal found for the underwriters, as the incident was a pre-conceived fraud. Subsequent criticism led to these revisions in the 2009 ICC, as the rice had been stolen.

In addition, this clause no longer has a "Hold Covered" provision, which was confusing to Assureds unfamiliar with the MIA 1906: the ICC 1982's Change of Voyage Clause could give the impression that there was a guarantee of cover where no such cover was in fact commercially available.

## Definition of Terrorism

The new wording is in line with the newer definitions of terrorism, in particular the UK Reinsurance (Acts of Terrorism) Act 1993 definition following the St. Mary Axe bomb in 1992 which severely damaged The Baltic Exchange. This definition was developed specifically for insurance claims. The current definition uses the word 'terrorist', but it's likely that the courts are unlikely to treat terrorism as a profession. The more modern approach is to define a terrorist by his or her actions, rather than by their qualifications. Other definitions that use phrases such as "putting the public or any section of the public in fear" are derived more from criminal law. The new definition in the ICC also follows the wider American Institute provisions which already refer to political and ideological motives, and the JCC thought that the inclusion of religious motives seemed urgently necessary.



## Other Changes

The other changes are modernisations and for consistency. For example, 'servants' now become 'employees'; the antiquated 'inure' dropped from the Benefit of Insurance Clause; and the nuclear accident wording has been updated to fit with the Extended Radioactive Contamination Exclusion Clause.

In the coming months other Institute Clauses will be revised and we will advise you of these as they occur.

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