



Himalaya Clause

A Himalaya clause is a contractual provision expressed to be for the benefit of a third party who is not a party to the contract.

Traditionally, the Himalaya clause was conceived as a contractual remedy whereby the exemptions/limitations of liability provided by the law in favor of the ocean carrier were extended to the carrier auxiliaries, such as crew and stevedores. The idea was to contrast the practice of the persons damaged during transport to claim compensation in tort against the carrier's employees/agents, as actual authors of the damage, in order to elude the exemptions and limitations enjoyed by the carrier.

Over time the scope of application of the Himalaya clause was extended to other maritime fields now Himalaya clauses protecting agents and employees of the contractor can be found in a number of model contracts such as Crewman B BIMCO contract, Shipmanagement 2009 BIMCO, Wreckfixed, Wreckstage and Wreckhire 2010 BIMCO, ICOMIA Standard Yacht Refit/Repair Contract.

By effect of the Himalaya clause and similar clauses, the protection of the auxiliary is guaranteed by the substantial lack of convenience of the action in tort against it, which, in addition to imply a heavier burden of proof, does not allow the damaged party to obtain a compensation higher than the one afforded by the action in contract against the carrier or main contractor.

In the Italian legal practice, it is generally accepted that Himalaya or similar clauses benefitting the auxiliaries of the carrier or main contractor, stipulations falling within the scheme of the contract in favor of a third party (art. 1411 Italian Civil Code), which as such are valid irrespective of whether the carrier/main contractor, in stipulating the clause, acts in the capacity of agent of its auxiliaries.

In relation to Himalaya clauses included in the contract of carriage for the benefit of port terminals, Italian case law issued rulings whereby in order to extend the carrier's exemptions and limitations to the terminal operator, it is necessary that the

terminal operator's activity falls within the obligation undertaken by the carrier towards the shipper and that the terminal operator perform said activity as auxiliary of the carrier.

In accordance with the provisions of Articles 1341 and 1342 of the Italian Civil Code on “vexatious” contractual terms, when the Himalaya clause is included in the general terms and conditions of a carrier or other person, same must be expressly approved in writing by the shipper/or other contracting party. Moreover, if the clause results in an alteration of the rights and obligations of the contracting parties and one of them is a “consumer”, the clause may be declared unfair and therefore ineffective. Finally, under article 1229 of the Italian Civil Code, the Himalaya clause is invalid when it goes so far as to exonerate the auxiliary for his own willful misconduct or gross negligence.

For more information please contact:

Angelo Merialdi

+39 010 543951

+39 335 5689039

a.merialdi@siccardibregante.it

Riccardo Delucchi

+39 010 543951

+39 329 4846541

r.delucchi@siccardibregante.it