

## Himalaya Clause

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

Over the years the scope of application of the Himalaya clause was extended to other maritime fields. Now Himalaya clauses protecting agents and employees of the main contractor can be found in a number of model maritime 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 employees/servants/agents is granted as, even when a claim is pursued by the interested party against any of them in tort, such

claim remains subject to the same defenses, exemptions and limitations applicable to the claim in contract against the carrier or the main contractor.

In the Italian legal practice, it is generally accepted that Himalaya or similar clauses fall within the scheme of contract in favor of a third party (article 1411 Italian Civil Code) and are therefore valid irrespective of whether the carrier or main contractor, in stipulating the clause, explicitly declare to act in the capacity of agent of its employees/servants/agents.

In relation to Himalaya clauses incorporated in a contract of carriage for the benefit of port terminals, Italian Courts have ruled that, 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 performs said activity as agent of the carrier.

When the Himalaya clause is included in the general terms and conditions of a carrier or other main contractor and the contract is governed by Italian law, the validity of the clause may be held subject to

the regime of express approval in writing contemplated by articles 1341 and 1342 of the Italian Civil Code. Moreover, if the clause results in an alteration of the rights and obligations of the contracting parties and one of them is a “consumer”, as it happens in cruise passengers tickets, 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 employee/servant/agent for its own willful misconduct or gross negligence.

For more information please contact:

**Angelo Merialdi**

+39 010 543951

+39 335 5689039

[a.merialdi@siccardibregante.it](mailto:a.merialdi@siccardibregante.it)

**Riccardo Delucchi**

+39 010 543951

+39 329 4846541

[r.delucchi@siccardibregante.it](mailto:r.delucchi@siccardibregante.it)