



# Circular

Ref: 15/10

SEPTEMBER 2010

## OUTLINE

- The International Group of P&I Clubs (IG) and BIMCO have drafted a revised Himalaya clause for use in bills of lading and other contracts
- A copy of the revised clause is attached to this circular.
- The clause intends to exempt a contractual carrier's or other contracting party's servants, agents or subcontractor's from liability under a contract or extend to them the same protection from liability enjoyed by the carrier.
- Care should be taken to ensure the clause achieves its purpose when incorporated into different types of contract e.g. properly defining the terms 'Carrier' and 'Merchant' when used in bills of lading or other contracts of carriage.
- Depending on the jurisdiction in which liability may arise, the protection of the clause cannot always be guaranteed.

## TO THE MEMBERS

Dear Sirs

### REVISED HIMALAYA CLAUSE FOR BILLS OF LADING AND OTHER CONTRACTS

The International Group of P&I Clubs (IG) and BIMCO have completed a review of the Himalaya clause for use in bills of lading and other contracts and as a result have drafted a revised Himalaya clause (the Clause).

A Himalaya clause is a contractual provision intended to confer a benefit on an entity that is not a party to that contract. This benefit, in a contract of carriage such as a bill of lading, is to exempt, as far as possible, the servants, agents and independent contractors employed by the contractual carrier (carrier) from liability to other parties to the contract, such as the shipper, consignee or holder of a bill of lading or extend the same protection from liability enjoyed by the carrier.

#### Why is it called Himalaya?

The Himalaya clause takes its name from the English case of *Adler v Dickson*<sup>1</sup>. Mrs Adler was a passenger on the P&O liner "Himalaya" who was seriously injured when the gangway she was walking down collapsed, throwing her to the dockside below. The passenger ticket contained a non-responsibility clause exempting P&O from liability, so Mrs Adler sued the master of the ship, Captain Dickson, and the boatswain for compensation. The Court of Appeal held Captain Dickson liable and awarded damages to Mrs Adler. Significantly, the Court decided that it was possible for P&O to incorporate a clause excluding its employees from liability into its ticket conditions – however, it had not done so.

A consequence of the "Himalaya" case is that clauses in contracts of carriage (whether for passengers or cargo) developed to ensure, as far as possible, that liability attached only to the carrier – failing which, the carrier's servants, agents and subcontractors had the benefit of any limits, exemptions and defences enjoyed by the carrier. Claims would, generally, be brought only against the carrier and not its servants, agents and subcontractors (e.g. stevedores) and other independent subcontractors (such as railroad companies.)

<sup>1</sup> *Adler v Dickson (The Himalaya)* [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158

## **Key features**

Himalaya clauses are by nature rather complex and it is impossible to produce a clause that operates successfully on every occasion and in every jurisdiction. The aim of BIMCO and the IG has been to produce a clause which should be recognised and given effect to in most of the major jurisdictions, including the US and UK. To this end, advice was obtained from leading UK and US counsel during the drafting process.

The Clause is primarily intended for use in bills of lading, although with care it can be adapted for use in charter parties and other marine contracts. Parties using the Clause must take care to ensure that it achieves its purpose when incorporated into different types of contract. For instance, when used in bills of lading or other documents containing or evidencing contracts of carriage, the terms 'Carrier' and 'Merchant' will need to be defined and the definitions will need to reflect the parties' intentions, which may vary from contract to contract. Where necessary, the IG/BIMCO recommend that any amendments to the Clause are made subject to obtaining appropriate legal advice. Members are of course free to contact the Club for assistance in this regard.

In summary the Clause is intended where possible to:

- Wholly exempt a contractual carrier's or other contracting party's servants, agents or subcontractor's from liability under a contract (subject always to any relevant court construing the Clause in such a way as to grant that total exemption) and/or to confer on such servants, agents and subcontractors all the rights, limits, defences and exemptions from liability enjoyed by the contractual carrier under that contract.
- Impose on the other party to the contract, defined in the Clause as the "Merchant" (which term includes a shipper, consignee or holder of a bill of lading) an obligation not to sue any servant, agent or subcontractor of the contractual carrier, and to indemnify the contractual carrier in the event that the Merchant makes a claim, whether under the contract or in tort, bailment or otherwise, against the servants, agents or subcontractors of the contractual carrier employed in performing the contract.
- Ensure that the Clause operates as effectively as possible for the protection of its intended beneficiaries, by providing that the contractual carrier or other contracting party acts as an agent or trustee for its servants, agents or subcontractors in relation to the contract, and that such servants, agents or subcontractors are deemed to be a party to such contract.
- To provide protection in respect of operations related to the carriage of goods but which are not necessarily carried out on board a ship, for example operations which take place before loading or after discharge from a vessel or operations involved in multi-modal carriage.

However, depending on the jurisdiction in which liability may arise, the protection of the Clause cannot always be guaranteed.

The full text of the IG/BIMCO Clause is set out below. The Clause may also be downloaded free of charge from the BIMCO web site at [www.bimco.org](http://www.bimco.org) and is also available as an additional clause to subscribers of BIMCO's online charter party editing system, *idea*. It can also be downloaded from the IG website [www.igpandi.org](http://www.igpandi.org)

All clubs in the IG have issued a similar circular.

Yours faithfully

**THOMAS MILLER (BERMUDA) LTD.**

## **CONTACT**

- Members requiring further information should contact Dr. Chao Wu ([chao.wu@thomasmiller.com](mailto:chao.wu@thomasmiller.com) or telephone +44 20 7204 2157).

## **International Group of P&I Clubs/BIMCO Revised Himalaya Clause**

- (a) It is hereby expressly agreed that no servant, agent, direct or indirect subcontractor or other party employed by or on behalf of the Carrier, or whose services or equipment have been used in order to perform this contract (such persons so employed, or whose services or equipment have been used, hereinafter termed "Servant") shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, receiver or other party to this contract (hereinafter termed "Merchant") for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the Servant's part while acting in the course of or in connection with the performance of this contract.
  
- (b) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein (other than Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein) and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder including the right to enforce any jurisdiction or arbitration provision contained herein shall also be available and shall extend to every such Servant, who shall be entitled to enforce the same against the Merchant.
  
- (c) (i) The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any Servant which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with this contract whether or not arising out of negligence on the part of such Servant. The Servant shall also be entitled to enforce the foregoing covenant against the Merchant; and  
  
(ii) The Merchant undertakes that if any such claim or allegation should nevertheless be made, he will indemnify the Carrier against all consequences thereof.
  
- (d) For the purpose of sub-paragraphs (a)-(d) of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of the Servant who shall to this extent be or be deemed to be a party to this contract.