

CIRCULAR

20 November 2014

To all Members

Revised Himalaya Clause for bills of lading and other contracts

Owners/Members were advised by a club circular issued in September 2010 of the joint review of the Himalaya Clause for use in bills of lading and other contracts undertaken by the International Group of P & I clubs (IG) and BIMCO and of the revised IG/BIMCO Himalaya Clause wording recommended for adoption following that review. The 2010 circular can be viewed here:

<http://britanniapandi.com/assets/Uploads/documents/himalayclausebslothercontracts09-2010.pdf>

This circular should be read in conjunction with the 2010 circular, which set out the key features and intended effects of the 2010 revision of the original Himalaya Clause.

Since the publication of the recommended revised wording in 2010, it has been reported that there have been cases in the US where claimants have filed suit against ship managers in order to avoid the COGSA defences/limitations which protect shipowners. US legal advice was therefore obtained on a possible amendment of the current revised clause, which expressly extends to "servant, agent, direct or indirect sub-contractor or any other party employed by or on behalf of the Carrier," to also expressly include managers.

Most other jurisdictions would be likely to interpret the clause as currently drafted as extending to a manager employed by the owner. On the basis of the advice received, and with the joint agreement of BIMCO, a further revised Himalaya Clause wording has been produced with the objective of making it clear that the protection afforded under the clause is extended to managers. The revised wording is set out on the following page and Members are recommended to amend their contracts of carriage to incorporate this new clause.

The clause may also be downloaded from the BIMCO website at www.bimco.org and is also available as an additional clause to subscribers of BIMCO's online charterparty editing system, *idea*.

International Group of P&I Clubs

BIMCO Revised Himalaya Clause (November 2014)

- (a) For the purposes of this contract, the term "Servant" shall include the owners, managers, and operators of vessels (other than the Carrier); underlying Carriers; stevedores and terminal operators; and any direct or indirect servant, agent, or subcontractor (including their own subcontractors), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract whether in direct contractual privity with the Carrier or not.
- (b) It is hereby expressly agreed that no Servant shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, receiver, holder, 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.
- (c) 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 of the Carrier, who shall be entitled to enforce the same against the Merchant.
- (d)
 - (i) The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any Servant of the Carrier 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.
- (e) For the purpose of sub-paragraphs (a)-(e) 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 all persons mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract.

All clubs in the International Group are issuing a similar circular on this subject.