ANALYSIS OF THE HAMBURG RULES ON MARINE CARGO INSURANCE AND LIABILITY INSURANCE

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I. INTRODUCTION

There has been an increasing interest on the effects of the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) on the double insurance problem which arises whenever a proposal to modify a carrier's liability regime is under discussion.[1] The Hamburg Rules can

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1. The Hague Rules were so controversial in the United States that it took Congress 12 years to enact them. The Visby Amendments have given us a quarter century of controversy, with no end in sight. The Hamburg Rules have been controversial practically since the United Nations first began to work on them. The most prominent of the arguments that have reappeared

potentially alter not only the price of insurance relevant to international trade but also the insurance-purchasing behavior among parties involved in international trade. Sets of propositions have been introduced explicating whether and how the Hamburg Rules would affect insurance practices among cargo owners, that is, mostly international traders and cargo carriers.

Supporters of the Hamburg Rules have argued that adopting them will decrease double insurance and overall insurance costs.[2] Opponents assert that these costs are lower under the Hague or the Hague-Visby Rules than under the Hamburg Rules.[3] However, neither side rests on empirical

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virtually every time might be about "the insurance argument." Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 1, 120 (1993).

2. Examples of supporting arguments for the Hamburg Rules are as follows. First, for an argument that the adoption of the rules would decrease total costs due to a higher standard of care on the part of the carrier, see, for example, *United Nations Conference on the Carriage of Goods by Sea*, U.N. Doc. A/CONF.89/14 (1981) [hereinafter UN COGSA] (comments of the Australian representative); Erling Selvig, *The Hamburg Rules, the Hague Rules and Marine Insurance Practice*, 12 J. MAR. L. & COM., 299, 311 (1981). Second, for an example of arguments that the clarity and better predictability of the Hamburg Rules will reduce litigation and the expense of claims settlements, see Rolf Herber, *The UN Convention on the Carriage of Goods by Sea, 1978: Hamburg Rules, Its Future and the Demands of Developing Countries*, Y.B. MAR. L., 81, 91-92 (1984); *But see* John O. Honnold, *The United Nation Commission on International Trade Law (UNCITRAL): The 1976 Draft Convention on the Carriage of Goods by Sea*, 4 ANN. PROC. FORDHAM CORP. L. INST. 365, 370 (1978). Third, for an example of arguments that shifting a greater proportion of the risk to the carrier and then to the P&I clubs in the Hamburg Rules would reduce overall costs since P&I insurance is operated more cost-effectively than cargo insurance see, Stephen Zamora, *Carrier Liability For Damage or Loss to Cargo in International Transport*, 23 AM. J. COMP. L. 391, 394 n.12 (1975); Selvig, *supra* note 2 at 316; UNCTAD, *Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, U.N. Doc. TD/B/C.4/315 (Part I), 16 (1987). *See* Sturley, *supra* note 1, at 121, n.14.

3. Examples of opponents' arguments against the Hamburg Rules are as follows. First, for an argument that there is no reason to believe that cargo damage would be any less common under the Hamburg regime, see John A. Maher & Joan D. Maher, *Marine Transport, Cargo Risks, and the Hamburg Rules: Rationalization or Imagery?*, 84 DICK. L. REV. 183, 202 (1980). Second, for an argument that the adoption of the Hamburg Rules would lead to unnecessary and expensive litigation due to more confusing and less clear provisions, see George F. Chandler, *A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules*, 15 J. MAR. L. & COM. 233, 237 (1984); Birch F. Reynardson, *The Implications on Liability Insurance of the Hamburg Rules*, *in* THE HAMBURG RULES 1-2 (Lloyd's of London Seminar Sept. 28, 1978); J.P. Honour, *The P. & I. Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978*, *in* THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA, 239-40 (Samir Mankabady ed. 1978). Some Hamburg Rules opponents even seek to generalize these assertions to contend that any change in well-established laws will lead to uncertainty and higher expenses. *See* Herber, *supra* note 2, at 81, 91-92. Third, for an argument that the Hamburg Rules would increase overall costs by exacerbating a needless double insurance expense, especially due to higher costs in liability insurance than marine insurance, see, *e.g.*, Thomas Chenal, *Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules*, 20 ARIZ. L. REV. 975 n.144 (1978); UN COGSA, *supra* note 2, at 235 (comments of the

evidence to support its arguments.[4] Hence we cannot draw any conclusions about their ostensible superiority or inferiority unless we analyze the problem systematically with reliable information. First, the Hamburg Rules have not yet been generally adopted as a common rule, and the Hague and Hague-Visby Rules are applied in different ways in different countries. Second, cargo insurance premiums are not based on risk statistics because reliable statistics often are not available. Instead, the premium is set according to the account (whether it is a large or small policy, whether the insured is a new client, etc.) and according to the underwriter's own intuition.[5] Even if insurance costs increase, competitive carriers will be able to absorb the increased costs internally rather than shifting them to the shipper. This is because insurance cost is not a major factor in rating total freight, which can be absorbed through more reasonable management than before.[6] With this reality in mind, it is hard

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Japanese representative). Fourth, there is also concern that carriers may use the Hamburg Rules as an excuse to increase rates even if their P&I calls do not increase. For such a concern, *see, e.g.*, Zamora, *supra* note 2, at 394, 395; Robert Hellawell, *Less-Developed Countries and Developed Country Law: Problems for the Law of Admiralty*, 7 COLUM. J. TRANSNAT'L L. 203, 212, 216 (1968). *See* Sturley, *supra* note 1, at 147.

4. There are authors who have stated that there is little reliable information for empirical study on this problem. *See, e.g.*, Sturley, *supra* note 1, at 148; UNCTAD, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, U.N. Doc. TD/B/C.4/315 (Part I) 4, 16 (1987); Selvig, *supra* note 2, at 314; William Tetley, *The Hamburg Rules: A Commentary*, LLOYD'S MAR. J. COM. L.Q. 4 (1979); Janet M. Donovan, *The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea*, 4 MAR. L. 1, 9 (1979); Honour, *supra* note 3, at 244; John D. Kimball, *Shipowner's Liability and the Proposed Revision of the Hague Rules*, 7 J. MAR. L. & COM. 250 (1975).

5. There are four main types of individual rate plans used in business insurance contracts:

1) the experience rating plan;
2) the retrospective rating plan;
3) the schedule rating plan; and
4) the judgment rating plan.

Of these, usually it is the judgment-rating plan that is adopted in marine cargo insurance, which involves rating mainly according to the judgment of underwriter and not so much according to any statistical rationales. The judgment rating plan is justifiably the most unscientific of the four main plans commonly used.

6. Basically, the cost of liability insurance does not seem to consume any substantial portion of total freight. According to a report by the United States Department of Transportation, United States shipping companies' net cost of liability insurance amounts to about 0.15% of total freight receipts, and total cost of liability insurance (including claim amounts and premium) amounts to about 2.05% of total freight receipts. Another report relates that the total operating cost of liners is estimated from 8% to 25%, or 3-5% of average liner freight. Therefore, the effect of a 6-8% increase in the cost of liability insurance on liner freight rate comes to only about 0.2% (.03 × .06) or 0.4% (.05 × .08). If the insurance cost portion of total liner freight is assumed to be 10% and this cost is increased by 15%, its effect on total liner freight comes to 1.5%. Reynardson, *supra* note 3, at 16. It has also been asserted that the question of whether carriers raise their freight rates to cover their increased P&I insurance costs

to generalize the effects that these three rules have on overall insurance costs. Double insurance will be burdensome to the cargo owner in the end, and this will dampen the vitality of international trade and the efficient allocation of international resources. Therefore, the liability between the carrier and the shipper should be distributed in a way to minimize double insurance — keeping in mind in any case that it will be hard to avoid the double insurance problem because both the liability insurer and the cargo insurer must pay administrative costs or current expenses. We should evaluate the distribution of liability between the carrier and the shipper from this point of view.

With these difficulties in mind, this paper will examine the theoretical effects of the application of the Hamburg Rules on both liability insurance and cargo insurance and then explore potential implications by means of face-to-face interviews with concerned parties. This article will not attempt to provide definitive answers to these questions, for that would require greater statistical groundwork than what is currently available.

II. CARGO INSURANCE UNDER THE HAMBURG RULES

Sea carriage depends on two types of insurance, namely cargo insurance and carrier's liability insurance. These are similar in that they both cover risks on loss or damage during sea carriage. They are different with respect to the contracting parties and the risks to the insured. Liability insurance covers carrier liability for loss or damage during carriage, while cargo insurance covers economic losses resulting from loss or damage to the goods.[7] However, they constitute an overlapping system of insurance in the sense that they cover the same goods. Costs related to claims investigation, administration, and litigation likewise overlap in these two different types of policy. Though not widely recognized, the overlapping insurance problem existed before the Hamburg Rules were concluded.

Almost all cargo loss or damage is ultimately paid either by the cargo insurer or the carrier's liability insurer (to be precise, either type is paid by four parties, including the cargo interests and the carrier). The uncertainty about compensation for loss or damage to shipped cargoes during the voyage may be eliminated by having the carrier assume absolute liability. Another alternative is having the shipper assume all liability for

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will depend on the particular competitive situation of the carrier. That is, although one cannot generalize, it may be that there are many cases where carriers will not raise their rates to recapture the entire increase in P&I costs. Under such conditions, on the whole, the shift in burden from cargo insurers to P&I insurer should, in itself, have little effect on world shipping. *See* Robert Hellawell, *Allocation of Risk Between Cargo Owner and Carrier*, 27 AM. J. COMP. L., 357, 366-67 (1979); Hellawell, *supra* note 3, at 211-16.

7. There is one case in which cargo insurance covers third-party liability. This is provided by the Collision Clause of the Institute Cargo Clauses of 1982.

loss or damage. However, it is unlikely that such a method would be accepted as practical.[8]

To complicate matters further, even though shifting the risk to each of the two contracting parties would eliminate dual insurance, it does not always result in savings against total costs, whether from the point of view of the cargo owner or from that of the total society. If the cargo owner bears responsibility for all cargo damage, cargo insurance becomes more important than liability insurance, and hence liability insurance could be eliminated. This could result in savings in the P&I costs of administration, claims investigation, and subrogation recoveries, as well as P&I calls. However, it is uncertain whether the cargo owner is benefited by such cost saving, since it depends on changes in the freight rate and cargo insurance premium. One important issue relevant to this question may be whether carriers will be able to pass on the costs of P&I insurance to shippers through higher freight rates. Predictions are divided regarding this. Opponents of the Hamburg Rules generally assert that carriers must pass on any cost increase if they are to stay in business.[9] Supporters, on the other hand, consider the issue more complicated and argue that carriers may not pass on higher costs.[10] "Comparing the relative expense of cargo insurance and P&I insurance undoubtedly requires empirical evidence, for there are plausible reasons why either could be found less expensive."[11]

On the other hand, if the carrier bears responsibility for all cargo damage and possible decrease in costs[12] turn out to be more than the

8. The insured bill of lading attempted by OCL (Overseas Container, Ltd.) and ACT (Associated Container Transportation, Ltd.) was not successful because the large cargo owners rejected it. That was due to the fact that the savings in premiums resulting from insuring large goods through cargo insurance was greater than that resulting from the insured bill of lading. *See* G. Tantin, *Les Documents de Transport Combiné*, 15 EUR. TRANS. L. 377-78 (1980). That is, insured bill of lading would provide all shippers with standard coverage at an average cost, and large shippers do not like this. They prefer to arrange insurance coverage consistent with the needs of the particular business activity involved and thus to obtain advantages regarding claim settlements, premiums and other benefits that insurers offer important customers or that a customer with a good claims record may want. It has been suggested that a more practical way to approach this problem would be to develop understandings between cargo insurers and shipowner-liability insurers whereby formulae are agreed upon in advance for the allocation of loss in specified categories of claims, with non recourse agreements backing up those formulae so that the cargo insurer will not attempt to recover from the liability insurer amounts in excess of what would be provided therein. It has also been indicated that costs would be incurred in investigating the claims and in assessing quanta. At least the costs of litigation would be reduced, however, and in this way one of the main potential disadvantages of the adoption and application of the Hamburg Rules would be avoided or mitigated.

9. *See supra* note 3.

10. *See supra* note 2.

11. Sturley, *supra* note 1, at 147.

12. It is asserted that as cargo insurance is a highly competitive business, premiums would go down as payments from P&I clubs increase simply because the cargo insurance companies'net

increase in costs in P&I calls and freights, it is theoretically plausible that cargo owners will have some benefits under that regime. However, even if cargo owners have such benefits, there is no practical way for them to select the range of coverage to take advantage of favorable premiums. Additionally, a number of problems can arise because cargo owners have to make claims directly to liability insurers for loss or damage. In short, there is no reason to expect that the covered risks of the cargo insurer will be reduced substantially.

Consequently, some degree of double insurance is unavoidable under the Hamburg Rules. This fact is apparent upon examination of the provisions of the Rules that follow, although there may be no practical problem for the shipper to be compensated for loss or damage from the carrier according to the provisions of the Hamburg Rules.

A. *Basis of Liability*

Carrier liability under Article 5(1) of the Hamburg Rules[13] is based on the principle of presumed fault or neglect. This provision is heavily influenced by the language used in conventions concerning the international transport of cargo by air,[14] rail,[15] and road[16] carriage. According to this

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payments will go down. Selvig, *supra* note 2, at 316; Hellawell, *supra* note 6, at 366-67. Regarding the cost of recourse actions which should be taken into account in rating premiums, the simplification of the liability regime in the Hamburg Rules is said to be likely to facilitate recourse to such an extent that one may even expect an actual reduction in recourse cost. It has also been indicated that cargo companies are hardly expected to seek recourse in cases where the cost will be unreasonably high. Selvig, *supra* note 2, at 316. In addition, it has been asserted that if the ratio of claims administration to recoveries is increased (mainly due to the increase in recourse actions between two insurers), it would be temporary, reflecting only the inevitable period of uncertainty, which occurs whenever any new measure is introduced, whether it be a statute, a convention or a technological advance. C. C. Nicoll, *Do the Hamburg Rules Suit a Shipper Dominated Economy?*, 24 J. MAR. L. & COM. 1, 176-77 (1993).

13. Article 5(1) provides that:

> [t]he carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

UN COGSA, *supra* note 2.

The former part of Article 5(1) gives strict liability to the carrier, while the latter part permits the carrier an exclusion by requiring him to take all measures that could reasonably be required to assure safe delivery. In the clause above, the exact level of care required of the carrier is open to future determination, since the language "took all measures that could reasonably be required" is novel in the area of carriage of goods by sea. Hellawell, *supra* note 6, at 358.

14. Articles 18-(1) and 20-(1) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air October 12, 1929 478 U.N.T.S. 371 [hereinafter The Warsaw Convention]. The Warsaw Convention applies only to international carriage, which is defined as that taking place between two contracting states, or occurring within a single

clause, the carrier is not liable for loss resulting from loss or damage to the goods unless the occurrence which caused the loss or damage took place while the goods were in his charge. Compensation from the carrier is uncertain if it is impossible to explain the cause of such loss or damage because there is no provision for determining who is responsible for liability in such a case. Moreover, there is a certain amount of ambiguity in Article 5(1) as to whether the shipper is responsible for proving that the cause of the loss took place while the goods were under the carrier's custody, or whether the carrier is responsible for proving that the cause of the loss had arisen before the goods were in his custody when the clean bill of lading was issued.

The carrier is not liable for any loss if there is no fault or negligence on his part or on the part of his servants or agents according to the principle of fault or neglect. However, some level of cargo damage is nearly inevitable in sea carriage, even where the carrier has taken all measures that could reasonably be taken to avoid it. Some level of cargo damage might be considered almost an inevitable price of international commerce, even though the level of damage is still subject to some degree

contracting state if there is an agreed-upon stopping place outside it. *Id.* art. 1(1), (2). With respect to the basis of liability, the carrier under the Warsaw Convention is presumed liable upon simple proof of damage or loss to the cargo, in line with the general rule. *Id.* art. 18(1). The major exceptions to liability, and the air carrier's major defense, are contained in Article 20(1).

15. Articles 27-(1) and 27-(2) of the International Convention Concerning the Carriage of Goods by Rail (May 9, 1980) <http://www.unicc.org/unece/trade/cotif/cotif09.htm> [hereinafter CIM]. The scope of the CIM may be summarized in terms of three criteria: (1) the convention applies only to international carriage between at least two contracting states; (2) the shipment must be covered by a single transport document, in the approved form, which covers the entire carriage; and (3) the shipment must be carried only on lines registered on official lists. *Id.* art. 1(1). The convention applies from the time the goods are accepted for delivery until the time of delivery. *Id.* art. 27(1). The liability system under the convention has been assessed to be based on absolute liability, strict liability (droit strict) or liability *ex recepts* (system of liability without fault). Zamora, *supra* note 2, at 424, which is provided in Article 27(1). Under the CIM there are two classes of exceptions to liability. Under one class of exceptions, termed *non-privileged exceptions*, the burden of proof is on the carrier to establish that one of these exceptions caused the damage or loss. CIM, *supra* note 15, arts. 27(2), 28(1). Under the other class of exceptions, termed *privileged exceptions*, the carrier's burden of proof is applied favorably. *Id.* art. 27(3). That is, the carrier needs only show that the loss or damage could have been caused by one of these risks, in which case it shall be presumed that the damage or loss was so caused.

16. Articles 17-(1) and 17-(2) of the Convention on the Contract for International Carriage of Goods by Road (Geneva, May 19, 1956) <http://www.anase.irv. uit.no_trade/law/doc/UN. CMR. Road.Carriage.Convention.1956.html10/21/97> [hereinafter CMR]. The CMR applies to every contract for the carriage of goods by road in vehicles for reward, when transport takes place between two countries, at least one of which is a contracting country, which can be applied by contractual agreement when it would not be applied by default. *Id.* art 1(1). The basic feature of the regime is a presumption of liability against the carrier once the cargo owner has established the fact of the loss or damage. *Id.* art. 17(1). The carrier's liability depends on the exceptions available to the carrier to rebut the presumption against it. *Id.* art. 17(2).

of control. If carriers were willing to take all necessary precautions, we could have international commerce with little to negligible cargo damage. But possibilities of loss or damage still remain due to other causes, such as by inherent vice or nature,[17] latent defect, unavoidable fire, third parties' cargo, war, strikes, etc. Precautions may far exceed the value of almost any cargo carried by sea. Thus, contracting parties make a conscious decision to tolerate some level of cargo damage in order to save in the overall costs of the enterprise operation.

We recognize that there are vague provisions about the placement of liability in the Hamburg Rules. Some losses are inevitable. Substantial losses during sea carriage are commercially predictable. Therefore, cargo owners might bear some of the risk under the Hamburg Rules as they do under the Hague-Visby Rules, and they will need to purchase cargo insurance just the same.[18]

B. *Period of Liability*

The carrier's period of liability under the Hamburg Rules (Article 4) is based on the port-to-port criteria, which impose a duty of care on the carrier while he is in charge of the goods, from receipt to delivery. It replaces the old tackle-to-tackle limitation of carrier liability. However, cargo should be delivered to the departing port or inland depot and stored at a place of storage before it is under the custody of the carrier. If the cargo insurance covers all risks from warehouse to warehouse,[19] the cargo insurer compensates the cargo owner for loss or damage regardless of the

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17. Inherent vice or nature of the goods is covered under a cargo insurance policy by the special or expressed clauses — including, for example, the rust clause, the standard coal clause, the livestock clause, or the clause involving risks of rats and/or vermin — which require the insurer's due diligence or reasonable measures to avoid such risks for the indemnification from the insurer.

18. Even under cargo insurance there are exclusionary risks such as willful misconduct of the assured, delay (delay is excluded even if the delay is caused by a peril insured against), ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, and rats/vermin, under the United Kingdom's Marine Insurance Act of 1906 and under the Institute Cargo Clauses (A) of 1982. *See* Section 55(2) of the Marine Insurance Act of 1906; Clause 4 of the Institute Cargo Clauses (A). In current practice there is also the category of cargo loss or damage for which neither the carrier nor the cargo insurer is liable, such as loss or damage caused by the purely inherent vice or nature of the cargo or willful misconduct of the assured.

19. In cargo insurance, which is developed in accordance with the various demands of the insured, the duration of risk regulated in the United Kingdom's Marine Insurance Act of 1906 from loading at the departure port to discharging at the destination port — is expanded by the transit clause or the warehouse-to-warehouse clause. For example, in the Institute Cargo Clauses of 1982 (Clause 8), the duration of risk is from the time the goods leave the warehouse or place of storage at the place named in the policy for the commencement of the transit to the time the goods are to be delivered to the consignees' warehouse or other final warehouse or place of storage at the destination named therein.

carriage section in which the loss or damage occurs, or even if the cause of loss or damage cannot be proved. Without cargo insurance, the cargo owner may encounter difficulty in attempting to show that the cause of loss or damage occurred while the cargo was in the carrier's custody. Therefore, under the Hamburg Rules, cargo insurance is still necessary, although the carrier's period of liability is extended.[20]

C. Package Limitation

Much discussion has taken place about the increase in the monetary limit of liability under the Hamburg Rules. The Hamburg Rules provide for a nominal increase of about twenty-five percent in the monetary limit by comparison with the Hague-Visby Rules.[21] However, it is unimportant to the cargo owner or carrier whether the carrier's limits of liability in international conventions are high enough or are excessively low because the limitation exists merely to create some certainty in commercial relations.[22] Moreover, the shipper can be provided compensation that is considered sufficient, over and above the limitation of the carrier's liability, in accordance with the specific provisions of the agreement with

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20. The carrier's liability under the Hamburg Rules may be said to be strengthened when one considers the fact that the probability of occurrence of loss or damage from the stage of receipt of the cargo for transportation to the stage of shipment is high compared to other stages of transportation. But in some countries (*e.g.*, the United States or France) the carrier's extended period of liability has been realized to incorporation into the bill of lading. Such an extension of the carrier's period of liability is helped less by the Hamburg Rules than the Hague or Hague-Visby Rules.

21. The Hague Rules have a limit of £100 per package or unit, which has led to wide variation in calculating the limitation figure. The Hague-Visby Rules, as amended by the 1979 Protocol, provide for a limit of 666.67 SDR per package or 2 SDR per kilo, whichever is greater. Under the Hamburg Rules the limits are 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods, whichever is greater. This nominal increase of about 25%, which could hardly be interpreted as generous to cargo owners, is assessed to represent a substantial reduction in the limits of a carrier's liability in real terms when inflation is taken into account. This is said to be contrasted with the much more generous levels fixed by the other conventions, for example, the CMR, whose Article 23 provides for a limit of 8.33 SDRs per kilogram (together with all the costs of carriage). A. J. Waldron, *The Hamburg Rules: A Boondoggle for Lawyers?*, J. BUS. L. 313-14, n.41 (1991).

22. *See* C. W. H. Goldie, *Effect of the Hamburg Rules on Shipowners' Liability Insurance,* 24 J. MAR. L. & COM. 113 (1993). The package limitation was asserted not to be substantially meaningful due to one of the following reasons. First, the limit of liability in terms of real values has nearly always varied greatly among Hague Rules countries. Extremes are exemplified by Spain with a low of $62 and Switzerland with a high of $1455 per package. These differences are due themselves to the fact that legislation in most Hague Rules countries has fixed the amount in national currency and monetary developments during the past 40 to 50 years have resulted in quite different outcomes for the currencies of the various countries. Second, the concepts of package and unit, one element of the limit of liability, has also been understood in different ways. This has greatly affected the actual limit to be applied in particular cases. Selvig, *supra* note 2, at 321.

the carrier.[23] The shipper simply has to choose between the security of having full recovery guaranteed from the carrier who agrees to cover such costs with higher freight or the purchase of excess cargo insurance, and the greater risk entailed by keeping within standard liability limits. Considering that compensation from the carrier is commonly delayed and compensation procedures are somewhat complicated, the shipper would do well to insure the goods by purchasing cargo insurance for prompt and full compensation. In light of this, the necessity to insure goods by means of cargo insurance will continue to exist regardless of the expansion of the carrier's liability limitation.

D. Other Clauses

Where fault or neglect on the part of the carrier, his servants, or agents only causes part of the loss, damage or delay in delivery, the carrier is liable only to the extent that it is attributable to such fault or neglect.[24] In such a case it will tend to take considerable time to investigate the loss

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23. Cases are common in which claims clearly exceed the limitation figure, which was defined as a mere reflection of relative economic power between the two interests, the carriers and the shippers, more than of commercial need. It seems inevitable that the courts will find a way to break the limitation in order to provide the claimant with what is considered to be adequate compensation. *See* Goldie, *supra* note 22, at 114. One method whereby United States courts circumvent the limitation has been to insist that the shipper be given a fair opportunity to declare the true value of the goods when it is higher than the package limitation. Blank square clauses in bills of lading, published tariffs giving the shipper a choice of valuations, and incorporation by reference to the short-form bill of lading of the terms of the long-form bill of lading (which refers to COGSA) have been accepted by American courts as fair opportunities. The principle of a fair opportunity to declare has arisen in Canada also. Another method has been to define the package as a smaller and smaller unit by ruling that each package in the container, rather than the container itself, is a package. This legislative approach, which has been called the judicial response to an anachronistic law, is described in GUIDO CALABRESI, A COMMON LAW FOR THE AGES (1982) and by many other authors cited in WILLIAM, TETLEY, MARINE CARGO CLAIMS 866-67 (3d ed. 1988). Also, when the carrier commits a deviation, most United States courts do not apply package limitations according to the doctrines of deviation and fundamental breach. *See, e.g.*, Constructors Técnicos, S. de R. L. v. Sea-Land Service, Inc., 945 F.2d 841, 844-45, 1992 AMC 1284, 1289 (5th Cir. 1991); Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293-301, 1988 AMC 223, 234 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); English Electric Co. v. S.S. Nancy Lykes, 706 F.2d 84-89, 1987 AMC 1351, 1358 (2nd Cir. 1987); General Electric Co. v. S.S. Nancy Lykes, 706 F.2d 80, 86-88, 1983 AMC 1947, 1957-59 (2nd Cir. 1983), *cert. denied*, 464 U.S. 849 (1983); Nemeth v. General Steamship Corp., 694 F.2d 609, 612-13, 1983 AMC 885, 889 (9th Cir. 1982); Calmapuip Engineering West Hemisphere Corp. v. S/S Yafo, 590 F.2d 633, 638, 1984 AMC 839, 846 (5th Cir. 1979). *But see* Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt Gmb.H., 313 F.2d 872, 874-75, 1963 AMC 665, 668-69 (7th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963). In continental countries, in contrast with common law countries, the limitation clause has not been applied to damage caused by the intent or gross negligence of the carrier, but rather the question of whether the carrier may limit liability for damage caused by such fault of his servant or agent has been solved in different ways. Selvig, *supra* note 2, at 321.

24. Articles 5-7 of the Hamburg Rules. U.N. COGSA, *supra* note 2.

or damage to ascertain the carrier's portion of liability, even though the carrier is proved liable for a substantial part of the total loss incurred. Therefore, even though the carrier indemnifies cargo interests, it will not necessarily be an advantage to the shipper who is interested in rapid reimbursement. For a prompt return, it would be more efficient for the shipper to receive indemnification from the cargo insurer and then to transfer the claims against the carrier to the cargo insurer.[25]

The universality of the new standard of carrier's liability and burden of proof is undercut by special rules about losses to fire.[26] In the case in which it is interpreted as shifting the burden of proof back to the shipper, the above clause makes it practically impossible for the cargo owner to establish the source of the fire during the voyage because the carrier may be the only party knowledgeable of any accidents that have occurred during the voyage.

In view of this, the cargo owner still needs to insure goods by means of cargo insurance against loss or damage arising from fire in order to guarantee compensation. Thus, the necessity to insure goods through marine cargo insurance would not be mitigated under the Hamburg Rules during the period of enforcement, even though it would be reduced more or less in the long run under the condition that prompt and full compensation from the carrier is secured, such as from the cargo insurer.

III. LIABILITY INSURANCE UNDER THE HAMBURG RULES

To date, the matter of double insurance has mainly been discussed under the assumption that the Hamburg Rules would strengthen the liability

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25. In practice,

> a loan receipt could be applied, which is an arrangement between the shipper and his insurer whereby the latter lends the shipper the amount of the loss caused by the carrier's negligence, in consideration of the shipper's agreement (a) to take suit against the carrier at the expense and direction of the insurer, and (b) to pay over any eventual recovery to the insurer. This loan receipt, rather than subrogation receipt, is often used by American underwriters so that the claim is technically and theoretically unsettled and yet the underwriter, under the terms of the loan receipt and the insurance policy, may sue in the name of the insured.

William Tetley, *Who May Claim or Sue for Cargo Loss or Damage?*, 17 J. MAR. L. & COM. 2, 171-72 (1986).

26. Article 5.4(a) of the Hamburg Rules provides that the carrier is only liable for the loss of, or damage caused to, goods, or delay in their delivery, caused by fire if the claimant proves that the fire arose from the fault or neglect of the carrier or his servants or agents. The failure to employ the formula "all measures that could reasonably be taken," as in the case of other loss or damage and specifying instead *fault or neglect* as the criterion for liability gives rise to the question of whether the effect of Article 5.4(a) is purely to reverse the burden of proof or has a more substantive effect upon the standard of the carrier's care.

of the carrier.[27] Now this article will examine the effects that strengthening a carrier's liability has on liability insurance and costs. There has also been a great deal of discussion on the increase in monetary limits of carrier liability, as well as on the potential increase in the amount of litigation that is likely to arise due to ambiguity in the provisions and the removal of the lists of exceptions under the Hamburg Rules. The latter will affect shipowner's liability insurance demand and cost.

Irrespective of whether the increased package limitations discussed above should be of any concern,[28] it is unlikely that any such increase will have a dramatic effect on shipowner's liability insurance under the Hamburg Rules. There have been many disputes in the courts related to this, but interpretations of the relevant clauses in the Hague Rules have been continuously invoked to settle them for seventy years.[29] It seems likely, therefore, that the volume of litigation involving the interpretation of the clauses will increase insofar as the principle of interpretation changes according to changing circumstances.

But it is not enough to show that there will be an increase in litigation because of the adoption of the Hamburg Rules. Under the Hamburg Rules, the carriers are primarily anxious about restrictions on the

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27. Of course, there are some authors who see the Hamburg Rules as reducing the carrier's liability. Tetley, *supra* note 4, at 17.

28. Examples of this trend may be found in the Conventions on Limitation of Liability for Maritime Claims, such as the Convention on Limitation of Carrier's Liability, effected in December 1986, and the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, effected in April 1987. The former increased the liability limitation by 140% or more, while the latter increased the liability limitation by 25% for cargo in the hold, 67% for automobiles, including luggage, and 12.5% for other cargoes, compared to the Convention of 1957. Moreover, shipowners like Matson Navigation in the United States voluntarily increased the limitation to U.S.$1000 per package. John Betz, *Anchors Aweigh for the Hamburg Rules?*, DISTRIBUTION, Feb. 1992, at 54.

29. Opponents of the Hague Rules have proffered arguments that ambiguity in the Rules will lead to expensive and unproductive litigation. This is similar to opponents' arguments against the Hamburg Rules regarding interpretation. *See, e.g.*, *Relating to the Carriage of Goods by Sea: Hearings before the House Committee on Merchant Marine & Fisheries*, 68th Cong., 2d Sess. 20 (1925) (statement of Norman Drapper), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PRÉPARATOIRES OF THE HAGUE RULES 716, 239-40 (1990); *Relating to the Carriage of Goods by Sea: Hearings before the House Committee on the Merchant Marine & Fisheries*, 67th Cong., 4th Sess. 91 (1923) (statement of C. B. Heinemann). Until somewhat recent years there have been two opposite points of view about ambiguity in the Hague Rules. Some commentators have asserted that the Hague Rules have worked well in practice and have provided a considerable degree of certainty, especially in dealing with cargo claims, which is the most important part of the provisions of the Rules. *See* John C. Moore, *The Hamburg Rules*, 10 J. MAR. L. & COM. 2 (1978-1979); Honour, *supra* note 3, at 239. Other opponents have asserted that some provisions are uncertain and differ in the interpretation of the Rules. *See* Kurt Grönfors, *The Hamburg Rules: Failure or Success?*, J. BUS. L. 334 (1978); SAMIR MANKABADY, THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA 30, 114 (1978), *cited in* Selvig, *The Hamburg Rules*, *supra* note 2, at 302.

defenses which are available to them by removal of the catalogues of exception of the Hague-Visby Rules. Shipowners have little opportunity to prevent or manage risk during the voyage in most countries, and companies, and the extent to which shipowners do indeed have control over short deliveries or damage to shipped cargoes during a given voyage varies from country to country and among carriers' companies.[30]

In spite of the fact that the defenses available to the carrier through the exception catalogues have tended in practice to be interpreted restrictively under the Hague or Hague-Visby Rules,[31] the removal of those defenses under the Hamburg Rules might weaken the shipowner's position because the court will not consider the exceptions.[32] Hence, an increase in carrier liability through the removal of exceptions would result in an increase in demand for carrier liability insurance. Nevertheless, it is not likely that an increase in carrier liability due to a removal of exceptions under the Hague-Visby Rules will result in an equivalent increase in the liability insurance premium. Carrier liability insurance covers many kinds of risks, and one cannot predict with any confidence that an increase in some cost factors will be fully reflected in the total cost of liability insurance.[33]

From the point of view of pure economics, the P&I club could be assessed to be more efficient and prone to undertake cost-saving measures

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30. For example, some companies whose risk management operations are run by a skilled, well-educated staff and crew will more easily be able to prevent short delivery or damage to goods during a voyage, while companies that fail to manage risk efficiently will have much more difficulty doing so. So if we want to assess the effect of the application of the Hamburg Rules, we should do it country by country and company by company. *See* Goldie, *supra* note 22, at 112.

31. According to the Hague Rules:

> this means that in many countries it is increasingly difficult for the carrier to prove the exercise of due diligence in making the ship seaworthy, and it is even more difficult for him to rely on some of the exceptions listed in Article 4 Rule 2, and it is also more difficult for him to rely on (b) Fire, (c) Perils of the Sea, (i) Act or omission of the shipper, etc., (m) Inherent vice, (p) Latent defects, or (q) Any other cause arising without the actual fault or privity of the carrier, his servants or agents.

Id.

32. *Id.* at 113-14.

33. Cargo liabilities are reported to amount to between 1/3 and 2/5 of all claims made. Selvig, *supra* note 2, at 317. The Hamburg Rules' effect on liability insurance has been assessed to be too limited because the portion of actual accidents out of the risks insured by the P&I clubs was reported to be not so large (that is, 30%) and because the provisions of the Hamburg Rules are related to cargo liabilities among many kinds of liabilities. Reynardson, *supra* note 3, at 1. Thus, if the claim amount is increased by 10% to 20%, the total claim amount paid to carriers will be increased by 3% to 6%.

than the profit-pursuing cargo insurance companies.[34] Hence, it is possible that carriers may be insured more inexpensively through a P&I club than if insured through a cargo insurance company, especially in a world of perfect information and zero transaction costs.[35] Granted, it is very difficult to predict the effect of the Hamburg Rules on the total cost of insurance without some empirical support, but it is highly doubtful that activation of the Rules will bring about any increase in total insurance costs as opponents have asserted, if the shift from marine cargo insurance to carrier liability insurance is a smooth one.

To summarize, this article has examined the effect of the Hamburg Rules on liability insurance in this section. While the effect on increased demand seems somewhat substantial, the liability insurance premium does not seem quite so dramatic. Nevertheless, we cannot draw any definitive conclusions about this without better information.[36]

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34. Some investigations made in 1979 showed that the portion of total claims that constitutes the operating cost of the P&I club is estimated to be 3.5%, Reynardson, *supra* note 3, at 4, and 85% to 90% of the total premium is estimated as constituting actual claims. Selvig, *supra* note 2, at 316. According to one United States report about 50% of cargo insurance companies' premium receipts was estimated as constituting claim amounts, while about 33% went to general operating costs. The rest constituted company profits. Cargo Liability Study, FINAL REPORT, PREPARED BY OFFICE OF FACILITATION, OFFICE OF THE ASSISTANT SECRETARY FOR ENVIRONMENT, SAFETY, AND CONSUMER AFFAIRS, UNITED STATES DEPARTMENT OF TRANSPORTATION, 65 (June 1975). In the case of the European cargo insurance companies, 75% of total premium receipts was estimated as constituting claim amounts, 20% as general operating costs, and 5% as profits. N. Kihlbom, *The Hague Rules and the UNCITRL Draft*, SCANDINAVIAN INS. Q. 32, 34 (1977).

35. *See* Sturley, *supra* note 1, at 125. There are some contrary assertions that P&I insurance is generally more expensive than cargo insurance. *See, e.g.*, Chenal, *supra* note 3, at 915, n.144; M. J. Shah, *The Revision of the Hague Rules on Bills of Lading Within the UN System: Key Issues in the Hamburg Rules on the Carriage of Goods by Sea*, at 11, n.5 (1978); Hellawell, *supra* note 3, at 367. *See also* comments by Germany, VII Yearbook 218-19; comments by Sweden, *id.* at 230-31; International Maritime Committee, *id*, at 249; International Union of Marine Insurance, *id*, at 257; comments by Japan, *id*, at 221-22. One reason is that cargo insurance spreads the risk of a major catastrophe broadly, among all the cargo insurance companies or underwriters involved on the navigation, while P&I insurance concentrates that risk on a single policy. *See, e.g.*, N.R. McGilchrist, *The New Hague Rules*, LLOYD'S MAR. & COM. L. Q. 260 (1974). Another is that first-party property insurance is more economical than third-party liability insurance. *See, e.g.*, U.N. COGSA, *supra* note 2, at 235 (comments of the Japanese representative). From the point of view of risk combination and diversion, insurance companies' underwriting methods and premium imposition are more efficient and scientific than those of the P&I club, considering the relatively large volume of underwriting and long-established experience of the underwriters. But it is not reasonable to conclude that liability insurance is costlier than cargo insurance if we consider this point alone and do not consider the total operating costs of the two industries.

36. There are two examples of empirical studies on the effect of the Hamburg Rules on liability insurance. One was done by the forwarder associations of the United Kingdom and the other by C. W. H. Goldie. The major freight forwarder associations of the United Kingdom made the new standard clauses about the carrier's liability. Instead of the actual principle of non liability, according to which the shipper is responsible for proving the carrier's negligence, these

IV. EXPLORATION OF THE EFFECT OF THE HAMBURG RULES: FIELD PRACTITIONERS' EXPECTATIONS

The purpose of this exploration is to introduce an understanding of the effects of Hamburg Rules from the perspective of business practitioners involved in international trade, that is, international traders as cargo interests and carriers. A more complete understanding of the effects of Hamburg Rules is likely to be obtained by scrutinizing both theoretical explication and field practitioner opinion. Because the main purpose of the Hamburg Rules is to regulate the business practices of carriers involved in international trade, opinions from the field should be regarded at least as important as what academicians theorize.

Firsthand information from industry practitioners was collected by means of a series of face-to-face interviews with personnel working for either trading companies or shipping companies located in Korea.[37] Interviewees included company presidents, directors, and other authorities in charge of their firms' decisions concerning insurance and carriage contracts regulating the importation and exportation of goods. In order to obtain both broad and in-depth information, a set of unstructured, open-ended questions was presented in each of the 231 one-on-one interviews

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clauses adopt the new limitation of liability, which has substantially been strengthened. This means that the carrier's liability has been more strengthened than it would have been under the Hamburg Rules. However, it has been observed by the business world that freight rates have not gone up and the major freight forwarders have not been required to pay higher premiums for liability insurance than under the previous system. M. D. Booker, European Shippers View on the Hamburg/Visby Controversy, Paper Presented to the Shippers National Freight Claims Council at its 13th National Conference at New Orleans (Mar. 4, 1987), cited by United Nations Conference on Trade and Development, *supra* note 33, at 34. On the other hand, C. W. H. Goldie examined the possible impact of the Hamburg Rules on liability insurance in 1993. His study showed that the effect of the Hamburg Rules on shipowner's liability insurance would not be notably dramatic. Goldie, *supra* note 22, at 115-16.

37. As an example from this empirical study, Korea was assumed to lie between the shipping developed countries like the United States and the shipping developing countries like those that have yet to ratify the Hamburg Rules. That would place Korea at around the tenth largest country in volume of foreign trade and the twelfth largest in volume of shipping space in the world. Consequently, Korea's adoption or rejection of the Rules may or may not be indicative of the decisions of other countries. But the effect of the Rules on marine cargo insurance and shipowner's liability insurance in Korea would be even less indicative of broader trends created by the Rules than the question of their adoption. Perusing the results of the interviews, we should consider the general state of the circumstances surrounding Korea's insurance and shipping industries with those of other advanced countries. For example, in Korea, marine cargo insurers usually use the premiums made in other insurance-advanced countries as benchmarks in setting their rates rather than using completely independent criteria. Almost all Korean shipping companies have very weak competitive positions compared to shipping-advanced countries, and it may be somewhat restrictive for them to estimate freight according to the market mechanism. These factors may obstruct our ability to generalize concerning the general effect of the Hamburg Rules on marine cargo insurance and the shipowner's liability insurance.

with trading company authorities and fifty with shipping company authorities. These questions included:

1) whether the Hamburg Rules are likely to change the informant's firm's insurance purchasing behavior;
2) whether the Hamburg Rules are likely to affect the premiums of the insurance the informant's firm purchases; and
3) how the informant's firm would respond or is responding to the changes brought about by the Hamburg Rules.

Interviews were conducted during the period from August 1993 to August 1996.

Informants were evaluated based on the adequacy of their knowledge of and willingness to provide the information. All informants were familiar with the Hamburg Rules and the potential effects of the Rules on their businesses. In Korea, carrier liability has been strengthened substantially by the modification of the International Sea Carriage Law in 1992, which incorporated ideas from the Hague-Visby Rules and, to a lesser extent, from the Hamburg Rules. Informants were aware of on the implications of those modifications, which had significantly increased carrier's liability marine cargo. In addition, all informants were willing to provide information. During the interview period, the author was in charge of Advanced Management Programs at Pusan National University, where the authorities of the affronted trading and shipping companies had been educated. A one-on-one interview, lasting an average of about forty-five minutes, was conducted in either a seminar room or in the author's office at the University.

The procurement of information from two major parties involved in international trade helped clarify the field practitioners' perceptions of the Hamburg Rules and the expected influences by the Rules on their insurance-related businesses. Considering the diversity of propositions that are provided in the literature on the issue, the opinions of these business practitioners were surprisingly similar. Findings are summarized based upon the interviews with the traders and then with the carriers. Finally, the information from both categories of informant is integrated to discuss the overall effects of the Hamburg Rules on marine cargo insurance and shipowner's liability insurance.

A. Traders' Responses

The Hamburg Rules will not change cargo insurance practices. More than ninety percent of informants representing trading companies expressed a need to insure the goods they export and import regardless of increased carrier liability on those shipped goods. Trading companies in general seem to trust insurance companies rather than either shipping companies or P&I clubs to provide prompt and full compensation for lost or damaged goods. Surprisingly, most trading companies are reluctant to contact shipping companies to make claims for the loss or damage of their goods incurred during voyage. Shipping companies in most cases were reported to be substantially unresponsive in compensating the shipper for lost or damaged goods, even when causes are clearly attributable to the carrier. Trading companies seem to be motivated to resort to insurance companies rather than to shipping companies.[38] The working relationship with an insurance company resulting from accumulated transactions provides international traders with not only trustworthy relief but also fringe benefits such as discounted insurance premiums. Thus, because international trading companies perceive cargo insurance as a better alternative than the compensation plan available at shipping companies, an increase in carriers' liability imposed by the Hamburg Rules would not significantly alter the practice of marine cargo insurance among international traders.[39]

As far as the possible change in cargo insurance premium is concerned, trading companies do not expect such a change in the foreseeable future. Quite contrary to what many academicians have proposed, business practitioners believe that cargo insurance premiums would be minimally, if at all, affected by the increase in carriers' liability on shipped cargo. Informants representing trading companies expected, judging from their business experiences, that because cargo insurance premium levels are determined by a multiplicity of factors, changes in a

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38. Basically, they seemed to be very reluctant to expose themselves to possible confusion over complicated procedures in making claims with shipping companies as well as to settle such matters in court. In addition, the proportion of attorneys to total population is much lower in Korea than in the United States. Therefore, very few trading companies have their own legal advisors or counselors.

39. It may also be inferred from the cargo interests' conservative attitudes about their business in relation to marine cargo insurance that the requirement to insure traded goods with marine cargo insurance, irrespective of strengthening the carrier's liability, will continue for a substantial period of time. For example, in Korea, the New Lloyd's Policy of 1982 for marine cargo insurance with the Institute Cargo Clauses of 1982 (made by the Corporation of Lloyd's of London and the Institute of London Underwriters) was introduced and used from 1983. See EUN SUP LEE, MARINE INSURANCE 134-37 (1996). Its contents were reported to be very understandable and convenient for Korean traders compared to the Lloyd's S.G. Policy of 1779 with the Institute Cargo Clauses of 1963. *See id.* However, until June 1996, the Lloyd's S.G. Policy had been used. The author surmises from the above interviews with trading companies that the Lloyd's S.G. Policy had, in fact, covered 50-60% of all insurance contracts made by them in Korea for 13 years after the introduction of the New Lloyd's Policy. It seems to have made little difference that it is far more difficult for Korean traders to understand the terms of the Lloyd's S. G. Policy than those of the New Lloyd's Policy of 1982.

single factor (that is, increased carriers' liability) would not be strong enough to have an immediate effect on the premium level. A number of informants added that it will take substantial time (at least ten years) before the increase in carrier liability decreases the premiums on marine cargo insurance.

B. Carriers' Response: Cost-Saving, not Freight Increase

Informants representing carrier companies also provided information regarding the potential impact of the Hamburg Rules on their businesses. According to them, the Hamburg Rules would have a strong influence on their businesses in terms of how they impact on shipowner's liability insurance. The increased carrier responsibility imposed by the Rules would raise their costs because they will have to purchase more liability insurance, and these additional costs, in turn, would alter their business practices.

Many carrier company respondents indicated that they have attempted to absorb the increased costs through cost-saving strategies rather than by raising freight. These informants further explained that, due to intensive competition among carriers, most Korean carriers are discouraged from attempting to raise freight to make up for the increased costs incurred by increased liability coverage. They would rather save in other areas by resorting to reengineering, mark-up reduction, and service reduction. Contrary to opponents' objections to the Rules that one finds in the literature, therefore, the Hamburg Rules may not directly affect freight levels, at least in the near future. In summary, the increase in carrier liability by the Hamburg Rules is likely to result in market expansion for the liability insurance industry and an increase in P&I calls. However, freight levels are not likely to increase in the foreseeable future.

C. Overall Effects of the Hamburg Rules on the Insurance Industry

The effects of the Hamburg Rules on marine cargo insurance and shipowner's liability insurance, inferring from the interview data, needs to be evaluated from both long-term and short-term perspectives. In the long term, the Hamburg Rules have the potential to induce a restructuring of insurance practices among parties involved in international trade. International traders are likely eventually to take advantage of the reduced burden under the condition that they come to trust shipping companies to render prompt and full compensation for lost or damaged goods. They will not have to insure cargo as much as they do now. We can consequently predict some shrinkage in the cargo insurance market in the long run. On the other hand, increased carrier liability will result in the expansion of the liability insurance market, increasing the carriers' costs. Eventually, freight levels will have to go up.

On the other hand, the Hamburg Rules are not likely to affect the insurance industry in general in the foreseeable future. Current business practices are not providing a viable ground for the Rules. International traders, in particular, expressed resistance to the idea of pacing up their business practices with the changes imposed by the Rules. Their insurance purchasing behavior seems to be more influenced by existing business customs than the new liability regime imposed by the Hamburg Rules. Regardless of the increased liability on carriers, international traders are likely to insure the goods they import and export. The Rules are not expected to affect the Cargo insurance either. The area in which the Hamburg Rules have an immediate influence seems to be the liability insurance market. Facing increased liability, carriers will have to purchase more liability insurance. A majority of carriers, however, will not be able to charge additional freight because of intensive competition in the industry. Freight levels will consequently not be directly affected by the Hamburg Rules in the short term.

Overall, the Hamburg Rules may have a detrimental effect on world trade in the short run due to the increased possibility of double insurance. As long as international traders hesitate to rely on carrier compensation plans, a cargo of shipped good has a greater chance of being insured by both traders and carriers. The Hamburg Rules thus need to be understood at best as not affecting and at worst as even exacerbating the current practice of double insurance in the short term.[40]

V. CONCLUSION

Resolving the problem of insurance costs depends on a number of empirical conclusions. Consider, for example, the argument that cargo

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40. Besides the effect of the Hamburg Rules on marine cargo insurance and shipowner's liability insurance, the general economic benefits of the Hamburg Rules from the view point of the shippers were recognized by the parties concerned in the interviews, *viz.*, maximum amounts of compensation from the carrier would increase. Recovery would be permissible when the shipowner's negligence is the (proximate) cause of the loss, or for delay. Greater care of cargo by the carriers or their agents could be expected. This observation is very similar to cargo interests' contentions of other advanced countries like the United States, except with regard to the matter of the cargo insurance premium. For example, William J. Augello, the Executive Director, for the Transportation Claims & Protection Council, pointed out that the Hamburg Rules would reduce the cost of international trade by lowering the cost of cargo insurance, in addition to the above benefits. Augello also charged the marine insurance industry with opposition to Hamburg because they feared a reduction in cargo premium revenue, contrary to their own apocalyptic objection that the Hamburg Rules would constitute a "brand new regime of international law governing ocean liability, requiring years of litigation to clarify issues." Betz, *supra* note 28, at 52-54.

insurance costs will drop if the carrier is more liable for losses. In theory, this should occur because the cargo insurer will recover a greater share of its payments from the carrier through subrogation. The cargo insurer, knowing that its net payments will be lower, could charge lower premiums, while the liability insurer could charge higher premiums. However, there are still two questions to be answered. First, how much decrease and increase will there be? Second, how quickly will the reduced and increased premiums take effect? Not only is it unclear whether the Hamburg Rules significantly shift the risk of loss from cargo interests to the carrier, but most shippers would still prefer to purchase cargo insurance even if the carrier were fully liable for all cargo damage.

In light of the foregoing theoretical review and qualitative exploration, it is unlikely that the Hamburg Rules will have the dramatic effect on the double insurance problem by efficiently and economically shifting the shipper's risk from the cargo insurer to the shipowner's liability insurer in the near future. Instead, if the Hamburg Rules impose such heavy liability on the carrier, this will increase what are perceived as wasteful *double insurance* expenses from the standpoint of the total economic system, but it will not affect freight directly for a substantial time. Moreover, it will take considerable time for the Hamburg Rules to realize its potential to affect the double insurance problem even though they strengthen carrier liability in the end, and it is for this reason that cargo owners have to trust shipping companies to render prompt and full compensation. In short, the gap between the ideal of the Hamburg Rules and actual business practices will continue for some time to come.