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THE ARBITRATOR

SOCIETY OF MARITIME ARBITRATORS, INC.

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PRESIDENT'S CORNER

Lower Manhattan, where the SMA offices are located, was severely impacted by Hurricane Sandy. Queens, Staten Island and Brooklyn were hit much harder and our wishes for recovery and healing are with the residents of those areas, some of whom are our maritime industry colleagues.

While walking to the office in the Wall Street area I saw pump trucks, oil trucks, generators and various other types of construction equipment in the streets. Several of the buildings housing the offices of maritime law firms are still under repair from flooding and it is now the end of November. Our building has been without telephone service since the hurricane. The area has taken on a strong residential/business mix in the last 10 years that exacerbated the effects of the loss of electricity and telephone service. However, New Yorkers are a hardy group and will overcome.

The Society's Board of Governors has decided to include in our Award Service the publication of Interim Rulings (IR). While we already publish Partial Final Awards, the Board recognized that some Interim Rulings could prove to be particularly informative to the readers of the Award Service. Not all IRs will qualify, as some matters may be more routine in nature, but for those that decide common critical issues, the Board voted that they should be published. Two upcoming IRs, one on the matter of consolidation and another on cargo interests' burden of proof with respect to containerized shipments are in the publication pipeline.

Our annual *Maritime Arbitration in New York* course is planned for Thursday, February 28 and Friday March 1, 2013. Last year's course qualified for CLE credit and the committee will be working for that again for this year. Look for details on the webpage.

It is my sad duty to report the sudden loss of one of our long time members, Captain Victor Goldberg. Vic was Chief Operating Officer with Crowley Shipping in Jacksonville, FL. His obituary follows at the end of this issue. He will be missed by all of us.

As we were going to press with this issue we learned of the untimely passing of Michael Marks Cohen, Esq., a giant of a man in the New York Maritime law and arbitration community. He was one of the most remarkable men I have ever met and I am fortunate to have had the opportunity to work with him on several maritime arbitration matters. Dinners with Michael were always an adventure into the world of great intellect and rollicking humor. In our next edition we will provide an in-depth review of Michael's meaningful contributions to the New York maritime law community, especially to the SMA. To his family and friends, our heartfelt condolences.

Austin L. Dooley

P.S. Our next luncheon is December 12. Please check the SMA webpage for details. For our readers that knew Michael Marks, please take note that at the funeral service, his wife Bette and son Dan asked people to wear their most colorful tie or scarf in a celebration of Michael's love of bright colors. Please, let's do the same at the SMA luncheon where Michael was in such regular attendance.

MICHAEL MARKS COHEN (1937 – 2012)

It is with great sadness that we advise of the passing of Michael Marks Cohen, Esq. He was a meticulous supporter of our society. As noted by President Dooley, we will dedicate considerable space in our next issue memorializing some of this man's considerable contributions to the New York maritime arbitration and legal communities. Below is a reprint of the obituary that appeared in the Sunday, December 2, 2012 edition of the New York Times:

COHEN-Michael Marks, age 75 on December 1. A former Naval officer, he was a law clerk of Chief Judge Stanley H. Fuld of the New York Court of Appeals, and then became an admiralty trial lawyer at the U.S. Department of Justice. He had been in private practice in New York City since 1970, specializing in admiralty law, marine insurance, commodities trading, and international arbitration. Former Senior Partner at Burlingham Underwood LLP, he was of counsel to Nicoletti Hornig & Sweeney. He taught the admiralty course at Columbia Law School for more than 30 years. A Titulary Member of the Comite Maritime International, he was an elected member of the American Law Institute, which honored him with its John Minor Wisdom Award. He was a member of the Executive Committee of the Maritime Law Association of the United States, and served on the BIMCO Documentary Committee. He was an associate editor of American Maritime Cases, editor of the Digest of the Award Service of the Society of Maritime Arbitrators, and was the editor of several volumes of Benedict on Admiralty. He was selected by the American Bar Association to receive the 2013 Leonard J. Theberge Award for Private International Law. Survived by his wife of 50 years, Cantor Bette Cohen, son Daniel (Jill Drossman), and grandson, Caleb. Funeral services: Riverside Chapel, NYC, 11:15, Monday, December 3.

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Michael Marks Cohen

I first met Michael in 1976. I was a tyro legal editor on *Fairplay Shipping Weekly* at the time. Michael wrote inviting me to join him for dinner in London after reading something with my name against it in the magazine. At that dinner there was also a high court judge, a court reporter, a baroness, and a lion-tamer. Michael had no reason to reach out to me, much less pay for my supper. I count myself lucky that he did. My life would be very much poorer had he not done so.

That first dinner was typical of the talent Michael had for making things happen, and making them happen with style. I may be wrong about the lion-tamer, but it was somebody equally exotic. Michael delighted in bringing together diverse groups of people and making them feel comfortable with him, and comfortable with each other. Mark Twain said that the most interesting table at any dinner party was the one with the smokers on it. He was wrong. It was the one which had Michael as its host.

That dinner was the first of many we were to enjoy over the ensuing years, in New York and in London. On special days, Bette came too. There were also lunches, visits to the theatre, and even a cantor initiation ceremony. Over time, our meetings were bolstered, at Michael's suggestion, by

THE ARBITRATOR

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other members of my wider family, about whom I had written in the pages of *Fairplay.*

Then there were the curries. Michael had little or no experience of Indian food when we first met but, over the years, the backdrop to our meetings on both sides of the Atlantic invariably involved some flock wallpaper. Typically, Michael was not afraid to eat whatever I dared him to, however fiery the ingredients.

Over the years, even if we didn't meet or speak for months, I always knew Michael was there. I knew that, very soon, a postcard would arrive – usually depicting something which embraced Manhattan and the arts – with a fountain-penned message from Michael on the reverse side. Either that or I would get a cutting from the *New York Times* with Michael's annotated thoughts in the margin, suggesting that this might be an idea for a column, or else a torn-out *Fairplay* editorial with 'cheap shot' scrawled across it. These days, emails are quicker, but not nearly so exciting.

Michael was known for the colourful ties he wore. He loved colour. How fitting that Bette should ask those attending Michael's funeral service to sport their most colourful neckwear. Michael would have liked that. On first meeting Michael, you couldn't help but notice the ties. But, once you got to know him, it was the last thing you'd be aware of. If ever there was a man who didn't need to wear bright ties to attract attention, it was Michael. There was so much else to take in.

Others are better placed to speak of Michael's achievements in the law. The Michael Marks I knew was a man with a love of life, a passion for everything he did, a fierce intellect, a wonderful sense of humour, a proper grasp of humility, a sense of honour and fairness, a belief in justice, and the courage to court controversy when he felt that justice was not being served. He was a gentleman and a gentle man, with a heart as big as a teapot.

One of the things I hoped never to do in my life was to write a dedication to the life of Michael Marks. I wish I had known Michael longer. His absence leaves a space in my life, and in the lives of all those who knew him, which cannot be filled by anybody else.

I could have told you, Michael, this world was never meant for one as beautiful as you.

Chris Hewer

CHRIS HEWER WRITES (WITH APOLOGIES TO THE DEVIL'S DICTIONARY)

(This article was written and submitted prior to the passing of Michael Marks Cohen. When assembling this issue I suggested to Chris Hewer that too much levity following his ***in memoriam*** might be inappropriate, only to be reminded by Chris that Michael would have loved the juxtaposition. And I agreed. – The Editor)

Alphabet soup

The English language is constantly changing. Sadly, apart from one chap in Eastbourne, nobody thinks that it is changing for the better. As for the American language, let's not go there. Given the rate of change, it is important to remind ourselves of the true meaning of some of the words we use in our everyday lives. Here is a brief, alphabetical reminder of some of these. (There is still an alphabet, isn't there?)

Arbitration

A system of dispute resolution whereby two parties agree to wash their dirty linen in public (except in England) in the hope of getting the laundry bill paid by the other side.

Both to Blame

A term often inserted into contracts of affreightment to make both parties feel bad about themselves.

Charter Party

A contract between a shipowner and a charterer covering the carriage of goods drawn up by lawyers and later dissected by a number of different lawyers in search of a loophole.

Deadfreight

An empty space on board a ship which is paid for by the charterer.

Exclusion Clause

A proviso inserted into an insurance or other contract making the underwriter liable only for those claims which are never going to happen.

Free Pratique

There is no such thing as a free pratique

GPS

A space-based satellite navigation system which allows ships to collide with other ships in a much more scientific way than was possible under the old rules of the road.

Hamburg Rules

A set of rules to replace the Hague-Visby Rules dreamed up on March 31 by the United Nations to govern the international carriage of goods, with a special focus on disadvantaging those countries with a maritime history dating back further than 2003.

Indemnity Clause

A provision in an insurance policy making everybody liable for something. The indemnity may be doubled in extreme cases where the policy-holder has had her husband murdered and tried to make it look like he fell from a moving train.

Jones Act

Legislation introduced in 1920 designed to ensure that the United States remains different and separate from the rest of the world and a law unto itself.

Kamsarmax

A type of bulk carrier which is typically long and thin, like Chile. Takes its name from the port of Kamsar in Equatorial Guinea which specialises in the shipment of bauxite. Kamsar is the main source of aluminium everywhere in the world except the US, where it is the main source of aluminum.

Lloyd's of London

An independent grouping of insurance underwriters that started out life in a London coffee house popular with sailors in the 17th century and which has now moved to another building in London known as the percolator.

Mediation

A system of dispute resolution whereby two parties agree to have an argument in private, attended by arbitrators and lawyers, about something that is not big enough to trouble the courts or arbitrators with.

No Cure No Pay

The idealistic principle of pure salvage whereby the salvor is expected to work for nothing, as opposed to the principle of No Pay No Cure adopted in every other walk of life apart from certain areas of the law.

Overboard

Somewhere to go when eulogising.

Protection & Indemnity

A system of mutual liability insurance popular in the marine market where shipowners agree to pay each other's claims, up to a point. Mutuality is not popular with the European Union, but is worth 14 points in Scrabble.

Quarantine

A period of detention undergone by a vessel in order to allow the terminal and port authorities to catch up with their housework.

Rotterdam Rules

A set of rules dreamed up by the United Nations to govern the international carriage of goods, with a special focus on the rights of landlocked countries (see Hamburg Rules). Thirteen years in the making, the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (to give it its full, grey name) takes us back to pre-Hague Rules days (see Hague Rules) and carries on the tradition of producing something for everybody which meets the needs of nobody (see me).

Salvage Award

An amount based on guesswork awarded to the unloved in pursuit of the unsustainable.

Tonnage Tax

An alternative method of calculating corporation tax profits by reference to the net tonnage of a ship whereby daily profit is multiplied by the number of days it takes a man to crawl on his hands and knees to the South Pole and back again.

Ullage

The empty space in a tank paid for by the charterer (see also Deadfreight)

Visby

A very remote area of Gotland selected in 1968 by sticking a pin into a map to find the most appropriate and very remotest place possible to amend the Hague Rules (see Hague Rules). Literally translated as 'sacrificial city', Visby has lived up to its name.

Warranty

A promise provided by one party to another to undertake to put right something which is unlikely to go wrong for a price that is prohibitive to all but the wealthy or foolish.

X

The number of decades in Roman numerals (minus IV) that London arbitrators have been trying to justify their niggardly decision not to publish maritime awards.

York-Antwerp Rules

A set of maritime rules formulated by the **Comité Maritime International** to give the United Nations a break and to codify the law of general average, under which it is better to give than to receive. The rules are always amended in years ending in a 4 (*viz*, 1974, 1994, 2004), so you should be getting ready now for 2014.

Zero-rated

Goods or merchandise that are not subject to the payment of tax. See also 'Death' in other reference works).

NEW YORK MARITIME ARBITRATION SEMINAR 2013

By Klaus C.J. Mordhorst

The SMA will again hold its popular, comprehensive two–day seminar on "Maritime Arbitration in New York under SMA Rules", for the eighth consecutive year, on February 28 and March 1, 2013 at the Best Western Seaport Hotel, 33 Peck Slip, New York, NY 10038 (in the historic South Street Seaport District in Downtown Manhattan).

This course is offered to help further and promote the fair, just, ethical and cost efficient resolution of charter-party and other maritime contract disputes by arbitration in New York. Jeffrey Weiss, Esq., Professor of Maritime Law at New York Maritime College, with over 27 years of college and graduate-level teaching experience, will again be the lead instructor.

The subjects to be covered will include: Arbitration Overview, Commencing the Arbitration, the Federal Arbitration Act and SMA Rules.; the Arbitration Award: Interim Awards, Final Awards, Majority Decisions, Dissenting Opinions; Confirmation, Vacatur and Enforcement of Awards; Panel Member and Ethical Considerations; Discovery in aid of Arbitration; Hearing Procedures; Security in Aid of an Award; Evidentiary Considerations in Arbitration, the Federal Rules of Evidence and Related Issues; Time Bar, Defaults and Consolidation of Arbitrations.

For further details and registration, please see the SMA website at www.smany.org. The registration fee includes Continental breakfast, morning and afternoon coffee each day. There are numerous attractive Seaport District restaurants for lunches and dinners. Hotel rooms are available at a special rate at the Best Western Seaport Hotel when you mention the SMA Seminar. The Hotel sustained substantial damages as a result of hurricane SANDY and is presently being restored/refurbished. Check the SMA website at http://www.smany.org for contact details as soon as they become available. For any other course or registration questions, call Klaus C.J. Mordhorst at 973.492 9472 or e-mail at klausm@lefflerchartering.com.

FEDERAL APPELLATE COURT FINDS KEY U.S. DISCOVERY TOOL CAN BE USED TO AID FOREIGN ARBITRATIONS

By James H. Hohenstein, Christopher R. Nolan, Michael J. Frevola
Holland & Knight

(This paper was presented by Mr. Hohenstein at the October SMA luncheon)

The Eleventh Circuit, the federal appellate court for the southeast region of the U.S. including Florida, in *In*

re Consorcio Ecuatoriano de Telecomunicaciones S.A.,[1] recently decided a case with broad implications for foreign litigants involved in private arbitration and seeking documents or testimony from witnesses physically located in the United States.

The pertinent statute is 28 U.S.C. §1782 — the discovery tool that Consorcio noted is the "product of over 150 years of congressional effort to provide federal-court assistance in gathering evidence for use in foreign tribunals." Section 1782 applications have been employed to depose vessel officers and crew on vessels calling in the U.S., to obtain documents from vessel management companies, and even to seek bank account information from New York-based intermediary banks where such asset analysis can aid the underlying proceeding and subsequent arbitration award/judgment enforcement phase.

Consorcio Is Important for Several Reasons

Initially, the Eleventh Circuit affirmed the lower court ruling allowing discovery in aid of a private commercial arbitration in Ecuador (which the court deemed a "tribunal" thus allowing the application of Section 1782). A court has wide discretion whether to order a person or company in the U.S. to produce documents or give testimony for use in a "proceeding in a foreign or international tribunal." Before this ruling, the appellate courts overseeing key maritime jurisdictions in New York and Texas (the Second and Fifth Circuits, respectively) had found private arbitrations were not "tribunals" based on their respective analysis of case law and legislative history. The Eleventh Circuit acknowledged this authority but noted the Second and Fifth Circuit made their rulings before the U.S. Supreme Court's seminal ruling in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), in which decision the Supreme Court emphasized that the key issue is not whether the tribunal is private or quasi-governmental, but rather whether the tribunal acts as a first-instance adjudicative decisionmaker which ultimately is subject to judicial review. In support of its decision, the Eleventh Circuit cited *In re Winning (HK) Shipping Co., 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010)*, appropriately named, where the court allowed discovery in Florida in support of a soon-to-be-filed English arbitration.[2]

Consorcio is significant not only because it is the first U.S. federal appellate court to specifically hold private arbitrations to be "tribunals" under Section 1782, but also because it recognized that district courts can narrowly tailor document requests or discovery to ensure that the information requests were not abusive. As a result, the request for judicial assistance need not be an "all or nothing" prospect, with an overly broad request resulting in a flat denial of judicial assistance. Further, the court made clear that a party opposing discovery by arguing that discovery would be "unduly burdensome" is not enough — specific examples of overreaching must be articulated by the opposing party. Examples of document requests found appropriate are incorporated into the decision. The court also acknowledged the original application was ex parte without further discussion, implicitly acknowledging that seeking a Section 1782 discovery order without notice to one's opponent (or the discovery target) is entirely appropriate. This is a key issue in emergency situations where relief is immediately needed, or where concerns exist that the opposition or discovery target may hide or remove information before the court's order is issued.

High Court in England and Chinese Appeals Court Accept Section 1782

Discovery obtained as a result of Section 1782 applications has been well received in overseas proceedings. Indeed, England's highest court (then referred to as the House of Lords) in *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* favorably referenced §1782 as a device that parties can use "in order to prepare and present their case."[3] As a more recent example showing Chinese courts' acceptance of the process, in October 2008, in *In re Application of Carsten Rehder Schhiffsmakler und Reederei GmbH & Co.*,[4] the United States District Court for the Middle District of Florida granted a German ship manager's discovery request to obtain information regarding the claimant's insurance settlement of its claim to use in a Chinese appellate proceeding to demonstrate that the claimant in the Chinese proceeding did not have standing to sue the German ship manager. The discovery application was granted, the information obtained confirmed that the claimant did not have standing to sue, and the Chinese appellate court reversed on appeal and dismissed the claimant's case. As part of the Chinese proceedings, the Chinese appellate court extended the ship manager's time to submit the materials that the ship manager was attempting to obtain in the U.S., and then allowed the materials to be considered on appeal despite not being part of the record before the trial court.[5]

U.S. Appellate Courts May Be Willing to Revisit Section 1782

In summary, if documents — or a person who can provide testimony — are located in the U.S., the person seeking relief is an "interested person" (e.g., a party to a non-U.S. arbitration), and the information being produced is for use in a foreign proceeding (court or arbitral proceeding), *In re Consorcio* lends support to an application before a U.S. federal court. Further, given that the cases in New York and Texas were decided before *Intel*, arguably courts in those jurisdictions could be approached with a §1782 application based on an arbitration and while the reviewing district court may well feel compelled to follow prior local precedent and deny the application, the relevant appellate courts might now be willing to revisit the issue (while permitting the stay of release of the relevant information pending review of the issue).

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1 ___F.3d ___, 2012 WL 2369166 (11th Cir. June 25, 2012).

2 Holland & Knight's Maritime Team was counsel of record in *In re Winning (HK) Shipping Co.* The team argued that an English arbitral proceeding is a "tribunal" for purposes of the discovery statute.

3 [1986] 2 Lloyd's L. Rep.317, 326.

4 Case No. 6:08-mc-108-35-DAB.

5 Holland & Knight's Maritime Team was counsel of record in *In re Application of Carsten Rehder Schhiffsmakler und Reederei GmbH & Co.* on behalf of the German ship manager in obtaining the discovery order and providing the documents obtained for use in the Chinese appellate proceeding.

ASSESSING DAMAGES IN MARITIME ARBITRATION UNDER THE RULE IN HADLEY V. BAXENDALE

Patrick V. Martin[1], Anthony J. Pruzinsky[2]

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[2]Hill Rivkins LLP (Partner), New York, NY USA

(Presented at ICMA XVIII in Vancouver in May 2012)

One of the most confusing aspects in rendering awards or giving judgment is the assessment of contract damages for anything other than the most straightforward of losses resulting from a breach. A tremendous amount of "gray area" relating to the issues of foreseeability and certainty shrouds the second prong of the ancient rule in Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), the claim for consequential damages, confounding fact finders to this day. We believe this is due not only to the opinion's broad language but also to the numerous characterizations and classifications of "damages" that the decision has spawned. Nevertheless, we believe that by carefully examining commercial basics of claims, fact finders can properly apply the rule in assessing damages.

1. The Decision in Hadley v. Baxendale

Hadley v. Baxendale is a seminal case in the law of contract damages, and it has been cited with great approval in England and the United States since 1854. Although it also has been the subject of criticism in its application to particular matters, its impact remains undiminished.

The oft-quoted passage in the opinion was in fact an instruction for how the jury should assess damages at a retrial of the case. The first jury had awarded the plaintiffs damages for lost profits based on the following facts.

The plaintiffs, Jonah and Joseph Hadley, were grain millers and mealmen at the docks in Gloucester, England. Their mill was relatively "cutting edge" for the times, as it was powered by a steam engine rather than waterpower, allowing grain to be milled at the docks before shipment. The mill was brought to a standstill when the engine's crankshaft broke. The Hadleys arranged to have a new one made by a manufacturer some distance away. Before the new crankshaft could be fabricated, however, the manufacturer required that the broken shaft be sent to it in order to ensure that the new crankshaft would fit together properly with the other parts of the steam engine. The Hadleys contracted with the defendant Baxendale, who operated as a well known common carrier, to deliver the crankshaft to the manufacturer by a certain date for an agreed freight. Through some negligence (otherwise not specified), the carrier failed to deliver on the date in question, so the mill was forced to remain closed an extra five days. The Hadleys sued Baxendale for the profits they lost during those days, and the jury found for the Hadleys.

Baxendale appealed, contending that he did not know the Hadleys would suffer any particular damage by reason of the late delivery. He was not aware that the mill could not resume working because the Hadleys did not have a spare shaft or other means of operating the mill. The question thus raised on appeal was whether a defendant in breach of

contract could be held liable for damages that the defendant did not know would be incurred from that breach.

The judgment rendered by Alderson B. on appeal stated the following rule:

> *Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury that would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known the parties, might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.*

2. The Two Prongs of Hadley

The decision in Hadley v. Baxendale recognizes two distinct types of contract damages:

> *a) General and Incidental Damages: those based on the value of performance and/or the market independent of the injured party's special circumstances and thus "arising naturally, i.e. according to the usual course of things…"*
>
> *b) Consequential and Special Damages: arising as a secondary consequence of non-performance resulting from the injured party's special circumstances (i.e., lost profits that the injured party would have made under a transaction with a third party is the most typical form of a contract related consequential damages claim). These damages most often arise from the non-breacher's commercial dealings with third parties.*

3. Recent English Decisions Demonstrate Various Approaches to the Rule

Transfeld Shipping Inc v. Mercator Shipping Inc., (The "Achilleas")[1], involved the not uncommon occurrence of a ship's late redelivery under a time charter. The owner, in anticipation of the agreed redelivery date, had fixed the vessel to another charterer for a four-to-six months charter at a very lucrative rate. When the original charterer redelivered late by nine days, the vessel was also late on the next charter. Thus, to preserve the next charter the owner had to renegotiate a less favorable hire rate in consideration of extending the cancelling date.

In due course, the owner brought an arbitration proceeding against the first charterer for the loss for the difference between the original rate and the reduced rate over the period of the fixture. The panel, with one of the three arbitrators dissenting, found in favor of the owner and awarded damages. The High Court affirmed as did the Court of Appeal in a 3-0 decision. The House of Lords allowed the appeal by 5-0, dismissing the owner's claim for lost profits. So, of the 12 persons who considered the owner's claim, six were for it and six were against it. Unfortunately for the owner, the view of the House of Lords prevailed.

Each law lord had a somewhat different view as to why the owner was not entitled to recover its loss based on the difference in rates. The consensus seems to be that such a loss based on the time charter's four to six month length, of which the current charterer was not aware, was not foreseeable at the time of fixing the first charter as, indeed, the second time charter was not made until near the end of the first charter. The owners were only entitled to recover the difference between the market rate and the charter rate for the nine days of overlap.

The issue of lost profits arose more recently in the High Court case Sylvia Shipping Co. Limited and Progress Bulk Carriers,[2] involving a time charter. Subsequent to the fixture, the charterer sub-chartered the vessel to a third

party with a specified cancelling date. The vessel developed cracks in some of its bulkheads and failed inspection, as a consequence of which it could not make the laycan for the sub-charter. The sub-charterer cancelled, and the charterer refixed to another sub-charterer at a lesser rate.

The charterer then sought to recover the difference in rates. The arbitrators found that the owner had breached the charter and awarded damages. The owner's appeal was dismissed. The court found that the arbitrators had considered and applied the correct law, determining as a matter of fact that the loss was foreseeable and falling within the first prong of Hadley. In other words, the court considered the arbitrators' findings and conclusion essentially as issues of fact, which it would not disturb.

The different results in The Achilleas and Sylvia Shipping arose in the way the respective arbitration awards in the two chartering disputes were considered by the courts.

In The Achilleas, it was emphasized that the issue of forseeability of consequential damages in this "unusual" case was a matter of law and not a question of fact. The House of Lords decided that, as a matter of law, the owners' loss of profit for a follow-on time charter extending beyond the redelivery date, but made after the charter at issue, was too remote and beyond the reasonable contemplation of the parties. It was not reasonable to have the charterer assume responsibility for such a loss.

In Sylvia Shipping, the High Court decided that the issue was a mixed question of fact and law and therefore saw no reason to vacate the award as the arbitrator simply applied the law to the facts. The arbitrators' finding that the charterer's loss of the voyage sub-charter came within the first prong of Hadley was not to be disturbed, and so it dismissed the appeal.

In a balancing of expectations, both the arbitrator and court in Transworld Oil Ltd. v. North Bay Shipping Corporation (The "Rio Claro")[3] declined to award a market loss to the charterer, an oil trading firm. The vessel delayed in sailing and arrived late at the loading port. The charterer had entered a contract to purchase crude oil, but a previously announced market price increase went into effect on the bill of lading date, costing the charterer an additional $700,000. If the ship had sailed and arrived at the load port on time, as agreed, it would have departed before the price increase went into effect. It appears that the owner was unaware of the announced market increase.

On these facts, the arbitrator found the owner in breach of the charter, but denied the charterer's claim for consequential damages in the form of its increased purchase expense. The arbitrator recognized that the owner, as a tanker operator, should have known the charterer was a trader and that the oil would be traded. Thus, the owner would be aware that the charterer could be subject to market volatility. However, the charterer's claim was denied because here the price increase was based on a specific contract term about which the owner was unaware. The loss was the result of this contract term and not a market price of which the owner would have had knowledge. Even where the owner should know that delays could negatively impact a sales agreement, this would happen in only a small minority of cases, and so should not be considered within the contemplation of the parties at the time of contracting.

Applying the foreseeability requirement of Hadley as analyzed in the case of Koufos v. Czarnikow Ltd.,[4] the arbitrations and court in The Rio Claro surmised that the Hadley court intended to limit recoverable foreseeable damages to only those which would be expected to happen in the main, but not those likely to happen in only a small minority of cases. The notion that consequences of a breach that are foreseeable only in a small minority of cases should not qualify when determining whether to award consequential damages, however, was not explained further in either Czarnikow or The Rio Claro. Nevertheless, it seems to us that reliance on probabilities alone to limit consideration of consequential damages is a departure from most other cases, where probabilities may or may not factor into the determination.

4. Application in the United States

The rule in Hadley v. Baxendale with respect to indirect damages has long been fully endorsed in the United States[5]. The rule has been applied by the courts to contracts in general, codified in the Uniform Commercial Code, cited in virtually every treatise on contract law (including maritime texts) and, of course, applied in many maritime arbitrations.

a) The Judicial Approach

In a case more than 100 years old, Oliver Wendell Holmes, Jr., one of the most respected Supreme Court Justices, opined that common sense should be the guiding principle in any analysis of a claim for special damages in Globe Refining Company v. Landa Cotton Oil Company[6]. The case arose out of a sales contract for the delivery of cottonseed oil. The seller did not deliver the oil and the buyer sued for damages, including freight paid to railroads for tank cars not used, and the loss of customers, credit and reputation.

The Supreme Court affirmed the dismissal of the suit, with Justice Holmes writing:

> *It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind.*

As will be seen below, this common sense approach to determining what the parties would have agreed, if they had consciously considered the consequences of a breach, has been the guiding principle in applying the second prong of Hadley under U.S. law.

b) Uniform Commercial Code

Article 2 of the Uniform Commercial Code ("UCC"), which has been adopted in 49 out of the 50 states,[7] sets forth the law of sales in the United States, and it contemplates the collection of consequential damages for breach of a sales contract.[8] In concert with the UCC's scheme, the rule of Hadley v. Baxendale has been codified to an extent in the UCC §2-710(2) under a provision entitled "Seller's Incidental and Consequential Damages," and in §2-715(2), under a provision entitled "Buyer's Incidental and Consequential Damages."

UCC §2-710(2) states:

> *Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise.*

And UCC §2-715(2) states:

> *(2) Consequential damages resulting from the seller's breach include*
>
> *(a) any loss resulting from general or particular requirements and needs of which the seller at time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise …*

As applied through the UCC, consequential damages under Hadley v. Baxendale are limited to those damages reasonably foreseeable at the time the breaching party entered into the contract. While some courts have intimated that the defendant must have a conscious understanding to bear losses occurring due to particular needs or requirements of the non-breaching party, the prevailing and probably better view accepts, as does the UCC, that a party need not explicitly agree to bear the risk of another's special needs; it need only have a "reason to know" of those needs. Thus, special circumstances and needs must be made known to the counter party. In addition, the damages must be reasonably certain. Finally, consequential damages are recoverable under the UCC only if they "could not reasonably be prevented." In Hydraform Products Corporation v. American Steel & Aluminum Corporation[9], Justice David Souter writing at the time as a member of the New Hampshire Supreme Court explained:

> *First, under [UCC] 2-715(2)(a) consequential damages are limited to compensation for "loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know …" This reflection of Hadley v. Baxendale, thus limits damages to those reasonably foreseeable at the time of the contract. … To satisfy the foreseeability requirement, the injury for which damages are sought "must follow the breach in the natural course of events, or the evidence must specifically show that the breaching party had reason to foresee the injury."… Thus, peculiar circumstances and particular needs must be made known to the seller if they are to be considered in determining the foreseeability of damages. …*
>
> *Second, the damages sought must be limited to recompense for the reasonably ascertainable consequences of the breach. … While proof of damages to the degree of mathematical certainty is not necessary … a claim for lost profits must rest on evidence demonstrating that the profits claimed were "reasonably certain in the absence of the breach. … Speculative losses are not recoverable.*

> *Third, consequential damages such as lost profits are recoverable only if the loss "could not reasonably be prevented (citations omitted) or otherwise. §2-715(2)(a). See §2-712(1) (i.e., by purchase or contract to purchase goods in substitution for those due from seller).*[10]

In summary, recovery of consequential damages under the UCC must be reasonably foreseeable, ascertainable, and unavoidable.

c) Arbitration Awards

We have identified fifty one arbitration awards reported by the Society of Maritime Arbitrators that analyze consequential damages under Hadley v. Baxendale. Some are considered below, and others are addressed in Mr. Berg's paper (see **THE ARBITRATOR**, Vol 43, No 1, September 2012 issue) discussing consequential damages in follow-on charters and hedging transactions.

It is fair to say, however, that arbitrators determining what consequential losses are foreseeable, are cautious about ascribing commercial awareness to the breaching party of the non-breaching party's circumstances, although we have not seen the "minority of cases" approach adopted in The Rio Claro. Rather, the panels appear to take each consequential damages case on an individual basis according to its unique facts.

While Mr. Berg's paper discusses in greater detail losses due to cancellation of a follow-on charter, it is relevant to note here that panels also seem reticent in awarding market-related consequential damages in an environment of extreme market volatility, the rationale being that unusual occurrences ought not be considered within the contemplation of the parties at the time of contracting.[11] We believe as well that this is the direction to which the arbitrator and High Court were pointing in The Rio Claro.

5. Key Applications in U.S. Law

Although the various recitations about consequential damages in the sales context ought to be fairly clear given that the rule is codified in the UCC, a good deal of confusion still arises with respect to the application of Hadley. In addition, the same general principles seem to apply to both sales contracts and other agreements.

(a) The breaching party must know or have reason to know of the non-breaching party's special needs.

It is not necessary for one party to expressly convey special requirements, only that the counter-party does or should know of them at the time of contracting. However, this concept calls for certain levels of proof that go beyond mere assumptions. While a court or an arbitrator may have a feel for what a breaching party ought to have known, it is important to put personal notions aside for the moment and listen to both parties' proofs as to why the breaching party should or should not be charged with knowledge of special requirements. A good example of this is the case of B.F. McKernin v. United States Lines, Inc.,[12] wherein a shipper of containerized consignment of brassware, sued the carrier after delay in delivery caused the shipper to miss the Christmas season. Based on the evidence before it, the court denied the claim, holding that a common carrier would not have reason to know of the shipper's special needs and its particular time constraints.

Even where a specific need or matter might be apparent at the time of contracting, it is still important to consider the evidence. Arbitration panels are frequently called upon to rule whether a non-breaching party, usually a charterer, is entitled to recover lost profits due to a sale of shipped goods to a third party. Often carriers and owners have knowledge of the nature of the business of their chartering customers, particularly where the chartering customer is a commodities trader. From such knowledge, an arbitration panel may conclude that the breaching party knew, or should have known, of the special requirements of the non-breaching party. In the arbitration of Sigmoil Resources N.V. v. Burmpac Trading & Transport Co. (M/T Elbe Ore),[13] for example, the charterer Sigmoil entered into a voyage charter party with Burmpac for the lifting of two parcels of Nigerian crude oil, which Sigmoil had bought from Sohio. The charter contained a warranty that the vessel had not called at South African ports. In fact, the vessel indeed had called at South African ports, and Sigmoil was advised that the Nigerian authorities would likely reject the vessel. Sigmoil thereupon cancelled the charter. Burmpac's breach also required Sigmoil to amend its supply and sale contracts in a volatile market, resulting in a substantial loss on the transactions.

Sigmoil then sought to recover its losses in arbitration. Burmpac conceded that it was in breach and that Sigmoil was correct in cancelling the charter. However, it disputed that Sigmoil was entitled to recover its market loss. After considering all the evidence, the panel awarded damages to Sigmoil for the loss on the resale. The panel stated:

> *The testimony of Burmpac's witness … makes it clear that at the time of the charter, Burmpac was aware of the fact that Sigmoil was an oil trader engaged in the business of buying and selling oil. Burmpac was also aware of the fact that the nature*

of the market for crude oil is speculative and can vary greatly from day to day based upon volatile economic and political pressure. Burmpac was heavily involved in the crude oil market, and [the witness] testified that she followed crude oil prices and spoke with oil traders on a regular basis.

Under these circumstances, the panel believes that Sigmoil's damages due to loss of market were, or reasonably should have been, within the contemplation of the parties at the time of the charter of the Elbe Ore, even though it was not the late arrival of the cargo at destination that caused Sigmoil's loss. The panel recognizes that it was the delay in being able to sell the cargo that resulted in the loss.

In confirming the award, the District Court stated the rule of foreseeability as follows:

This Court notes that it is not inconceivable that a sophisticated entity such as Burmpac could have foreseen that its breach of a charter party agreement would result in substantial damages to an oil trader selling in a declining market. While it is true that the Czarnikow case can be read as favoring a narrow view of what damages are foreseeable, courts and commentators have subsequently made clear that "what must be foreseeable is only that the loss would result if the breach occurred. There is no requirement that the breach itself or the particular way that the loss came about be foreseeable." … Even if Burmpac could not have foreseen the precise circumstances that led to Sigmoil's loss, the Panel's conclusion that Burmpac could have foreseen a loss is by no means evidence of the Panel's "manifest disregard of the law." [14]

On the other hand, where no credible evidence of the non-breaching party's conveyance of specific information to the breaching party is submitted, then a panel or court is more likely to deny a recovery for consequential damages. For example, the panel in M/T Berge Bragd[15] dismissed a lost profits claim based on to the vessel's delay in delivering to the charterer's purchaser. The panel rejected the charterer's attempt to impose a "form of 'blanket' foreseeability" on the owner with respect to the lost profits on a third-party sale. The panel was direct:

As the party asserting this claim, however, Charterer has the burden of proof, and it must at least establish the existence of an issue of credible material fact in order to meet the tests of foreseeability and summary judgment, supra. It cannot merely allege an issue of fact in order to establish it for this purpose. …

Charterer argues it was not necessary for Owner to have particular knowledge of the Maraven contract, but only of general pricing trends and practices in the oil market. However, we believe this argument stretches the definition of foreseeability too far, and we are unwilling to apply such a broad interpretation to the term. …

The panel is compelled to note that there was neither testimony nor evidence to support Charterer's argument that at the time of fixing, Owner was made particularly aware of the importance for the vessel to arrive by February 23. In fact, the witness's testimony was characterized more by vague explanations such as "…I am sure it was explained to them [Owner] that we needed to arrive by a certain date."

Thus, general knowledge, without a specific factual context, should not support a claim for consequential damages. This principle was eloquently explained 85 years ago by Justice Benjamin Cardozo, then writing as the Chief Judge for the New York Court of Appeals in Kerr S.S. Co. v. Radio Corporation of America.[16] The case involved a steamship operator's attempt to send vessel loading instructions to its local agent in the Philippines. The telegram was never transmitted due to the negligence of the defendant. For want of the instructions, the cargo was not loaded and Kerr lost a substantial freight for which it sued defendant R.C.A. The telegram message on its face was non-revealing, apart to suggest it was being sent to advance the plaintiff's business interests. The trial court believed that a mere understanding that the telegram related to a business transaction was adequate to charge the defendant with the plaintiff's loss. The Court of Appeals reversed, and Judge Cardozo wrote:

[The trial judge] held that the cipher, though the defendant could not read it, must have been understood as having relation to some transaction of a business nature, and that from this understanding without more there ensued a liability for the damages that would have been recognized as natural if the transaction had been known. …. The settled doctrine of this court confines the liability of a telegraph company

> *for failure to transmit a message within the limits of the rule in Hadley v. Baxendale. Where the terms of the telegram disclose the general nature of the transaction which is the subject of the message, the company is answerable for the natural consequences of its neglect in relation to the transaction thus known or foreseen. .... On the other hand, where the terms of the message give no hint of the nature of the transaction, the liability is for nominal damages or for the cost of carriage if the tolls have been prepaid. …. We are now asked to hold that the transaction has been revealed within the meaning of the rule if the length and cost of the telegram or the names of the parties would fairly suggest to a reasonable man that business of moment is the subject of the message. This is very nearly to annihilate the role in the guise of an exception.* [17]

(b) The non-breaching party's special circumstances must be apparent at the time of contracting.

This is a question of foreseeability. As noted in Rexnord Corporation v. DeWolff Boberg & Associates[18]:

> *Contract law takes two approaches to consequential damages in cases in which the contract itself fails to make provision concerning them (this is such a case). One, which the great Holmes favored …. but has fallen into disuse …. is that consequential damages can be awarded only if the promisor has assumed the risk of the consequences in question - has, in other words, agreed, whether expressly or as a matter of "what the parties probably would have said if they had spoken about the matter," to bear them.… The second approach requires merely that consequential damages be foreseeable…and it is the approach that the parties have correctly assumed governs here.*

Arbitrators and the courts consistently have denied the recovery of consequential damages where, at the time of contracting, the non-breaching party had not yet entered into the agreement for which it subsequently sought lost profits or other consequential damages. For example, in the M/T Berge Bragd mentioned the arbitrators denied the charterer's claim on the additional ground that the charterer's sales agreement with the third party was not made until after the vessel was fixed. As the panel noted, because the charterer's sales contract followed after the charter party, "it was impossible for Owner to foresee any consequences under it for Charterer to place Owner on notice of anything with respect to [the third party sale] at that time." Legal precedents take the same approach: if the plaintiff seeks lost profits on a contract entered into after its contract with the defendant, the claim for consequential damages often will be denied.

Notwithstanding this rule of general application, it is occasionally the case that a contract between the non-breaching party and a third party necessarily will not be in existence at the time of the original agreement. Then, plaintiffs sometimes sue for loss of future or prospective profits generally on new or anticipated business. Rarely are these claims granted, however, because the quality of proof necessary is very high in order to demonstrate both the entitlement to and relative accuracy of consequential damages for lost future profits. Thus, it has been said:

> *It must be demonstrated with certainty that such damages have been caused by the breach and second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes. In addition, there must be a showing that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made. If it is a new business seeking to recover for loss or future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.*[19]

It is key when speaking of future profits that, in determining the reasonable contemplation of the other party's liability, consideration must be given to "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made."[20] There is no hard and fast rule for allowing a claim for future profits from new business. It is a question of proof that goes to the weight of the evidence rather than automatic preclusion on the basis that they are necessarily speculative.[21]

In the pair of cases comprising the litigation in Kenford Company v. County of Erie, a non-maritime case in the State of New York, the plaintiff donated property near Buffalo in 1968 to be used for the construction of a domed stadium. Much was anticipated by the plaintiff, who was to receive a 20-year operating agreement for the stadium. However, the stadium was not built and the plaintiff sued

Erie County for lost benefits. In the first appeal,[22] the court acknowledged that the plaintiff had submitted an enormous amount of evidence as to what kind of economic benefits it would have received had the stadium been built. However, the court concluded that, while the volume of the economic evidence was impressive, it nevertheless required "a multitude of assumptions… to establish projections of profitability." The court said that the proof did not satisfy the requirement that liability for loss of profits over a 20-year period could possibly have been in the contemplation of the parties when the contract was executed and when it was breached.

Thereafter in Kenford II, the same plaintiff sought to recover damages for loss of what it had expected to realize in increased property values for the land it owned adjacent to the projected stadium site. The court again noted that this cannot be something that the defendant would have anticipated when the contract to build the stadium was made.[23] The Kenford cases make clear the high bar established for proof of future lost profits:

> *If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.*[24]

Speculation can rarely, if ever, satisfy this burden:

> *[I]t is beyond dispute that at the time the contract was executed, all parties thereto harbored an expectation and anticipation that the proposed domed stadium facility would bring about an economic boom in the County and would result in increased land values and increased property taxes. … We cannot conclude, however, that this hope or expectation of increased property values and taxes necessarily or logically leads to the conclusion that the parties contemplated that the County would assume liability for Kenford's loss of anticipated appreciation in the value of its peripheral lands if the stadium were not built.*[25]

In maritime arbitration, the award in Promotora de Navegacion S.A. v. Turbana Corporation[26], follows the same rationale as Kenford. Turbana had started a new venture marketing bananas on the East Coast of the United States, which it sourced from various Latin American countries. To transport the bananas, Turbana entered into a three year contract of affreightment with Promotora for two reefer vessels. It was important that the vessels could maintain a weekly schedule so that the bananas would arrive in a timely manner at Wilmington, North Carolina. The vessels could not maintain the schedule and the COA was cancelled by Turbana. Promotora then sought damages for wrongful cancellation and Turbana counter claimed for lost profits. The panel denied both claims. Leaving aside the discussion of Promotora's claim, the panel stated:

> *We find that the particular damages claimed here were not reasonably within the contemplation of the parties. While Promotora may be held to some standard of knowledge of the banana trade, it cannot be held to have contemplated Turbana's specific plans to compete with the top tier banana importers. Promotora had no direct knowledge of the various tiers to which the service would be pitched. To the extent to which Turbana could penetrate the market with the margins that were projected was solely hopeful speculation in the minds of Turbana's salesmen. The change in the EEC tariff structure surely affected the market and the ability of a new player to compete successfully therein.*
>
> *The Panel realizes that once there is a breach, the harmed party is entitled to the reasonable damages flowing therefrom. It is difficult to see what additional proofs Turbana could have offered, but at the end of the day, this evidence is insufficient to overcome the high barriers the law places in cases of this nature. The Panel does not doubt that the vessels' failure to maintain schedules caused major problems and disruptions in Turbana's efforts to sell to top tier customers and that eventually its overall credibility in the market suffered. However frustrating as this was to Turbana, it does not merit an award of damages for lost profits.*

(c) Damages must be ascertainable with reasonable certainty.

It is well settled that consequential damages, to be recoverable, must have a firm basis in reality. This was clearly laid out in the Kenford cases. Further, as noted in one South Carolina case involving lost profits but equally applicable to all claims for consequential damages, a determination of this nature must be "established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative."[27] Nevertheless, it has been said that such damages need not be proved to an absolute certainty, only

that they be reasonably and reliably ascertainable. Again, it is a question of fact[28].

(d) The non-breaching party's conduct will be examined.

Under UCC §2-715(2) consequential damages can be awarded only to the extent that they "could not reasonably be prevented by cover or otherwise." Thus, the finder of fact must look at the conduct of the party claiming consequential damages to determine whether they are rightly available. The same principle should apply generally in the common law. This aspect of the rule in Hadley v. Baxendale does not receive a lot of attention, but it is important.

Writing for the 7th Circuit Court of Appeals in an interesting trio of cases, Judge Richard Posner fixed upon the fact in Hadley v. Baxendale that the carrier did not know the Hadleys lacked a spare shaft which could have been put to use should there be a delay in delivery of the repaired shaft. In Evra Corporation v. Swiss Bank Corp.[29], the plaintiff Hyman-Michaels Corp. ("H-M") had a vessel, the Pandora, under time charter in a rising market. On a series of prior occasions the plaintiff had been dilatory in making hire payments (a few days here, a few days there!) in order to get the most out of its money and wound up in arbitration when the owner cancelled. Fortunately, H-M prevailed because the panel determined that the owners needed to warn of cancellation before actually doing it. Now on notice, however, H-M continually waited until the last moment to wire its monthly payment, but it always arrived on time …. until that certain day when H-M instructed Swiss Bank to make a hire payment by a specific date which was required under the time charter. Through negligence, the bank failed to make the payment timely. The owner refused the late payment and withdrew the vessel. H-M brought arbitration proceedings against the owner for wrongful withdrawal and lost. The panel held that failure to make timely payment allowed the owner to cancel the charter. H-M then sued the bank for negligence to recover loss of profits and the expenses of arbitration. The trial court awarded damages of $2.1 million. The bank appealed. Judge Posner stated:

> *The bank knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named Pandora. But it did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels. And it did not know that Hyman-Michaels knew the Pandora's owner would try to cancel the charter, and probably would succeed, if Hyman-Michaels was ever again late in making payment, or that despite this peril Hyman-Michaels would not try to pay until the last possible moment and in the event of a delay in transmission would not do everything in its power to minimize the consequences of the delay. Electronic funds transfers are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry. Swiss Bank did not have enough information to infer that if it lost a $27,000 payment order it would face a liability in excess of $2 million. Cf. Snell v. Cottingham, 72 Ill. 161, 169-70 (1874); Flug v. Craft Mfg. Co., 3 Ill. App. 2d 56, 67, 120 N.E. 2d 666, 671 (1954). Id. 957. If he [i.e. the Bank] does not know what that probability and magnitude are, he cannot determine how much care to take. That would be Swiss Bank's dilemma if it were liable for consequential damages from failing to carry out payment orders in timely fashion. To estimate the extent of its probable liability in order to know how many and how elaborate fail-sale features to install in its telex rooms or how much insurance to buy against the inevitable failures, Swiss Bank would have to collect reams of information about firms that are not even its regular customers. It had no banking relationship with Hyman-Michaels. It did not know or have reason to know how at once precious and fragile Hyman-Michaels' contract with the Pandora's owner was. These were circumstances too remote from Swiss Bank's practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department or whether it should have more intelligent machines or should install more machines in the cable department.*[30]

After discussing the notice and foreseeability requirements in Hadley, the court reversed the district court and ordered the case to be dismissed. Judge Posner also criticized plaintiff's lack of prudence throughout by regularly waiting until the very last day to wire the payment after it had put itself in a position with the shipowner where even a day's delay would lead to a cancellation of the charter.

Next, Judge Posner tackled the plaintiff's preparedness under Hadley in a tort case, Rardin v. T&D Machine Handling, Inc.[31] Mr. Rardin, a printer, had purchased a used press for his business. The seller hired the defendant T&D

to dismantle the press and load it onto Rardin's truck. The press was damaged due to T&D's carelessness, and Rardin sued T&D not only for the cost of repair, but also for profits lost due to the consequent delay in putting the press into service. Although it was a tort case, and not one for breach of contract, Judge Posner nevertheless believed "the spirit of Hadley … broods over this case…" After reviewing the facts of Hadley and its holding, Posner got to his issue:

> *The plaintiffs, however, as the court noted, could have protected themselves from the consequences of a delay by keeping a spare shaft on hand …. Indeed, simple prudence dictated such a precaution, both because a replacement shaft could not be obtained immediately in any event (it had to be manufactured), and because conditions beyond the defendants' control could easily cause delay in the delivery of a broken shaft to the manufacturer should the shaft ever break.*
>
> *…. could have taken measures to protect himself against the financial consequences of unexpected delay. He could have arranged in advance to contract out some of his printing work, he could have bought business insurance, or he could have negotiated for a liquidated-damages clause in his contract with [the seller] that would have compensated him for delay in putting the press into working condition after it arrived.*[32]

Obviously, Mr. Rardin was denied his claim for consequential damages.

Twenty years after Evra, Judge Posner took up the issue again in Rexnord Corp. v. DeWolff Boberg & Assoc. Inc. ,[33] still concerned about the Hadley mill's "failure to have protected itself against the consequences of a delay by the carrier by having a spare part on hand." He went on:

> *In other words, there was a sense in which the mill was the author of its own loss. In still other words, the carrier was not on notice that the mill was taking an unusual risk and had it been told that it would be an insurer against that risk it would have demanded a higher price for its service.*

Posner thus viewed "the animating principle" of Hadley to be "that the costs of untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so."[34]

This economic approach is reminiscent of outlook taken by Judge Cardozo in Kerr Steamship[35]:

> *We are not unmindful of the force of the plaintiff's assault upon the role in Hadley v. Baxedale in its application to the relation between telegraph carrier and customer. The truth seems to be that neither the clerk who receives the message over the counter nor the operator who transmits it nor any other employee gives or is expected to give any thought to the sense of what he is receiving or transmitting. This imparts to the whole doctrine as to the need for notice an air of unreality. The doctrine, however, has prevailed for years, so many that it is tantamount to a rule of property. The companies have regulated their rates upon the basis of its continuance. They have omitted precautions that they might have thought it necessary to adopt if the hazard of the business was to be indefinitely increased. Nor is the doctrine without other foundation in utility and justice. Much may be said in favor of the social policy of a rule whereby the companies have been relieved of liabilities that might otherwise be crushing. The sender can protect himself by insurance in one form or another if the risk of nondelivery or error appears to be too great. The total burden is not heavy since it is distributed among many, and can be proportioned in any instance to the loss likely to ensue. The company, if it takes out insurance for itself, can do no more than guess at the loss to be avoided. To pay for this unknown risk, it will be driven to increase the rates payable by all, though the increase is likely to result in the protection of a few. We are not concerned to balance the consideration of policy that give support to the existing rule against others that weight against it. Enough for present purposes that there are weights in either scale.*

Indeed, the UCC adopts a similar requirement, although it may be viewed as in the nature of mitigation after the fact, such that consequential damages may not be collected unless the loss "could not reasonably be prevented."[36]

6. Contract Prohibitions of Recovery for "Incidental", "Consequential" and "Special Damages"

Limitations on the types of damages that may be sought for breach, while not frequently seen in charters, often find their way into sales and service contracts. They are a major feature in the contract terms of logistics providers, and

often appear in sales contracts. Examples of these clauses might be as simple as:

> *Liabilities: Neither party shall be liable for indirect or consequential damages or for specific performance.*

… or as convoluted as:

> *Limitation of Liability: Except for supplier's indemnification obligations as to third party claims under Sections 10, 11 and 12 and third party damages for customer's negligence or intentional misconduct in connection with Section 16, both parties' non-disclosure obligations under Section 13, for which no limitation shall apply, in no event shall either party be liable to the other party, its employees, subcontractors, and/or agents, or any third party, for any indirect, incidental, special, consequential, punitive damages, or lost profits for any claim or demand of any nature or kind, arising out of or in connection with this agreement or the performance or breach thereof.*

Clauses of this nature are enforceable throughout the United States, and the right to exclude consequential damages in sales contracts is codified in UCC §2-719(3), which states:

> *Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.*

Such clauses can effectively limit a non-breaching party's ability to recover consequential damages, and they generally are viewed as conscionable when in contracts between merchants in the absence, of course, of fraud, misrepresentation or the like. What happens, however, when the contract also sets forth an exclusive remedy for breach but it is inadequate to compensate the injured party?

In the most common of these situations, sales contracts, the same general provision in the UCC that allows exclusion of consequential damages also provides:

> *Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.*[37]

In cases such as this, courts will look to the remedy to see if it fails of its essential purpose. Justice Souter, in Hydraform Products, recognized that an exclusion of consequential damages can fail of its essential purpose where lost profits are the only damages available for a breach of timely performance where time was of the essence[38]. There the plaintiff buyer was in a seasonal business, manufacturing wood burning stoves. It agreed to purchase its entire supply of steel to make the stoves from the defendant seller. Their contract contained an exclusive remedy that the seller would replace or refund the price for any product nonconformities. The clause also excluded consequential damages. The seller became seriously delinquent in its performance, such that it ultimately delivered only a fraction of the conforming steel contracted for. Because of this, the buyer sold about one-third fewer stoves than it would have during the season, and sued the seller for its lost profits.

The court first determined that the clause, excluding consequential damages and limiting the plaintiff's remedies to replacement or refund, was conscionable for a contract of this nature between a sophisticated buyer and seller. Nevertheless, the court allowed the plaintiff's claim for consequential damages:

> *It is quite another question, however, whether the clause remained enforceable under the terms of §2-719(2). This section provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose" the clause in effect must be set aside, leaving a party free to pursue remedies otherwise available under article two of the code, including consequential damages. We are satisfied that the record amply supports the trial court's conclusion that the circumstances in this case did cause the exclusive remedy clause to fail of its purpose.*
>
> *The purpose of the clause was to limit the right to seek consequential damages, but only subject to [the seller's] obligation to provide replacements as a remedy for defective goods. It is apparent, however, that the limitation clause did not address the problem of late shipment at all. It is equally apparent that if replacement is to be an appropriate response to the delivery of defective materials to a seasonal manufacturing business, the replacement must be prompt. Thus if [the seller] delayed the basic shipments or the required replacements, the clause would fail of its essential purpose to provide some effective remedy for breach. Time*

was of the essence, and delay of a replacement shipment would negate its adequacy.[39]

At the end of the day, it has been said that a seller who designates a remedy as exclusive, runs the risk that it will "fail of its essential purpose," as an exclusive "repair or replace" contract might do.[40] In such a case, the clause may be set aside, leaving the injured party free to pursue its Article 2 remedies, including consequential damages.[41] A similar rule should apply at common law.

This proposition should not be taken for granted, however. There are two lines of judicial thinking about whether failure of a limited remedy's essential purpose automatically negates an exclusion of consequential damages. One view says it does, not only because UCC §2-719(b) expressly allows pursuit of all remedies, including consequential damages, when the exclusive remedy fails of its exclusive purpose, but also because parties to an integrated contract naturally would intend the validity of the consequential damages exclusion to be dependent on the exclusive remedy.[42] However, the currently prevailing view regards the exclusive remedy and the consequential damages exclusion as independent contract undertakings. As stated by the New Jersey Supreme Court in Kearney & Trecker Corporation v. Master Engraving Company, Inc.:

We are also persuaded that many routine business transactions would be dislocated by a rule requiring the invalidation of a consequential damage exclusion whenever the prescribed contractual remedy fails to operate as intended. Concededly, well-counseled businesses would avoid the problem posed by better draftsmanship of their sales contracts. …. But the commercial reality is that for many sellers, immunity from liability for their customers' consequential damages may be indispensable to their pricing structure and, in extreme cases, to their solvency.

Nor do we find that enforcement of a consequential damages limitation when a limited remedy has failed of its essential purpose is necessarily inequitable to the buyer. As noted earlier, the Code affords remedies other than consequential damages when a warranty is breached. …. Ordinarily, the availability of such remedies will assure the buyer of "a fair quantum of remedy for breach of the obligations or duties outlined in the contract.[43]

Thus, it appears the better approach is to treat the limitation of remedies and the exclusion of consequential damages not as interdependent, but rather as distinct contractual undertakings each subject to its own analysis.

Conclusion

It clearly can be seen that the common threads running up to Hadley v. Baxendale and on from it are the twin considerations of foreseeability and communication. On the one hand, where consequential damages are foreseeable, they are more likely to be granted. And where the injured party communicates his special needs to the counter party at the time of contracting, consequential damages can become part of the undertaking. On the other hand, the more remote the consequential loss or the less aware the counter party is about the promisee's special needs, then collection of consequential damages will be less likely. Likewise, where the injured claimant's losses arise from third party transactions entered after the contract, they also are less likely to be recovered.

Ultimately, it is a question of proof. Where the consequential loss alleged is remote or prospective, then fact finders – both courts and arbitrators – clearly tend to require a heightened level of proof both as to foreseeability and quantum. Assumptions should have little, if any, place in the evaluation, and preconceived notions about what an actor "ought to know" should he set aside while weighing the quality of the claimant's proofs.

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1. [2008] UKHL 48, [2009] 1 AC 61
2. [2010] EWHC 542 (Comm.)
3. [1987] 2 Lloyd's Rep. 173.
4. [1967] 2 Lloyd's Rep. 457
5. Indeed, there is clear indication that U.S. jurisprudence was considered by the court in Hadley - particularly the decision by Justice Story in The Lively, 1 Gall. 315, 15 F. Cas. 631 (C.C. Ma., 1812), denying lost profits in a case of wrongful capture.
6. 190 U.S. 540, 543 (1903).
7. Louisiana's law of sales remains governed by the Louisiana Civil Code
8. UCC §§2-708 and 2-709(1) (Seller's Damages) and §§2-713 and 2-714 (Buyer's Damages) all provide for the recovery of "incidental and consequential damages"
9. 127 N.H. 187, 498 A.2d 339 (1985)
10. An identical rule will apply to seller's damages under UCC §§2-710

11. See, for example, Kingsbury Navigation Ltd. and Koch Shipping Inc. (M/T Seadancer), SMA 4131, 2011 WL 2706022 (S.M.A.A.S. 2011)

12. 416 F. Supp. 1068 (S.D.N.Y. 1976)

13. SMA No. 2561, 1989 WL 1646489 (S.M.A.A.S. 1989)

14. Sigmoil Resources N.V. v. Burmpac Trading & Transport Co. 1989 WL 125879, 1989 AMC 2874 (S.D.N.Y. 1989) confirming the M/T Elbe Ore award, SMA No. 2561. See also, In Re Columbiana Shipmanagement Ltd., Owners of the M/S Mercure, and American Agip Co., 2003 WL 25794958 (S.M.A.A.S.). Note: the "Czarnikow case" to which the judge referred is a New York case, and not the U.K. precedent on which the arbitrator and court relied in the Rio Claro.

15. M/T Berge Bragd, S.M.A. No. 3478, 1998 WL 35281311 (S.M.A.A.S.) (1998)

16. 245 N.Y. 284, 157 N.E. 140 (1927).

17. 245 NY at 287-288, 157 N.E. at 141 (internal citations omitted). Judge Cardozo's opinion in this case is one of the finest expositions of the rule in American jurisprudence.

18. 286 F.3d 1001, 1004 (7th Cir. 2002). In spite of this, modern fact finders nevertheless regularly consider "what the parties would have said "about issues if they had discussed it.

19. Kenford Company, Inc. v. County of Erie [Kenford I],67 N.Y. 2d 257, 493 N.E. 2d 234, 502 N.Y.S.2d 131 (1986)

20. Kenford Company v. County of Erie, [Kenford II], 73 N.Y.2d 312, 319 537 N.E. 2d 176, 540 N.Y.S. 2d 1, 4 (1989)

21. See, The Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207, 371 S.E.2d 532 (1988).

22. 492 N.E.2d 234 (N.Y. 1986).

23. 537 N.E.2d 176 (N.Y. 1989)

24. Kenford I, 492 N.E.2d at 235

25. Kenford II, 537 N.E.2d at 179

26. 1996 WL 34449931, SMA No. 3293 (1996)

27. The Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc., 296 S.C. 207 (1988)

28. Ashland Management Inc. v. Javien, 82 N.Y. 2d 395, 624 N.E. 2d 1007 (1993)

29. 673 F.2d 951 (7th Cir. 1982).

30. Id. at 958

31. 890 F.2d 24 (7th Cir., 1989)

32. Id at 27

33. 286 F.3d 1001 (2d Cir. 2002)

34. Evra, 673 F.2d at 957; cert. denied 459 U.S. 1017 (1982). Posner's background is in economics, so his unique take on Hadley should not be surprising.

35. 245 NY at 291-292

36. UCC §§2-710(2), 2-715(2)

37. UCC §2-719(2).

38. Hydraform Products Corporation v. American Steel & Aluminum Corporation,127 N.H. 187, 498 A.2d 339 (1985)

39. Id. at 344

40. County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 323 F. Supp. 1300 (D. Ohio 1970)

41. Id. at 344.

42. Caudill Seed & Warehouse Co. Inc. v. Prophet 21, Inc., 123 F.Supp.2d 826 (E.D.Pa. 2000)

43. 107 NJ 584, 599; 527 A2d 429, 437-438 (1987)

MERCANTE'S SEA TRIALS ADMIRALTY LAW: "YOU SUNK MY BATTLESHIP?"

A yacht owner's vessel sank when it was launched after winter storage. Now that summer is behind us, boat owners will be thinking about winter storage ashore, so a recent federal court decision presents a 'see-worthy' fact pattern.

Winter-above water

The vessel owner brought his 40-foot cruiser to a marina for storage ashore for the winter (no battleship, but a great game that was!). This particular marina, however, did not have a service department that repaired, winterized or commissioned boats. It simply rented slips, provided on land storage facilities, hauled and launched boats, and assisted owners in finding contractors to service their boats. Thus, the cruiser's owner contracted with the marina only for hauling, winter storage and spring launching of his vessel. There was no dispute the cruiser was in good condition when hauled by the marina and the marina accepted possession of the vessel for the winter.

The vessel owner then retained an outside contractor to do the winterization, which involved draining all water out of the boat's systems and replacing the water with antifreeze. To accomplish this, the contractor opened the sea-strainer caps to clean out the strainer baskets and to run antifreeze through the cooling system. Upon completion of the winterization process, the contractor left the port side strainer cap loosely fitted, allegedly intentionally. The contractor did not mention anything about the loosely fitted sea strainer cap, which required tightening at launching.

The vessel owner paid the contractor for his services. The cruiser was then shrink-wrapped by a second contractor and stored on blocks for the winter season.

The vessel owner had access to his vessel while it was stored at the marina and had inspected the exterior of the vessel at times during the winter. The owner kept the keys for the vessel and did not give a set to either the marina or the winterization contractor.

Spring-under water

When spring sprang, the owner contacted the marina to request the boat be launched. Accordingly, the shrink-wrap was removed, the boat was washed and waxed and zincs replaced.

The marina conducted a visual inspection of the exterior of the boat, including the drain plugs, and launched it. None of the marina personnel boarded the boat or visually inspected the interior or engine compartment before or after it was launched. The boat was secured in a slip and the marina employees secured for the day. When marina personnel arrived the next morning, the cruiser was found sunk. Trial time!

Because the vessel sank and incurred significant damages, the marina did not charge the vessel owner a fee for the launching, but that was not enough to satisfy the owner. Litigation and a trial ensued.

Three causes of action were asserted against the marina for damages sustained to the vessel in the sinking. These were (i) breach of contract, (ii) negligence and (iii) breach of bailment. The vessel owner succeeded on two out of the three causes of action, and in law, as in song, two out of three ain't bad!

A contract for the storage and launch of a vessel is a maritime service contract. In maritime law, one who performs a service does so "with the implicit agreement to perform in a workmanlike fashion." Thus, that contract included an implied warranty of workmanlike performance requiring that the party providing the service to perform in a "workmanlike manner" and exercise "reasonable care."

A marine expert for the contractor testified at trial that leaving sea strainer caps loosely fitted was proper after the winterization process to bleed air.

There was also undisputed expert testimony that if a cursory inspection had been done when the vessel was afloat, the loosely fitted sea strainer cap would have become visually and audibly obvious because the vessel would be taking on a large quantity of water through the sea strainer into the bilge space.

After listening to fact and expert testimony and reviewing the evidence, the federal judge determined that the use of "reasonable care" when launching a vessel includes boarding the vessel and completing a cursory inspection once in the water "to determine that the vessel is sound and not leaking." Based on the evidence, the marina was found not to have complied with this obligation and liable on the breach of contract count.

With respect to negligence, there was trial testimony that when an owner requests his or her boat be launched, it is expected that it would be put in the water and stay afloat. The party launching the boat has an obligation to make sure that there are no obvious defects or problems that will cause her to take on water, even if the owner does not explicitly request such an inspection.

The court found that a marina in the business of launching boats must exercise at least reasonable care in that process and that, here, its duty was breached when marina employees launched the boat and neglected to board the vessel or undertake any inspection once it was in the water. Since a cursory inspection would have revealed the obvious and audible incursion of water through the sea strainer cap, the court found that the failure to undertake a cursory inspection upon launching proximately caused the submersion. Plaintiff therefore proved at trial by a "preponderance of the evidence" all the elements of negligence. On the other hand, negligence was not proven against the contractor who winterized the vessel (also a defendant) because the contractor was not hired to launch or commission the vessel, just to winterize it properly.

With respect to the bailment claim, a contract for the storage or maintenance of a vessel typically constitutes a "bailment." A bailment (a contract formed as a matter of law) usually requires exclusive control by the facility (here, the marina). But, since the vessel owner and his own contractors had access to the vessel while it was in storage and the vessel owner kept the only set of keys, the court found that there was no exclusive control by the marina and no bailment relationship was created. This cause of action failed.

As the court determined that there was negligence and breach of contract, the marina was required to pay the full extent of the damages, plus prejudgment interest from the date of the loss at a rate of 6% per year.

Conclusion

No one would expect a boating season to end the very day it is set to begin. It must have been distressing for the owner to arrive at the marina with new season excitement to learn his vessel was on the bottom. This is a case where liability could have been shared equally between the marina and the winterizing contractor, who did not announce that he left one sea-strainer cap loose. But, a well-versed federal judge heard all the trial testimony and reviewed all evidence, leaving no loose ends — so the judge's ruling is watertight!

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IN MEMORIAM

Victor Y. Goldberg

SMA Member Victor Y. Goldberg died unexpectedly on October 4, 2012. After sailing Master, Vic's first position ashore was with American Trading Transportation Company, Inc. as Port Captain responsible for operations of a fleet of American flag tankers. He demonstrated unique interpersonal skills that served him well with company personnel and charterers alike. He broadened the scope of his work to include chartering of the company's vessels and his final position with the company was as Vice-President of Operations and Chartering.

His unique and broad sense of humor was often demonstrated. Two relatable instances come to mind. The first was his remarkable production of a home film. Vic played a super-human with an unlimited range of capabilities. The production showed his workouts, symphonic skills, medical expertise, etc. as a hilarious parody on a combination of some characters in vogue at the time.

A second rather spontaneous demonstration occurred when he was hurriedly asked to make a luncheon reservation at a local restaurant. He picked up the telephone and called a local New York 46th street restaurant outside of which there had been a well-known shooting the previous week. Vic was casually asked if he wanted the "no smoking section". His reply "I'd really like a no-shooting section"!

A moving memorial was held at the mariner chapel at Vic's Alma Mater, the US Merchant Marine Academy on Friday, October 19.

The following eulogy appeared in the ***Maritime Executive and MarEx Newsletter:***

"Captain Victor Y. Goldberg died at age 61 on October 4, 2012, far too young for such an engaging, exuberant and devoted family man and superb shipping executive.

Vic joined Crowley Maritime Corporation in 2002 as vice president of ship management in Weehawken, N.J., and was promoted in 2005 to vice president of marine operations. He relocated to Jacksonville in 2006, and was responsible for the safe and reliable operation of Crowley's marine petroleum assets including product tankers and articulated tug barges. In 2009, Vic was the proud recipient of the Thomas Crowley Trophy, the company's highest honor. Vic was a graduate of the U.S. Merchant Marine Academy in Kings Point, Long Island, NY, and was the first in his class to earn the rank of captain.

A private service was on held on Amelia Island on October 7, 2012, with Rabbi Robert Goodman presiding. A public memorial service will be held at the Merchant Marine Academy in Kings Point, Long Island, at a later date. In lieu of flowers, donations may be made in his memory sent payable to USMMA Alumni Association and Foundation at 300 Steamboat Road, Babson Center, Kings Point, NY 11024.

'Vic was a wonderful colleague who was a great contributor to the success of the organization,' said ***Tom Crowley, Crowley's company chairman, president and CEO****. 'He was a calm and steady influence on the crews he helped to manage. Everyone respected and looked up to him, including our customers who knew they could always count on him. We will all miss him greatly.'*

'We are all shocked and saddened to lose such a great and well respected co-worker and friend,' said ***Crowley's Rob Grune, senior vice president and general manager, petroleum services****. 'Captain Victor Goldberg was one of the best in the industry. I had the pleasure of working alongside him at Crowley for ten years. He touched everyone he met with his quick wit, genuine concern for the wellbeing of his coworkers and crewmembers, his work ethic, and so much more. Our lives won't be the same without him but we are so grateful for his many contributions.'*

Vic was chairman of the Chamber Shipping of America (CSA). ***CSA President & CEO Joseph Cox*** *had the following to say about him: 'The Chamber of Shipping of America is deeply saddened at the loss of our colleague, Capt. Vic Goldberg. As chairman of our operations committee, Vic was instrumental in ensuring the industry was on the correct course regarding the many issues we faced. He performed his responsibility in leading the committee with humor, grace and professionalism. He will be remembered as a person who led the industry to the highest levels of dedication to safety and environmentally sensitive operation. We are thankful that we had the opportunity to be associated with Vic ... a mariner and friend.'*

'I knew Vic for over 20 years. As a young salesperson he encouraged me and spent time with me even though he was a senior executive at ARCO. I can remember when I started the Maritime Executive Magazine and was traveling to New York City on business. Vic had heard about my being in the city from a mutual friend and he asked me to lunch. He was such a generous man, and we spent the afternoon discussing the maritime issues of the day and how I could publish the magazine and make a difference in the industry. I will miss him, and I have always called him a friend. The industry has lost a true maritime executive.' –Tony Munoz, Publisher & Editor-in-Chief of the Maritime Executive and MarEx Newsletter"

All who had the good fortune to know him will surely miss Captain Goldberg. The SMA and its members bid him fair winds and Godspeed.

THE ARBITRATOR

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