

# ASBA NEWS



THE NEWSLETTER OF THE ASSOCIATION OF SHIP BROKERS & AGENTS (U.S.A.), INC.

DECEMBER 2010

## TIME OF THE ESSENCE by Patrick V. Martin

In a time of volatile commodity and freight markets, it is perhaps useful to examine and put into context the concept of "time of the essence" which is often referred to and incorporated into commodity and shipping contracts.

The law imposes a duty upon contracting parties to act reasonably. If not specified in a contract, courts generally hold that the time for each party's performance shall be a "reasonable time". What is a reasonable time depends "on the nature, purpose, and circumstances of the action to be taken" in a particular matter. These words can often be the subject of extensive arbitration or litigation.

Even where a contract recites the time for performance, courts will often say that is only an estimated time, and the failure of one party to comply does not give the other a right to cancel. For example, if a contract for the sale of a real property provides for a closing date of June 15, the failure of a party to be ready by that date usually will not give rise to a right of cancellation. The same would hold true for the sale of "goods" in general. The reason for this is that courts are reluctant to declare a cancellation or forfeiture of a contract.

Thus, to avoid confusion, it is common for a party receiving performance to insist on a "time of the essence" provision. This is usually expressed or incorporated in a cancellation clause to make absolutely clear that failure of a party to perform by a certain date will give rise to a right of cancellation by the non-breaching party.

There is a wide variety of cancellation clauses, and one appears in virtually every form of charter party. A typical clause gives the charterer the right to cancel should the vessel not be ready to perform by an agreed date. Because cancellation is such a drastic remedy, the charterer's right is often tempered by language such as appears in the ASBATANKVOY at clause 5 "... by giving Owner notice of such cancellation within twenty-four hours after such **cancellation date**, otherwise this Charter to remain in full force and effect." The AMWELSH 93 at clause 5 provides that the "Charterer shall have the option of cancelling this Charter Party, not later than one hour after the said **notice [of readiness]** has been tendered." The AMWELSH 93 also has an extended grace clause which does not appear in the AMWELSH 79.

Similarly, in time charters the Owner has the right to withdraw the vessel "...failing the punctual and regular payment of the hire..." Because this is also a drastic remedy, the Owner's right to withdraw usually is tempered by a clause giving the Charterer a grace period.



WARMEST WISHES  
TO YOU AND  
YOUR FAMILY

FOR A

JOYOUS HOLIDAY SEASON

AND A

PROSPEROUS NEW YEAR

## TIME OF THE ESSENCE continued . . .

Although many shipping people believe cancellation is part of the law, in practice it is not. Rather it is a creature of contract and, as noted, most courts try to avoid declaring contracts cancelled unless they contain clear language permitting a party to do so. Thus, cancellation is part of the bargain that the parties strike in their negotiation.

Along these lines, "time of the essence" issues usually arise in the course of negotiations leading up to the fixture. When a vessel is fixed on subjects, the party who must agree to options or lift subjects normally has a "reasonable time" under the law to respond. In the hectic world of chartering, however, what is a reasonable time often is in the eye of the beholder. Therefore, most astute chartering offices will specify a time and manner in which to respond. Failure to meet that time will most often give the other party the right to withdraw from the intended fixture without penalty.

In the present age, with atomic clocks and similar devices, this time can be managed to the minutes or even seconds. So if a party to a recap agrees to respond to an offer or to lifting subjects by a definite time, it must, without excuse, meet that time. Indeed, parties have cancelled fixtures where the other party has been late in responding by even a few minutes or less. Recent arbitrations in both chartering and commodity disputes have only served to emphasize this point.

## Cargo Conference

- BEST ONE YET -  
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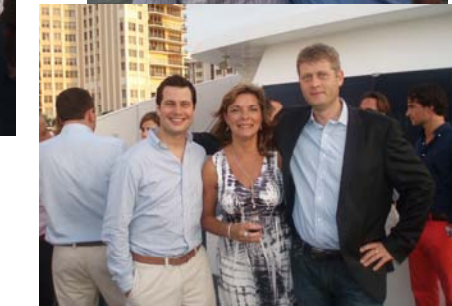
Opening Reception



Daniel Maldonado  
Bunge Latin America  
Keynote Speaker



Dinner Cruise on the Intercoastal



Most sincere thanks are extended to our generous sponsors  
and all who show their support by joining us each year!  
*The Cargo Conference Committee*

## **ASBA COURSES** **Winter 2011 Schedule**

### **Live Seminars**

January 20-21 Marine Insurance Stamford, CT  
February 11 Agency Seminar Houston, TX

### **Online Courses**

January Shipbroking & Chartered Vessel Operations  
February Commercial Trade Transactions

### **Home Study Course**

**Basic Principles of Chartering**  
Available now and throughout the year

## **CALENDAR OF EVENTS**

**FEB 3, 2011 - Princeton Club - NYC**

11:00am - **Agency Affair Meeting**  
4:00pm - **Board of Directors Meeting**  
6:30pm - **Annual General Meeting**

**MARCH 21, 2011 - ASBA/BALTIC**  
**Reception - Stamford, CT**

### **EMPLOYMENT OPPORTUNITY**

#### **Fettig & Donalty, Inc.** **Washington, D.C.**

- An established ship chartering and logistics firm for over 60 years, is looking for a **JUNIOR BROKER/LOGISTICS MANAGER** to join their team. Ideal candidate is a motivated self starter willing to train in aspects of food aid chartering and transportation and has a minimum 2 yrs. experience in shipping; preferably in liner transportation or ship chartering, computer skills which include Microsoft Excel and PowerPoint. Experience in container liner booking, export documentation, chartering terms a plus. This is an outstanding opportunity for the right candidate. Please send resume to [rfettig@fettigdonalty.com](mailto:rfettig@fettigdonalty.com).

### **IN MEMORIAM**

Anton Boel - Formerly of Anton Boel Chartering  
Kai Schmidt - Formerly of Omega Chartering  
Svein Nerdalen - Formerly of Planet Shipping  
William Sembler - SUNY Maritime College  
Vince Gilligan, Jr. - Poten & Partners



**Pre - Holiday Social**  
**Nov. 15 - Windfall - New York City**



***New and improved ASBA website coming soon - [www.asba.org](http://www.asba.org)***

**ASBA/WGMA SOCIAL**  
**hosted**  
**Nov. 11 @ Cadillac Bar - Houston, TX**



**WELCOME NEW MEMBERS**

**COMPANY MEMBERS**

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