

Lurking logistics terms— INCOTERMS, COGSA & ESG!

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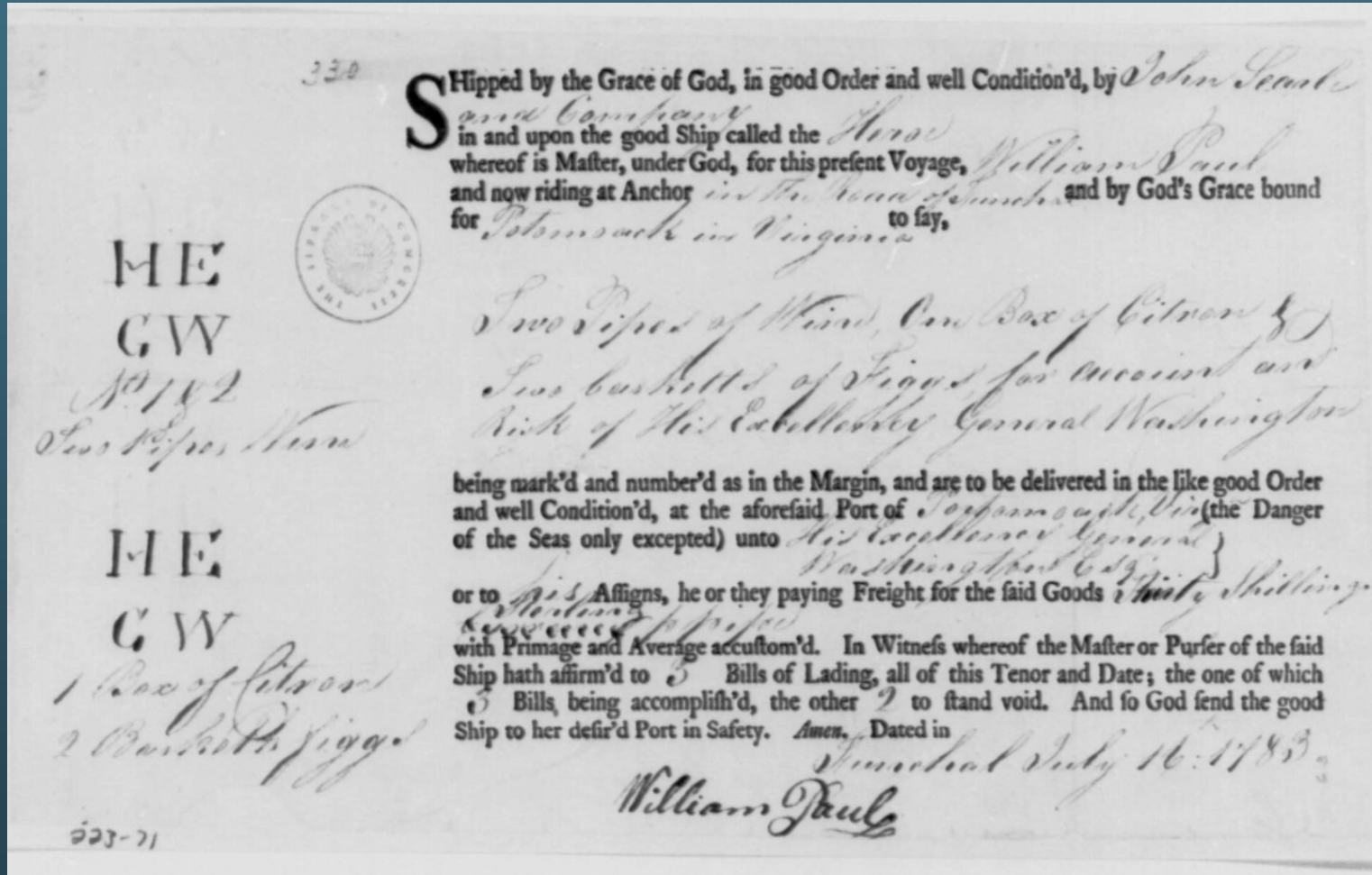
May 20, 2021

The Pillsbury logo, featuring the word "pillsbury" in a lowercase, sans-serif font. The letters are a reddish-brown color. The logo is positioned on a white rectangular background that is part of a larger white box on the right side of the slide.

Some issues lurking in the fine print

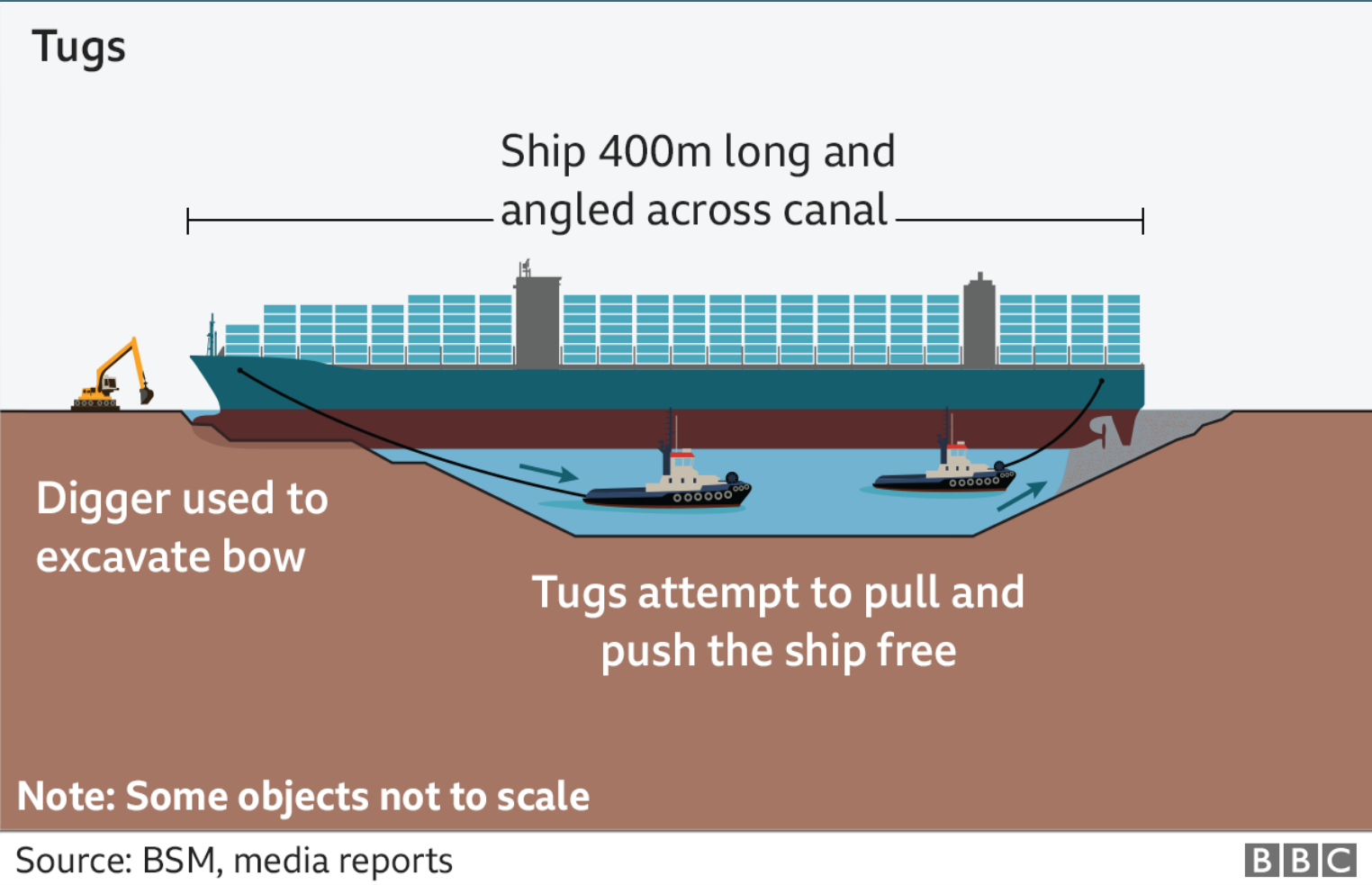
- Delivery terms: INCOTERMS
- Liability terms: COGSA, Conventions, and Carmack
- ESG terms: Coming soon to a contract near you?

George Washington's bill of lading, 1783



Two baskets of figs,
 a box of citron, and
 two pipes of Madeira wine,
 "of a fine Amber Colour,
 High Flavour, &
 Three years Old." Amen.

EVER GIVEN, March 2021



ONE APUS, December 1, 2020



En route Yantian-Long Beach
1,816 containers overboard, ~40 with hazardous materials

A ONE APUS law-school exam answer outline

- **CHOICE OF LAW**—domestic law(s), admiralty/maritime law, or conventional international law?
- **CHOICE OF FORUM**—U.S.? California? China? Japan?
- **CARGO v CARGO** – claims of general average, by which the risk holder of the lost containers may be compensated by the risk holder of the containers that weren't lost
- **CARGO v VESSEL** – Carriage of Goods by Sea Act (COGSA) and the Hague Convention may limit the vessel owner and charterer's liability
- **GOVERNMENTS v VESSEL** – must the vessel owner or charterer take any actions to retrieve or safeguard the overboard containers?
- **OTHER** – liability of inspectors, and whoever strapped in the containers?
- and...
- **CARGO BUYER v CARGO SELLER**—the domain of INCOTERMS®

An Inkling of INCOTERMS

AN INKLING OF INCOTERMS® 2020 Robert A. James, Pillsbury Winthrop Shaw Pittman LLP

Term, Mode [⚡]	Meaning (must insert [place])	2 Seller's Delivery Obligation	3 Risk in Transit	4/5 Carriage Obligation/ Insurance Choice	6 Delivery Documents	7 Customs Clearance	9 Transportation Cost Allocation	10 Notices
EXW	Ex works [delivery place]	Place at B's disposal at named place, ready for loading by B or its carrier	B	B may arrange for carriage/B	B: evidence of taking goods	S: Assist B: Exp/Tran/Imp	S: None B: All	S: If needed for B to take goods
FCA	Free carrier [delivery place]	S premises: Load on B's transport Elsewhere: place at B's disposal on S's carrier, ready for unloading by B or its carrier	B	B/B	S: evidence of delivery Option: B: bill of lading when risk passes, not when loaded	S: Exp B: Tran/Imp	S: Exp, loading if S premises B: loading if elsewhere, Tran/Imp	S: delivered, or carrier failed to take timely
FAS [⚡]	Free alongside ship [shipment port]	Place alongside B's nominated ship at named port—e.g., on quay or barge—or procure goods there	B	B/B	S: evidence of delivery	S: Exp B: Tran/Imp	S: Exp B: Tran/Imp, other	S: delivered, or vessel failed to take timely
FOB [⚡]	Free on board [shipment port]	Place on board B's nominated ship at named port or procure goods there	B	B/B	S: evidence of delivery	S: Exp S: Tran/Imp	S: Exp B: Tran/Imp, other	S: delivered or vessel failed to take timely
CFR [⚡]	Cost [and] freight [destination port]	Place on board ship at origin port (name it) or procure goods there	B	S/B	S: transport document (e.g., bill of lading)	S: Exp B: Tran/Imp	S: Freight, Exp B: Tran/Imp, other	S: if needed for B to receive goods
CIF [⚡]	Cost, insurance [and] freight [destination port]	Place on board ship at origin port (name it) or procure goods there	B	S/S must buy clause C LMA/IUA insurance	S: transport document and policy or evidence of insurance	S: Exp B: Tran/Imp	S: Freight, Insurance, Exp B: Tran/Imp, other	S: if needed for B to receive goods
CPT	Carriage paid to [destination place]	Hand over to carrier at origin place (name it)	B	S/B	S: transport document	S: Exp B: Tran/Imp	S: Freight, Exp B: Tran/Imp, other	S: delivered, and if needed for B to receive goods
CIP	Carriage [and] insurance paid [to] [destination place]	Hand over to carrier at origin place (name it)	B	S/S must buy clause A LMA/IUA insurance (CIP 2010 clause C)	S: transport document and policy or evidence of insurance	S: Exp B: Tran/Imp	S: Freight, Insurance, Exp B: Tran/Imp, other	S: delivered, and if needed for B to receive goods
DAP	Delivered at place [destination place]	Place at B's disposal at named place, ready for unloading by B	S	S/S or B	S: as needed for B to receive goods	S: Exp/Tran B: Imp	B: Unloading, Imp S: Exp/Tran, other	S: if needed for B to receive goods
DPU (2010's DAT)	Delivered [at] place unloaded [destination place]	Unload at named place for B's disposal	S	S/S or B	S: as needed for B to receive goods	S: Exp/Tran B: Imp	B: Imp S: Unloading, Exp/Tran, other	S: if needed for B to receive goods
DDP	Delivered duty paid [to] [destination place]	Place at B's disposal at named place on S's transport beyond import customs, ready for unloading by B	S	S/S or B	S: as needed for B to receive goods	S: Exp/Tran/Imp B: Assist	B: Unloading S: Exp/Tran/Imp, other	S: if needed for B to receive goods

Robert A. James, *An Inkling of INCOTERMS® 2020*
(Full chart with annotations)

What INCOTERMS do

- International Chamber of Commerce calls them “trade terms”
- Better: “delivery terms” — shorthand for
 - What a seller must do
 - Which party must take actions, pay money, and bear risks for transport and customs
 - Which party bears the risk of loss or damage to goods in transit past some point
 - Which party must provide transportation or delivery notices or documents
- *Does your contract use both an INCOTERMS term and provisions on these subjects?*

What INCOTERMS **don't** do

- Frequent points of confusion
 - Describe when and how payment is made—
“COD” is not INCOTERMS
 - Spell out what documents are required for payment
 - Define inspections or conditions for tender or rejection of tender
 - Provide excuse for force majeure, impracticability, frustration
 - *Does your contract lack provisions on these subjects?*
- And the #1 asked question: when does title pass?
It's complicated!

Parsing INCOTERMS—working backwards!

- Preferred style: “XXX [named place] INCOTERMS® 2020”
- Why “2020”? Because the decennial updates are substantive
 - **CIP increased insurance coverages in 2020**
 - **DAT was renamed DPU in 2020**
 - **Old warhorses DAF, DES, DEQ and DDU were retired in 2010**
- Why “®”? ICC licenses them
- Why “INCOTERMS?” Because there are other systems
- Why “[named place]”? Depending on term,
 - sometimes place of shipment
 - sometimes place of delivery
- Which XXX term?

Two INCOTERMS terms: FCA/FOB

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FCA	Free carrier [<u>delivery place</u>]	S premises: Load on B's transport Elsewhere: place at B's disposal on S's carrier, ready for unloading by B or its carrier	B	B/B	S: evidence of delivery Option: B: bill of lading when risk passes, not when loaded	S: Exp B: Tran/Imp	S: Exp, loading if S premises B: loading if elsewhere, Tran/Imp	S: delivered, or carrier failed to take timely
FOB ⚓	Free on board [<u>shipment port</u>]	Place on board B's nominated ship at named port or procure goods there	B	B/B	S: evidence of delivery	S: Exp S: Tran/Imp	S: Exp B: Tran/Imp, other	S: delivered or vessel failed to take timely

Two more INCOTERMS terms: CIF/CIP

Term, Mode	Meaning (must insert [place])	2 Seller's Delivery Obligation	3 Risk in Transit	4/5 Carriage Obligation/ Insurance Choice	6 Delivery Documents	7 Customs Clearance	9 Transportation Cost Allocation	10 Notices
CIF	Cost, insurance [and] freight [<u>destination port</u>]	Place on board ship at <u>origin</u> port (name it) or procure goods there	B	S/S <u>must</u> buy <u>clause C</u> LMA/IUA insurance	S: transport document and policy or evidence of insurance	S: Exp B: Tran/Imp	S: Freight, Insurance, Exp B: Tran/Imp, other	S: if needed for B to receive goods
CPT	Carriage paid to [<u>destination place</u>]	Hand over to carrier at <u>origin</u> place (name it)	B	S/B	S: transport document	S: Exp B: Tran/Imp	S: Freight, Exp B: Tran/Imp, other	S: delivered, and if needed for B to receive goods
CIP	Carriage [and] insurance paid [to] [<u>destination place</u>]	Hand over to carrier at <u>origin</u> place (name it)	B	S/S <u>must</u> buy <u>clause A</u> LMA/IUA insurance (CIP 2010 clause C)	S: transport document and policy or evidence of insurance	S: Exp B: Tran/Imp	S: Freight, Insurance, Exp B: Tran/Imp, other	S: delivered, and if needed for B to receive goods

INCOTERMS after 9/11 and COVID

- EXW: seller leaves all logistics to buyer
- DDP: buyer leaves all logistics to seller
- *Challenges for international sales after 9/11:
know your customer/know your supplier*
- Inspection and shipment qualifications in a pandemical world

Loss or damage in transit

- COGSA: \$500 per “package”
 - “50 cement bags” or “1 pallet”?
- The contract liability clause vs. liability provisions of the carrier’s tariff
- COGSA \$500 limit for “below deck cargo” [Article](#)

Loss or damage in transit

- Carmack Amendment
- For goods coming by truck into the U.S., some carriers will include an express waiver of the Carmack Amendment or of “49 U.S.C. § 14706(c)(1)(A)”
 - What’s at stake? Liability standard and valuation
 - Canadian truck imports also have statutory protections. Article

The ESG overlay

- Environmental, social and governance criteria
 - Extended from companies to entire “supply chain,” including logistics
 - Labor and environmental conditions up and down the chain
 - Anti-slavery diligence and certifications
 - Conflict minerals and Dodd-Frank
 - Renewable fuels, “at berth” emission rules
 - ISO 14000 and other qualifications for transport facilities
 - From “mine/mill→product→disposal” to the increased “circular economy”: recyclable and post-consumer materials

The ESG overlay

Start using new contractual clauses that help fight climate change

A focused and collaborative effort of lawyers from around the world to develop new contracts and model laws to help fight climate change.

Get started

- **Emission measurement and reporting**
- **Covenant to use green fuels**
- **Liquidated damages or green fees**
- **Sea Cargo Charter**

Thanks!

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