# Lurking logistics terms— INCOTERMS, COGSA & ESG!

#### **Rob James**

Pillsbury Winthrop Shaw Pittman LLP
San Francisco & Houston

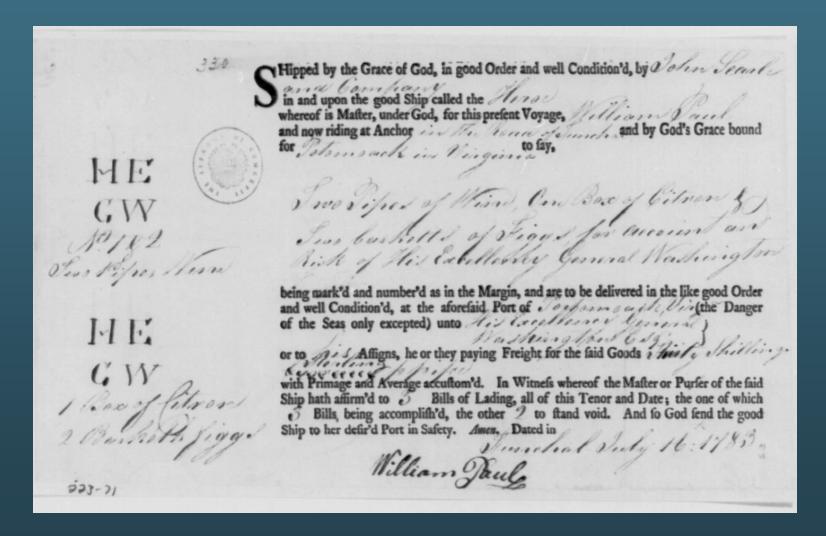


## Some issues lurking in the fine print

- 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.



## The contemporary bill of lading

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PER DATE				PER DATE				PIECE COUNT				

#### TERMS AND CONDITIONS

- 1. DEFINITIONS.
- "Cartle" refers to the Lynden entity engaged by Stigger to gravide transportation services with respect to the goods. For a list and description of the tarticus Lynden entities, glease with our website at: \$1000 LYNDEN COM.
- b. "Consignee" refers to the entity identified by Skipper and agreed by Carrier as the entity to receive the goods
- "Scots" refers to those learns of goods, sargoes, commodities and other personal property with respect to which Carrier has been requested to or dose perform transportation various, including all learns and materials associated with the goods, such as any boose consequences, carrier, personal respectively. Some consequences are consequences and the consequences are consequences and the consequences are consequences.
- d. "Entry" refers to all forms of business entities as well as to natural persons
- "Load" refers to all goods of Shipper in brids single compiner. Speak, nigrium, trailer, etc.
- "Stigger insists to the entity engaging Confervitis respect to the goods as well as the owner(x), consigner, consigner and all others who may have right of claim by, frough, or with respect to the goods.
- "Stigment" wifes to all goods identified on a singularly numbered bill of being or air respell, as applicable (but which bill of being or air verybill may comain multiple gamp.
- h. The number of packages or shipping units stand on the face of the SIII of Lading in the box provided shall be deemed the number of packages for the gungose of any limit of lability per package or shipping unit provided by \$6000.

- Chaldes Sporase and Cober Charges. Preight, comage and other charges of Comies shall be as identified by Comient in a applicable
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  of Comies which had been beauted upon inaccuration or infranciples international or granting may be ensultated by Comies and time without advance notice.
- Other Organia and Secretary, Stigger shall be responsible for all diverges and expenses relating to the possible and interest prosperation, healthly, without Interface, all least sense of bother, fine and expenses including visitual interface, all least sense and expenses increasibly visits and diverged as colors, unablation or other to comply with its abligations between the provided participation and an expense increased as interesting and provided as a sense of the provided participation.
- <u>Parment</u> People, coorge and other charges shall be deemed fully earned upon notice of the goods by Shipper for transportation and goods in advances and plant to delivery unless convents agreed in writing by Contex. Concern due Contex shall be gold in U.S. collers without decicions or their instances or assumes to all extreme gold with a consecutive for any of an analysis of participations. (CSR) per matrix. Singles, including all articles follow within the definition of from term above, shall be jointly and severally label. for gayment of all amounts due Carrier respecting the goods.
- d. Lig. Shipper, including and on balls if if all entities falling within the delitition of that term above, agrees that Contential it is entitled to a security interver in and lies upon all goods of Shipper in Content communities or actual geostated by a ground of any higher strongs or other charges or camerand over the Shipper or Content. Shipper and Content Content on the Content of the prements and agrees that Carrier may worse and/or sell such goods, at the fisk and expense of Shipper, unless and until all such
- INFORMATION FROM SHIPPER, Singler warrants the accuracy and complements of all information, instructions and particulars. néaring to the goads, including their trause, description, apedal characteristics, marks, number, weight, ruisme and quantly, etc., upor all of which Carrier shall rely. Shipper shall méndunes Carrier for any less or expense (holoding additional charges) sessiting from any
- HAZARDOUS GOODS. Shipper must identify to Carrier in writing prior to alignment any goods which require associatized handling or are stangered or factorizing, and Carrier must specifically agreed in whiting to transport the same. In coch an every, Sittinger stall provide complete and accurate handling factorizing, including releaser safety procedures, and shall be stelly responsible for completion of all both stelly responsible for the completion of all decommendation regulated and otherwise for completion, and shall obtained and otherwise for completion and beautiful and otherwise for completion and beautiful and otherwise for completion and some address or the completion and completion and some address or the completion and completion and some address or the completion and c the transportation thereof. Should, in Carrier's opinion, any goods create a risk of fram to genions or property and/or make the transportation thereof improdical, Carrier may discharge, some and/or dispuse of any or all of such goods at Shipper's sole tak and
- DEPROSEDATED, PERIONALES AND VALUABLE GOODS, Sintger must identify to Confer in writing year to adoptive a symptem say
  particular, supplements controlled, steep from flueding, collector floors poorly, and Confer more specifically agree to manager the same.
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- TENDER OF GOODS: Shipper shall be responsible for windering the goods to Confer on the time and place (Serified, with all such
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  orange of the shall be shall If process of the roads shall be deemed in-const and author to these serves and conditions unless acreed unlesselve by Carrier's
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LOSSIGNMAGE TO GOODS. Carrier's lability with respect to the goods, and/or Shipper, Consignee and/or any other person of ently daining by, through or with respect to the goods, and whether for loss, damage, delay, shortage, **cylinky, t**ollow to deliver or otherwise, whall be only as follows:

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Contential not be liable to Skinner or any other dathline by through or with regner to the pools, whether for loss, delay, sharpen glebilings, fallure to deliver or otherwise, or in turn, comtact or upon any other theory, other than as earthoth harein, and Shipper agrees a indemnity and hold Comier harmiese (including legal flees and coast) from and against any loss, damage, expense, lability, dailm, fin penalty and break prising out of or in any fashion who soever relating to the goods or their transportation.

Claims, As a condition precedent to any recovery analyst Carrier.

- The goods must be confully inspected by Shipper or Consignee immediately upon delinent, and any loss or damage which need then be edition must be road in writing to Confer on the bill of bading, was pill or delivery useful, or the goods with the conclusively postured to have been delined in the same good only, court and confident as when inflish, teached
- by Come.

  It has warm of any loss or damage nor accessificable at delivery, whose notice must be given to Cantier within three (i), day of delivery for transportation by versor, under Opping, which waves (I) days of delivery for UE deviced to the prosportation, and developed the P(I) days of delivery, the which the section for the versor notice having search which all be conductably greatered than the goods were delivered in the same good order, court and condition as when interfer construction for each.
- In the same of goods daily jet, but or otherwise not thinky delivered, Confer must be given without notice within times (2), days of delivery for transportation by versace, under <u>ORADIA</u>, without more (7) days of delivery for USI, downed on the prosportation, and therefore within the ref (2) days of delivery, of the the same any existion the goods and these beams delivered, or the goods shall be concluded greatment to have been delivered in the same good otter, cours and condition. as when Initially received by Corrier.
- Confer shall have a reasonable opportunity to inspect the goods, including their gooking and goolsging. In the same condition as upon delivery and before any observior or destruction feets.
- Written claim for basistenage, apacitying the full particulars thereof and the amounts) taking dainted, must be find with Cartier within their steps for U.S. domests at representation or coherebic which their (i) months of delivery, from the date on which the goods should have been advised, or the stope on which former disabloared the date or representanged or the
- Saint against Carrier must be filed within one [1] year for managemetics by ware, under COSON, within one [1] year for U.S. dereseld of managements, or schemics within two (3) pairs, from Salinay, the date within the good should have been delivered, or the date or within Carrier disclaimed in colling agentine part of the date, which there is been.
- There shall be no recovery against Corrier until fielght and all charges due Corrier with respect to the goods and for their
- 14. SUBCONTRACTING. Confer shall be entited to subcontract on any terms and/or conditions the whole or any nam of the ranguration samiles, including without limitation to its affiliand writins, with all such subcommotors entitled to the same limitations upon, and exemptions and defenses to, liability gramed to Camier hareunder, or law or otherwise.

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16. <u>SELEO OF LADING. REVIEWELLO. ESCEPTS. ETC.</u> Oils of lading, already in, eachyr, etc. may be algred by the respective agents and representatives of the parties, including in accommens and to by electricity means; your highest consent, websit or denning. Comment and properties of the parties of the properties of the properties of the properties.

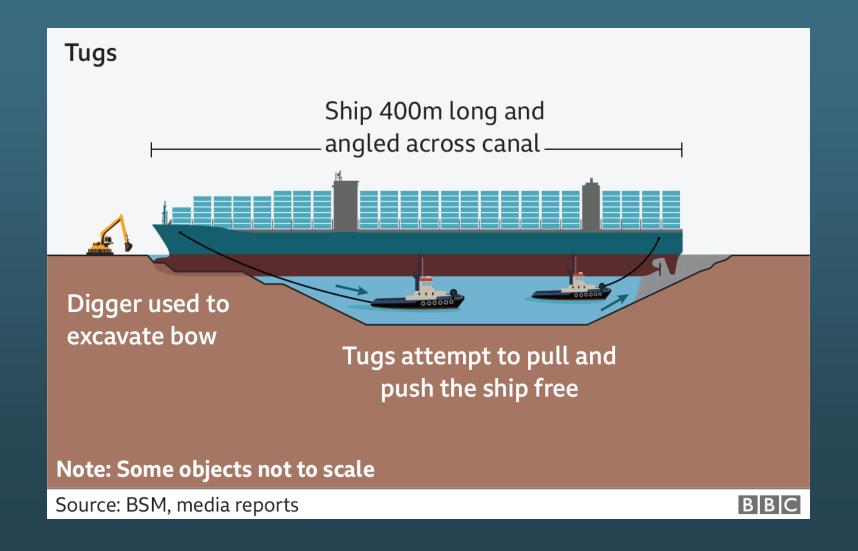
 INTEGRATION, MODIFICATION AND CONSTRUCTION. Upon render of goods to Contex Shipper shall be deemed to have conserved and served to these serve and conditions, which shall be prolicable to all services movided by Contex and suppressed and bill of lading, air varibill, receipt or other document from any entry other from Carrier, including any such document from Skipger. The These terms and conditions shall not be modified expent through a writing stored by an authorized representative of Stiftner and the executive officer of Carrier, no other agent, employee or representative of Carrier has authority to alter, modify or value these terms and conditions. These terms and conditions alone with any transportation presented in 16 balling, all vigotial, tate injuration, land and condition. He will all the condition of the product of the condition o than for or against a garry. The headings used herein are for convenience of reference only.

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## 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	В	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	В	B/B	S: evidence of delivery <b>Option</b> : 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	В	В/В	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	В	В/В	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 <u>origin</u> port (name it) or procure goods there	В	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 <u>origin</u> port (name it) or procure goods there	В	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
СРТ	Carriage paid to [destination place]	Hand over to carrier at origin place (name it)	В	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 <u>origin</u> place (name it)	В	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
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
(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 <u>lack</u> 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

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 at B's disposal at named place,	В	B may arrange for	B: evidence of taking	S: Assist	S: None	S: If needed for B to
	<u>place]</u>	ready for loading by B or its carrier		carriage/B	goods	B: Exp/Tran/Imp	B: All	take goods
FCA	Free carrier [delivery	S premises: Load on B's transport	В	B/B	S: evidence of	S: Exp	S: Exp, loading if S	S: delivered, or carrier
	place]	Elsewhere: place at B's disposal on			delivery	B: Tran/Imp	premises	failed to take timely
		S's carrier, ready for unloading by B			Option: B: bill of		B: loading if	
		or its carrier			lading when risk		elsewhere,	
					passes, not when		Tran/Imp	
					loaded			
FOB.±	Free on board	Place on board B's nominated ship at	В	B/B	S: evidence of	S: Exp	S: Exp	S: delivered or vessel
	[shipment port]	named port or procure goods there			delivery	S: Tran/Imp	B: Tran/Imp, other	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 [destination port]	Place on board ship at origin port (name it) or procure goods there	В	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
СРТ	Carriage paid to [destination place]	Hand over to carrier at <u>origin</u> place (name it)	В	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)	В	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" <u>Article</u>



#### 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
  - o 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!

#### **Rob James**

#### Robert A. James

Pillsbury Winthrop Shaw Pittman LLP

+1.415.983.7215 / +1.713.276.7689

rob.james@pillsburylaw.com

Twitter @diogenes510

