

B2C...and back again

REVERSE LOGISTICS: The planned kind, and the other kind

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REVERSE LOGISTICS – SIX KEY TOPICS

1. What is it?

- Best defined in contracts or statements of work
- From a good SOW thou shalt reap good things!

2. Regulatory issues

- Don't necessarily mirror “fronthaul” rules
- U.S. domestic vs. Cross-border

3. Confidentiality, commercial security, public safety

- From removing labels and logos to witnessed destruction
- USDOT residue rules

4. Special procedures

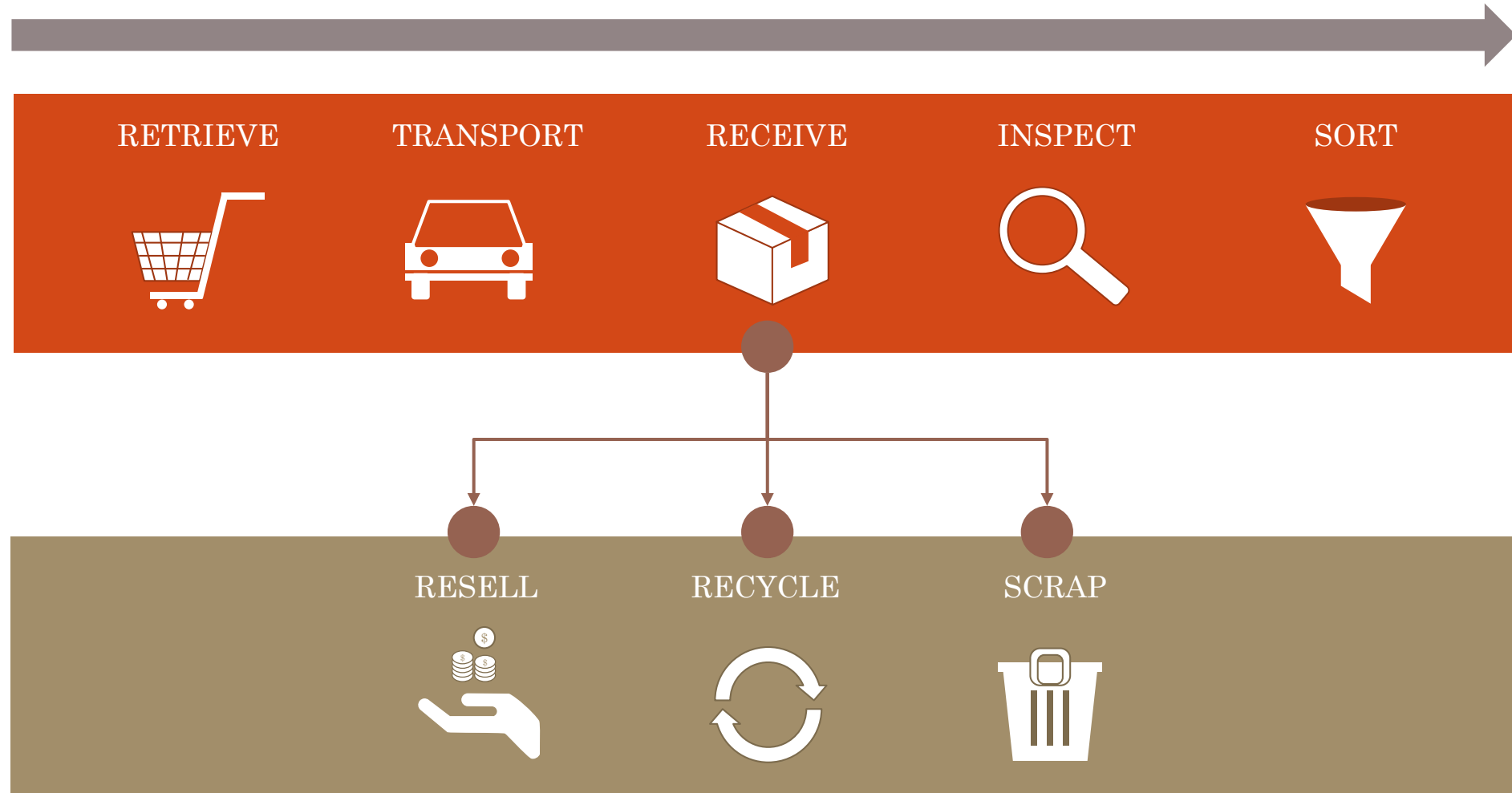
- Receiving and return systems for trusted vendors
- 3PLs – Restocking or return services for retailers

5. Unintended reverse logistics

- When supply chains unravel

6. Dispute resolution

DEFINING REVERSE LOGISTICS



DEFINING REVERSE LOGISTICS

The things you expect

- Cargo overages
- Overstocks
- Return of specialized containers (e.g., beer kegs)
- Refurbishment of hazmat containers (PHMSA rules)
- Disposal of damaged cargo
 - Carmack
 - FSMA

The things you don't expect

- Trade barriers
- Truck wrecks



DEFINING REVERSE LOGISTICS

Due to sheer variety of reverse logistics tasks, tailored contracts are essential to bind the various parties...

- Supplier / vendor
- Receiver / customer
- 3PL / broker (if any)
- Returning or disposing carrier
- Specialized support providers (if any)
- E.g.:
 - wreckers
 - refurbishers



DEFINING REVERSE LOGISTICS

Suggested SOW elements for return and disposal service providers (brokers, 3PLs and/or carriers)

- Product descriptions
- Origin and destination addresses
- Container/Packaging descriptions
- MSDS & other info from USDOT hazmat table
- Specify any containers/packaging *not* to be destroyed
- Destruction process for product and packaging
- Witnessed destruction? Affidavits to confirm?
- What to do with any residue after destruction?
- What licenses do subcontractors require?
 - USDOT
 - DHS, CBP, TTB *[if alcohol involved]*
 - EPA
 - State, local and foreign regulators



DEFINING REVERSE LOGISTICS

Drafting tips

- Make SOW part and parcel of transport & logistics contracts, along with normal commercial terms on pricing, liability, renewal, termination, etc.
- If the reverse logistics provider also is under contract for “fronthaul” services, the SOW elements for return and disposal can be incorporated by reference into the main agreement for transport and logistics services



REGULATORY ISSUES – U.S. domestic

USDOT issues unique to reverse logistics

- Is the returning commodity still regulated?
- Is it still interstate?
- If not, consider available exemptions/intrastate regulations
- If it has no commercial value, is it “property” subject to FAAAAA preemption – 49 U.S.C. § 14501(c)? Some States might say “no.”
- Can “fronthaul” carriers still handle the returning commodity?
 - Do they want/need to hand it off?
 - Can they broker it under MAP-21?
- Was “fronthaul” a hazmat?
- If so, consider PHMSA “residue” rules – 49 CFR §§ 171.8, 173.29

REGULATORY ISSUES – U.S. domestic

FDA Food Safety Considerations

- Food Safety Modernization Act, 21 USC §2201-2252
- Sanitary Transportation of Human and Animal Food (STF rules), 81 FR 20091
- STF rules v. Carmack liability:
 - FDA does not require automatic “crush and dump”
 - STF preamble allows “qualified individuals” to determine actual “adulteration or contamination” from broken seals or temp variations
 - Carriage of goods contracts can reallocate most STF responsibilities among shippers, carriers, and brokers on “fronthauls” and returns

REGULATORY ISSUES – U.S. domestic

Other Regulatory Considerations

- Pharmaceuticals compliance
 - Drug Supply Chain Security Act, 21 USC §360eee-3
- Federal motor carrier registration
 - 49 USC 13902
- Federal property broker registration
 - 49 USC 13904
- TSA approval for IAC operation
 - 49 CFR 1548.7
- State registration requirements
 - E.g.:IL Broker 625 ILCS 5/18c-5102



REGULATORY ISSUES – U.S. domestic

Cross-border Considerations

- Customs broker operations licensure
 - 19 CFR 111.2
- Duty-free entry of returned items
 - HTS 9801.00.10/26



CONFIDENTIALITY

Significant risks

- customer reputation
- competitiveness
- intellectual property

Data security can be critical

- systems integration
- consumer data

Essential contract provisions

- information return
- data destruction
- data transfer provisions



DISPOSAL, IP RIGHTS and SALVAGE

Reputational risks

- customer
- vendors
- licensors

Customer's sole discretion over disposal of product

Contract to include detailed procedures re obliteration –

- owned brands
- licensed brands



FACILITY AND PRODUCT SECURITY

- Risk to product, business activity, and reputation
- Dedicated space with security from other products
- Fire suppression and temperature control terms
- CCTV, live guards, fencing and gating, alarm systems, visitor registration and escorting
- Incident response procedures with 24-hour notice, sequencing for alert to authorities
- Independent standards available for use in contracts
 - IWLA
 - NFPA

SPECIAL PROCEDURES

Receiving and return systems for trusted vendors

- Requires negotiated agreements between vendor and purchaser
- Purchaser signs incoming BOLs and releases delivery drivers – “subject to count”
- Enables carriers to conserve drivers’ hours in today’s ELD era
- After incoming goods are inspected, purchaser advises vendor of adjustments/chargebacks for all overages, shortages and damage
- Vendor accepts adjustments absent clear and convincing evidence of error/fault on purchaser’s part
- Both parties free to fire carriers/brokers based on OS&D records
- Prescribed procedures for ADR, periodic review and termination
- Can be used for freight-prepaid and freight-collect shipments, including those covered by FSMA and SFT rules

SPECIAL PROCEDURES

Unique value-add services

- VAS may include testing, refurbishment, relabeling, repacking
- Highly detailed SLAs for receiving, processing, and shipping
- Reporting of receipt, condition, and placement back in inventory
- Detailed inventory control procedures and WMS book of record
- Forecasting inbound and outbound volumes, even to SKU level
 - forecasting can be critical to staffing levels and rating
- Capital intensive cost structure, amortization and title transfer
 - material-handling equipment
 - information technology

UNINTENDED REVERSE LOGISTICS

...or, when best-laid plans are disrupted by

- truck wrecks
- product recalls
- commercial disputes
- consignee bankruptcies
- trade embargoes
- seizure by U.S. or foreign Customs authorities



No matter what the cause, the common issues are...

- What to do with the freight?
- Who fronts the subsequent carriage, storage and penalties?
- Who ultimately pays for these charges?

DISPUTE RESOLUTION

Consider the following (not so) hypothetical scenario –

- Interstate shipment of heavy industrial equipment
- Carrier A re-brokers shipment to Carrier B
- Rollover involving Carrier B's tractor trailer while en route
- Shipper delivers replacement order to consignee
- Carrier B initially claims it cannot afford towing charges
- Towing company claims a lien on tractor-trailer *and* cargo ¹.
- Carrier B's insurer eventually pays towing charges
 - Does cargo need to be removed from tractor-trailer?
 - Who will return the cargo to the shipper?

¹. SPOILER ALERT – No such cargo lien exists in most States

DISPUTE RESOLUTION

Local county sheriff steps in, and determines –

1. the freight could not remain on Carrier B's trailer, because it could not safely be pulled on public roads, and
 2. the replacement driver furnished by Carrier B was disqualified due to problems with his CDL.
- Carrier A agrees to furnish a replacement truck
 - New dispute between shipper and Carrier A over payment of the towing company's fees for reloading cargo on replacement truck
 - Ultimately these parties agreed to split the reloading fee
 - Shipper got its cargo back one month after the wreck!

DISPUTE RESOLUTION

Key takeaways from our “hypothetical” scenario –

- No contracts between shipper and Carrier A or Carrier B
- No requirement for shipper’s prior approval of any re-brokering
- Fortunately, Carrier A did have both broker and motor carrier authority, thus eliminating MAP-21 liability
- The only shipping document covering the cargo was the BOL form prescribed by the former ICC for use with railroads
- No prior understanding between shipper and Carrier A about procedures to follow in the event of a truck wreck, or about who would speak for shipper in contacts with a towing company

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