

# CY Japan Legal Update

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## Transportation laws and regulations, legal position of individual drivers and distribution of legal responsibility related to food delivery in Japan

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### 1. Introduction

Spread of the covid-19 has forced many restaurants to close and reduce their operations. In Japan, spread of the covid-19 had once calmed down, but it has started to expand again. A number of restaurants cannot continue business as usual before. On the other hand, due to expansion of working at home, use of online shopping for fresh food has increased. Demand for delivery of cooked dishes from restaurants has also increased.

As a result, many internet applications and services have emerged to match the supply and demand of restaurants which want to sell cooked food and customers who want cooked food delivered to their homes. Also, we tend to frequently see drivers who use bicycles and motorbikes to carry dishes. As a background to the supply of human resources for the drivers, there are serious circumstances which compel individuals who need to secure an income because of reduction or stoppage of their former operations due to the spread of the covid-19 infection.

However, there were few articles that addressed issues regarding the transportation laws and regulations concerning food delivery, legal position of individual drivers who are responsible for food delivery, and distribution of legal responsibilities in the event of a traffic accident or delivery failure. I will attempt to sufficiently address the issues in this paper<sup>1</sup>.

### 2. Basic Structure of Transportation Laws and Regulations in Japan

(1) The regulatory laws and regulations differ for each means of transportation:

Transportation industry in Japan is regulated by separate laws when using land transportation, railways, ships and aircrafts. Those means of transportations that are not regulated by any of these laws and regulations are not subject to regulation. A typical means of carriage without any regulations is walking. Since food delivery is typically considered to be conducted only by land transportation, I will not discuss the regulations concerning railways, ships and aircrafts in this paper. As for the possibility of delivering food by drones, under current laws and regulations, it is very difficult to fly a drone in a population-intensive area, so it seems that it is not practical as a means of carrying food at this time<sup>2</sup>.

(2) Restrictions apply only when carrying other people's cargo:

The basic statute which regulates land transportation in Japan is Motor Truck Transportation Business Act (Act No. 83 of December 19, 1989) ("Act"). The Act stipulates that a permission or a notification is required when carrying other person's cargo<sup>3</sup> for a fee by a specific means of carriage. Restaurants and supermarkets that use their own employees to deliver their products and dishes are not subject to transportation laws and regulations. Similarly, a business model that brokers customer's demand for food and the supply by restaurants and supermarkets that can deliver themselves is not subject to transportation laws and regulations.

(3) Regulations on carriers themselves and regulations on arrangers of carriers differ:

(a) Regulations on the carriers themselves:

The Act defines "light motor truck transportation business" as when the carriers use (i) small-size automobiles (Kei-automobiles) with three wheels or more and (ii) two wheeled automobiles, wherein the Act requests carriers to notify to the Minister of Land, Infrastructure, Transport and Tourism when starting a business<sup>4</sup>. On the other hand, the Act defines "general motor truck transportation" as when the carriers

<sup>1</sup> The views expressed in this paper are personal to the author. It does not represent the views of City-Yuwa Partners, which I belong to.

<sup>2</sup> Ministry of Land, Infrastructure, Transport and Tourism website [https://www.mlit.go.jp/koku/koku\\_tk10\\_000003.html](https://www.mlit.go.jp/koku/koku_tk10_000003.html)

<sup>3</sup> Precisely, "upon demands by other persons", Article 2, Sections 2 and 4 of the Act. However, which case is interpreted as "upon demands by other persons" is not an easy problem to solve. For example, according to the old notification of the Ministry of Land, Infrastructure, Transport and Tourism, cleaning shop deliveries are unregulated despite delivering clothes owned by others. I think that it is an issue that can be solved by an appropriate interpretation of "upon demands by other persons".

<sup>4</sup> The Act Article 36, Section 1

use automobiles other than (i) small-size automobiles (Kei-automobiles) with three wheels or more and (ii) two wheeled automobiles, wherein permission from the Minister of Land, Infrastructure, Transport and Tourism is required to start the business<sup>5</sup>. If a carrier uses other means of land transportation, typically those that are not automobiles (e.g., bicycles or hand carts), neither a permission nor a notification is required.

In addition, "two wheeled automobiles" are limited to those with a displacement of more than 125 cc when powered by an internal combustion engine and a rated capacity of 1.0 kW or more when powered by an electric motor. This is because the Road Transport Vehicle Act distinguishes between an "automobile" and a "motorized bicycle", and a "motorized bicycle" is not a two-wheeled "automobile". It should also be noted that the range of motorized bicycles under the Road Traffic Act and the Road Transport Vehicle Act differs.<sup>6</sup> In other words, for two two-wheeled vehicles, the type of driving license required and the business regulations which fall under the transportation laws do not necessarily match.

In order to obtain a permission for general motor truck transportation, it is necessary to meet conditions such as possessing multiple trucks. Therefore, it is difficult to open a business for individuals who need to secure an income due to business contraction or suspension due to the spread of the new coronavirus infection. On the other hand, with the notification of light motor truck transportation business, if an individual has a small-size automobile (Kei-automobile)<sup>7</sup> or a two-wheeled automobile, he or she can start the business on the same day at the shortest by simply submitting a notification that meets the prescribed description.

In addition, if a motorized bicycle under the Road Transport Vehicle Act or a vehicle other than an automobile (such as a bicycle) is used, there is no business regulation under transportation laws and regulations, and a wide range of driver candidates can be found. Therefore, bicycles are often used in food delivery.

(b) Regulations on persons who arrange carriers:

There are two legal forms of arranging a carrier: consigned forwarding and brokerage. If a person uses a subcontractor carrier and take responsibility for transportation to the shipper (typically a restaurant in food delivery), it will be in the form of consigned forwarding. On the other hand, if a person does not take responsibility for carriage and it simply connects the shipper to the carrier, it will be a form of brokerage. As described in (2) above, brokerage is not subject to laws and regulations. With regard to consigned forwarding, if the means of transportation of the subcontractor is (1) small-size automobiles (Kei-automobiles) and (3) a smaller means than small-size automobiles (Kei-automobiles), it is not subject to business laws and regulations. (2) it is necessary to register for consigned forwarding only when a means larger than small-size automobiles (Kei-automobiles) is used.

Therefore, in a business model that connects restaurants that supply food to the customers that are seeking food, if the means of transportation is small-size automobiles (Kei-automobiles) or smaller, transportation regulations are unnecessary, regardless of whether for consigned forwarding or brokerage. However, as described below, there will be a difference in the distribution of responsibility between consigned forwarding or brokerage for default in the event of a failure to deliver, as well as third party liability due to traffic accidents during transportation. Who is responsible makes an important difference in the business models.

### 3. Relaxation of the Ban on Cargo Passenger Mixing - Delivery by taxi

In Japan, passenger transportation and freight transportation are clearly separated, and the laws and regulations that are applied are different. A person cannot put cargo in a taxi, a person cannot put people in a truck. The exception was called cargo passenger mixing, and it was only exceptionally recognized for passenger railways and regular buses in depopulated areas<sup>8</sup>.

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<sup>5</sup> The Act Article 3

<sup>6</sup> Under the Road Traffic Act, the threshold of displacement is 50 cc and the threshold of rated capacity is 0.6 kW to distinguish between motorized bicycle and motorcycles.

<sup>7</sup> Under the Act, it does not matter whether the K-automobile is a Kei-cargo automobile or a Kei-passenger automobile. However, multiple Transportation Bureaus assume that it is a Kei-cargo automobile. I think this is an important issue which needs to be discussed separately. I will just introduce the issue in this paper and not go into detailed discussions.

<sup>8</sup> For example, the materials of Ministry of Land, Infrastructure, Transport and Tourism, published on June 30, 2017.

However, with spread of the covid-19, demand for food delivery has increased rapidly. In addition, some customers seemed to not prefer bicycle transportation services, and the pricing structure and services (and the distribution of legal responsibilities described below) did not always meet the needs of all restaurants. In April 2020, the Ministry of Land, Infrastructure, Transport and Tourism started operations to permit delivery of food by using taxi for business operators that already have a taxi business license for a certain period of time. It has been reported that the first operation in Tokyo was the delivery of Chinese food and American steak<sup>9</sup>.

In Japan, spread of covid-19 has seen some stability, but the Ministry of Land, Infrastructure, Transport and Tourism announced on September 11, 2020 that it will permanently allow this cargo passenger mixing taxi, which was initially a temporary measure<sup>10</sup>. This could change the status quo and relax the prohibition of cargo passenger mixing. I thought that the day when taxis carrying luggage in Tokyo would not come for the time being, hence, I was surprised that deregulation was carried out at once, and I think this is due to the magnitude of the impact of the new coronavirus.

#### **4. Issues Related to Legal Status of Individual Drivers and Distribution of Legal Responsibility**

(1) Legal structure – when carried out by sole proprietors:

Notification of light motor truck transportation business using small-size automobiles (Kei-automobiles) is made as a sole proprietor. In addition, when outsourcing transportation of food to drivers who use motorized bicycles or bicycles, it is generally made as a business consignment contract for individual sole proprietors who are in the business of transportation, and it seems unlikely that a company that provides food delivery matching apps will hire drivers.

This is due to the fact that layoffs are very severely restricted by the labor legislation in Japan, and those individual sole proprietors are better off as a side business. In addition, since business consignment contract are paid for the results, not for the time, they may appear to fall below the minimum wage applicable to employment contracts as a result, but this is not illegal in itself. Sole proprietors do not have the concept of paid leave or overtime work, or compensation for occupational accidents<sup>11</sup>.

And as a matter related to the distribution of legal responsibility, if the employed driver causes a traffic accident or fails to deliver, then due to non-delivery, the employer must take responsibility, but since the food delivery matching app company is competing for costs, it seems that the starting point is not to take such legal responsibility.

(2) Can the claim of "not employment" completely isolate responsibility?

Since it is in principle that a sole proprietor must do business at their own expense and risk, insurance in the event of a traffic accident or compensation for a third party is at their own risk, and if they are injured, there is no compensation for workers' compensation. In addition, they are in a position where the shipper can seek liability of failure to deliver (non-delivery or damages). Conversely, food delivery matching app companies are not responsible for these.

However, drivers who actually take on the same work from the same operator all day as their full-time main business may argue that in reality this is equivalent to a full-time employment by the food delivery matching app company. From the viewpoint of the food delivery matching app company, if the claim of employment is accepted, it cannot be easily dismissed as described above, and problems with workers' accident insurance, health insurance, and employment insurance will be incurred. Furthermore, the problem of having to withhold tax from the salary arises. Since it is not necessary to withhold tax from the compensation paid to the drivers, if the national tax authority later judges that they are to be considered as employed, then the employer must pay non-payment addition tax and delinquent tax to the national tax

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[https://www.mlit.go.jp/report/press/jidosha04\\_hh\\_000134.html](https://www.mlit.go.jp/report/press/jidosha04_hh_000134.html)

<sup>9</sup> Nippon Kotsu Co., Ltd. website <https://www.nihon-kotsu-taxi.jp/news/200427/>

<sup>10</sup> [https://www.mlit.go.jp/report/press/jidosha04\\_hh\\_000220.html](https://www.mlit.go.jp/report/press/jidosha04_hh_000220.html)

<sup>11</sup> There are also some insurance associations that provide workers' compensation insurance for independent drivers. There is also information that "In recent years, in the transportation industry, along with social insurance (health insurance and welfare pension), there have been an increasing number of cases where workers' compensation, especially special occupations of small and medium-sized business owners and sole business owners, are required to confirm whether or not they have joined such insurance programs and to provide insurance numbers." <https://www.kanrikyokai.com/driver/>

authority as unpaid withholding tax. And even if the company tries to recover it later from the driver, it is practically extremely difficult.

Therefore, it seems that the important legal issue on the part of the food delivery matching app company is how they maintain the principle that "drivers are sole proprietors and not workers (employment)". This is a difficult problem. In the case of a light motor truck transportation business that uses small-size automobiles (Kei-automobiles), it could be a powerful rebuttal to the claim that it is an employment relationship, because the individual drivers provide the most important requirement, which is the means of transportation (automobiles) and also bear the fuel and other costs. However, in the case of bicycles and walking, these problems can become more serious because they are close to simpler labor.

(3) Social issues associated with the distribution of responsibility:

If the food delivery matching app company emphasizes that the driver is a sole proprietor, the food orderer and/or society may bear the risks and damages. For example, when uninsured or motorized bicycles run in large numbers in society, the insurance programs that these individuals can join often does not support commercial use, so in the event of a traffic accident, the victim may not be compensated sufficiently.

However, since the victim has to undergo it, it is possible to sue the food delivery matching app company and argue that the driver is a worker (employment) rather than a sole proprietor. And if the court considers that it cannot leave victims who have not recovered, it could give a direction to recognize them as employment. In general, the court dislikes the idea that a company is only concerned about reaping the benefits without taking any responsibility. Therefore, if this social risk is not cared for by blatantly emphasizing the nature of the sole proprietors, then there is a risk that it will be recognized as employment in the court, and as a result, the foundation of the business model will be broken. In particular, it is a very important question as to who will provide the non-life insurance.

In addition, in the event of an accident, Japanese tort liability law tends to broadly recognize employer's liability and it does not necessarily limit the relationship of employment. Therefore, even if labor laws and regulations still do not recognize the drivers as workers, in relation to the victim, the treatment of a driver in the event of a traffic incident or accident does not necessarily mean that the risk can be isolated just because a sole proprietor driver is used. From this point of view, it is a very important question, especially in terms of who will provide the non-life insurance.

(4) Future problems - Treatment when it is not easy to determine who is responsible for food poisoning, etc.

If the dish does not arrive or the outer box is damaged, it will be easy to say that there is a problem with the transportation process. In this case, who the orderer of the dish pursues the responsibility is decided by the transfer of the danger specified by the food delivery matching app. If the danger is transferred upon arrival, the orderer will often ask the restaurant for a refund or exchange. After that, restaurants are likely to compensate the drivers.

On the other hand, if a food poisoning occurs, it may not be determined whether the cause has already occurred during cooking, occurred during transportation, or occurred after it has been delivered. This is a new problem that the restaurants may face by delivering dishes that the restaurants have previously had in mind to be consumed immediately and inside the restaurant premises. No matter how short the shelf life is, consumers do not always follow it. This way, risk distribution when it cannot be determined who is responsible for these may also affect the competition between the business models of food delivery matching apps. However, this is a big issue to deal with in this paper, hence, I have just briefly introduced it.

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