

CY Japan Legal Update

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Unattended Delivery: Expanding the Legal concept of Delivery

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1. Variations of unattended delivery - from delivery boxes to drones

《A package bought via an online platform is delivered to a doorstep by a drone after a few hours, and a message of "delivery completed" arrives on a smartphone app》 - It is a scene depicted as a delivery in the not so far distant future.

As a limiting factor for transportation by drones, first of all, there is a problem that it cannot fly in urban areas without permission under the current law. Therefore, it is being considered for use in the depths of the mountains and remote islands. In addition, in a Cabinet decision on March 9, 2021¹, a draft law was decided that drones that have received a certain certification of aircraft would not require national permission or approval when pilots who have received a certificate of skill, control the drone². In response to this, there is a report that ANA Holdings Inc. will start drone logistics services in 2022³. However, even if the destination is located in a place with few people, or if technical problems is solved and legal restrictions are deregulated regarding the flight itself, if a drone lands in the garden of a private home and places the package on the ground, it will not immediately be a complete delivery. A third party may take the package (theft) and the contents may be polluted or damaged by subsequent rain. It can also be thought to be trespassing on private land, and drones may be destroyed or captured.

This problem is actually common to "unattended delivery". Even if it is put in a delivery box and a mailbox on the premise, and it is put in the hallway of the apartment, the degree of the risk of theft, pollution, and damage is different, but the legal mechanism is the same as the mechanism considered by the last mile drone transportation. Unattended delivery completes transportation by moving the package to a specific location without a face-to-face delivery to a consignee⁴, and as an effect, it is characterized by being able to conduct in the case of consignee's absence or without receipt by a consignee, and it is also characterized by the handling of risks (e.g., theft, damage, etc.) that may happen after a package is placed will be the issue.

Unattended delivery is one of the key solutions to reducing redelivery in the transportation industry, which is suffering from the burden of redelivery of home deliveries. The Ministry of Land, Infrastructure and Transport ("MLIT") held an "Unattended delivery study meeting" and on March 31, 2020, "Current Circumstance of Unattended Delivery and Points for Implementation of Unattended Delivery" ("MLIT Point") was made public⁵. However, while the MLIT Point contains a lot of information related to unattended deliveries, I think that it is not easy for the readers of MLIT Point to understand the legal nature of unattended deliveries, which is a contractual change to the dual-structured "delivery" concept described below.

So what is unattended delivery in the first place? Is it a problem that the definition of unattended delivery is not defined by the laws? However, if you read this article, you may understand that unattended delivery does not require a definition. This article discusses the concept of "delivery" and changes under a contract, using unattended delivery and last mile drone transportation as examples, and discusses the possibility of future expansion of transportation methods and their challenges.⁶

¹ https://www.mlit.go.jp/koku/koku_tk10_000003.html

² https://www.mlit.go.jp/report/press/kouku01_hh_000110.html

³ April 15, 2021, Nihon Keizai Shimbun

⁴ The word "receiver" may be easier to understand as a nuance than a "consignee". You can replace it like that and read it.

⁵ <https://www.mlit.go.jp/common/001335954.pdf>

⁶ The views expressed in this article are my own, and it does not express the views of City-Yuwa Partners where I belong to.

2. Dual structure of “delivery” - delivery as a carrier and delivery as a consignor

(1) Delivery performance as a carrier

Commercial Code Chapter 8, Section 2 stipulates "Freight Transportation". Commercial Code Article 570, the fundamental article, stipulates that "a contract of Freight Transportation shall take effect when a carrier promises to receive certain goods from a consignor and agrees to deliver the said goods to a consignee, and for that a consignor promises to pay the carrier a fee for the result."

This article tells us that there are three characters in the world of Freight Transportation: a consignor, a carrier, and a consignee.

It is stipulated that a contract of Freight Transportation is an agreement in which a consignor agrees that the fee will be paid for the "result" of handing over the package to a consignee. However, the Commercial Code does not determine what a carrier has to do to achieve the "result" of handing over the package to a consignee. And a delivery which no one will dispute, which is socially well-consensused, is considered to be a face-to-face delivery to a consignee. As a result, a carrier usually has to hand over the package face-to-face to a consignee to complete its job. This is why redelivery naturally goes hand in hand with home deliveries even though redelivery can occur for the consignee's convenience and it is a burden for a carrier.

On the other hand, the Commercial Code does not define what delivery is, then it is in the category of contractual freedom to materialize the definition of delivery by an agreement between a consignor and a carrier. In addition, Article 570 of the Commercial Code is a default rule provision that can be changed by an agreement of the parties, and parties can agree differently from the contents of the same article. Therefore, a contract between a consignor and a carrier to interpret moving a package to a specific location and putting it on the spot as "result", or to regard the result as “delivery” to a consignee of the Article 570 of the Commercial Code. Such an agreement would allow a consignor and a carrier to implement unattended delivery.

In other words, if a consignor agrees to free the carrier from the pressure of a face-to-face delivery to a consignee which is caused by uncertainty over the concept of "delivery" in Commercial Code Article 570, a carrier doesn't care where he or she will place the goods. Without fear of misunderstanding, a carrier should follow instructions of a consignor, but it does not have an obligation to consider a consignee who does not have contractual relationship with a carrier, and he or she does not have to worry about what will happen to the package afterwards. In face-to-face delivery practice, a carrier usually does not verify a consignee's identity. After all, delivering a package to a person called as the consignee located in a location designated by the consignor⁷ is the only requirement, and a carrier does not have to be concerned about what will happen to the package afterwards.

In addition, a receipt that a carrier is issued by a consignee in face-to-face delivery is positioned as evidence to a consignor that the carrier has delivered to the consignee. Therefore, the fact that unattended delivery does not provide a receipt from a consignee is not a legal obstacle, but just a difficulty issue of proving that an unattended delivery has been completed, and it is up to a consignor and a carrier to prove at a cost. In order to prevent the spread of Covid-19, the number of carriers who omit receipts and signatures is increasing, and it can be seen that receipts are just evidence.

(2) Performance of delivery as consignor

On the other hand, the relationship between a consignee and a consignor often requires consideration for a consignee as a specific person. This is because transportation is done between a consignee and a consignor to serve some purpose. For example, in the case of online shopping, delivery will be conducted as a delivery performance of the goods that are the purpose of a purchase and sales agreement, so if a seller as a consignor does not reliably deliver the goods to the buyer as a consignee,

⁷ This issue might be resolved between a consignor and consignee by the theory of Performance to Person That Appears to Be Authorized to Accept (Civil Code Article 478). However, I do not think that such theory can provide a complete solution for a carrier. Simply, it seems to be in line with the understanding of the parties that a consignee from a viewpoint of a carrier is not a specific person, rather, it is an abstract impression to illustrate a person who is in the specified location which a consignor has designated and who has the function of receiving the package there.

it cannot be said that the seller fulfilled the obligation of the purchase and sales agreement. The reason why a carrier is allowed to hand over a package to a family without verifying their identity of a consignee, it is usually that the family has the authority to receive on behalf of the family members.

And if a carrier conducts unattended delivery and then a third party steals a package or it gets wet in the rain and it becomes dirty or damaged, there will be a dispute over whether a consignor fulfilled the obligation of purchase and sales agreement. Therefore, a consignor usually instructs a carrier to ensure face-to-face delivery to consignee to prevent such dispute risks.

Conversely, if a consignee and a consignor can agree on how to deliver goods and transfer hazards, there is no need to limit consignor's instructions to face-to-face delivery. It is enough to agree that it will be delivered at a specific location and it is regarded as performance of purchase and sales agreement, then the risk will be transferred when the package is placed, then the seller as a consignor will not care afterwards. And the content of such an agreement is still in the category of contract freedom unless the Consumer Contract Act or any other acts are amended to prohibit such contractual freedom. Even if there is a risk of theft, there is a thought that it is definitely better to deliver at a doorstep or place it in a delivery box when a consignee is absent than waiting for redelivery and having to stay home in the meantime. Also, from the viewpoint of preventing the spread of Covid-19, there is also the advantage that a consignee does not have to meet a carrier by choosing unattended delivery even if he or she is at home.

3. Legal structure of unattended delivery

(1) Legal structure of unattended delivery

The legal structure of unattended delivery is clarified by examining it in 2. above. In other words, unattended delivery resolves two problems (1) a carrier must hand over the package to a consignee, and (2) the consignor must hand over the package to a consignee due to a relationship between a consignor and a consignee by the consignor's initiative. And because how it is resolved depends on the business design of a consignor, there is no legal definition for unattended delivery⁸. So, what kind of business design can we think of?

First of all, with regard to (1), there is usually a dispute as to whether or not a carrier performed delivery according to Article 570 of Commercial Code just by carrying the package to the destination where a consignee is located. However, if a consignor agrees that a carrier can conduct unattended delivery (or a carrier should conduct unattended delivery) as a part of carrier's business design, such an agreement is in the range of freedom of contract. It reduces the risk of redelivery for a carrier, which may result in cheaper fares and expansion of delivery time slots.

However, a carrier, which is a third party to a consignee, does not have the authority to enter the private space of a consignee. For example, opening the door without permission and bringing a package to the front door of an empty residence can constitute a crime of invasion of a personal dwelling by a carrier. However, a carrier does not always have a way to contact a consignee directly.

Therefore, a consignor also needs to agree with a consignee. For example, if a purpose for transportation is shopping, a seller, a consignor, agrees with a buyer, a consignee, to deliver by unattended delivery, and at the moment of unattended delivery, the delivery is completed, and the risk is also transferred. The agreement also includes a consignee's acceptance for a carrier to enter the private space of a consignee. It is also possible to obtain consent to provide personal information such as a consignee's phone numbers to a carrier for the purpose of individually consulting a consignee on detailed methods of unattended delivery.

(2) Expansion to transportation purposes other than that of purchase and sales

MLIT Point may appear to assume that unattended delivery is for a purchase and sales agreement. However, it can be understood that it shows purchase and sales agreement as a typical example.

⁸ On the other hand, how unattended delivery will be performed and how risk will be allocated should be specified in detail for individual transactions. Regardless of whether or not there is a general definition of unattended delivery, abstract agreement "we will do unattended delivery" will not be enough for an agreement between a consignor and a consignee.

Unattended delivery is not limited to purchase and sales agreement. For example, in the case of carriage of one's own luggage, that is, if a consignor is also a consignee at the same time (for example, if you send a golf bag used on the golf course to your home), there is no contractual relationship because the consignor and the consignee are the same in the first place, and it is enough that the consignor and a carrier just agree that the designated way of unattended delivery is fine. Freight transportation based on the subject of gifts and leases is also feasible at unattended delivery. The use of a mailbox and a delivery box is also unattended delivery. In the first place, a carrier doesn't know the relationship between a consignor and a consignee as the reason for transportation, and business can't be done if it depends on whether it can or cannot do unattended delivery.

(3) Method of agreement for unattended delivery

There can be many forms of an agreement as unattended delivery. It may be an individual agreement. In some cases, it may be stipulated in general terms and conditions of a consignor. However, in essence, it is important, and enough, by a consignor's initiative to reach an agreement between a consignor – a carrier, and a consignor – a consignee. MLIT point discusses implementation measures for delivery methods and measures to protect consumers and reduce risk, but it can be understood that these are examples of practical measures to reduce dispute risk, not legal restrictions, or requirements. Of course, in practice, such ingenuity highlights the differences in business models, and MLIT point introduced the ingenuity of each company.

(4) Proof of completion of unattended delivery as a practical ingenuity

Unattended delivery has already said that face-to-face delivery does not provide a receipt from a consignee, which means there is a difficulty issue to prove. MLIT point introduced each company's efforts to prove the completion of unattended delivery. These measures may have a function to prevent theft, etc. at the same time.

(5) Unattended delivery and transportation-related business laws are unrelated

The transportation-related business law has never appeared in the discussion so far. MLIT is involved because of the great social goal of spreading unattended delivery, but unattended delivery itself is a matter of civil law.

(6) Dispute resolution of unattended delivery without a consignee's permission

Unattended delivery without a consignee's permission can be organized as if the agreement of unattended delivery has not been agreed between a consignor and a consignee, or if it is a failure to perform specified method of unattended delivery. A consignee can put responsibility on a consignor if the package does not arrive as a result of theft, pollution, or damage, because it is simply non-delivery. Also, it is not obvious that a consignee is obliged to receive an unidentified package placed in front of the entrance, even if the package is intact, therefore a consignee may allege non-delivery.

Next, after the consignor fulfills the above legal responsibilities to the consignee (for example, after resending a new product), to resolve whether a consignor and a carrier bear the cost, the question is whether they have agreed to allow unattended delivery. If allowed, a carrier is released because it has fulfilled its legal obligations. On the other hand, if a consignor does not allow it, there is currently no consensus that unattended delivery is considered to be a complete delivery, so a carrier is not considered to have completed delivery, and a carrier must pay damages. However, since a carrier loses the package without knowing the contents of the package, proving the damages amount can be a problem.

And since a consignee has no way of knowing about such a responsibility-sharing agreement between a consignor and a carrier, and not even carrier's contacts, and may not know what happened to the package, therefore, it is not easy for a consignee to seek tort liability for carrier's negligence or seek reliefs under Commercial Code Article 581. As a consignee, if there is a cause such as purchase and sales in transportation, it is easy to pursue the default liability of a consignor on the cause of the failure to do so. Therefore, it is reasonable to design a system that a consignor should first resolve the troubles of unattended delivery with a consignee.

(7) Structure of drone transportation managed by carriers

The details of the services of ANA Holdings Inc. and other entrants are still unknown, but the basic structure of a consignor's initiative remains unchanged as long as unattended delivery is used. There is no legal basis for drones to enter a consignee's residence that don't even know their package is coming. Therefore, if the expected service includes last mile transportation to a private home, it may be necessary for a consignor to agree with a consignee in advance to use the service.

Another approach is to use drones only for transportation between carrier's own locations. For example, drones may be more efficient to land only at a specific drone port and then after that land transportation will succeed. In that case, the drone port may still be under the control of a consignor or a carrier. For example, even if transportation to a remote island is carried out, it is considered that it is sufficient to leave the transportation on the remote island to the inland shipping company in the island.

4. Possibility of transportation methods by changing the concept of "delivery"

(1) Drone transport + unattended delivery

Based on the above discussions, we can see why the opening case "A package bought via an online platform is delivered to the doorstep by a drone after a few hours, and a message of "delivery completed" arrives on a smartphone app" is legally established. First of all, the point is that it is "bought". In this purchase and sales agreement, between the seller who is a consignor and the buyer who is a consignee, they agree (1) delivering to the doorstep by a drone, (2) not delivering face-to-face, but considering the delivery to be complete, (3) the risk of the package being stolen, damaged, etc. after it is placed on the doorstep is assumed to be borne by the consignee. In addition, a consignor has obtained the approval of a consignee that (4) carriers will use drones to access the entrance, a private area of a consignee. Then, in an agreement with a carrier, a consignor made a transportation agreement that the carrier's work would be completed simply by using a drone to deliver it to the consignee's doorstep.

In this way, unattended delivery expands the ways of transportation by changing the two delivery concepts of delivery as a consignor and delivery as a carrier.

(2) Expansion of transportation methods by changing delivery concepts by a contract

In this way, the delivery concept can be changed by a contract, and a new business model can be considered. For example, in an attempt to develop last mile transportation by self-driving trucks, it seems that it is being considered to contact a consignee that the car is nearby via a smartphone app or by SMS, and to have the consignee come out to collect it.

This is inconvenient compared to the current Japanese carrier transportation practice where drivers deliver it to a doorstep. However, if a consignor and a consignee can agree that this is fine, there is a possibility that a carrier will not have to deliver it to the front door of a consignee, so it can configure a cost-competitive business. This can be thought for some products that we can expect a consignee to receive reliably because a consignee wants to receive the product right now, or for a facility that has more than one consignee and we can expect someone to receive it reliably.

However, since the case of a consignee not arriving to pick it up always exists, it is still necessary to establish whether it will be treated as a complete delivery (i.e., the package will be confiscated) or redelivery is necessary. Unattended delivery's main strength is that a carrier can complete the delivery unilaterally, even in the absence of a consignee. Therefore, it is inevitable that arrangements of contract structures that request active involvement of a consignee will be limited by business models, regardless of technology. In Japan, autonomous trucks are being considered for middle mile transportation (i.e., highways, etc.), and the fact that the examination in the last mile is not active seems to be due not only to technical reasons such as safety, but also to such legal reasons.

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