

THE REAL ESTATE
LAW REVIEW

TWELFTH EDITION

Editor
John Nevin

THE LAWREVIEWS

THE REAL ESTATE
LAW REVIEW

TWELFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2023
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Nevin

THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2023 Law Business Research Ltd
www.thelawreviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at February 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to info@thelawreviews.co.uk.
Enquiries concerning editorial content should be directed to the Content Director,
Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-152-2

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AUMENTO LAW FIRM
BINDER GRÖSSWANG RECHTSANWÄLTE GMBH
CHANDLER MHM LIMITED
CHIOMENTI
CORDATO PARTNERS LAWYERS
DE PARDIEU BROCAS MAFFEI
ESTUDIO BECCAR VARELA
GONZALEZ CALVILLO
GUZMÁN ARIZA
HALIM HONG & QUEK
HENGELER MUELLER
LOYENS & LOEFF
MAPLES GROUP
NIEDERER KRAFT FREY
NISHIMURA & ASAHI
OCAMPO MANALO VALDEZ LIM
PATRIKIOS PAVLOU & ASSOCIATES LLC
PINHEIRO NETO ADVOGADOS
POPOVICI NIȚU STOICA & ASOCIAȚII
SLAUGHTER AND MAY
TSIBANOULIS & PARTNERS
TSMP LAW CORPORATION
URÍA MENÉNDEZ

CONTENTS

PREFACE.....	vii
<i>John Nevin</i>	
Chapter 1 ARGENTINA.....	1
<i>Pedro Nicholson and Sofía María Kovacic</i>	
Chapter 2 AUSTRALIA.....	11
<i>Anthony J Cordato</i>	
Chapter 3 AUSTRIA.....	22
<i>Tibor Fabian and Markus Uitz</i>	
Chapter 4 BELGIUM.....	32
<i>Ariane Brobez and Christophe Laurent</i>	
Chapter 5 BRAZIL.....	43
<i>Franco Grotti and Guilherme de Toledo Piza</i>	
Chapter 6 CYPRUS.....	52
<i>Stella Strati and Stylianos Trillides</i>	
Chapter 7 DENMARK.....	60
<i>Torben Mauritzen</i>	
Chapter 8 DOMINICAN REPUBLIC.....	76
<i>Fabio J Guzmán Ariza and Alfredo Guzmán Saladín</i>	
Chapter 9 ENGLAND AND WALES.....	83
<i>John Nevin</i>	
Chapter 10 FRANCE.....	106
<i>Pierre Gebarowski and Alexandre Blestel</i>	

Chapter 11	GERMANY.....	125
	<i>Jan Bonhage and Thomas Lang</i>	
Chapter 12	GREECE.....	137
	<i>Aristeidis Goulandris</i>	
Chapter 13	HONG KONG	149
	<i>Dennis Li</i>	
Chapter 14	IRELAND.....	162
	<i>Diarmuid Maawe, Craig Kenny and Katelin Toomey</i>	
Chapter 15	ITALY	172
	<i>Patrizia Liguti</i>	
Chapter 16	JAPAN.....	186
	<i>Norio Maeda, Takuya Shimizu, Akihiro Shiba, Masato Morizuka and Kei Fujita</i>	
Chapter 17	LUXEMBOURG.....	200
	<i>Julien Lecler, Tom Hamen and Olivier Coulon</i>	
Chapter 18	MALAYSIA	209
	<i>Leon Gan Han Chen, Gob Li Fei and Hee Sue Ann</i>	
Chapter 19	MEXICO	218
	<i>Alfredo Chávez and Joaquín Alcalá</i>	
Chapter 20	PHILIPPINES	225
	<i>Manolito A Manalo and Joan Roshen M Dueñas</i>	
Chapter 21	ROMANIA	240
	<i>Valentin Creața</i>	
Chapter 22	SINGAPORE.....	254
	<i>Jennifer Chia, Brenda Chow and Lau Tin Yi</i>	
Chapter 23	SPAIN.....	267
	<i>Belén Simbor and Andrea Sandi Badiola</i>	
Chapter 24	SWITZERLAND	278
	<i>Andreas F Vögeli, Oliver Zbinden, Annina Fey and Jamie Lee Mancini</i>	

Chapter 25	THAILAND	289
	<i>Tananan Thammakiat, Susumu Hanawa, Piyawanee Watanasakolpunt, Namita Tangpitukpaibul, Tanyamai Thanissnanont and Chaveeporn Vithayanupong</i>	
Appendix 1	ABOUT THE AUTHORS.....	301
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	317

PREFACE

This time last year the world's focus was still on the covid-19 pandemic as the dominant issue affecting us all. Tragically, just as we were starting to see light at the end of the tunnel, the much-hoped-for fresh start was stopped in its tracks by the war in Ukraine. The past 12 months have been dominated by war in Eastern Europe and the ensuing global humanitarian, economic and political fallout. The stability and certainty craved by all currently remains a distant hope.

Following on from COP26 in Glasgow, this year the focus was on Sharm El Sheikh for COP27. Once again, some key world leaders were notable by their absence and there remains the sense that more could and should have been achieved. This year, a further focus was acknowledging the developed world's contribution to the climate problem, and a new loss and damage fund was agreed upon to help meet the climate change costs suffered by the world's poorer nations. It has been accepted that something needs to be done, and that includes in the property industry. The built environment accounts for at least 25 per cent of the UK's greenhouse gas emissions, and significant changes are necessary if net zero targets are to be met. To date, the focus has been on high-profile new developments with eye-catching environmental, social and governance credentials. How to deal with the much larger stock of older, lower-value and underperforming buildings remains a bigger challenge.

A great deal has happened since the first edition of *The Real Estate Law Review* appeared in 2012; Brexit seems but a distant memory, as a pandemic was swiftly followed by war in Europe and a cost of living crisis. These have truly been unprecedented times. This 12th edition of *The Real Estate Law Review* will, perhaps more than ever, continue to prove its worth by giving readers an invaluable overview of how key markets across the globe operate and how they react to major world events. The covid-19 pandemic and the war in Ukraine have both served as stark reminders that it is not possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of global events, and *The Real Estate Law Review* continues to help its readers to do just that.

This edition extends to 25 key jurisdictions around the world, and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effects on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of their client's own jurisdiction.

Covid-19 has not gone away but we have learned to live with it. The pandemic's legacy will be its lasting effect on how we live, work and play, and on each and every aspect of the global real estate market. More immediate headwinds include the very real risk of a long and deep recession, soaring inflation, rising interest rates, the withdrawal of government

lockdown support, failing consumer confidence, increasing costs, a critical shortage of labour and materials as well as ongoing supply chain problems. On a more positive note, the property industry has traditionally proved to be resilient, and covid-19 demonstrated its ability to adapt to difficult and challenging times. The United Kingdom will be anxious to maintain its position at the top of global shopping lists as investors look for relatively safe havens for their investment capital. London and the regions seem certain to remain attractive to overseas investors looking for investment opportunities, both in the traditional real estate investment markets and also the rapidly evolving alternative asset sectors. The next few years will undoubtedly be challenging as we continue on the journey to recovery, but opportunities will arise, and real estate will remain a key part of global investment strategies. Knowledge of the global real estate markets will prove key to identifying and making the most of buying opportunities.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this 12th edition of *The Real Estate Law Review*. I would also like to thank the members of *The Law Review* team for their sterling efforts in coordinating the contributions and compiling this edition. Finally, I wish everyone the very best of health for 2023 and beyond.

John Nevin

Slaughter and May

London

February 2023

JAPAN

Norio Maeda, Takuya Shimizu, Akihiro Shiba, Masato Morizuka and Kei Fujita¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

The basic ways in which real estate can be held are either holding ownership title to real estate directly or holding a beneficial interest in a trust that holds title to real estate in connection with large-scale commercial investments.

Land and buildings are considered separate and independent real estate; therefore, one person can hold the title to land while another person can hold the title to a building on the land. When different persons own a building and the parcel of land upon which the building is located, the two owners will typically enter into a contract such as a land lease agreement where the building owner is permitted to use the land.

Joint title to real estate, which is governed by the rules under the Civil Code, is one form of title that can be held by multiple persons. Condominium title to a condominium that is part of a building, which is governed by both the rules under the Condominium Law and by the Civil Code, is another form of title that can be held by a single person separately from other condominium owners of the building.

Trust beneficial interests in real estate are typically issued when a real estate owner places the real estate in a trust. The trustee holds title to the real estate placed in the trust. The owner, however, holds a trust beneficial interest that represents a contractual relationship with the trustee under a trust agreement. Under this, the beneficiary may instruct the trustee to administer and manage the real estate in the trust and to distribute profits earned from the real estate (after deducting costs and expenses for administration and management of the real estate). Trust beneficial interests are used for various reasons, including delegating administrative duties from the beneficiary to the trustee and deferring taxes related to real estate transfers by transferring the trust beneficial interests instead.

ii System of registration

Ownership title and other property rights with respect to real estate are typically registered in the real estate registry maintained by local registration offices. Trustees are typically the registered owners of real estate that is placed in trust. The general rule is that transactions, including the sale and purchase of real estate and creation of a mortgage on real estate, take effect upon execution of agreements between the parties, and that no formalities are required; however, the holder of ownership title or other property rights with respect to real estate must

¹ Norio Maeda, Takuya Shimizu and Akihiro Shiba are partners and Masato Morizuka and Kei Fujita are associates at Nishimura & Asahi.

have its interest registered in the appropriate real estate registry to assert its rights against a third party. This means that generally, to perfect a right over real property, there must be a valid agreement between the parties, and the right must be registered in the name of the holder. The registration is governed by the Real Property Registration Act.

While registration of a real property right in the name of a certain person does not necessarily mean that the person actually holds the registered right, registration is usually considered strong evidence. Neither the local registration office nor the government guarantees the accuracy of the real estate registry. A registration in the real estate registry only reflects and records the transactional activities that private persons described in their applications for registration.

iii Choice of law

In the context of a cross-border transaction, choice of law rules are provided in the Act on General Rules for Application of Laws. Under the Act, if the subject matter is a property right or other registrable right in real estate, the law of the jurisdiction in which the real estate is located shall be the governing law; however, under the Act, the governing law of a contract can be chosen by the parties thereto. Despite the Act permitting the parties to choose the governing law of the contract, parties usually choose Japanese law as the governing law of a sale and purchase agreement with respect to real estate located in Japan because property rights in real estate are governed by Japanese law.

II OVERVIEW OF REAL ESTATE ACTIVITY

Japan has developed various innovative real estate investment structures during the past few decades.

The GK-TK structure (see Section IV) and the specified-purpose company (TMK) structure are frequently used in real estate investment transactions. Japanese real estate investment trusts (J-REITs) have made it possible for investors with smaller amounts of capital to invest in real estate through the purchase of listed J-REIT securities. The listed J-REITs have become major players in the Japanese real estate investment market through the use of the accumulated capital of investors, and the flow of capital through listed J-REITs into the real estate investment market has contributed to the overall growth of the real estate industry.

The increase in flexibility offered by such investment structures has resulted in a greater influx of domestic and foreign capital into Japanese real estate. The response to demands from an increasing number of participants has made the real estate investment market more sophisticated and attractive, and many investors consider the Japanese real estate market to be an important focus in their global investment strategy.

After the government pension fund's adoption of the Principles of Responsible Investment in 2015 and the announcement to commence investments using an environmental, social and governance (ESG) index as a benchmark in 2017, there has been a growing emphasis on ESG factors in the Japanese market, including the real estate market. A growing number of investors into the Japanese real estate market have started to realise that the value of real estate that considers ESG factors is increasing and will increase, and even listed J-REITs have started to publish their policies regarding ESG and obtain ratings from evaluating organisations.

III FOREIGN INVESTMENT

There are no direct restrictions on acquisitions of commercial or residential real estate in Japan by foreign investors, either directly or through a vehicle. Similarly, establishment of a corporation by foreign investors to invest in commercial or residential real estate is not restricted.

However, under the Agricultural Land Act, an authorisation by the relevant authority is required to acquire certain agricultural land. This authorisation can only be granted if the purchaser is qualified as a farmer or as a corporation for owning agricultural land. It would not be easy for foreign investors to be granted such an authorisation.

The Act on the Review and Regulation of the Use of Real Estate Surrounding Important Facilities and on Remote Territorial Islands (the Important Land Review Act) came into force on 20 September 2022. Under the Act, any party who intends to enter into a contract to transfer or obtain ownership title to real estate within any 'special monitored area' must notify the Prime Minister in advance of the transaction. The Prime Minister is expected to designate 'special monitored areas' based on certain criteria, such as proximity of the real estate to certain important facilities or the real estate being located on certain border islands. While the complete list of special monitored areas has not been published yet, on 27 December 2022, the government issued a notification designating 29 sites as special monitored areas. Such designation will come into force on 1 February 2023. In total, approximately 200 sites may be designated as special monitored areas.

After a foreign investor's acquisition of real estate, a post-transaction report to the government authority may be required pursuant to the Foreign Exchange and Foreign Trade Act (FEFTA). A post-transaction report of payment or receipt of payment may be required in the case of cross-border payments or payments between a foreign investor and a Japanese resident in accordance with the FEFTA.

IV STRUCTURING THE INVESTMENT

When choosing an investment structure, the legal, accounting and tax implications must be considered because each can be a driving factor for the choice. The most popular structures and investment vehicles used for real estate investments in Japan are the GK-TK structure, the TMK structure and the J-REIT.

i GK-TK structure

A limited liability company (GK) is one type of corporate entity under the Companies Act. In some respects, it is similar to a limited liability company in the United States; however, it is not itself a pass-through entity for tax purposes.

When a GK is used as an asset investment vehicle, typically an investor leverages its investment by third-party loans and makes its own investment in the GK through a contractual anonymous partnership (TK) arrangement. The TK arrangement is a bilateral (not multilateral) contractual partnership relationship created for the investment purposes by the TK interest holder, called the TK investor. The other party to the contract is called the TK operator. Under the GK-TK structure, the TK operator is the GK.

A TK arrangement qualifies for favourable tax treatment if the TK investor is a passive investor with minimal control over the management of the GK and the contributed funds under the arrangement. If the TK arrangement qualifies, the GK is permitted to

deduct distributions to the TK investor from its taxable profits in addition to deducting debt payments. This tax-efficient combination of a GK and a TK arrangement is called a GK-TK structure.

Typically, a GK-TK structure has been used to make investments in trust beneficial interests in real estate, and loans backed by real estate. If a GK holds real estate directly, by raising funds from TK investors, it will generally be subject to a licensing requirement under the Act on Specified Joint Real Estate Ventures (ASJREV); therefore, the GK-TK structure has usually been structured to invest in trust beneficial interests in real estate, not in real estate itself. An exemption from the licensing requirement under the ASJREV allows the GK-TK structure to invest in real estate itself if certain requirements are met.

A GK-TK structure that is used to invest in a trust beneficial interest in real estate will subject the GK to the strict registration requirement under the Financial Instruments and Exchange Act (FIEA) in relation to the GK's investment management business, unless an exception applies.

One of the exceptions available under the FIEA is the Specially Permitted Businesses for Qualified Institutional Investors, etc. exemption (the QII exemption), which essentially requires that:

- a* there is at least one qualified institutional investor (QII) under the FIEA among the TK investors;
- b* the number of non-QII TK investors (if any) is 49 or fewer (non-QIIs are limited to certain categories, which includes a foreign corporation);
- c* none of the TK investors is a disqualified investor as described in the FIEA; and
- d* the GK, as the operator of the TK arrangement, files with the relevant government authority a notification regarding the QII exemption.

Another exception, introduced in November 2021 and available under the FIEA, is the Specially Permitted Business for Foreign Investors, etc. exemption (the foreign investors exemption), which essentially requires that:

- a* TK investors are limited to certain qualified investors, such as foreign corporations, certain individuals domiciled in foreign countries, and professional investors;
- b* more than 50 per cent of the entire TK investment into the GK is made by non-residents;
- c* none of the TK investors is a disqualified investor as described in the FIEA;
- d* the GK, as the operator of the TK arrangement, has a personnel structure capable of appropriately conducting the GK's investment management business; and
- e* the GK files with the relevant government authority a notification regarding the foreign investors exemption.

Another exception available under the FIEA in relation to the GK's investment management business is the exemption by outsourcing to a registered discretionary investment manager. Under this exemption, the GK retains a registered discretionary investment manager (a 'registered financial instruments operator' under the FIEA) as its asset manager to manage its trust beneficial interest in real estate on a discretionary basis. This exemption requires, among other things, that:

- a* the GK enter into a discretionary asset management agreement with the registered discretionary investment manager that authorises the manager to make a discretionary investment decision on behalf of the GK on its trust beneficial interest in real estate;

- b* the TK agreement provide that under the asset management agreement described above, the GK authorises the manager to make a discretionary investment decision on its behalf on its trust beneficial interest in real estate;
- c* the TK agreement provide an outline of the asset management agreement described above, including the fees (or the fee arrangement) to be paid to the asset manager from the assets managed under the GK-TK structure;
- d* both the TK agreement and the asset management agreement described above provide certain duties of the asset manager, such as the asset manager's duty of loyalty and duty of care of a prudent manager, both owed to the TK investor in carrying out the investment management of the trust beneficial interest in real estate held by the GK;
- e* the GK manages its assets of the GK-TK separately from its own assets (and its other investment assets managed for other investors, if any) and the asset manager supervises such separate management; and
- f* the asset manager file with the relevant authority a notification of the outsourcing by the GK prior to the GK entering into the TK agreement.

ii ASJREV structure

GK-TK structures may, provided certain requirements are met, directly invest into real estate without the GK (the TK operator) having to obtain a licence or registration. The 'special venture' GK-TK structure available under the ASJREV essentially requires that:

- a* the GK must be established for the sole purpose of distributing proceeds and profits from transactions related to the subject real estate;
- b* the GK, as the TK operator, must delegate the management of transactions related to the subject real estate to a licensed operator of a 'specified joint real estate venture' or a registered operator of a 'small-scale specified joint real estate venture' to conduct the management activities pursuant to the ASJREV;
- c* the GK as the TK operator must delegate the solicitation of TK investments into the TK operator by the potential TK investors to a licensed operator of a specified joint real estate venture to conduct such solicitation activities pursuant to the ASJREV. The licensed or registered operator must also be a registered operator of a 'type II financial instruments business' under the FIEA to conduct such solicitation of the TK investments, which are regulated as securities under the FIEA;
- d* the TK investors must be limited to 'special investors' (or professional investors), which includes licensed operators of a specified joint real estate venture under the ASJREV, real estate brokers approved to conduct transactions for the clients on a discretionary basis under the Real Estate Brokerage Business Act, real estate investment advisers registered under the Real Estate Investment Adviser Registration Regulations, professional investors under the FIEA, and stock companies with stated capital of ¥500 million or more, if the GK, as the TK operator, is to conduct development of land as a site for buildings, construction of a building, or repair or renovation of a building, the cost of which exceeds (1) 10 per cent of the value of the subject real estate, in the case that the asset manager retained by the GK is a licensed operator of a specified joint real estate venture; or (2) ¥100 million, in the case that the asset manager is a registered operator of a small-scale specified joint real estate venture;
- e* the agreement between the GK and the licensed operator of a specified joint real estate venture or the registered operator of a small-scale specified joint real estate venture as described in point (b) must stipulate certain items specified under the ASJREV; and

f the GK must submit a notification to the relevant authority as the operator of a special venture before commencing its business under the TK arrangement.

Another GK-TK structure available under the ASJREV (the ‘venture only for qualified special investors’) is a structure where the TK investors are limited to ‘qualified special investors’ (or ‘super professional investors’), which includes licensed operators of specified joint real estate ventures under the ASJREV, real estate brokers approved to conduct transactions for clients on a discretionary basis under the Real Estate Brokerage Business Act, discretionary real estate investment advisers registered under the Real Estate Investment Adviser Registration Regulations and certain types of ‘qualified institutional investors’ under the FIEA. To use this structure, the GK, as the TK operator, is required to submit a notification to the relevant authority as the operator of a venture only for qualified special investors before commencing its business under the TK arrangement, but it is not required for the GK to retain a licensed operator of a specified joint real estate venture or registered operator of a small-scale specified joint real estate venture as its asset manager or distributor.

The foregoing GK-TK structures under the ASJREV can enjoy certain preferential tax treatment such as reduction of registration and licence tax, and real estate acquisition tax.

iii TMK structure

A TMK incorporated under the Act on the Securitisation of Assets (ASA) is another type of corporate entity often used as a real estate investment vehicle. This entity may only be used to liquidate or securitise certain assets. This investment platform is used to make investments in real estate, trust beneficial interests in real estate, and loans and TMK bonds that are backed by real estate.

A TMK is typically funded by issuing TMK bonds and preferred shares that meet certain tax qualifications required for the preferential tax treatment of the TMK. If a TMK, its bonds and its preferred shares are properly structured, and the TMK meets certain other requirements under the Tax Code, distributions to the preferred shareholders can be deducted from the TMK’s taxable profits in addition to deducting debt payments.

One of the requirements for the preferential tax treatment is that its TMK bonds be purchased by an institutional investor or other similar person or entity (a Tax II or equivalent investor) as defined in the Tax Code. Certain QIIs under the FIEA and certain other QIIs meeting additional requirements fall under the definition of a Tax II or equivalent investor. One of the important steps in setting up a TMK structure is to find a TMK bondholder that is a QII and is a Tax II or equivalent investor.

When using a TMK structure, it is also important for the TMK to comply with strict regulations under the ASA. These regulations include a requirement to file an asset liquidation plan with the relevant government authority. The asset liquidation plan of a TMK outlines how its assets are to be liquidated or securitised. A TMK structure requires close attention to be paid to the regulations regarding the asset liquidation plan.

iv J-REITs

A J-REIT is a type of investment fund formed under the Act on Investment Trusts and Investment Corporations (AITIC). A J-REIT established to invest in and manage real estate assets uses investors’ funds to purchase real estate assets, in return for which investors receive investment units. The investment units of a J-REIT can be listed and traded on the stock exchange. If a J-REIT’s investment units are listed, the J-REIT must comply with the rules

of the stock exchange in addition to the AITIC. Under the AITIC, a J-REIT must retain an asset management company (a registered financial instruments operator under the FIEA) to manage its investment. In practice, all investment decisions for a J-REIT are designed to be made by its asset management company.

Unlike an ordinary corporation, which is subject to corporation tax on its profits, a J-REIT is exempt from taxation if certain requirements are satisfied, including:

- a* the J-REIT is not engaged in any business other than that permitted for J-REITs;
- b* the J-REIT would not be classified as a family corporation as defined in the Tax Code at the end of its fiscal period;
- c* the J-REIT distributes more than 90 per cent of its profits as dividends to the holders of its investment units for each fiscal period; and
- d* more than 50 per cent of the investment units on an aggregate issued amount basis have been offered in Japan.

The basic concept underlying the J-REIT legislation is that unlike a GK-TK structure or a TMK structure, a J-REIT's investments are not limited to certain assets specified at the time of its start-up. By raising long-term funds through a combination of debt and equity financing, a J-REIT can continue to accumulate and replace its investment portfolio for a longer term. At the same time, however, it would distribute most of its profits (more than 90 per cent) to the holders of its investment units for each fiscal period as described above, and therefore may not have sufficient internal reserve funds.

When structuring a J-REIT, it is important to mitigate the potential risks of not having sufficient funds to deleverage its debt during an economic downturn. Because a J-REIT would practically be restricted regarding the amount of reserves it may retain, it should adopt another financial strategy to mitigate the potential risks, such as keeping its debt-to-asset ratio at a conservative level.

V REAL ESTATE OWNERSHIP

i Planning

City Planning Act

The City Planning Act is the primary national law that governs real estate development and zoning. Under the Act, land development is strictly controlled in urbanisation control areas. Developers must obtain approval from local government authorities for developments in areas designated for urbanisation. Approval is given if the proposed development meets certain requirements under the City Planning Act.

There are various local laws established under the framework of the City Planning Act. Local government authorities are granted the power to control land use in accordance with the City Planning Act and the local laws.

Building Standards Act

The Building Standards Act provides regulations regarding constructing a building, including regulations regarding its use and the ratio of its total floor area to its site area. Under the Act, the relevant local government authority must approve construction work for a building before the work commences, and a completion inspection of the building by the relevant local government authority is required upon completion of work.

ii Environment

Under the Soil Contamination Countermeasures Act, if a manufacturing factory that uses certain hazardous materials ceases its operations, the owner, manager or occupant of the land (the landowner) must examine the land and test for contaminants. In addition, in the case of the development of a large area of land (at least 3,000m²), the developer must notify the appropriate local government authority at least 30 days before any change is made to the land. After receiving this notice, if the authority determines that the land may be contaminated in the manner designated by the Soil Contamination Countermeasures Act, it may order the landowner to investigate.

The local government authority may also order a landowner to examine land and conduct testing for contaminants if it determines that the land may harm the health of inhabitants in the neighbourhood through underground water or otherwise in the manner designated by the Soil Contamination Countermeasures Act. If the result of an examination of the land reveals that the relevant regulations have not been met, local government authorities will designate the land as a contaminated area and require appropriate measures, including clean-up of the land, to prevent public health from being impaired.

iii Tax

Stamp taxes, registration and licence taxes, and real estate acquisition taxes apply when the ownership title of real estate is transferred.

General

Stamp taxes are paid by affixing a revenue stamp on a taxable document. An agreement to transfer the ownership title to real estate requires a stamp tax of progressive amounts generally ranging from ¥200 to ¥600,000, based on the purchase price provided in the agreement. A range from ¥200 to ¥480,000 will apply to an agreement entered into between 1 April 2014 and 31 March 2024.

Registration and licence taxes are imposed when registering certain matters with respect to real estate with the appropriate local registry. The tax rate to register a transfer of ownership title to land or buildings is generally 2 per cent. A rate of 1.5 per cent will apply to a registration regarding a transfer of land occurring between 1 April 2013 and 31 March 2023,² and a rate of 0.3 per cent will apply to a transfer of ownership title to certain qualified residential buildings that are acquired by an individual by 31 March 2024, to be used for residential purposes.

Real estate acquisition taxes are imposed on a purchaser of real estate at a rate of 3 per cent (for land and for residential buildings), or 4 per cent (for non-residential buildings); provided that the reduced tax rate of 1.5 per cent will apply to residential lands that are acquired by 31 March 2024.

² Such tax reduction may be extended pending a proposal by the Cabinet and approval by the National Diet.

Beneficial treatment

Transfer to a TMK

If a TMK acquires real estate and meets certain requirements, it may qualify for the following tax benefits:

- a* the registration and licence taxes to register the acquisition until 31 March 2023³ will be reduced to 1.3 per cent; and
- b* the real estate acquisition tax rate is currently two-fifths of the original rate, and this reduced rate will apply until 31 March 2023.⁴

Transfer of trust beneficial interest

Using a trust structure where the trustee holds ownership title to real estate provides certain tax benefits. Stamp taxes for real estate trust agreements and for sale and purchase agreements for a trust beneficial interest in real estate is ¥200, which is substantially less than stamp taxes for a sale and purchase agreement of the real estate itself. While registration and licence taxes and real estate acquisition taxes will be imposed on the purchaser of real estate, the following reduced registration and licence taxes will be imposed on real estate being placed in trust, and on a trust beneficial interest in real estate being transferred from the initial holder to the purchaser:

- a* on placing the real estate in trust: 0.3 per cent (for land, until 31 March 2023⁵), or 0.4 per cent (for buildings); and
- b* on the transfer of the trust beneficial interest: ¥1,000 for each building and piece of land.

Real estate acquisition taxes are not imposed on real estate when it is placed in trust or on the transfer of the trust beneficial interest; however, when the holder of a trust beneficial interest in real estate (other than the initial holder) terminates the trust agreement and receives delivery of the real estate from the trustee, registration and licence taxes at a rate of 2 per cent will be imposed upon registration of the real estate transfer. Upon such a transfer, real estate acquisition taxes will also be imposed on the beneficiary at a rate of 3 per cent (for land and for residential buildings), or 4 per cent (for non-residential buildings).

By applying the tax benefits of a trust structure as described above, a substantial amount of taxes related to the real estate acquisition can be deferred until the trust agreement is terminated and the real estate is delivered to the beneficiary.

Transfer of real estate to a GK-TK structure under the ASJREV

Preferential tax treatment applies to certain GK-TK structures under the ASJREV.

If the GK, as the operator of a special venture under the ASJREV (except where the GK delegates management of transactions related to the real estate to a registered operator of a small-scale specified joint real estate venture) or as the operator of a venture only for qualified special investors under the ASJREV (where the GK delegates the management of transactions related to the subject real estate entirely to a real estate broker licensed under the Real Estate Brokerage Business Act), acquires (1) land satisfying certain requirements to be

3 See footnote 2.

4 See footnote 2.

5 See footnote 2.

used as a site for a building with certain scale and quality, provided that such building will be newly constructed or reconstructed by rebuilding a building older than 10 years or seriously damaged by natural disasters, newly constructed on vacant land or created by extension, repair or remodelling of a building older than 10 years or seriously damaged by natural disasters; or (2) a building older than 10 years or seriously damaged by natural disasters to be rebuilt, extended, repaired or remodelled on land satisfying certain requirements, by meeting certain requirements, it may qualify for the following tax benefits until 31 March 2023:⁶

- a* the registration and licence taxes to register the acquisition is reduced to 1.3 per cent; and
- b* the value of the real estate for the purpose of real estate acquisition tax is deemed to be half of the applicable value with respect to the subject real estate.

The GK as the operator of a small-scale specified joint real estate venture under the ASJREV or as the operator of a special venture under the ASJREV (where the GK as the operator of a special venture delegates the management of transactions related to the subject real estate to a registered operator of a small-scale specified joint real estate venture) may qualify for the following tax benefits until 31 March 2023,⁷ if the GK meets certain requirements:

- a* the registration and licence taxes to register the acquisition of a building for the purpose of new construction or reconstruction by rebuilding, or extension, repair or remodelling will be reduced to 1.3 per cent; and
- b* the value of real estate for the purpose of acquisition tax is deemed to be half of the applicable value with respect to the subject real estate, if the real estate is one of the following:
 - a building constructed before 1 January 1982 and acquired for the purpose of extension, reconstruction, repair or remodelling; or
 - land acquired as a site for the building.

iv Finance and security

Mortgages on real estate are the most frequently used form of security interest in real estate. In general, once the mortgage is registered, it is granted priority over unsecured creditors; however, even a registered mortgage is subordinate to tax claims against the mortgagor that became due prior to the registration of the mortgage. The registered mortgage will also be subordinate to any previously registered mortgages or other previously registered security interests on the same real estate.

Another form of security interest in real estate that is frequently used is a pledge over a trust beneficial interest in real estate. If real estate is held in the form of a trust beneficial interest in real estate, the lender would create a pledge over the trust beneficial interest and not a mortgage on the real estate itself. Perfection of the pledge is made by obtaining the consent of the trustee with a date certified by a notary public.

TMK bondholders are granted a security interest by operation of law, which is a statutory general security interest on all the current and future assets of the TMK granted in their favour under the ASA. The statutory general security interest will also secure (by operation of law under the ASA) all the TMK bonds subsequently issued; therefore, in many cases, holders of TMK bonds do not create a mortgage or pledge on the real estate or trust

6 See footnote 2.

7 See footnote 2.

beneficial interest in real estate held by the TMK. This is mainly because the mortgage and pledge securing the bonds need to be held by a trustee in accordance with the Secured Bond Trust Act, and additional costs to establish such a trust arrangement are not considered economically justified in many cases.

VI LEASES OF BUSINESS PREMISES

The Act on Land and Building Leases (ALBL) and the Civil Code regulate real estate leases. The general rule is that the ALBL is applicable to land leases that are made for the purpose of the lessee owning a building on the land and building leases. The ALBL takes precedence over the Civil Code when their provisions overlap.

i Types of lease

The ALBL provides for various types of lease, including the following.

Land lease for the purpose of a lessee owning a building on the land

Ordinary land lease

Under the ALBL, a land lease made for the purpose of the lessee owning a building on the land (other than a fixed-term land lease as discussed below) has a 30-year term, unless the parties agree to a longer term. These land leases are automatically renewed for a term of 20 years for the first renewal and 10 years for subsequent renewals unless otherwise agreed by the parties. The lessor cannot object to renewal without a justifiable reason. Generally, a justifiable reason is not easy to establish, and the lessor's refusal to renew the lease is strictly restricted.

Fixed-term land lease

A fixed-term land lease made for the purpose of the lessee owning a building on the land is not renewable under the ALBL; however, the parties are not prohibited from entering into a new lease agreement at the expiry of the lease. Fixed-term land leases were introduced because concerns of landowners about the strict restrictions on the ability of the owners of land to refuse to renew a land lease were considered to inhibit effective use of real estate. There are three types of fixed-term land leases:

- a* a general fixed-term land lease available for either residential purposes or business purposes (the fixed term is 50 years or longer);
- b* a land lease with a special agreement by which the lessee assigns the building on the land to the lessor (the lease agreement can provide for the lessor's right to obtain the building on the land from the lessee at a reasonable price to terminate the lease after 30 or more years following the commencement of the lease); and
- c* a fixed-term land lease for business purposes (the fixed term is 10 years or more but must be shorter than 50 years).

Building leases

Ordinary building lease

A building lease usually has an agreed term. Under the ALBL, a building lease with an agreed term (other than a fixed-term building lease as discussed below) is automatically renewed

and the lessor cannot object to the renewal of the building lease without a justifiable reason. Generally, a justifiable reason is not easy to establish and the lessor's refusal to renew the lease is strictly restricted.

Fixed-term building lease

A fixed-term building lease is not renewed under the ALBL; however, the parties are not prohibited from entering into a new lease agreement at the expiry of the lease term. The parties can agree on the fixed term without restriction on its duration.

ii Typical provisions

There are typical provisions for leases of business premises in Japan regarding increase or reduction of rent, termination and assignment of lease or sublease.

Rent increase or reduction

Under the ALBL, if the amount of rent payable becomes inappropriate (e.g., if it differs significantly from the market rent), the lessor or the lessee may request that it be increased or reduced. This applies both to land leases made for the purpose of the lessee owning a building on the land and to building leases. The parties to the lease agreement, however, can eliminate the right to request an increase in rent by agreeing not to increase the amount of rent for a certain period. The right to request a reduction cannot be eliminated from a lease that is not a fixed-term building lease.

Termination

Under the Civil Code, if one party breaches an agreement, the other party can terminate it; however, under Supreme Court precedents, a lessor cannot terminate a real estate lease agreement if the lessee can establish the existence of a special circumstance where a relationship of mutual trust remains between the lessor and the lessee even after the breach. Failure to pay rent for several months would usually entitle the lessor to terminate the lease because this non-payment would usually be regarded as destroying the relationship of mutual trust.

Assignment of lease or sublease

Lease agreements usually prohibit the lessee from assigning the lease or subletting without the consent of the lessor.

VII DEVELOPMENTS IN PRACTICE

i Enactment of the Important Land Review Act

The Important Land Review Act allows for the designation of 'monitored areas' in Japan and, within the category of monitored areas, a narrower category of 'special monitored areas'. Under this Act, the Prime Minister may recommend (and, in certain cases, order) landowners within a monitored area to cease certain uses of their land or to take certain actions in respect of their land if the Prime Minister finds that there is a clear risk that the use or transfer of such land will interfere with certain functions of certain important facilities or of certain remote border islands. The term 'important facility' includes bases of Japan's Self-Defence Force, the US military and Japan's Coast Guard.

Moreover, under this Act, a person who intends to enter into a contract to transfer or obtain ownership title to land located in a special monitored area must provide prior written notice to the Prime Minister regarding certain terms and conditions to be set forth in the contract. The Act defines a special monitored area as one that is designated by the Prime Minister as such owing to its proximity to certain important facilities or it being located on certain border islands.

This Act came into force on 20 September 2022. As of the time of writing, although the complete list of monitored areas and special monitored areas has not been published yet, on 27 December 2022, the government issued a notification designating 58 sites as monitored areas, of which 29 are special monitored areas. Such designation will come into force on 1 February 2023. In total, approximately 600 areas in Japan may be designated as monitored areas, of which 200 may be designated as special monitored areas.

Although this Act only requires that notice be provided to, rather than consent be obtained from, the Prime Minister in relation to the acquisition of land in special monitored areas, it remains unclear how this prior-notice requirement will be applied and enforced; therefore, in practice, the acquisition of ownership title to land located in a special monitored area may be restricted through such prior-notice requirement under this Act.

ii Real estate security token offering

Recent developments in distributed ledger technology have attracted attention to security token offerings (STO), including those involving real estate tokenisation (real estate STO). Tokenised securities in a real estate context are typically TK investments in real estate assets or trust beneficial interests in real estate.

A series of new regulations on tokenised securities were introduced in May 2020 under the FIEA. The introduction of the foregoing regulations on tokenised securities under the FIEA has drawn the attention of traditional real estate market players to real estate STOs: in 2021 and 2022, the market saw several real estate STOs.

An amendment made to the Payment Services Act in 2022 (to be effective no later than June 2023) will introduce regulations on electronic payment instruments (e.g., fiat currency-denominated stablecoins), which are expected to be useful as a means for delivery versus payment in transactions involving security tokens. Certain industry players are also discussing the development of the secondary market for security tokens, including a proprietary trading system that deals with security tokens. It is hoped that once the regulations on electronic payment instruments are implemented and the secondary market is developed as discussed by the industry players, there will be more real estate investments through a more stable and efficient STO practice.

The government is currently considering new regulations on tokenised real estate-backed TK interests issued by TK operators licensed or registered and regulated under the ASJREV. The new regulations under consideration include classification of such TK interests as securities under the FIEA, which means that the FIEA will regulate the above-described TK interests as tokenised securities. This development in the regulations is expected to enhance protection for investors and lead to stability in trading the tokenised securities.

iii REID system

The government is working to establish a national real-estate ID (REID) system. Because the data available with respect to specific real properties in Japan are not provided under a unified

rule, it can be difficult to determine whether a real property mentioned in various data is the same because of the different forms of notations of addresses and lot numbers. This has led to inefficiency in the real estate market.

In an effort to resolve this issue, the government is working to establish the REID system. Guidelines regarding the REID system were published on 31 March 2022. Pursuant to the guidelines, a REID would be a 17-digit real estate number, which would be formed by a 13-digit real estate number and a specified 4-digit code. By utilising this information, a person researching specific real property would be able to accomplish the following:

- a* Various types of information, such as past sales and upgrades, linked to a real property's REID would be readily accessible.
- b* Relevant information would be able to be found, notwithstanding any confusion resulting from inaccurate descriptions of property addresses or multiple buildings being located at the same address or lot number; whereas previously such information might have been accessed only after great difficulty, if at all, the REID system is expected to facilitate the search for information related to a particular real property.

The system is expected to increase the liquidity in the real estate market. By compiling many different types of information with a link to one, centralised REID system, it would be easier for purchasers and other interested parties to encounter information regarding a specific real property more easily, even if there are errors in the property address in the data. Multiple buildings belonging to the same address or lot number would no longer be a problem. The resulting increase in transparency and accessibility is expected to improve the ability to conduct research regarding real properties, thereby enhancing activities in the real estate market and liquidity in the real estate market.

VIII OUTLOOK AND CONCLUSIONS

The outbreak of the covid-19 pandemic gave rise to unprecedented global challenges and difficulties, and had a severe effect on commercial activities in Japan. In the real estate sector, the hotel industry experienced the most striking impact because of the various restrictions on leisure activities and the movement of people, and the office leasing market saw a decline in demand for office space because of the prevalence of remote work and the uncertain future of the economy. Nevertheless, as countries, including Japan, begin lifting restrictions and returning to pre-pandemic life, it is hoped that the real estate market will experience a recovery.

There are other factors that could adversely affect the real estate sector: Russian aggression in Ukraine increased the cost of energy, and a weak yen led to an increase in the cost of materials for construction projects.

Considering the foregoing as a whole, there is still uncertainty surrounding the real estate sector; however, even during such a difficult period, the legal infrastructure for Japanese real estate remains well established and continues to evolve. We hope that through the efforts of the real estate sector to further develop the infrastructure for real estate, the Japanese real estate market will keep providing foreign investors with a stable basis for investment.

ABOUT THE AUTHORS

NORIO MAEDA

Nishimura & Asahi

Norio Maeda is a partner with expertise in transactions involving the acquisition of, investment into and financing of Japanese real estate assets. He has represented domestic and foreign investors, including investment funds, financial institutions, investment managers and developers from the United States, Europe and Asia in numerous investment and development projects involving sophisticated structures. He has also represented lenders in numerous structured finance transactions involving real estate assets. His expertise extends to the restructuring of distressed real estate asset investments. He is admitted to the Japan Bar and New York Bar.

TAKUYA SHIMIZU

Nishimura & Asahi

Takuya Shimizu is a partner with expertise in transactions involving the acquisition of, investment into and financing of Japanese real estate assets. He has represented domestic and foreign investors and lenders in numerous acquisition, investment and development projects involving sophisticated structures. He was admitted to practise in Japan in 2001.

AKIHIRO SHIBA

Nishimura & Asahi

Akihiro Shiba is a partner with expertise in transactions involving the acquisition of, investment into and financing of Japanese real estate assets, as well as fintech such as crowdfunding and Web 3. He was admitted to practise in Japan in 2007 and in New York in 2018.

MASATO MORIZUKA

Nishimura & Asahi

Masato Morizuka is an associate who mainly focuses on transactions involving the acquisition of, investment into and financing of Japanese real estate assets. He was admitted to practise in Japan in 2019.

KEI FUJITA

Nishimura & Asahi

Kei Fujita is an associate who mainly focuses on transactions involving the acquisition of, investment into and financing of Japanese real estate assets. He was admitted to practise in Japan in 2020.

NISHIMURA & ASAHI

Otemon Tower

1-1-2 Otemachi, Chiyoda-ku

Tokyo 100-8124

Japan

Tel: +81 3 6250 6200

Fax: +81 3 6250 7200

n.maeda@nishimura.com

t.shimizu@nishimura.com

a.shiba@nishimura.com

m.morizuka@nishimura.com

k.fujita@nishimura.com

www.nishimura.com

