The Real Estate Law Review

Fifth Edition

Editor
John Nevin

Law Business Research

The Real Estate Law Review

The Real Estate Law Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Real Estate Law Review - Edition 5
(published in February 2016 – editor John Nevin)

For further information please email
Nick.Barette@lbresearch.com

The Real Estate Law Review

Fifth Edition

Editor
John Nevin

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

MARKETING COORDINATOR
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Gina Mete

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2016 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 is accurate as of February 2016, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-85-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

AL TAMIMI & COMPANY

ASBZ ADVOGADOS

BALCIOĞLU SELÇUK AKMAN KEKİ

BONELLI EREDE PAPPALARDO

BUN & ASSOCIATES

CAREY OLSEN

CMS REICH-ROHRWIG HAINZ

DE BRAUW BLACKSTONE WESTBROEK NV

DELOITTE ADVOKATFIRMA AS

DENTONS

DE PARDIEU BROCAS MAFFEI

G ELIAS & CO

HENGELER MUELLER

HERBERT SMITH FREEHILLS LLP

IGLESIAS, POZAS Y PÁEZ

LEE AND LI, ATTORNEYS-AT-LAW

LENZ & STAEHELIN

LETT LAW FIRM

LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK

MAPLES AND CALDER

M & P BERNITSAS LAW OFFICES

NISHIMURA & ASAHI

ODVJETNIČKO DRUŠTVO BARDEK, LISAC, MUŠEC, SKOKO D.O.O.
IN COOPERATION WITH CMS REICH-ROHRWIG HAINZ

PAPADOPOULOS, LYCOURGOS & CO LLC

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PETRIKIĆ & PARTNERI AOD IN COOPERATION WITH
CMS REICH-ROHRWIG HAINZ

SHIN & KIM

SLAUGHTER AND MAY

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

TSMP LAW CORPORATION

URÍA MENÉNDEZ

VIEIRA DE ALMEIDA & ASSOCIADOS, RL

WOLF THEISS ATTORNEYS AT LAW

ZÁRECKÝ ZEMAN

CONTENTS

Editor's Preface vii
John Nevin

Chapter 1 AUSTRIA 1
Peter Oberlechner

Chapter 2 BELGIUM.. 14
Yves Delacroix and Alexandre Emond

Chapter 3 BOSNIA & HERZEGOVINA.. 28
Muamer Suljić and Ana Terzić

Chapter 4 BRAZIL 38
Marcelo José Lomba Valença and Tamiris Micheletti Britzki

Chapter 5 CAMBODIA 49
Sophealeak Ing

Chapter 6 CAYMAN ISLANDS.. 61
George Loutas

Chapter 7 CHINA.. 70
Alex Wang and Edward Hsu

Chapter 8 CROATIA.. 83
Ana-Marija Skoko

Chapter 9 CYPRUS 95
Nicolas Th Papaconstantinou

Chapter 10 DENMARK.. 108
Torben Mauritzen

Chapter 11 ENGLAND & WALES 120
John Nevin

Chapter 12 FRANCE 135
Pierre Gebarowski and Guillaume Rossignol

Chapter 13 GERMANY 150
Ingo Klöcker

Chapter 14 GREECE 161
Nikos A Vouhiounis and Christina C Zakopoulou

Chapter 15 INDONESIA... 174
Luky I Walalangi, Miriam Andreta, Fiesta Victoria and T Anggra Syah Reza

Chapter 16 ITALY 185
Alessandro Balp

Chapter 17 JAPAN 197
Norio Maeda, Naoko Katakami, Yasuo Asami and Toshiyuki Yamamoto

Chapter 18 JERSEY.. 211
Christopher Philpott and Will Whitehead

Chapter 19 KOREA... 223
Kyung Don Lee, Robert C Young and Thak-Hwan Kim

Chapter 20 MEXICO 242
Enrique Iglesias Elizondo, José G Pozas de la Vega and David Páez Gonzalez

Chapter 21 MONTENEGRO ... 252
Mihajlo Matković

Chapter 22 NETHERLANDS ... 262
Annemieke Wessels, Maarten Tinnemans and Max van Drunen

Chapter 23 NIGERIA ... 274
Gbolahan Elias, Lynda Chinweokwu and Pelumi Asiwaju

Chapter 24 NORWAY ... 282
Thorvald Nyquist

Chapter 25 POLAND ... 293
Janusz Siekański and Radosław Waszkiewicz

Chapter 26 PORTUGAL ... 304
Pedro Ferreirinha

Chapter 27 QATAR ... 316
Seem Maleh

Chapter 28 RUSSIA ... 329
Sergey Kolobov and Margarita Slavina

Chapter 29 SERBIA ... 340
Marija Marošan and Đorđe Popović

Chapter 30 SINGAPORE ... 349
Jennifer Chia, Priscilla Lim and Alicea Tan

Chapter 31 SLOVAKIA ... 367
Tomáš Zárecký and Laura Ogurčáková

Chapter 32 SLOVENIA ... 383
Uroš Bogša, Mojca Fakin and Saša Sodja

Chapter 33 SPAIN 393
Diego Armero and Rodrigo Peruyero

Chapter 34 SWITZERLAND 404
Cécile Berger Meyer and Andreas Rötheli

Chapter 35 TAIWAN 416
Yi-Jiun Su and Yi-Li Kuo

Chapter 36 TURKEY 428
Barlas Balcıoğlu and Ali Can Gören

Chapter 37 UNITED ARAB EMIRATES 439
Ibrahim Elsadig and Joe Carroll

Chapter 38 UNITED STATES 451
Meredith J Kane

Appendix 1 ABOUT THE AUTHORS 467

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS .. 487

EDITOR'S PREFACE

I am honoured to have been invited to take over from David Waterfield as editor of *The Real Estate Law Review* and I would like to take this opportunity to personally thank David for his invaluable help and support over the years and, on behalf of *The Real Estate Law Review*, for his vital role in its success since the first edition back in 2012.

Building on the success of the previous editions of the *Review*, the fifth edition now extends to some 38 jurisdictions, and we are delighted to welcome new contributors from important jurisdictions around the world. Each contributor is a distinguished legal practitioner in his or her jurisdiction with an in-depth understanding of both his or her own domestic market and the wider global real estate market. Each chapter offers an essential guide to real estate practice in the relevant jurisdiction together with an invaluable focus on market activity, important legal and practical developments over the preceding 12 months and the outlook for 2016. Together, the chapters offer real estate practitioners and their clients an immediate and accessible overview of international real estate.

Real estate is a truly global industry and it is no longer possible to look at domestic markets in isolation. It has become essential to develop an understanding of the needs and expectations of overseas investors, and of how domestic markets are affected by legal, economic, political and social events and trends throughout the world. International economic and political instability continue to have a significant effect on the international real estate market and this is reflected in investors' pursuit of value and security. The United Kingdom (and London in particular) continues to be seen as a safe haven for capital from around the world, and the outlook here remains buoyant in both the commercial and residential sectors.

I wish to express my gratitude to all the distinguished practitioners from across the globe who have contributed to this fifth edition, and thereby to the continued success of *The Real Estate Law Review*. I would also like to take this opportunity to thank Gideon Roberton and his team for their sterling efforts in coordinating the contributions and compiling this edition.

John Nevin
Slaughter and May
London
February 2016

Chapter 17

JAPAN

Norio Maeda, Naoko Katakami, Yasuo Asami and Toshiyuki Yamamoto[1]

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 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, on the other hand, 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

1 Norio Maeda is a partner, and Naoko Katakami, Yasuo Asami and Toshiyuki Yamamoto are associates at Nishimura & Asahi.

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 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 Estate Registration Law.

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 right that can be registered in the real estate registry, the law of the jurisdiction in which the real estate is located shall be the governing law; however, under the Act, any law chosen by the parties can govern a contract. 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, because of the rule that Japanese law governs property rights in Japan.

II OVERVIEW OF REAL ESTATE ACTIVITY

Since the early 1990s, various innovative real estate investment structures have been developed in Japan.

The GK-TK structure and the specified-purpose company (TMK) structure (discussed in detail in Section IV, *infra*) are frequently used for real estate investment. Japanese real estate investment trusts (J-REITs) (discussed in Sections IV and VII, *infra*) 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 accumulated capital of the listed J-REITs has made them major players in the Japanese real estate investment market. The flow of capital through listed J-REITs into the real estate investment market has contributed to the growth of the real estate industry.

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

While the global economic turmoil in the late 2000s affected – and slowed down – activities in the Japanese real estate investment market (including activities by lenders), it also prompted further regulatory developments. The government has brought in various measures to relax regulations and enhance market activities. Since then, we have seen signs of a reversal in prices and transaction volume of real estate. The transaction volume for Japanese real estate in fiscal year 2014 recovered to levels nearly as high as those of fiscal year 2007, the previous watermark for high transaction volume prior to the global economic turmoil.

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. In theory, under the provisions of the Alien Land Law, a cabinet order may limit the rights of foreign investors related to land in Japan on the grounds of reciprocity or national security. At the time of writing, however, there has been no such limitation, since no such cabinet order has been issued.

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 an agricultural production corporation. It would not be easy for foreign investors to be granted such an authorisation.

After a foreign investor's acquisition of shares or equity of a corporation, or acquisition of real estate or a right related to real estate, a post-transaction report to the government authority may be required pursuant to the Foreign Exchange and Foreign Trade Law (FEFTL). 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 FEFTL.

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. The Real Estate Specified Joint Enterprise Act (REJEA) was amended in 2013 to enable a GK-TK structure (see below) to invest into real estate without requiring the GK as the TK operator vehicle itself to obtain a licence.

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 an LLC 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 REJEA. 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 REJEA (newly introduced in 2013) allows the GK-TK structure to invest into real estate itself if certain requirements are satisfied.

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 Law (FIEL), unless an exception applies. One of the exceptions available under the FIEL is the QII exemption, which essentially requires that:

a there is at least one qualified institutional investor (QII) under the FIEL among the TK investors;
b the number of non-QII TK investors (if any) is 49 or less;
c none of the TK investors is a disqualified investor as detailed in the FIEL; and
d the GK, as the operator of the TK arrangement, files with the government authority a simple notification regarding the QII exemption.

The requirements of the QII exemption were amended in 2015, and the amendment is expected to be implemented in 2016 (further discussed in Section VII, *infra*).

REJEA structure

The 2013 amendment to the REJEA allows a GK-TK structure to invest into real estate directly, without the GK as the TK operator vehicle needing to obtain a licence, if certain requirements are met. It is hoped that the new GK-TK structure under the amendment will enhance investment into real estate without the need to involve a trustee in respect of a trust beneficial interest at the underlying real estate level.

The new GK-TK structure under the amended REJEA 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 delegates (1) the management of transactions related to the subject real estate to a real estate specified joint enterprise business operator (REJEB operator) that is licensed to conduct its business under Article 2, paragraph 4, item 3 of the REJEA, and (2) the solicitation of investments into the TK operator by the TK investor (or investors) to a REJEB operator that is licensed to conduct its business under Article 2, paragraph 4, item 4 of the REJEA;

c only investors falling into one of the categories of 'special investors', which include a licensed REJEB operator and a QII (as defined under the FIEL), make TK investments in the TK operator; and

d the agreement for (1) as described at (b) above to be entered into between the GK and the REJEB operator must stipulate certain items specified under the REJEA.

Under this new requirement, the amended REJEA allows a licensed REJEB operator to be involved in a TK arrangement investing into real estate, not as a TK operator itself, but as a manager for the TK operator vehicle, as long as the delegation of the management covers (1) and (2) as described at (b) above.

To enhance the use of the new GK-TK structure, a GK-TK structure satisfying the above-mentioned requirements will benefit from reduced registration and licence tax, and real estate acquisition tax, when such a GK-TK structure acquires a building that is over a certain age, or acquires a building for the purpose of reconstruction. For more details on the reduction of these taxes, see Section V, *infra*.

ii TMK structure

A TMK incorporated under the Asset Liquidation Law (ALL) 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, it is permitted to deduct distributions to the preferred shareholders from its 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 FIEL 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 ALL. These regulations include a requirement to file an asset liquidation plan with the 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 being paid to the regulations regarding the asset liquidation plan.

iii J-REITs

A J-REIT is a type of investment fund formed under the Law concerning Investment Trusts and Investment Companies (ITL). 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 ITL. Under the ITL, a J-REIT must retain an asset management company (a registered financial instruments operator under the FIEL) 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. Since 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 Law

The City Planning Law is the primary national law that governs real estate development and zoning.

Under the City Planning Law, land development is strictly controlled in urbanisation control areas. Developers are required to 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 Law.

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

Building Standards Law

The Building Standards Law provides regulations with respect to construction of a building, including regulations with respect to its use and the ratio of its total floor area to its site area.

Under the Building Standards Law, the appropriate local government authority must approve construction work for a building before the work commences. Furthermore, a completion inspection of the building by the appropriate local government authority is required upon completion of work.

ii Environment

Under the Soil Contamination Countermeasures Law, 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 3,000 square metres), the developer must notify the appropriate local government authority at least 30 days before any change is made to the land. After receiving such notice, if the authority determines that the land may be contaminated in the manner designated by the Soil Contamination Countermeasures Law, it may order the landowner to investigate. The local government authority also may 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 Law. 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 cleaning up the land, to prevent public health from being impaired.

iii Tax

Stamp taxes, registration and licence taxes and real estate acquisition taxes apply when 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 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 2018.

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 real estate is generally 2 per cent. A rate of 1.5 per cent will apply to registration regarding a transfer of land occurring between 1 April 2013 and 31 March 2017. The transfer of ownership title to certain qualified residential buildings that are acquired by an individual to reside in will be 0.3 or 0.15 per cent.

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).

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 2017 will be reduced to 1.3 per cent; and

b three-fifths of the price for the acquisition will be excluded when calculating the related real estate acquisition taxes until 31 March 2017.

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 real estate itself. While registration and licence taxes and real estate acquisition taxes will be imposed on a 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 or 0.4 per cent (for land) or 0.4 per cent (for buildings); and

b on 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 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 registering the transfer of real estate. 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 a 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 recent amendment to the REJEA

If a GK-TK structure under the recent amendment to the REJEA (discussed in Section IV, *supra*) acquires an old building that needs to be rebuilt or renovated (defined as a building older than 10 years or a building seriously damaged by a disaster), land planned to be used for a newly built building replacing an old building or built on unimproved land, or land used for a building planned to be renovated, by meeting certain other requirements, it may qualify for the following tax benefits:

a the registration and licence taxes to register the acquisition until 31 March 2017 will be reduced to 1.3 per cent; and

b half of the price of the acquisition will be excluded when calculating the related real estate acquisition taxes until 31 March 2017.

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 ALL. The statutory general security interest will also secure (by operation of law under the ALL) all the TMK bonds subsequently issued. In many cases, therefore, holders of TMK bonds do not create a mortgage or pledge on the real estate or trust 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 Law, and additional costs to establish such a trust arrangement are not considered economically justified in many cases.

VI LEASES OF BUSINESS PREMISES

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

i Types of lease

The LLBLL 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 LLBLL, 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. Such 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 such 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 LLBLL; 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 LLBLL, 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 LLBLL; however, the parties are not prohibited from entering into a new lease agreement at the expiration 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 LLBLL, 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 such 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 Increasing variety of the types of assets involved in real estate investments

Over the past year, there has been an increase in the variety of the types of investment assets involved in the market for real estate investments in Japan. Some major categories of such varied investment assets are discussed below.

Healthcare facilities and hospitals

In light of the general ageing of the population of Japan and the anticipated corresponding increase in the needs of the elderly in Japanese society, the Japanese government is looking to expand the amount and availability of nursing services and hospitals and to craft effective housing policy for the aged.

In terms of related major developments, in November 2014, the first J-REIT investing only in healthcare facilities and related real estate (any such J-REIT, a Healthcare J-REIT) listed its investment units on the Tokyo Stock Exchange.

In June 2015, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) issued its guidelines for medical facilities, which join the existing guidelines for nursing facilities (issued previously in June of 2014) (each respectively, MLIT Guidelines). The new guidelines impose certain obligations on asset management companies of Healthcare J-REITs, requiring them to satisfy certain organisational requirements (e.g., to employ officers with certain experience levels, to obtain certain outside professional advice, and to abide by certain disclosure obligations to the users of the healthcare facilities).

Currently, there are three Healthcare J-REITs listed on the Tokyo Stock Exchange. Although there are not yet any Healthcare J-REITs that invest in medical facilities, it is expected that, once there is more clarity on the nature of the requirements for being considered an 'appropriate operator' under the MLIT Guidelines as related to the operation of medical facilities, there will be an increase in the number of Healthcare J-REITs that invest not only in nursing facilities but also in hospitals. Hence, in addition to an increase in the total number of Healthcare J-REITs, it is hoped that Healthcare J-REITs will boost investment in a variety of types of healthcare facilities, related real estate and new asset classes, such as hospitals.

Hotels and accommodation facilities

There has been a dramatic increase in the number of foreign tourists visiting Japan in recent times. Some factors that may have contributed to this increase include the 'Visit Japan Business' project of the MLIT's Japan Tourism Agency, the awarding of the 2020 Olympic Games to Tokyo, and the recent depreciation of the yen.

The evolving tourism market – as well as the ageing population of Japan – has increased, and will continue to increase, the demand for hotels and accommodation facilities. Going forward, it is expected that more hotels will be necessary to meet the expanding demand.

At present, there are only two J-REITs that invest mainly in hotels (any such J-REIT, a Hotel J-REIT) listed on the Tokyo Stock Exchange. However, as Japanese hotels and accommodation facilities are attracting both domestic and international investors because of the changing conditions described above, it is anticipated that there will be an attendant increase in the number of Hotel J-REITs. The likely result of the increase in the number of Hotel J-REITs, and of hotels becoming one of the major investment asset classes of J-REITs, will be continued improvement in the hotel market in Japan.

Rekindling of interest in foreign real estate investments

Following the financial crisis of the late 2000s, Japanese investment in foreign real estate decreased to a certain extent. However, more recently, it has been reported that outbound investment in real estate has begun to increase.[2]

Prior to certain amendments made to the ITL pursuant to the 2013 amendment of the FIEL, the ITL had prohibited J-REITs from investing in holdings of more than 50 per cent of the equity of any given entity (whether domestic or foreign), although the ITL did not prohibit J-REITs from investing directly in foreign (or domestic) real estate. However, because of foreign laws, regulations and tax issues in certain countries that restricted foreign investment in such countries, J-REITs were effectively unable to invest directly in foreign real estate in such countries. That said, the Financial Services Agency of Japan (JFSA) has now deregulated the ITL pursuant to the 2013 amendment of the FIEL to achieve the goal of enabling J-REITs to invest in more foreign real estate for the purpose of greater diversification of their portfolios. Hence, because of the 2013 ITL amendment, J-REITs are now able to invest in holdings of up to 100 per cent of the equity of foreign entities that invest in foreign real estate in certain foreign countries. The JFSA has announced that China, India, Indonesia, Malaysia, Vietnam and the United States are countries in which J-REITs can, without limitation, invest in foreign entities that invest in foreign real estate in such countries. This policy has been implemented because, as described above, existing laws or other customs in these countries, among other issues, had restricted J-REITs, as foreign investors, from directly investing in foreign real estate in such countries in the years prior to the 2013 ITL deregulation.

2 See *Nihon Keizai Shimbun* (Japanese newspaper), 20 October 2015.

It is anticipated that in the near future J-REITs will move to diversify their investments by including in their portfolios holdings of foreign entities investing in foreign real estate.

ii Progress concerning the recent amendment to the REJEA

Since the REJEA amendment came into effect on 20 December 2013, 16 REJEB operators have been newly licensed for the new REJEA structure as implemented under the amendment to the REJEA (as of 26 November 2015). REJEB operators are imperative for the new REJEA structure (discussed in detail in Section IV, *supra*), and the present total of 16 REJEB operators represents a fourfold increase since the previous year. The recent increase in the number of REJEB operators is likely to lead to more frequent use of the REJEA structures. Several transactions have been structured pursuant to the amended REJEA to date, and we expect the number of such transactions to increase, particularly in the area of real estate in suburban and rural areas.

iii Amendment to the QII exemption

Legislation for an amendment to the QII exemption has been enacted, and promulgated as of 19 June 2015. Drafts of the relevant cabinet order and cabinet office ordinance have already been published and at the time of this writing are undergoing a process whereby comments are gathered from market participants. The exact implementation date has not yet been determined, but in any event the amendment to the QII exemption must be implemented by its statutory deadline of June 2016.

The amendment will not change the underlying concept of the QII exemption (see Section IV, *supra*). However, it will change certain aspects of its substance. The following 'stricter' rules are expected to be introduced:

a additional requirements for GKs as operators of TK arrangements; a disqualification system will be introduced for not admitting GKs as statutory qualified operators. Requirements for the notification to be filed by GKs with the government authority will become more complex in the future, as compared with the current simple requirements, including, for example, several newly required attachments. These requirements treat GKs in a manner similar to how registered financial instrument business operators are treated under the FIEL;

b applicable requirements on QII and non-QII investors in the structure of the QII exemption will be made stricter;

c most of the regulations equivalent to those that currently bind acts of registered financial instrument business operators under the FIEL, such as the principles of 'suitability' and 'due care of a prudent manager', will also be applied to GKs. GKs will be required to prepare business reports and statutory books and documents; and

d the regulator will be able to take necessary measures for supervisory purposes and issue business suspension or abolishment orders.

Grandfathering clauses for current GK statutory qualified operators are being made available, but new solicitation for TK investment and the resulting TK investments themselves will be subject to the new amendment. On the other hand, existing GK statutory qualified operators must additionally notify the government authority of the required matters, including submission of the required materials.

VIII OUTLOOK AND CONCLUSIONS

The past two years have seen an overall upward trajectory in the volume of real estate acquisitions in Japan. The continued depreciation of the yen has encouraged increased investment of foreign capital in Japanese real estate. At the same time, certain types of asset classes in the real estate market have also become more attractive, including healthcare facilities and hotels (discussed in Section VII, *supra*). Subsequent to the global economic downturn, there have been many improvements in the legal infrastructure for real estate investment, and, to date, numerous transactions under the auspices of the new infrastructure have been completed. In terms of overall outlook, there is general optimism that the foregoing developments have contributed and will continue to contribute to an increasingly more active, stable and transparent Japanese real estate investment market.

Appendix 1

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 Bars of Japan and New York.

NAOKO KATAKAMI

Nishimura & Asahi

Naoko Katakami is an associate with expertise in asset management and real estate investment trusts, including listed J-REITs. She also specialises in capital market transactions, loan securitisations and financial regulations with respect to financial institutions. She has also worked as a foreign attorney at a leading law firm in Australia. She was admitted to practise in Japan in 2005 and in New York in 2013

YASUO ASAMI

Nishimura & Asahi

Yasuo Asami is an associate with expertise in transactions involving the acquisition of, investment into, and financing of Japanese real estate assets. He also specialises in international trade and corporate acquisitions, as well as handling other general corporate matters between Japanese and Chinese companies. He was admitted to practise in Japan in 2008.

TOSHIYUKI YAMAMOTO

Nishimura & Asahi

Toshiyuki Yamamoto is an associate who mainly focuses on asset management, derivatives and other finance-related transactions. He also handles numerous cross-border matters with foreign clients. He was admitted to practise in Japan in 2009. Prior to joining the firm, he worked in the field of securitisation at a domestic credit rating agency and at the Tokyo office of a global investment bank.

NISHIMURA & ASAHI
Otemon Tower
1-1-2 Otemachi, Chiyoda-ku
Tokyo 100-8124,
Japan
Tel: +81 3 6250 6200
Fax: +81 3 6250 7200
info@jurists.co.jp
www.jurists.co.jp/en