

THE REAL ESTATE
LAW REVIEW

NINTH EDITION

Editor
John Nevin

THE LAWREVIEWS

THE REAL ESTATE
LAW REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Nevin

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Tommy Lawson

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Martin Roach

SUBEDITOR

Robbie Kelly

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK
© 2020 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 2020, 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 – tom.barnes@lbresearch.com

ISBN 978-1-83862-496-5

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

ACKNOWLEDGEMENTS

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

ALLEN & OVERY SCS

AUMENTO LAW FIRM

BELLWETHER GREEN

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

BIRD & BIRD

CHIOMENTI

CORDATO PARTNERS LAWYERS

DE PARDIEU BROCAS MAFFEI

DLA PIPER NEDERLAND NV

ESTUDIO BECCAR VARELA

GUZMÁN ARIZA

HENGELER MUELLER

HERBERT SMITH FREEHILLS CIS LLP

KIM & CHANG

MAPLES GROUP

N. DOWUONA & COMPANY

NISHIMURA & ASAHI

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PINHEIRO NETO ADVOGADOS

POPOVICI NIȚU STOICA & ASOCIAȚII

SHARQ LAW FIRM

SLAUGHTER AND MAY
SOŁTYSIŃSKI KAWECKI & SZŁĘZAK
TSMP LAW CORPORATION
URÍA MENÉNDEZ
WALKERS

CONTENTS

PREFACE.....	vii
<i>John Nevin</i>	
Chapter 1 BREXIT AND REAL ESTATE.....	1
<i>John Nevin</i>	
Chapter 2 ARGENTINA.....	5
<i>Pedro Nicholson and Delfina Calabró</i>	
Chapter 3 AUSTRALIA.....	15
<i>Anthony J Cordato</i>	
Chapter 4 AUSTRIA.....	26
<i>Tibor Fabian and Markus Uitz</i>	
Chapter 5 BRAZIL.....	35
<i>Franco Grotti and Guilberme de Toledo Piza</i>	
Chapter 6 CAYMAN ISLANDS.....	45
<i>George Loutas</i>	
Chapter 7 DENMARK.....	53
<i>Torben Mauritzen</i>	
Chapter 8 DOMINICAN REPUBLIC.....	66
<i>Alfredo Guzmán Saladín and Fabio J Guzmán Ariza</i>	
Chapter 9 ENGLAND AND WALES.....	73
<i>John Nevin</i>	
Chapter 10 FRANCE.....	88
<i>Pierre Gebarowski and Alexandre Blestel</i>	

Contents

Chapter 11	GERMANY.....	106
	<i>Jan Bonhage and Thomas Lang</i>	
Chapter 12	GHANA.....	119
	<i>NanaAma Botchway</i>	
Chapter 13	HONG KONG.....	128
	<i>Dennis Li</i>	
Chapter 14	IRELAND.....	139
	<i>Rachel Rodgers, Robert Upton, Aisling Burke and Ronan McNabb</i>	
Chapter 15	ITALY.....	151
	<i>Umberto Borzi</i>	
Chapter 16	JAPAN.....	161
	<i>Norio Maeda, Takuya Shimizu, Akihiro Shiba, Yujin Gen and Yuto Tokoro</i>	
Chapter 17	LUXEMBOURG.....	176
	<i>Serge Hoffmann and Philippe Eicher</i>	
Chapter 18	NETHERLANDS.....	186
	<i>Max van Drunen, Leen van der Marel and Kirsy Corten</i>	
Chapter 19	POLAND.....	197
	<i>Janusz Siekański and Radosław Waszkiewicz</i>	
Chapter 20	QATAR.....	207
	<i>Josias de Salles and Moawiah Milbem</i>	
Chapter 21	ROMANIA.....	217
	<i>Valentin Creața</i>	
Chapter 22	RUSSIA.....	231
	<i>Sergey Kolobov</i>	
Chapter 23	SCOTLAND.....	242
	<i>John Bingham</i>	
Chapter 24	SINGAPORE.....	254
	<i>Jennifer Chia, Yvonne Lian and Lena Yeo</i>	

Contents

Chapter 25	SOUTH AFRICA	270
	<i>Pieter Hugo Niehaus and Chloë Merrington</i>	
Chapter 26	SOUTH KOREA	280
	<i>Hyoung Soo Kwon, Jin Ho Song and David H Pyun</i>	
Chapter 27	SPAIN.....	288
	<i>Diego Armero and Belén Simbor</i>	
Chapter 28	SWEDEN.....	298
	<i>Jan Berg and Carl-Magnus Uggla</i>	
Chapter 29	UNITED STATES	307
	<i>Meredith J Kane</i>	
Appendix 1	ABOUT THE AUTHORS.....	323
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	339

PREFACE

The ninth edition of *The Real Estate Law Review* is testament to the book's success and the continued significance of real estate as a global asset class. A great deal has happened since the first edition appeared in 2012. *The Real Estate Law Review* has proved its worth by providing readers with an invaluable overview of how key markets across the globe operate and how they have evolved in the context of world events. It is no longer possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of the global investment market, and *The Real Estate Law Review* seeks to help its readers to do just that.

This edition extends to 28 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 effect 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 the client's own jurisdiction.

In the year that the UK was expected to leave the EU, Brexit and the associated economic and political fallout has continued to be the dominant issue for UK real estate markets. Although there has been a drop-off in investment volumes, continued interest from a wide range of investors from around the world underlines the need to see each issue in the context of world events. A growing cache of investment capital is likely to prompt a surge in investment activity once some degree of certainty is finally achieved. The UK, and London in particular, seem certain to remain attractive to overseas investors troubled by matters of greater significance than Brexit.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this ninth 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 co-ordinating the contributions and compiling this edition.

John Nevin

Slaughter and May
London
February 2020

JAPAN

Norio Maeda, Takuya Shimizu, Akihiro Shiba, Yujin Gen and Yuto Tokoro¹

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, 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 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 and Takuya Shimizu are partners, Akihiro Shiba is a counsel and Yujin Gen and Yuto Tokoro 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; on the other hand, 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 right in real estate is 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 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.

Although 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 the Japanese government to develop various regulations. The government has taken various measures to relax regulations and enhance market activities. Since then, we have seen a reversal in the prices and transaction volume of real estate. The transaction volume for Japanese real estate in fiscal year 2013 recovered to a level nearly as high as that in each of the fiscal years 2005 and 2006 when the Japanese real estate market was strong, and remained strong until the first half of fiscal year 2018. However, activities in the Japanese real estate market slowed down in the second half of fiscal year 2018, and the transaction volume has remained at the same level as of the first half of fiscal year 2019.

After the governmental pension fund's adoption of the Principles of Responsible Investment in 2015, and announcement to commence investments using ESG (environmental, social and governance) index as a bench mark in 2017, there has recently been a growing emphasis on the ESG factors in the Japanese market, including the real estate market. Growing number of investors into 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 policy 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. In theory, under the provisions of the Act on Foreign Nationals' Rights in Relation to Land, 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, as 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 a qualified corporation for owning agricultural land. 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 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. The Act on Specified Joint Real Estate Ventures (ASJREV) was amended in 2013 to enable a GK-TK structure (see below) to invest in real estate without requiring the limited liability company (GK) as the operator (the TK operator) under a contractual anonymous partnership (TK) to obtain a licence or registration under the ASIREV.

i GK-TK structure

A 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 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 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 (newly introduced in 2013) 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), unless an exception applies. One of the exceptions available under the FIEA is the QII exemption, which essentially requires that:

- a* there is at least one qualified institutional investor (QII) under the FIEA among the TK investors (the requirements to qualify as a QII are now stricter after the amendment to the relevant cabinet order and cabinet office ordinance under the FIEA, which became effective on 1 March 2016);
- b* the number of non-QII TK investors (if any) is 49 or less (non-QIIs are limited to certain categories, which includes a foreign corporation, after the 1 March 2016 amendment to the relevant cabinet order and cabinet office ordinance under the FIEA, while there were no limitations imposed on non-QIIs before the amendment);
- 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 governmental authority a notification regarding the QII exemption (the requirements for the notification to be filed by the GK are now more complex, compared to the previous simpler requirements).

As noted above with respect to the relevant requirements, the requirements of the QII exemption were amended in 2016.

Another exception available under the FIEA 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 others, 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 manage 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.

ASJREV structure

Since the 2013 amendment to the ASJREV, 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. It is expected that the GK-TK structure under the amended ASJREV will enhance investment into real estate without the need to create a trust beneficial interest at the underlying real estate level. Further changes to the GK-TK structure and its requirements have been implemented with the most recent amendment to the ASJREV in 2017.

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 'specified joint real estate venture' or registered operator of '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 '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 '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 '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 advisors registered under the Real Estate Investment Advisor 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 'specified joint real estate venture' or (2) ¥100 million, in the case that the asset manager is a registered operator of 'small-scale specified joint real estate venture';

- e the agreement between the GK and the licensed operator of 'specified joint real estate venture' or registered operator of 'small-scale specified joint real estate venture' as described in (2) above 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 venture' 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 advisors registered under the Real Estate Investment Advisor 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 'specified joint real estate venture' or registered operator of '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.

ii TMK structure

A TMK incorporated under the Act on the Securitization 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, 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 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 governmental 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.

iii 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 AITEC. Under the AITEC, 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 Law

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

Under the City Planning Act, 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 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 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 Act, 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 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 3,000 m²), 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 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 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 2020.

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 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 2021, 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 2020, 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 2021.

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 2021 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 2021.

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), 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 subject 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 one or more of the following: (1) land satisfying certain requirements to be 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; and (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 2021:

- 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 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 2021, 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 (1) a building constructed before 1 January 1982 and acquired for the purpose of extension, reconstruction, repair or remodelling, or (2) 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. 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 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 to 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 An overview of the Integrated Resort Promotion Act (the IR Act)

The Integrated Resort Promotion Act was enacted on 20 July 2018 and will be implemented in the future (specific date unknown) to promote integrated resorts in Japan. The IR Act regulates the establishment and operation of complex tourist facilities comprised of casino facilities and (1) international conference centre facilities, (2) exhibition facilities, (3) tourism attraction enhancement facilities with performances that utilise Japan's tradition, culture, art and the like, (4) facilities for transporting tourists, and (5) hotel facilities and other facilities operated by private business operators ('specified complex tourist facilities'). Following the enactment of the IR Act, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) announced its plan to promulgate a basic policy (the Basic Policy), which includes specific requirements to introduce an integrated resort. The Basic Policy is expected to be promulgated in February 2020.

Business entities and authorisation

Private business operators that plan to establish and operate specified complex tourist facilities ('casino business operators') are required to obtain a licence from the casino committee, which is established pursuant to the IR Act. The casino committee will then exempt the private business operators from criminal liability with respect to the prohibition on certain types of gambling. Further, persons who intend to obtain 5 per cent or more of the voting rights or shares in a casino business operator must obtain permission from the casino committee.

Owners of sites for specified complex tourist facilities may not lease the site to casino business operators or transfer title to the sites without permission from the casino committee. Persons who own and operate casino facilities and provide these facilities to casino business operators must obtain a licence from the casino committee.

Entry restrictions

Casino business operators are required to prohibit the use of the casino facility by persons whose family members or other related persons have submitted a request that the person be prohibited from using the casino facility, and persons who are determined to have a gambling addiction and may be adversely affected if allowed to use the casino facility. Persons under the age of 20 are prohibited from entering a casino facility. Japanese nationals or foreigners who reside in Japan are prohibited from entering a casino facility more than three times over seven consecutive days, or more than 10 times over a period of 28 consecutive days. Casino business operators are required to confirm whether a visitor is prohibited from entering the casino facility.

Advertising regulations

The display of advertisements and the handing out of flyers promoting the casino business outside of the area of specified complex tourist facilities is prohibited, except for places that are designated by the ordinance as facilities for overseas visitors whose main transportation method is public transportation.

Restrictions on lending

Casino business entities are permitted to make loans to persons to play games at the casino, but this permission is in general limited only to loans to foreigners who do not reside in Japan. However, both Japanese nationals and foreigners who reside in Japan are permitted to borrow money from casino business operators if the Japanese national or foreign borrowers deposit to the account managed by the casino business operators an amount that is greater than the designated amount set forth in the rules of the casino committee.

Payment to the Treasury

Casino business operators are required to pay 15 per cent of the gross profit of their casino business to the Japanese government and another 15 per cent of the same gross profit to a designated prefecture. Casino business operators are also required to pay the amount designated by the casino committee to the Japanese government for the casino committee's operation costs.

The designated area and future schedule

Under the IR Act, specified complex tourist facilities may be constructed only in licensed areas, which are restricted to three undetermined areas. In accordance with the Basic Policy, the three licensed areas will be elected considering various factors such as whether (1) the concept of the integrated resort is definite and globally competitive; (2) the design of the integrated resort concretely expresses the concept of the integrated resort; (3) the MICE (meeting, incentive travel, convention, exhibition) facility established in the integrated resort has sufficient capacity to hold international conventions; and (4) the tourism attraction enhancement facilities provide the world's highest level of entertainment events. Certain local municipalities, including Tokyo, Chiba, Yokohama, Osaka, Wakayama, Nagoya, and Sasebo have expressed interest in submitting an application to obtain the licence, while Hokkaido, including Kushiro and Tomakomai, has decided not to submit an application. MLIT announced that the applications must be submitted from 4 January 2021 to 30 July 2021. Each of the interested local municipalities has been engaged in promotional activities to obtain the licence following the requirements stated in the proposed Basic Policy.

ii Real estate crowdfunding

Crowdfunding for investment into real estate is emerging in Japan.

The most popular structure takes the form of debt-based crowdfunding, where crowdfunding investors make TK investments into a debt arrangement. In this structure, the TK investments are made into the lending business (subject of the crowdfunding investments) of the TK operator who makes a loan secured by the subject real estate. The operator of this crowdfunding platform (i.e., the distributor of the TK investments, which can be the TK operator itself) must be a registered operator of 'type II financial instruments business' under the FIEA, which is the registration required to handle the distribution of the TK investment. The lender as the TK operator is typically required to be registered as a money lender under the Money Lending Business Act, which regulates lending businesses.

Real estate crowdfunding may take another form of fund-based crowdfunding. The investors in this form of crowdfunding make TK investments into the owner of the subject real estate or trust beneficial interest in real estate as the TK operator.

Where the TK operator is the owner of a trust beneficial interest in real estate, this fund-based real estate crowdfunding is regulated under the FIEA, and, therefore, must be structured to comply with the FIEA. The operator of this crowdfunding platform (i.e., the distributor of the TK investments, which can be the TK operator itself) must be a registered operator of 'type II financial instruments business' under the FIEA. The TK operator (which is typically an SPC in the form of a GK) typically delegates the management of its trust beneficial interests in real estate to a discretionary investment manager registered under the FIEA. In 2014, the rules on crowdfunding under the FIEA was introduced through its amendment (such as the rules requiring due diligence by the platform operator).

If the TK operator is the owner of real estate, rather than trust beneficial interest in real estate, the ASJREV is the relevant regulations contributing to the formation of framework of this crowdfunding arrangement. The TK operator, and the operator of this crowdfunding platform (i.e., the distributor of the TK investments, which can be the TK operator itself), must, in principle, be a licensed operator of 'specified joint real estate venture' or registered operator of 'small-scale specified joint real estate venture' under the ASJREV. The exception is the GK-TK structure with the GK as the operator of a 'special venture' under the ASJREV which must submit a notification to the authority as the operator. The rules on the

crowdfunding structure under the ASJREV were introduced through its amendment in 2017 (such as the rules on online delivery of statutory explanatory documents to the crowdfunding investors). The rules on this real estate crowdfunding has been further developed by the subsequent amendment to the regulations under the ASJREV and the issuance of the regulators' guidelines both in 2019.

iii Real estate security token offering

Recent developments in distributed ledger technology have attracted attention to security token offering (STO), including those involving real estate tokenisation (real estate STO). STO is expected to be utilised as a more cost-efficient form of securities offering. STO is generally understood as offering of security tokens (or digital securities), namely securities represented by digital tokens that are regulated as 'securities' under the FIEA. Real estate STO is expected to be a new digitalised form of real estate securitisation.

The amendment to the FIEA in 2019 has introduced a new regulatory framework for certain tokenised securities, to be effective by June 2020 at the latest. Under the amended FIEA, a new regulatory category of securities will be created to cover tokenised TK investments and certain other securities that will be subject to more rigid regulations equivalent to those applicable to shares and bonds (i.e., disclosure requirements on the issuer of securities for a public offering, and licensing requirements for dealers, brokers, distributors and underwriters of securities). If a typical GK-TK structure investing into trust beneficial interest in real estate is utilised for real estate STO, the tokenised TK investments in the STO will be subject to the new regulatory framework for tokenised securities under the 2019 amendment to the FIEA. This framework of regulations under the amended FIEA would be the basis when creating the legal structural framework for the real estate STO. Players who are interested in this new area of real estate STO are waiting for the Financial Services Agency to propose detailed rules to implement regulations on tokenised securities under the 2019 amendment to the FIEA.

VIII OUTLOOK AND CONCLUSIONS

Since the IR Act was enacted and MLIT announced its plan to promulgate the Basic Policy, according to media reports, numerous developers and operation companies, including foreign companies, have actively been engaged in marketing activities to the national and local governments in Japan with respect to the construction and operation of specified complex tourist facilities. The market for the specified complex tourist facilities would be a new frontier for real estate development in Japan. New trends in the real estate crowdfunding and real estate STO are also emerging. While it is uncertain to what extent these new areas will become active, the activities in those areas may bring about an innovation to traditional types of real estate transactions. Recent emphasis on the ESG factors in the real estate market is another factor that may lead to change in what has been prevalent in the real estate industry. After the 2013–2018 peak of the transaction volume of Japanese real estate, the Japanese real estate market now displays a wide array of potential opportunities in various new areas and concepts, which marks the start of a new chapter in the Japanese real estate industry.

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.

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 counsel with expertise in transactions involving the acquisition of, investment into, and financing of Japanese real estate assets, as well as fintech business such as crowdfunding and token business. He was admitted to practise in Japan in 2007 and in New York in 2018.

YUJIN GEN

Nishimura & Asahi

Yujin Gen 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 2015.

YUTO TOKORO

Nishimura & Asahi

Yuto Tokoro 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 2017.

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

an LBR business

ISBN 978-1-83862-496-5