

The International Comparative Legal Guide to: **Real Estate 2007**

A practical insight to cross-border Real Estate work



Published by Global Legal Group, with contributions from:

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1 Real Estate Law

1.1 Please briefly describe the main laws that govern real estate in your country. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1

In Japan, it is mainly the Civil Code that governs transactions of real estate. Real estate property rights are subject to the law of property rights in Book 2 of the Civil Code. This law regulates ownership, joint ownership, assignment and other relevant matters. Real estate contract transactions are subject to the law of contracts in Book 3 of the Civil Code. This law regulates the formation of contracts, the right and duties of the parties and other relevant matters.

Other laws relevant to real estate

1 The Commercial Code

The Commercial Code has several provisions on real estate transactions between companies.

2 The Land Lease and House Lease Law

The Land Lease and House Lease Law governs the relationship between the landlord and the tenant. This law applies to leases of business premises as well as residential.

3 The Law of Real Estate Registration

The Law of Real Estate Registration governs the registration process of real estate.

4 The Law for Condominiums (*Kubunshoyuho*)

The Law for Condominiums governs the relationship between unit owners of a building.

5 The Real Estate Transactions Business Law (*Takuchitatemonorihikigyoho*)

The Real Estate Transactions Business Law governs the brokerage real estate business.

6 The Building Standard Law

The Building Standard Law provides standards concerning the construction of buildings.

7 The City Planning Law

The City Planning Law regulates land development and zonings.

1.2 What is the impact (if any) on real estate of local common law in your country?

Under the Constitution, local governments are authorised to enact local regulations within the scope of the law, and some of these

local regulations substantially affect use of land.

1.3 Are international laws relevant to real estate in your country? Please ignore EU legislation enacted locally in EU countries.

There are no international laws relevant to real estate in Japan in any material respect.

2 Ownership

2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

In general, there are no legal restrictions on the ownership of real estate by particular classes of persons. However, it should be noted that under the Foreign Exchange and Foreign Trade Law, non-residents are in certain cases required to report real estate transactions to the relevant governmental entity after such non-residents have acquired real estate.

3 Real Estate Rights

3.1 What are the types of rights over land recognised in your country. Are any of them purely contractual between the parties?

Ownership

Under Japanese law, land and buildings are considered to be separate and independent real properties and ownership of land and the building which stands on such land can belong to different persons. Accordingly, if A owns land and B owns a building on the land, it is necessary that B lease the land or obtain the superficies (see below) in order to secure his ownership of the building. If B leases the land, this lease is called a land lease.

Ownership is defined as a right to use, make a profit from and dispose of real estate under the Civil Code. Ownership is categorised as a real right. A “real right” is a right that a person has over a thing and is distinguished from a “right of obligation”, which arises out of the relationships between persons. Real rights can be claimed against any other persons after their perfection by registration; hence, in this regard, ownership is not purely contractual.

Under Japanese law, ownership can be held by several persons. Such ownership is called joint ownership (*kyoyu*) and is subject to

the Civil Code. Unit ownership (kubunshoyu) of a building under condominium ownership is subject to the Law for Condominiums as well as the Civil Code.

Other property rights to use another person's real estate

1 Superficies (*Chijyoken*)

Superficies is a property right to use another person's land for the purpose of the buildings and other structures thereon. Superficies can be created for installations underground or above the land. Superficies is not purely contractual due to its character as a property right.

2 Servitudes (*Chiekiken*)

Servitudes is defined as a property right to use another person's land for the convenience and benefit of one's own land (e.g. right of way). Servitude is not purely contractual due to its character as a property right as well.

Leases

1 Lease with rents (*Chintaishaku*)

A lease is categorised as a contractual right and obligation under the Civil Code. However, under the Land Lease and House Lease Law, (i) a tenant of the land who owns a registered building on the land may assert his right against a new owner of the land; and (ii) a tenant of the building who was given possession of the building may assert his right against a new owner of the building. Hence, in practice, a lease is not purely contractual.

2 Lease without consideration (*Shiyotaishaku*)

The Land Lease and House Lease Law does not apply to leases without consideration. Hence, under a lease without consideration a lessee can only make claims against the lessor.

4 System of Registration

4.1 Is all land in your country required to be registered? What land (or rights) are unregistered?

Almost all land is already registered except for government property. With regard to buildings, buildings are required to be registered under the Law of Real Estate Registration but in practice some buildings remain unregistered until it becomes necessary to perfect the ownership against a third party (e.g. at the time of the purchase of the building).

4.2 Is there a state guarantee of title? What does it guarantee?

There is no state guarantee of title. However, under case law, any interests which are registered are deemed to be true and the burden of proof is imposed on the party who argues that the registered interests are null and void.

4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

No rights over land are compulsorily registrable. It should be noted that real estate transactions take effect upon the mutual agreement of the parties and no formalities, including registration, are required. However, the holder of a real estate interest cannot assert its interest in real estate against third parties if such interest is not registered. Therefore, in practice, interests in real estate are likely to be registered.

4.4 What rights in land are not required to be registered?

See the answer to question 4.3 above.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

There is no probationary period following first registration and there are no different classes of title on first registration.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Ownership is transferred to the buyer in accordance with the contract. In practice, sale and purchase agreements normally provide that ownership is transferred to the buyer once the buyer makes full payment of the purchase price.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

As we mentioned in question 4.3, one can assert one's right to real estate against third parties when that right is registered, thus obtaining priority for one's interests in that real estate over such third parties.

5 The Registry / Registries

5.1 How many real estate registries operate in your country? If more than one please specify their differing rules and requirements.

One real estate registry operates, called the Legal Affairs Bureau.

5.2 Can information on real estate ownership be accessed from the registry on line (electronically)?

In general, information on real estate ownership can be accessed online. However, the online registration application is not accepted at all offices of the Legal Affairs Bureau (the number of offices that make the online application process available is limited).

5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Under the State Compensation Law, compensation can be claimed from the registry if the relevant officials make a mistake in the course of registration, either negligently or intentionally.

5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

There are no restrictions on public access to the registry. However, it should be noted that one should examine written agreements in order to obtain all of the information one might need because the

details of interests over real estate, including leases or mortgages, do not necessarily fall within the scope of registrable matters.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your country? Please briefly describe their roles and/or duties.

- a) Selling and purchasing agents (or realtors)
- The real estate broker, named “*takuchitatemontorihikigyosha*”, would normally be involved in real estate transactions in Japan. He makes it his business to act as (i) an intermediary between the seller and buyer; or (ii) an agent of the seller or buyer. Governmental approval is required to engage in such business as a broker. A real estate broker owes a duty of care to his buyer or seller client under the Real Estate Transactions Business Law, including, without limitations, the duty to disclose important information about the subject property. It should be noted that a real estate broker may work for both his buyer client and his seller client simultaneously when he acts as an intermediary and that, in such cases, he may receive fees from both parties.
- b) Lawyers
- Lawyers would normally be involved in real estate transactions which are complicated and sizable in amount.
- c) Notaries
- It is unusual for notaries to be involved in real estate transactions.
- d) Others
- Judicial Scriveners (*shihoushosi*) are involved in almost all real estate transactions. They are professionals of the registry and it is commonly understood that one cannot complete the registration process without their involvement.

6.2 How and on what basis are these persons remunerated?

The upper limit of compensation for a real estate broker is (i) 6% of the amount of a transaction if he acts as an agent; and (ii) 3% of the amount of a transaction if he acts as an intermediary under the Real Estate Transactions Business Law. In the case of (ii), he can be compensated by both the seller and the buyer if both are his clients, hence compensation amounts to 6%.

With regard to other persons, it depends on the person as to how and on what basis they are remunerated.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

The transfer of real estate takes effect upon the mutual agreement of the parties and no formalities are needed.

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

In general, the seller is not under a duty of disclosure. However, it should be noted that, under the Civil Code, the seller is liable for any latent defects, latent encumbrances and loss of ownership (hereinafter collectively referred to as the “Defects”), even if there are no warranties to cover the Defects. The buyer may seek damages for the Defects and if, as a result of the Defects, the buyer cannot attain the purpose for which he purchased the property, he may also cancel the agreement.

7.3 Can the seller be liable to the buyer for misrepresentation?

If the seller induces the buyer to enter into a real estate transaction by fraudulent misrepresentation, the buyer may cancel such transaction and/or seek damages under the Civil Code.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

As we mentioned in question 7.2, the seller is liable for the Defects even if there are no warranties to cover the Defects. Hence, in practice, warranties normally cover those matters about which the buyer has special concerns. The seller is liable for any misrepresentation. It depends on the parties as to whether warranties are a substitute for the buyer carrying out his own due diligence.

7.5 Does the seller warrant its ownership in any way? Please give details.

As we mentioned in question 7.2, the seller is liable for defects or loss of ownership even if this is not expressly provided for in the agreement.

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

In general, the buyer has no liabilities in addition to paying the sale price.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

In general, under the Money Lending Business Law (*kashikingyoho*), a grant from the relevant governmental authorities must be obtained in order to engage in the money lending business, including the lending of money to finance real estate. However, there are no regulations concerning the lending of money specifically to finance real estate.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The main method is a mortgage on the real estate under the Civil Code. The base mortgage (*neteito*) is also a popular method of protecting a lender from default by the borrower. The base mortgage secures the unspecified obligation of the borrower; however the amount to be secured under the base mortgage is limited to the specified amount (*kyokudogaku*) prescribed under the mortgage agreement.

8.3 What minimum formalities are required for real estate lending?

Theoretically, no formalities are required for real estate lending; however, in practice, a written form is usually used in real estate lending transactions.

8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

A real estate lender is protected from such claims by the registration of the mortgage. As we mentioned in question 4.3, the lender can assert its mortgage interest on the real estate against third parties, including other creditors' interests over such real estate, if the mortgage is registered. It should be noted that the priority of the various mortgages on the real estate is based on the order of registration.

In the process of a borrower's bankruptcy proceedings, a lender may assert its mortgage against the trustee and other creditors. However, in the process of a borrower's company reorganisation (*kaishakosei*), a lender's mortgage may be modified in accordance with the adopted reorganisation plan.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The seller is an individual

1 Income tax and Individual inhabitant tax

If the seller is an individual, income tax and individual inhabitant tax is levied on the seller. The tax base of the income tax is broken into two categories: the long-term capital gain and the short-term capital gain. The long-term capital gain is derived from real estate owned for more than five years and the short-term capital gain is any capital gain other than the long-term capital gain. In the case of the long-term capital gain, the tax rate is 20% (15% income tax and 5% individual inhabitant tax). In the case of the short-term capital gain, the tax rate is 39% (30% income tax and 9% individual inhabitant tax).

2 Stamp tax

A stamp tax is levied on the parties to the contract. This tax can be up to 600,000 yen.

3 Registration and licence tax

A registration and licence tax is levied on the applicant for registration. This tax rate is 2% of the tax base of the value as recorded in the tax rolls (approximately 70% of the market value if the property is land). It should be noted that a tax rate of 1% shall apply to the applicant for registration in relation to the transfer of land which occurs between April 1, 2006 and March 31, 2008.

4 Real property acquisition tax

A real property acquisition tax is levied on the person acquiring the subject property. This tax rate is 4% of the tax base of the value as recorded in the tax rolls. It should be noted that a tax rate of 3% shall apply to the person acquiring the land and/or the residence between April 1, 2006 and March 31, 2009.

The seller is a corporation

1 Corporation tax, Corporate inhabitant tax and Enterprise tax

Corporation taxes, corporate inhabitant taxes and enterprise taxes are levied on net income. The total amount of these tax rates is about 40%.

2 Stamp tax, Registration and licence tax, and Real property acquisition tax

A stamp tax, registration and licence tax, and real property acquisition tax, as we mentioned above, may also apply to the transfer of real estate.

9.2 When is the transfer tax paid?

Income taxes and individual inhabitant taxes become due on 15 March of the year following the transfer of the real asset.

Corporation taxes, corporate inhabitant taxes and enterprise taxes become due within two months after the end of the corporation's business year.

The stamp tax is paid by affixing a stamp on the documents. Such stamps are sold in post offices. The registration and licence tax is paid on the occasion of an entry. The real property acquisition tax is paid after the transfer by the date specified by the tax bureau.

9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

A consumption tax is applied to the transfer of the ownership of a building. The tax rate is 5% (4% national consumption tax and 1% local consumption tax). A taxpayer is an enterprise which transfers taxable assets; however, the tax amount is normally added to the price of the assets and is ultimately borne by consumers. The transfer of land is not taxable and the lease of residential buildings and land is not taxable.

9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

As we mentioned in question 9.1, the income tax, individual inhabitant tax, corporation tax, corporate inhabitant tax and enterprise tax may be payable by the seller on the disposal of a property. A registration and licence tax is payable by the seller and the buyer under the law. However, it should be noted that the parties always agree in practice that such tax be borne fully by the buyer.

9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Theoretically, there is no difference. If the ownership of a company ("Y") owning real estate is transferred by a parent company ("X"), the corporation tax, corporate inhabitant tax and enterprise tax are levied on X on the basis of the capital gain that results from the transfer of ownership. Capital gains that result from the transfer of ownership by X are theoretically equal to the capital gains that result from the transfer of real estate by Y if Y has no assets other

than the real estate. Furthermore, there is no difference theoretically if X is an individual, provided that Y has no assets other than the real estate.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

The Land Lease and House Lease Law (hereinafter referred to as the "Law" in this section 10) and the Civil Code regulate matters concerning the lease of real estate. The Law applies to land leases for owning buildings and building leases, including office buildings as well as residential buildings. The Civil Code governs the lease of real estate for the purpose of any temporary use to which the Law does not apply, and land leases for purposes other than owning buildings.

10.2 What types of business lease exist?

Business premises leases are categorised as follows:

Land lease for owning a building

1 Ordinary land lease

The Law specifically regulates matters concerning the period, validity, renewal and legal proceedings related to changes in conditions of the ordinary land lease for owning a building. It should be noted that under the Law, an ordinary land lease for owning a building is automatically renewed and the landlord cannot object to such renewal without a justifiable reason. Such justifiable reasons are not easily found. Hence, under an ordinary land lease, the landlord's refusal to renew the lease is subject to strict control.

2 Fixed-term land lease

A fixed-term land lease for owning a building is not renewable under the Law. The fixed-term land lease was introduced because of concerns that the strict controls over the landlord's refusal to renew the lease could inhibit the effective use of real estate. There are three types of fixed-term land lease: (i) the general fixed-term land lease available for both residential purposes and businesses; (ii) the land lease with a special agreement on building assignments; and (iii) the fixed-term land lease for businesses under the Law.

Building lease

1 Ordinary building lease

Under the Law, the renewal of an ordinary building lease cannot be rejected by the landlord without a justifiable reason, which is not easily found.

2 Fixed-term building lease

A fixed-term building lease is not renewable under the Law.

10.3 What are the typical provisions for leases of business premises in your country regarding: a) length of term; b) rent increases; c) tenant's right to sell or sub-lease; d) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and e) repairs?

a) Length of term

Land lease for owning a building

1 Ordinary land lease

Under the Law, the term of the ordinary land lease for owning a building shall be 30 years, and when a term longer than 30 years has been provided, such term shall be effective.

2 Fixed-term land lease

Under the Law, the term of the general fixed-term land lease for owning a building shall be more than 50 years. With regard to a lease with a special agreement on building assignments, the right to assign the building to the landlord at a reasonable consideration in order to terminate the ordinary lease can be exercised more than 30 years after the commencement of the lease. With regard to the fixed-term land lease for businesses, the term of the lease shall be 10 years or more but no more than 20 years.

Building lease

1 Ordinary building lease

The term of the ordinary building lease depends on the agreement.

2 Fixed-term building lease

The term of the fixed-term building lease depends on the agreement.

b) Rent increases

Under the Law, if rent becomes inadequate (especially if it differs significantly from the market rent), the landlord or tenant may request an increase or decrease in the amount of rent. This applies to both land leases for owning buildings and building leases. The right to request an increase can be modified in the lease agreement. It should be noted that the right to request a decrease cannot be excluded from the agreement, except in the case of fixed-term building leases. The provisions with respect to rent increases or decreases are prepared taking into consideration the above legal restrictions.

c) Tenant's right to sell or sub-lease

The lease agreement usually prohibits the tenant from assigning the lease or sub-leasing without the consent of the landlord.

d) (i) Change of control of the tenant

The lease agreement usually does not prohibit the change of control of the tenant.

d) (ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)

The lease agreement usually prohibits the transfer of the lease as a result of a corporate restructuring except in the case of a merger.

e) Repairs

The Civil Code provides that the landlord is liable for all repairs necessary for the use of the premises, and some lease agreements provide for this as well. However, if the parties agree in a way that differs from this provision, their agreement prevails over such provision under the Civil Code. Usually, the lease agreement stipulates that the landlord is required to make repairs.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

If the landlord is an individual, income tax and individual inhabitant tax are levied on the landlord. The tax rate of such tax is progressive.

If the landlord is a corporation, corporation taxes, corporate inhabitant taxes and enterprise taxes are levied on the landlord.

A consumption tax is applied to business building leases.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Cancellation

Under the Civil Code, in the event that a party breaches a lease

agreement, the other party can cancel that lease agreement provided that the landlord has required the tenant to cure the breach within a reasonable period if such cure is possible. However, under the case law, the landlord cannot cancel a lease agreement if a tenant can establish the existence of any special circumstance under which there still remains a relationship of mutual trust between the landlord and the tenant even after the breach. It should be noted that under case law, non-payment of rent may entitle a landlord to terminate the lease, because such non-payment may destroy a relationship of mutual trust between the landlord and the tenant.

Renewal

As we mentioned in question 10.1, under the Law, a landlord of an ordinary lease cannot object to a renewal without a justifiable reason if such renewal is requested by the tenant. Such justifiable reasons are not easily found. Hence, under an ordinary lease, a landlord's refusal to renew the lease is under strict controls. It should be noted that an offer of compensation by a landlord shall be considered when the court finds that there is a justifiable reason. Hence, in practice, if a landlord desires to reject the renewal of a lease in any way, it is likely that the landlord will make such an offer.

On the contrary, a fixed-term lease is not renewable and terminates upon the expiration of the lease term.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?

No, the landlord and/or the tenant of a business lease do not cease to be liable for their respective obligations under the lease once they have sold their interests, because any obligations arising out of the lease prior to the transfer of the lease cannot be assigned without any specific agreement. They can be responsible in respect of pre-sale non-compliance.

11 Zoning and Environmental Issues

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land and buildings? Please briefly describe them and include environmental laws.

Zoning

The City Planning Law is the main law which governs real property development and zonings. In general, in urbanisation control areas (*shigaikachouseikuiki*), the development of land is subject to strict control and in areas designated for urbanisation (*shigaikakuiki*), development may be allowed if such development satisfies the requirements for development under the City Planning Law.

The Building Standard Law regulates the land use of the designated area, the ratio of the total floor area to the site area (*yosekiritsu*), the ratio of the building area to the site area of the building (*kenpeiritsu*), and relevant matters.

Environmental Law

The Land Contamination Measure Law is the main environmental law concerning land. Under this Law, if the land is designated as contaminated, the prefectural governor may order the owner of such land to take appropriate measures, including the clean up of such land.

It should be noted that the owners of buildings are sometimes required to take appropriate measures to remove the health risks to

inhabitants in buildings associated with the presence of asbestos.

11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

The city, town and village control land/building use and/or occupation, and environmental matters, in accordance with the laws and local regulations. The buyers can obtain information concerning these matters at the city, town and village.

11.3 What main permits or licences are required for building works and/or the use of real estate?

In general, confirmations under the Building Standard Law are required for building works and the use of real estate. In the case of land development, permits under the City Planning Law and relevant laws are required. Agricultural Law governs the use of farmland.

11.4 Are building/use permits and licences commonly obtained in your country? Can implied permission be obtained in any way (eg by long use)?

A building/use confirmation can be obtained if the building/use satisfies the requirements under the relevant law. In cases where one seeks more benefits for the building/use (e.g., a greater ratio of total floor area to site area), special permits are necessary and such permits are not necessarily easily obtained. Implied permission cannot be obtained.

11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?

It depends on each case. It should be noted that under the Building Standard Law, the building official shall give notice that the building plan conforms to the regulations within a specific period depending on the nature of the building. In addition, qualified private citizens may give confirmations for the building/use. This new procedure was recently introduced to prompt the confirmation process.

11.6 In what circumstances (if any) is environmental clean up ever mandatory?

Under the Land Contamination Measure Law, in the case of (i) the abolishment of manufacturing factories using certain hazardous materials; or (ii) a prefectural governor's order, which may be delivered if the prefectural governor decides that land contamination may injure the health of the inhabitants, land surveys shall be implemented. If the results of such land surveys do not satisfy the relevant regulations, the prefectural governor can designate such land as a contaminated area. The prefectural governor can order the owner of the land to clean up such land if it is located within an area designated as contaminated.

12 General

12.1 Are there any current proposals for significant reform of real estate law in your country - please give details.

The City Planning Law has been amended such that certain large-scale developments (e.g. the construction of shopping malls) are generally

prohibited in urbanisation control areas (*shigaikachouseikuiki*). The foundation for this amendment is a desire to prevent the commercial decline of city centres caused by big shopping malls in suburban areas. This amendment will be effective on November 30, 2009.

12.2 Date at which law is stated.

January 2007.



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