
THE REAL ESTATE LAW REVIEW

SECOND EDITION

EDITOR
DAVID WATERFIELD

LAW BUSINESS RESEARCH

THE REAL ESTATE LAW REVIEW

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Real Estate Law Review, 2nd edition
(published in April 2013 – editor David Waterfield).

For further information please email
Adam.Sargent@lbresearch.com

THE REAL ESTATE LAW REVIEW

Second Edition

Editor
DAVID WATERFIELD

LAW BUSINESS RESEARCH LTD

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

www.TheLawReviews.co.uk

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Jonathan Allen

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2013 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. 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 March 2013, 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 978-1-907606-58-8

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

ACKNOWLEDGEMENTS

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

ADVOKATFIRMAN VINGE KB

ALMEIDA BUGELLI E VALENÇA ADVOGADOS ASSOCIADOS

BALCIOĞLU SELÇUK AKMAN KEKI

BONELLI EREDE PAPPALARDO

DE BRAUW BLACKSTONE WESTBROEK NV

DE PARDIEU BROCAS MAFFEI

DRYLLERAKIS & ASSOCIATES

ENS (EDWARD NATHAN SONNENBERGS)

G. ELIAS & CO

HENGELER MUELLER

KPD CONSULTING LAW FIRM

KROGERUS ATTORNEYS LTD

LEE AND LI, ATTORNEYS-AT-LAW

LEKS & CO

LENZ & STAEHELIN

LIEDEKERKE WOLTERS WAELEBROECK KIRKPATRICK

LOYENS & LOEFF, AVOCATS À LA COUR

MASON HAYES & CURRAN

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

NAGY ÉS TRÓCSÁNYI ÜGYVÉDI IRODA

NISHIMURA & ASAHI

PAPADOPOULOS, LYCOURGOS & CO LLC

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

SCHÖNHERR ATTORNEYS AT LAW

SCHÖNHERR SI ASOCIATII SCA

SHEPHERD AND WEDDERBURN LLP

SHIN & KIM

SLAUGHTER AND MAY

SNR DENTON & CO

URÍA MENÉNDEZ

CONTENTS

Editor's Prefacevii
	<i>David Waterfield</i>
Chapter 1	AUSTRIA1
	<i>Peter Madl</i>
Chapter 2	BELGIUM.....12
	<i>Yves Delacroix</i>
Chapter 3	BRAZIL25
	<i>Marcelo José Lomba Valença and Rodrigo Bottamedi Ratto</i>
Chapter 4	CYPRUS36
	<i>Nicolas Papaconstantinou</i>
Chapter 5	CZECH REPUBLIC..... 47
	<i>Martin Kubánek and Pavla Šlapáková</i>
Chapter 6	ENGLAND & WALES 58
	<i>David Waterfield</i>
Chapter 7	FINLAND70
	<i>Samuli Palin and Rami Salonen</i>
Chapter 8	FRANCE 79
	<i>Pierre Gebarowski and Guillaume Rossignol</i>
Chapter 9	GERMANY91
	<i>Ingo Klöcker</i>
Chapter 10	GREECE101
	<i>Paraskevi A Anargyrou and Stella G Yannika</i>

Chapter 11	HUNGARY 111 <i>Péter Berethalmi and Kata Molnár</i>
Chapter 12	INDONESIA..... 120 <i>Eddy Marek Leks</i>
Chapter 13	IRELAND..... 131 <i>Kevin Hoy</i>
Chapter 14	ITALY 140 <i>Alessandro Balp</i>
Chapter 15	JAPAN 151 <i>Norio Maeda, Tomohiro Kandori and Yasuo Asami</i>
Chapter 16	KOREA..... 165 <i>Kyung Don Lee, Robert C Young and Eun Nyung Lee</i>
Chapter 17	LUXEMBOURG 181 <i>Véronique Hoffeld and Marc Meyers</i>
Chapter 18	NETHERLANDS 191 <i>Annemieke Wessels, Maarten Tinnemans and Max van Drunen</i>
Chapter 19	NIGERIA.....203 <i>Gbolahan Elias, Lynda Chinweokwu and Onyinye Chukwu</i>
Chapter 20	POLAND 209 <i>Paweł Halwa and Michał Gruca</i>
Chapter 21	PORTUGAL..... 218 <i>Filipa Arantes Pedroso</i>
Chapter 22	QATAR..... 227 <i>Louise Wall</i>

Chapter 23	ROMANIA	242
	<i>Silvia Popa and Ionuț Sava</i>	
Chapter 24	SCOTLAND	250
	<i>Michael Henderson and Nick Ryden</i>	
Chapter 25	SOUTH AFRICA.....	265
	<i>Andrew Bembridge</i>	
Chapter 26	SPAIN	274
	<i>Diego Armero and Rodrigo Peruyero</i>	
Chapter 27	SWEDEN	285
	<i>Patrick Forslund and Niclas Winnberg</i>	
Chapter 28	SWITZERLAND	294
	<i>Andreas Röheli and Cécile Berger Meyer</i>	
Chapter 29	TAIWAN	305
	<i>Yi-Jiun Su and Doris Lin</i>	
Chapter 30	TURKEY	315
	<i>Barlas Balçioğlu and Kaan Saadetlioğlu</i>	
Chapter 31	UKRAINE	326
	<i>Vladislav Kysil</i>	
Chapter 32	UNITED ARAB EMIRATES.....	336
	<i>Ibrahim Elsadig and Joe Carroll</i>	
Chapter 33	UNITED STATES	349
	<i>Meredith J Kane</i>	
Appendix 1	ABOUT THE AUTHORS.....	363
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...	379

EDITOR'S PREFACE

Following the success of the first edition of *The Real Estate Law Review*, the second edition now extends to some 33 jurisdictions and we are fortunate, once again, to have the benefit of incisive news and commentary from distinguished legal practitioners in each jurisdiction. Each chapter has been updated to focus on key developments in the relevant jurisdiction and their potential impact on the global real estate market. This edition continues to provide an up-to-date picture of real estate activity in each jurisdiction and, therefore, the global real estate market.

International economic and political instability, in particular the eurozone crisis and US fiscal cliff, continues to have a significant impact on the international real estate investment market as investors seek value and a safe haven for their cash. The ongoing scarcity of debt finance also continues to constrain the wider investment market. Although new sources of funding have started to appear, the transition from a dependence on bank lending has been gradual. The challenging economic climate seems likely to continue and practitioners and their clients will need to adapt to the challenges it brings and the investment trends and opportunities that emerge.

The globalisation of the real estate market is a continuing theme that is likely to become more significant to real estate practitioners and their clients with each passing year. The second edition of *The Real Estate Law Review* seeks to build on the achievement of the first by developing an understanding of the law and practice in key jurisdictions while helping to cultivate an overview of the global real estate market.

Once again, I wish to express my deep and sincere thanks to all my distinguished colleagues who have contributed to this edition. I would also like to thank Gideon Robertson and his publishing team for their tireless work in coordinating the contributions from the various countries around the world.

David Waterfield
Slaughter and May
London
March 2013

Chapter 16

KOREA

Kyung Don Lee, Robert C Young and Eun Nyung Lee¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

The Korean legal system is based on the civil (codified) law similar to that of Germany, France and Japan, with some influence from the American legal system in certain areas, such as the Korean bankruptcy and rehabilitation laws. Ownership under Korean law is based on complete ownership (similar to fee simple absolute under common law), which entitles the owner to do whatever he or she wishes to do with the property, including right to exclusive possession, use, encumber and transfer. Korean law does not recognise any other possessory real property interests such as a defeasible fee simple estate, fee tail, life estate or future interest in land. Real estate can also be owned by one or more parties in Korea. Generally, co-ownerships are held under the form of a *gong-yu*, *hap-yu*, or *chong-yu*,² and in the case of any purchase of property held under a co-ownership, the purchaser should ensure that the seller has, or has otherwise secured, authority to dispose of the property or his or her interest therein.

1 Kyung Don Lee and Eun Nyung Lee are partners and Robert C Young is a senior foreign attorney at Shin & Kim.

2 The most common form of co-ownership in Korea is the *gong-yu*, which is similar to the common law concept of tenancy in common, where two or more persons are owners of undivided (but in some cases, divided) interests in the property (such interests are indicated as ratios to the whole property), with each co-owner holding an estate in the property by separate and distinct titles but with unity in the possession, use and right to the whole property in proportion to their respective interest in the property. *Hap-yu* is ownership of property through a partnership that is not a recognised legal entity, but this is rarely used. *Chong-yu* is ownership by members of a group (which is not a recognised legal entity), such as a religious organisation.

Under Korean law, real property consists of land and buildings, which are considered separate real property. The relevant units used to measure ownership of land and buildings are *pil-gee* and *dong* (which is equivalent to one building structure), respectively. In principle, potential buyers are not allowed to acquire interests that are smaller than one *pil-gee* or one *dong* unless a building is deemed an aggregate building³ and the *dong* has been divided into several sections that are subject to independent use or ownership.

ii System of registration

Korea has a dual registration system for real property, consisting of a land registry and building registry. Ownership interests must be registered under the applicable registries because land and buildings thereon are considered separate real property.

If a person wishes to acquire an ownership interest or establish a security interest, such person must register relevant documents with the appropriate registry office to perfect the transfer of title (except where it arises by operation of law) or to establish a security interest. The priority order of the security rights established on the real property will depend on the order of the registration date.

The registration system is governed by the courts and is managed by the registration division of the court administration department at the Supreme Court. The registry may be viewed on, and printed from, the website of the Supreme Court. An entry is made in the register after administrative procedures are completed. To avoid fraud or abuse, the entry procedure is guarded by certain protective measures, for example only holders of the relevant property identification number and password are allowed to enter any change in information. However, there is no strict formality, such as executing a sales or transfer deed before a notary public, to transfer title or make any other type of entry into the register unlike other jurisdictions that have adopted a stricter system. Therefore, while registration in the real property registry creates a strong presumptive evidence of valid ownership, it is not conclusive.⁴

3 An aggregate building is a building that is structurally divided so that the divided sections (strata titles) can be independently used or owned (Article 1 of the Act on the Ownership and Management of Aggregate Buildings). The aggregate building and its divided sections must be separately registered before any transactions involving its use or ownership can be legally effected.

4 Under Korean laws, registration in the real property registry is strong presumptive evidence of ownership. However, there are some inherent limitations to verifying ownership under the Korean recording system and should there be any material defect in the chain of title for a certain parcel of real property, the right of the current title holder may be challenged. In order to avoid purchasing a property with a defect in the chain of title, the entire chain of title needs to be checked. Even if there is any defect in the chain of title of the property, anyone who (1) has been registered as an owner of the property for at least ten years and (2) has openly and uninterruptedly occupied such property for at least ten years in a way that a real owner would occupy its property will be deemed to have had valid title to the property under the Korean Civil Code.

iii Choice of law

The main bodies of law governing real estate transactions are the Civil Code, the Commercial Code, the Act on the Ownership and Management of Aggregate Buildings and the Real Estate Registration Act. Depending on the nature and circumstances of the transaction, laws that govern permits, zoning and approvals, such as the Building Act and the National Land Planning Act, or laws that govern qualifications of the buyer, such as the Foreigner's Land Acquisition Act, the Foreign Investment Promotion Act and the Foreign Exchange Act, may also apply.

In special cases, the real estate transaction may be subject to the Industrial Complex Act, the Act on Free Economic Zones, the Protection of Military Bases and Installations Act and the Farmland Act.

II OVERVIEW OF REAL ESTATE ACTIVITY

i Real estate funds

In 2004, real estate funds ('REFs') were introduced in Korea after certain amendments were made to the Indirect Investment Asset Management Business Act. Many investors embraced the concept of REFs and began widely using them as investment vehicles for real estate transactions. Private REFs are especially popular since only one or more persons are required for the formation of the REF. However, the simplicity of forming a private REF is currently under review as proposed amendments to the Financial Investment Services and Capital Markets Act will require two or more persons for establishment if passed by the legislature.

The chart below shows that the number of REFs has been steadily increasing for the past five years mostly because of the increase in private REFs.

	<i>Dec 2008</i>	<i>Dec 2009</i>	<i>Dec 2010</i>	<i>Dec 2011</i>	<i>Nov 2012</i>
<i>Public offer*</i>	11,377	8,560	8,915	8,512	10,527
<i>Private offer*</i>	77,525	107,028	132,398	155,783	184,017
<i>Total*</i>	88,902	115,588	141,313	164,294	194,544
<i>No. of REFs</i>	252	298	317	342	354

(Source: Korea Financial Investment Association; * = KRW100 million.)

ii Real estate investment trusts

Real estate investment trusts ('REITs')⁵ have become one of the more widely used real estate investment vehicles, as shown in the chart below. Recently, REITs have become particularly popular in projects involving the development of 'officetels' (which is a multipurpose building with residential and commercial units), developments, hotels, supermarkets, department stores and discount stores. One of the more notable trends in 2012 was the use of REITs for the development of hotels for accommodation of Asian tourists (notably Chinese and Japanese visitors).

5 Although the name 'trust' is used, the REIT is actually not a trust but a stock corporation.

	<i>Jun 2008</i>	<i>Jan 2009</i>	<i>Sep 2010</i>	<i>Feb 2011</i>	<i>May 2012</i>
<i>Total capital*</i>	23,673	24,905	35,912	39,832	41,799
<i>Total assets*</i>	49,045	48,837	72,565	74,106	82,339
<i>No. of REITs</i>	21	20	42	65	75

(Source: Ministry of Land, Transport and Maritime Affairs; * = KRW100 million.)

iii Project finance vehicles

Project finance vehicles ('PFVs') are one of the most common forms of investment vehicles that are used for real estate development projects. However, it is difficult to ascertain accurate data and information relating to PFVs as they are not governed by a central agency, such as the National Tax Office, but are governed separately by their relevant local tax office.

iv Foreigner real estate transactions

Following the 1997 Asian financial crisis, there has been a steady increase in foreign investment in Korean real estate owing to, among other things, changes in laws that permitted foreigners to directly own property in Korea and the increase in the amount of real estate for sale; the global financial distress of 2008, however, saw foreign investment slow down. While the impact of the economic crisis has been limited in Korea, it affected the traditional foreign real estate investors, including many of the American and European financial institutions and real estate funds. However, as shown below, the level of foreign investment has recovered from its low point in 2009.

	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>
<i>Land</i>	4,712	3,993	11,603	11,155
<i>Buildings</i>	3,206	3,001	7,956	8,988
<i>Total</i>	7,918	6,994	19,559	20,143

(Source: Ministry of Land, Transport and Maritime Affairs; No. of deals.)

III FOREIGN INVESTMENT

Under the Foreigner's Land Acquisition Act (the 'FLAA'), for a foreigner to acquire land in Korea, the filing of a report or the obtaining of an approval (in some exceptional cases such as acquisition of land located in military facilities protection areas, cultural relics protection areas, etc.) is required. A 'foreigner' is defined under the FLAA as: (1) a person of foreign nationality ('foreign nationals'); (2) a corporation or organisation established in accordance with the laws of the foreign country ('foreign corporation'); (3) a corporation or organisation established in Korea where 50 per cent or more of its shareholders and members are foreign nationals; and (4) a corporation or organisation established in Korea where 50 per cent or more of its capital or voting rights are held by a foreign national or foreign corporation.

i Acquisition of land by a foreigner

Prior to 26 June 2009, a foreigner was required to report the acquisition of land in accordance with the procedures set forth in the FLAA. However, after amendments to the FLAA, any foreigner that acquires land on or after 26 June 2009 may be exempt from filing a land acquisition report as long as such foreigner chooses to file the simpler real estate transaction report with the relevant mayor's office, regional office or local district office in accordance with the Act on Certified Broker's Business and Real Estate Transaction Act. In the event a non-resident foreigner wishes to acquire land, in addition to filing a land acquisition report or a real estate transaction report, the non-resident foreigner must file a real estate acquisition report under the Foreign Exchange Transaction Act for the inflow of foreign currency.

ii Acquisition of land by a foreign-invested Korean corporation

The Foreign Investment Promotion Act governs the registration by a Korean corporation as a foreign-invested corporation where it meets a certain percentage level of investment by foreigners, and offers certain taxation and procedural benefits. These Korean corporations, as corporations duly established under the laws of Korea, would ordinarily acquire land as any other Korean national or corporation would; however, as the FLAA defines certain corporations as foreigners and applies the relevant rules for foreigners, a foreign-invested Korean corporation must also complete the land acquisition notice or the real estate transaction notice.

iii Certain benefits to foreign-invested companies

There are certain tax and non-tax benefits available to foreign-invested companies. For example, a foreign-invested company may be eligible for incentives or exemptions from acquisition tax, registration tax, and property tax (reduced as low as zero and for up to 15 years) for acquisition of land in a designated foreign-investment zone, or if the foreign-invested company provides certain high-technology that supports Korean competitiveness.

Moreover, as the Korean government continues to foster foreign direct investment, some municipalities have provided opportunities to foreign-invested companies to purchase land at a lower than market price (but not lower than appraisal value) and without going through a bid process. Despite certain formalities and restrictions that apply to these transactions, the attractive prices and absence of a bidding process has resulted in many municipalities supplying land to foreign-invested companies for development projects. The Audit Board of Korea, however, has recently warned against the abuse of the system where foreign financing is being disguised as 'equity' investment (for instance, an equity investment with a guaranteed yield and put option) for a domestic company to acquire property from the municipalities at lower than market prices and without a bid process. Legislation to further restrict such abuse is also being considered.

IV STRUCTURING THE INVESTMENT

The Korean government introduced new indirect investment vehicles in 2000 in an attempt to stimulate and attract investor activity in the Korean real estate market. The most widely used investment vehicles in practice are as follows.

i REITs

A REIT is essentially a joint stock company (*chusik hoesa*) that has been established by investors for the purpose of earning (e.g., rent, gain on sale or development) and distributing profits. The establishment and operation of REITs are regulated by the Real Estate Investment Company Act.

REITs are subject to the following measures required by the Real Estate Investment Company Act. Some investors consider such measures to be too restrictive and prefer the use of the more flexible REF.

- a* The REIT shall offer at least 30 per cent of its shares to the general public within six months of obtaining business approval.
- b* The REIT shall not have any single shareholder that owns more than 30 per cent of the shares in the REIT.
- c* The REIT shall only take in-kind contributions of up to 50 per cent of the capital of the REIT.
- d* The REIT shall become a listed company if it meets the qualifications of a listed company under the Financial Investment Services and Capital Markets Act.
- e* The REIT shall distribute not less than 90 per cent of its maximum dividend limit of the relevant year to its shareholders (the REIT shall receive a corporate tax deduction if it distributes 90 per cent or more in dividends).
- f* The REIT shall not dispose of its newly acquired real estate within one year (three years for housing) unless the real estate was created or built pursuant to a real estate development project.
- g* The REIT shall invest only within 30 per cent of its total assets if it plans to invest into a real estate development project.

The Real Estate Investment Company Act recognises three different types of REITs: self-managed ('SM-REITs'), consigned-management and corporate-restructuring ('CR-REITs'). Since their introduction, CR-REITs have been popular among investors (in 2012, 36 out of 75 REITs were CR-REITs). This is because unlike the other REITs, they are (1) exempt from the public offering requirement, (2) exempt from the listing requirement, (3) not subject to a cap on the maximum ownership by a single shareholder and (4) are entitled to a corporate tax deduction if it distributes 90 per cent or more in dividends to shareholders even though it is prohibited from disposing of acquired real estate within one year. Nonetheless, CR-REITs are unsuitable for most real estate transactions because at least 70 per cent of the total assets of the CR-REIT must be invested into real estate for corporate restructuring purposes.

SM-REITs are unique in that shareholders may directly participate in investment and management decisions of the REIT through shareholder or board meetings. However, SM-REITs were rarely used by investors because they were deemed 'corporations' and were not only required to operate like corporations (i.e., hire full-time staff, employees),

but they were not entitled to receive corporate tax exemptions like the other REITs. In an attempt to promote further use of REITs and SM-REITs, on 13 July 2007, the Ministry of Land, Transport and Marine Affairs introduced development-oriented REITs, which allowed investment of their entire assets into real estate development projects even prior to being listed. Under the present law, development-oriented REITs may be structured in the form of an SM-REIT, consigned-management REIT or CR-REIT. The implementation of development-oriented REITs has contributed to the growth of SM-REITs as more investors have established development-oriented SM-REITs within the last five years than ever before (as of 2012, there were 14).

On 31 December 2011, the Ministry of Land, Transport and Marine Affairs introduced a new set of amendments to the Real Estate Investment Company Act intended to provide investors with more flexibility in using REITs. For example, the amendments relaxed the requirement that REITs have at least five employees with asset management expertise at the time of establishment to three employees at the time of establishment and five employees within six months of establishment; and allowed for another type of REIT structure called the parent-subsidary real estate investment trust ('parent-sub REIT') in support of institutional investors. To qualify as a parent-sub REIT, national pension plans or similar associations stipulated in the Real Estate Investment Company Act must own more than 50 per cent of the equity interests in the parent-REIT, which in turn owns more than 50 per cent of the equity interests in the subsidiary-REIT that owns real property. Unlike other REITs, parent-sub REITs are exempt from the public offering requirement, as well as the 30 per cent limitation on the maximum equity ownership by a single shareholder.

ii REFs

REFs are collective investment vehicles that invest more than 50 per cent of their equity interests in real estate. REFs are governed by the Financial Investment Services and Capital Markets Act.

Unlike REITs, REFs are not subject to the various requirements such as public offering, listing, dividend distribution, capital contribution limits, maximum ownership caps on single investors and, upon their discretion, may invest all of their assets in a real estate project. In addition, REFs may be structured in the form of a trust, a corporation or an association. For these reasons, REFs are currently the most popular collective investment vehicles in Korea. Although there are some drawbacks, such as limited investor participation in investment decisions, these are relatively minor considering that other REITs (e.g., consignment-REITs and CR-REITs) are subject to similar limitations and blind-type REFs (i.e., no oversight by investors) are almost non-existent in the Korean marketplace. Investors may not repurchase or redeem their shares after investment in a REF unless the trust securities (trust-type REF) or equity securities (corporation-type REF) become listed.

In Korea, the most common type of REF formed by investors is the trust-type REF. While there are no key differences in benefits or advantages, it appears that investors prefer the relative ease of forming a trust-type REF over a corporation-type REF.

iii PFVs

The PFV is a joint stock company established to engage in ‘facility investment, social indirect capital facility investment, development of resources or any other specially designated business that requires a considerable investment of time and capital and distribution of earnings to its shareholders’. The PFV is basically a paper company and shall not have any employees or persons serving as officers or full time directors. Although the PFV is governed by the Korean Commercial Code as a special purpose company, it is eligible for certain tax benefits under the Corporate Income Tax Law of Korea, such as exemption from the acquisition tax and corporate income tax (i.e., if it distributes 90 per cent or more in dividends).

Investors have widely embraced PFVs and they are commonly used in real estate transactions over REITs. The key advantages of PFVs are summarised as follows:

- a* an easy establishment process (REITs require approval from the Minister of Land, Transport and Maritime Affairs while PFVs only require a report to the relevant tax office);
- b* no mandatory categorisation of business (unlike REITs, PFVs do not need to indicate in their corporate name their business as a real estate investment vehicle);
- c* no reporting requirements (REITs in contrast must submit a quarterly business report to the Ministry of Land, Transport and Maritime Affairs);
- d* no public offering or listing requirements;
- e* no in-kind contribution caps; and
- f* no dividend requirements (even though it may enjoy certain tax benefits if it is distributing 90 per cent or more dividends).

In addition to their many advantages, PFVs are particularly attractive to investors as they allow participation in the investment decision-making process.

Some minor drawbacks of PFVs are that they are real estate investment vehicles mostly reserved for large development projects; they are paper companies that are set up to meet short-term goals; and the qualifications for being recognised as a PFV are still unclear.

iv Asset-backed securitisation

An asset-backed securitisation company (‘ABS company’) is a limited liability company (*yuhan hoesa*) that acquires real property and issues asset-backed securities (i.e., senior bonds, junior bonds and equity) based on this underlying asset to the bondholders and equity owners. ABS companies are regulated under the Asset-backed Securitisation Act.

To be recognised as an ABS company, a party must establish a limited liability company or register itself as trust with the Financial Services Commission and submit to the Financial Service Commission information such as the name of the company or trust, the assets under ownership, the expected duration of ownership and a business plan outlining management, operation and disposition of the assets. While the amount of information required and strict approval process may seem cumbersome to certain investors, ABS companies are among the more popular investment vehicles as they provide numerous tax benefits.

V REAL ESTATE OWNERSHIP

i Planning or zoning

The main body of law that governs the use and development of real estate is the National Land Planning and Utilisation Act. According to this law, the relevant offices of each metropolitan city (e.g., Seoul, Busan), city (e.g., Suwon, Pyeongtaek) and county (e.g., Goseong) shall devise a general use and management plan for their respective domains. Included in the general use and management plans are designated zoning areas (e.g., residential, industrial, farming), designated zoning districts (e.g., scenic districts, fire prevention districts, preservation districts) and designated zoning sections (e.g., green belt sections, city park sections). In some cases, a parcel of land may be subject to multiple designations (e.g., land designated for farming may also be deemed a preservation district). While the general use and management plan also regulates the type of buildings and structures that may be constructed and used on the land (e.g., purpose, lot coverage, height), it is the Building Act that regulates and approves the actual construction, remodelling and expansion of the building on the land.

The Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents primarily focuses on providing systemic and regular services to improve and develop the quality of life of residents in outdated and run-down urban areas. According to the foregoing law, the city shall evaluate areas that need maintenance and improvement, and indicate those areas in the general maintenance and improvement plan for urban and residential areas, which is produced every ten years. Areas that are designated for maintenance and improvement receive necessary services once qualified contractors are approved by the city.

The plan and execution of much larger urban projects (i.e., rezoning of an entire city) are governed by the Urban Development Act. Once a city is qualified to undergo urban development, an area is designated as a 'development area' and the central government, municipal government and landowners form a consortium and become the general contractors of the project.

Real estate transactions that involve the development and use of storage and logistical facilities are regulated under the Act on the Development and Management of Logistics Facilities. This Act aims to implement highly efficient and competitive logistical infrastructure within Korea. To meet such purpose, the Minister of Land, Transport and Maritime Affairs must publish an overall plan detailing its agenda every five years and persons who wish to operate multipurpose logistical terminals (i.e., terminals capable of supporting more than two transportation modes) must register with the Minister and submit a construction plan that includes the details of the structure and facilities to be built. The Minister may designate 'logistics facilities' and any developer that wishes to engage in the development and management of logistics facilities must be appointed by the Minister as the general contractor and may commence construction after submission and receipt of approval of the development plan of logistics facilities.

ii Environment

The Framework Act on Environmental Policy provides that the central government must work in concert with municipal governments and public agencies to preserve and shield

the environment from pollution by using preventive, restorative and punitive means. Individuals or businesses that are culpable of polluting the environment are subject to responsibility and shall, at their own costs, fully clean up and restore the environment to its original condition subject to approval by the central government.

Soil contamination has long been a serious environmental issue in Korea. According to the Soil Environment Conservation Act, a party who is responsible for causing soil contamination must clean up and restore the contaminated areas. If multiple parties are involved, and it is unclear which party caused the contamination, the parties are jointly responsible for restoring the damages incurred. Owners and its successors, and operators of facilities that cause soil contamination are responsible for any damage that may arise; however, the successor shall not be liable if the results of an environmental due diligence procedure conducted prior to the transfer of ownership did not reveal that the facility was at risk of causing contamination.

Owners of facilities categorised as 'public use facilities' must maintain a minimum air quality standard for its patrons. The air quality must be measured by the owner or a person qualified under the Code of the Ministry of Environment and recorded for inspection purposes.

iii Tax

A person who acquires real estate is typically subject to an acquisition tax of 4.6 per cent. However, if the real estate is located in an area designated as an 'overpopulation control area' under the Seoul Metropolitan Area Readjustment Planning Act and is acquired by the purchaser's main office or branch office within five years of the office's establishment in the overpopulation control area, the purchaser will be subject to an acquisition tax of 9.4 per cent. Certain investment vehicles such as the aforementioned REF, CR-REIT, ABS and PFV are not subject to acquisition tax.

iv Finance and security

The most common forms of a security interest used by debtors and creditors in a real estate transaction are a mortgage and a mortgage trust. Brief summaries of both are provided below.

Mortgage

The debtor maintains ownership of the real property while the creditor is granted a security interest on the debtor's real property for providing a loan. The mortgage interest must be registered in the relevant title registry. If the debtor fails to pay back the loan, the creditor may enforce its security rights by requesting the court to auction the real property and, upon foreclosure, the creditor receives its relevant share of the auction proceeds subject to the creditor's priority rights.

Mortgage trust

The debtor's real property is transferred into a trust whereby the trustee holds ownership of the property and the creditor is granted a priority interest on the trust proceeds. If the debtor fails to make the required loan payments, a public offering of the real estate is

made available by the trustee and the sale proceeds are distributed to the creditors subject to their priority interests.

With respect to real estate development projects, various security measures, such as pledges on shares issued by the general contractor, agreements to transfer or relinquish general contractor's development rights, general contractor's joint liability, pledges on insurance payments and agreements to transfer or assign general contractor's rights under the development contract, are also available to lenders.

VI LEASES OF BUSINESS PREMISES

The lease of business premises and the leasehold rights of the landlord and tenant are governed by the Commercial Building Lease Protection Act. A commonly used leasehold right in Korea is a unique right called a '*jeonse*'. In the case of a *jeonse*, the landlord receives a large key-money deposit from the tenant (in lieu of no or small monthly lease payments) and in return the landlord allows the tenant to use the property for the period stated in the applicable lease contract. Upon expiry or early termination of the lease term, the landlord must return the deposit to the tenant.

To secure the leasehold right and return of the deposit, a *jeonse-kwon* must be registered with the court having jurisdiction over the real property in question. If, in such cases, the landlord does not return the deposit to the tenant upon the expiry or termination of the lease term, the tenant may take action to foreclose on the property, regardless of whether the tenant holds a first priority security interest over the property, without securing a court judgment on the merits of the case. Upon completion of foreclosure proceedings, if auction proceeds resulting from foreclosure proceedings were insufficient to pay the deposit to the tenant, the tenant continues to have an unsecured claim against the landlord for the remaining balance of the deposit. Further, notwithstanding the foreclosure proceedings, the tenant must continue to pay monthly rent (if any) and management fees to the landlord until the tenant surrenders the premises and restores the premises to its original state.

According to the Korean Civil Code, a lease is an agreement between the landlord and tenant. While the lessee may use the leased premises upon making certain lease payments (in some cases security deposits equal to 10 times the amount of monthly rent are provided) to the lessor, unless the lease is recorded in the applicable registry, the lessee shall not have grounds to challenge the validity of the lease against a subsequent landlord (i.e., the subsequent landlord does not automatically assume the existing lease). Moreover, if the leased premises become subject to foreclosure and the lease is not registered, the security deposit shall not be returned automatically to the lessee as the lessee is deemed a general unsecured creditor and the auction proceeds will be distributed to the creditors subject to their priority rights.

However, unlike the provisions of the Korean Civil Code, if the lease relates to a commercial building and it is deemed that a lease exists according to the Commercial Building Lease Protection Act, lessees are entitled to special protections as subsequent landlords must assume existing leases and lessees are granted first priority rights for the return of their security deposits to a certain limited extent permitted by the Commercial Building Lease Protection Act.

VII DEVELOPMENTS IN PRACTICE

i Presidential Decree related to the Financial Investment Services and Capital Markets Act

On 29 June 2012, amendments were made to the Presidential Decree related to the Financial Investment Services and Capital Markets Act. One of the main priorities of the amendments was to relax restrictions on the disposal of domestic and foreign real property by REFs. Prior to the amendments, REFs were restricted from disposing of any domestic real property within three years of acquisition, or any foreign real property within the period mandated by the Rules of Collective Investment. However, after the amendments, REFs may dispose of domestic and foreign real property after one year from the date of acquisition if the subject real property is not a residential unit (which is still subject to a three-year restriction).

ii Real Estate Investment Company Act

On 18 December 2012, amendments were made to the Real Estate Investment Company Act, which will become effective on 19 June 2013. The amendments are intended to promote indirect investments in real estate by relaxing previous establishment and ownership restrictions on REITs. A brief summary of the amendments are provided below.

Under the current Real Estate Investment Company Act, at least 30 per cent of shares in all REITs are required to be offered to the general public within six months of obtaining business from the Ministry of Land, Transport and Maritime Affairs. Furthermore, REITs may not lend money to third parties. Under the proposed amendments, the offer period would be extended to 18 months, and REITs may lend money to development project companies and public-private companies specified in the Act on Public-Private Partnerships in Infrastructure provided that the loan amount is within the REIT's net assets.

Currently, single shareholders may not own more than 30 per cent of shares in an SM-REIT and a consigned-management REIT. The proposed amendments will permit a single shareholder to own up to 50 per cent of shares in a consigned-management REIT. In the case of SM-REITs, the current 30 per cent limit would continue to apply even under the proposed amendments, except that prior to 31 December 2012, a single shareholder would be permitted to own up to 35 per cent of the shares in a SM-REIT.

Under the current law, in-kind contributions may not exceed 50 per cent of the capital of the REIT. Under the proposed amendments, there would be no limit on the amount of capital that may be contributed in-kind as long as the amount is verified by an appraiser recommended by the institution specified by Presidential Decree.

iii Trust Act

Until recently, the Trust Act had been unchanged since its enactment in 1961. However, to adapt to the increased use of trusts and the evolving landscape of trust structures, the Korean legislature passed various amendments to promote and reflect the modern form of trusts. Effective since 26 July 2012, the most significant changes to the Trust Act are provided below.

- a* To promote use of trusts, beneficiary certificates (i.e., beneficiary interests in a trust in the form of ‘securities’) are issuable with respect to all types of trusts.
- b* A trust may now obtain limited liability status.
- c* Designation of a settlor as a trustee is permitted provided that the trustee will be unable to wind up the trust and will be required to meet specific formalities when executing the powers as trustee.
- d* The trustee is permitted to designate a third party to manage the trust if the beneficiary approves in writing and justifiable grounds exist.

iv Act on the Ownership and Management of Aggregate Buildings

On 18 December 2012, amendments were made to the Act on the Ownership and Management of Aggregate Buildings, which will become effective on 19 June 2013. The amendments set out to achieve clarification by defining warranty periods for defects that are specific to aggregate buildings (to avoid conflict with the Housing Act), to promote unity by permitting qualified lessees to participate in management meetings, and to implement an effective and efficient governing body by establishing an aggregate building dispute-resolution committee comprising experts within the applicable region. A brief outline of the amendments is set forth below.

- a* Warranty against defects: Under the current law, the warranty period for defects for apartments and multiple-unit buildings are governed by the Housing Act. The proposed amendments will strike the relevant provisions from the Housing Act and have the warranty period for defects governed by the Act on the Ownership and Management of Aggregate Buildings.
- b* Grant of voting rights: To permit lessees and tenants to discuss and vote on behalf of partial owners in management meetings.
- c* Establishment of an aggregate building dispute-resolution committee: To implement a simple and effective dispute-resolution system as an alternative to litigation. The dispute-resolution committee, which shall comprise regional experts, will be responsible for reviewing and determining the cases.

v Building Act

Amendments to the Building Act were made on 17 January 2012, effective from 18 July 2012. The relevant amendments aim to provide flexibility to building contractors by allowing them to forego the approval process of the building committee if it is determined that the underground floors are regularly being flooded or are uninhabitable and construction would extend the life of the building,⁶ and emphasise safety by requiring

⁶ Effective since 18 April 2012.

regular and random building inspections and having the inspection results reported to the competent authority.

vi Act on Sale of Building Units

Amendments to the Act on Sale of Building Units were made with effect from 1 June 2012. Prior to the amendments, the sale of building units over a certain size (e.g., buildings with floor space not less than 3,000 square metres) were subject to restrictions when selling units suitable for two or more persons. To alleviate these restrictions, pursuant to the amendments, the Act on Sale of Building Units no longer applies to the sale of: any building unit constructed with two or more areas that may be used for different purposes where the gross floor area of one such area is not less than 3,000 square metres and is being sold to a single person; and any building unit being acquired by a central or municipal agency. Although the law purports to promote the purchase and sale of building units, until actual issuance of a use permit has been obtained, subsequent resale by the initial purchaser or any arrangement thereof is prohibited.

vii Amendments to the Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents

On 1 February 2012, amendments to the Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents were carried out and have been effective since 2 August 2012 (certain amendments were made effective on 1 February). In light of the recent downturn of the economy and a sluggish residential property market, many residents began experiencing unsatisfactory domicile maintenance and management services. To combat these shortcomings, the amendments were implemented by the Korean legislature to expand the role of public institutions to provide maintenance and management services, increase operational transparency of service-providing unions, permit residents who live in unattractive development markets to decertify unions if necessary, provide authority to cancel or replace underperforming service providers and revamp the traditional methods of providing maintenance (e.g., evacuation of residents) and apply resident-friendly service systems.

viii Enforcement Decree of Environment Improvement Expenses Liability Act

On 13 March 2012 amendments to the Enforcement Decree of Environment Improvement Expenses Liability Act were made and have been effective since 14 September 2012. Prior to the amendments, environment improvement expenses were calculated twice a year (on 30 June and 31 December) and parties to the real estate transaction were required to pay the due expenses based on mutual agreement. Pursuant to the amendments, however, environment improvement expenses are now due once the ownership of the real property subject to such expenses is transferred; the responsible party may pay the due expenses at any time by calculating its proportionate share relative to the transferred title registration date.

ix Act on the Creation and Development of Financial Hubs

Pursuant to the Seoul Metropolitan Area Readjustment Planning Act, developers wishing to construct a certain type of building (standards regulated by Presidential Decree) in

Seoul are subject to an overconcentration charge. However, developers building finance-related structures within a designated financial hub (the Yeuido District in Seoul was designated a financial hub on 1 January 2009) are exempt from this overconcentration charge. According to the Ministry of Land, Transport and Maritime Affairs, developers who received construction permits prior to 1 January 2009 are also exempt.

x Corporate Tax Act

Amendments to the Corporate Tax Act were made on 31 December 2011, and have been effective since 1 July 2012. Under the amendments, foreign entities that earn income sourced in Korea must submit an application for the application of treaty-reduced tax rates to the relevant withholding obligor to be taxed at the reduced tax rate under the relevant tax treaty. In cases where the Korea-sourced income is paid through an overseas investment vehicle, the overseas investment vehicle must submit to the withholding obligor an overseas investment vehicle report, together with an application to pay treaty-reduced tax rates prepared by beneficial owners of the overseas investment vehicle. However, foreign investors who invest overseas depository receipts issued by Korean companies are exempt from the obligation to submit an application to pay treaty-reduced tax rates. Accordingly, foreign funds wishing to enjoy the benefits afforded by tax treaties in respect of their income from Korean investments (e.g., exemption from tax on capital gains realised from the transfer of shares, and reduced tax on interest and dividend) must submit the list of investors (beneficial owners) to the withholding obligor. Those foreign funds that fail to submit this list may not be entitled to the tax treaty benefits.

Previously, interest on foreign currency denominated bonds 'issued in Korea' was exempt from income tax or corporate tax. However, the exemptions are no longer available pursuant to amendments on the Special Tax Treatment Control Law effective as of 31 December 2011.⁷ The amendment applies to bonds issued after 1 January 2012.

VIII OUTLOOK AND CONCLUSIONS

There have been many recent amendments to real estate related laws intended to promote investments in real estate, and this is expected to have a positive impact on real estate investment in 2013. Foreign financial investors and real estate funds in Korea made a lot of divestments because of the impact of the global financial crisis in their home territories. Korean and domestic financial institutions and real estate investors, including funds and asset management companies, have not been so severely affected and there was, therefore, much more activity by domestic investors in Korean real estate. We expect this trend to continue into 2013, but we are also seeing foreign investment slowly return to Korea, particularly in the areas of sale and leasebacks, shopping centres and hotels (which have become very popular with the increase of tourists from other parts of Asia, including China and Japan).

⁷ Foreign currency bonds 'issued overseas' are still exempt from income tax or corporate tax. However, what constitutes 'issued overseas' is not absolutely clear.

The significant increase of Korean investors, including pension funds, financial institutions and real estate funds, acquiring properties overseas in places such as New York, San Francisco, London and Australia is a trend that is expected to continue into 2013.

Finally, Korea has just elected a new president from the ruling party and it is expected that this will have little or no adverse impact on foreign investment policies.

Appendix 1

ABOUT THE AUTHORS

EUN NYUNG LEE

Shin & Kim

Mr Eun Nyung Lee is a partner at Shin & Kim. His practice primarily focuses on corporate and financial transactions, particularly mergers and acquisitions and real estate. He has significant experience on cross-border M&A, domestic M&A, real estate, private equity, acquisition financing and real estate financing. He has worked as an international lawyer in the Hong Kong Office of Cleary Gottlieb Steen & Hamilton, and has been involved in capital market transactions such as IPO and debt offering.

ROBERT C YOUNG

Shin & Kim

Robert C Young, a senior US attorney, has been with Shin & Kim since January 1998. The focus of Robert's practice is real estate, financing and M&A. Robert has been involved in a multitude of real estate projects, including representing foreign and domestic funds and companies in the acquisition and sale of existing commercial properties and development projects, and senior and mezzanine financing. Robert also has extensive experience with sale and leaseback transactions, as well as on general leasing matters. Robert received his JD from the University of California, Hastings College of Law and clerked at the Hawaii Supreme Court.

KYUNG DON LEE

Shin & Kim

Kyung Don is a partner and co-head of the real estate and real estate finance practice group. Kyung Don is one of the leading experts in the field of real estate law in Korea and has been involved in many of the largest real estate transactions in Korea; he specialises in construction and development and project financing in connection with real estate transactions. Kyung Don graduated from Seoul National University with a BA and completed his LLM at Columbia University School of Law. He has worked at Shin & Kim, and Winthrop, Stimson, Putnam & Roberts in New York. He has

represented many real estate funds in acquisition, financing, operation and disposal of real estate assets as well as financial institutions and project financing funds in connection with loans to various real estate investors, including developers.

SHIN & KIM

8th Floor

State Tower Namsan

100 Toegye-ro

Jung-gu

Seoul 100-052

Korea

Tel: +82 2 316 4114

Fax: +82 2 756 6226

kdlee@shinkim.com

rcyoung@shinkim.com

enlee@shinkim.com

www.shinkim.com/eng/main.asp