Practical Law

GLOBAL GUIDE 2020
STRUCTURED FINANCE AND SECURITISATION

ACC Association of Corporate Counsel

Structured finance and securitisation in Japan: overview

Hajime Ueno and Takanobu Yamamoto, Nishimura & Asahi

global.practicallaw.com/6-500-8432

MARKET AND LEGAL REGIME

1. Give a brief overview of the securitisation market in your jurisdiction. In particular:

- **How developed is the market and what notable transactions and new structures have emerged recently?**
- **What impact have central bank programmes (if any) had on the securitisation market in your jurisdiction?**
- **Is securitisation particularly concentrated in certain industry sectors?**

Before the financial crisis, the securitisation market was very developed. During 2006, the actual issuance of securitisation products on an announced basis reached about JPY11 trillion. However, following the global financial crisis originating from the subprime mortgage crisis, the demand for securitisation products decreased (despite no issues having arisen relating to securitisation products themselves in the Japanese market, save for certain defaults of commercial mortgage-backed securities (CMBS) transactions that had resulted primarily from the reduction in the number of non-recourse real estate financing providers, and the general unwillingness to provide credit support to real estate financing).

Since the start of 2008, the scale of securitisation business shrunk so much that, during 2009 to 2015, the actual issuance of securitisation products per year on an announced basis was between JPY3 trillion to JPY5 trillion (not including J-REITs (Japanese real estate investment trusts)).However, residential mortgage-backed securities (RMBS) originated by the Japan Housing Finance Agency (JHF RMBS) continue to be steadily issued.

In addition, new structures have emerged recently, for example:

- Securitisation transactions using a declaration of trust by the originator.
- New structures using the TMK scheme have developed under eased regulations and requirements introduced by statutory reforms.
- A new scheme using the TK-GK under the recently amended Act on Specified Joint Real Estate Ventures.
- EETCs (Enhanced Equipment Trust Certificates) structured under Japanese trust law.

Of the total volume of issued securitisation products, the products originated by government-affiliated institutions has made up about half of the total issued amount for several years. The remainder seem to be originated mostly by consumer credit companies, banks and leasing companies.

The global 2019 novel coronavirus disease (COVID-19) pandemic is exerting considerable pressure on economic activity in Japan, including on securitisation transactions. For example, concerns have emerged about declines in rental income (especially for hotels) and the pandemic is likely to exert downward pressure on the real estate securitisation market, including residential mortgage backed securitisations. However, interests in alternative financing methods (in relation to straight bank loans) may increase as the overall economy experiences uncertainties as a result of the wide-spread COVID-19. All market participants are expected to be carefully observing and cautiously monitoring the market's development.

2. Is there a specific legislative regime within which securitisations in your jurisdiction are carried out? In particular:

- **What are the main laws governing securitisations?**
- **What is the name of the regulatory authority charged with overseeing securitisation practices and participants in your jurisdiction?**

Main laws governing securitisations

The main laws governing securitisations are as follows:

- **Civil Code (*Minpo*).** This provides the general rules in private law, including rules on contracts such as sales or loans and security interests such as pledges (*shichi-ken*) or mortgages (*teito-ken*).
- **Commercial Code (*Shoho*).** This code establishes the general rules of commercial law, including rules on bilateral agreements (*tokumei kumiai*) (TK) (*see Question 4*). In relation to the Civil Code, it provides special measures concerning commercial transactions.
- **Companies Act (*Kaisha-ho*).** Companies that are used for general purposes, such as *kabushiki kaisha* (stock companies; KKs) or *godo kaisha* (limited liability companies; GKs) (*see Question 4*) are incorporated under, and governed by, this statute and regulations thereunder.
- **Financial Instruments and Exchange Act (FIEA) (*Kin'yu-shohin-torihiki-ho*).** This statute is the primary instrument of Japanese securities regulation, including disclosure regulations, business regulations for securities firms, credit rating agencies, and securities exchanges, as well as insider trading regulations.
- **Trust Act (*Shintaku-ho*).** This statute sets out the private law aspects of trusts (other than regulations on trust business), such as their formation, governance and the rights and duties of the parties relevant to them.
- **Act on the Securitisation of Assets (Securitisation Act) (*Shisan no Ryudo-ka ni Kansuru Horitsu*).** This is a statute introduced to incentivise and enhance securitisation transactions (initially introduced in 1998), and special entities for securitisation, *tokutei mokuteki kaisha* (specified purpose companies; TMKs) and *tokutei mokuteki shintaku* (specified purpose trusts; TMSs) (*see Question 4*), are incorporated or

formed under, governed by, and regulated under this statute and the regulations under it.

- **Act on Investment Trusts and Investment Corporations (*Toshi Shintaku oyobi Toshi Hojin ni Kansuru Horitsu*).** This statute, and the regulations under it, provide for the incorporation or formation and the governance of, and regulate special entities, namely *toshi shintaku* (investment trusts) and *toshi hojin* (investment corporations), for the purposes of asset management and investment.
- **Act on Special Measures Concerning Claim Management and Collection Businesses (Servicer Act) (*Saiken-kanri-kaishu-gyo ni Kansuru Tokubetsu-sochi-ho*).** This statute regulates the servicing aspects of securitisation products. It provides an exemption from the Attorney Act (*Bengoshi-ho*) that prohibits non-attorneys from servicing claims that relate to legal matters such as litigation.
- **Act on Specified Joint Real Estate Ventures (*Fudosan-tokutei-kyodo-jigyo-ho*).** This statute regulates certain types of joint enterprises and investments in real estate.

Regulatory authorities

The Financial Services Agency (FSA) generally supervises and inspects financial institutions or companies, and regulates securities related transactions under the FIEA and/or other laws. Some aspects of securitisation can also be regulated by the Ministry of Justice or the Ministry of Land, Infrastructure, Transport and Tourism (MLIT).

REASONS FOR DOING A SECURITISATION

3. What are the main reasons for doing a securitisation in your jurisdiction? How are the reasons for doing a securitisation in your jurisdiction affected by:

- **Accounting practices in your jurisdiction, such as application of the International Financial Reporting Standards (IFRS)?**
- **National or supra-national rules concerning capital adequacy?**
- **Risk retention requirements?**
- **Implementation of the Basel III framework in your jurisdiction?**

Usual reasons for securitisation

The following are typical reasons for transactions in which financial institutions are the originators:

- Cheaper borrowing.
- Credit arbitrage.
- Balance sheet benefits.
- Capital adequacy (which is the primary reason).

The following are the typical driving motives if a general operating company is the originator:

- Cheaper borrowing.
- Balance sheet benefits.
- Alternative source of funding.

Accounting practices

To gain balance sheet benefits through off-balancing, it is necessary for the transfer of assets to an SPV to be regarded not as a financial transaction, but as a sales transaction, under the applicable accounting standards.

In Japan, the following four accounting standards are recognised:

- J-GAAP.
- The IFRS (the International Financial Reporting Standards).
- US GAAP (applicable only to those filing financial statements under US GAAP to the US Securities and Exchange Commission).
- JMIS (Japan's Modified International Standards, or so-called J-IFRS, which were introduced in June 2015 and are applicable to accounting years ending on or after 31 March 2016).

Substantial modification of consolidation rules or off-balance requirements would influence the securitisation market, regardless of whether the originator was an operating company or a financial institution. This was the case when standards for off-balance of owned real estate were newly introduced and the structure of real estate securitisation was significantly influenced (for example, structures using sale and leaseback of a seller-originator's headquarters office building have become rare).

Capital adequacy

Capital adequacy requirements under the Banking Act (*Ginko-ho*), FIEA and other laws, which is based on the rules set out under the Basel III Accord or at least rules similar to it, are imposed on banks and other deposit-accepting financial institutions, as well as securities firms. These financial institutions make use of securitisation transactions to reduce their own risk assets to gain capital relief. Therefore, if capital adequacy requirements are substantially modified, these modifications will affect securitisation transactions originated by these financial institutions. Accordingly, attention should be paid to the Basel Committee on Banking Supervision's argument for "simple, transparent and comparable securitisations". For further information on why these rules encourage financial institutions to securitise their receivables, see *Question 11*.

Under the Insurance Business Act (*Hoken-gyo-ho*), insurance companies must maintain a certain ratio of solvency margin to secure their capacity to honour their insurance policies.

Insurance companies, at least those "internationally active", will be subject to new capital requirement rules based on international standards that will be developed by the International Association of Insurance Supervisors (IAIS).

Risk retention requirements

Unlike in the EU or the US, risk retention requirements directly regulating originators (unless the originators themselves qualify as Banks, see below) have not been introduced in Japan, although:

- The FSA's liquidity coverage ratio (LCR) rules on deposit institutions based on Basel III, provide that RMBSs held by deposit institutions are counted as eligible assets for the purpose of LCR requirements if risk retention measures are implemented in the country or region where the RMBSs have been issued.
- According to the FSA's supervisory guidelines for financial institutions, financial institutions will be reviewed during the regulators' supervision, to check whether the financial institutions are adequately monitoring and accounting for risk retention by the originators when they invest in securitisation products.

In addition, on 15 March 2019, the FSA published a series of amendments to the regulations on regulatory capital requirements for securitisation products. The amendments are applicable to certain banks, other deposit-taking financial institutions, bank holding companies and certain securities holding companies (Banks), and became effective on 31 March 2019 (subject to certain grandfathering provisions). Under the new rules, if Banks cannot establish that their securitisation exposure satisfies certain risk retention requirements (in general, requiring that the originators

hold 5% or more of the aggregate amount of exposure), an increased regulatory capital charge, applying a risk weight three times higher than that otherwise applied to compliant securitisation exposures (subject to a cap weighting of 1,250%) will be imposed on the securitisation exposure, unless a certain exception is applicable.

Implementation of the Basel III framework

Capital requirement rules, STC (simple, transparent and comparable) criteria, LCR rules, leverage ratio rules and capital buffer rate rules based on Basel III have already been implemented in Japan.

THE SPECIAL PURPOSE VEHICLE (SPV)
Establishing the SPV

4. How is an SPV established in your jurisdiction? Please explain:

- **What form does the SPV usually take and how is it set up?**
- **What is the legal status of the SPV?**
- **How the SPV is usually owned?**
- **Are there any particular regulatory requirements that apply to the SPVs?**

Forms of SPV

SPVs used in Japanese securitisation transactions can be largely classified into two categories:

- Corporate entities, that is, special purpose companies (SPCs).
- Trust types.

Partnership interests are rarely used in securitisation transactions. SPCs used in most securitisations as holders of underlying assets take one of the following corporate forms:

- **KK.** This is a limited liability stock corporation incorporated under and regulated by the Companies Act.
- **GK.** This is typically used for a closely held limited liability corporation which is also incorporated under and regulated by the Companies Act. This form of corporation was first introduced in 2007 under the Companies Act.
- ***Yugen kaisha* (YK).** This is a closely held limited liability corporation, which existed before the introduction of the Companies Act on 1 May 2006, under which all YKs were automatically re-categorised as KKs.
- **TMK.** This is a special purpose company incorporated under and regulated by the Securitisation Act for securitisation and other structured transactions.
- **Investment corporation (*toshi hojin*).** This is a special purpose investment vehicle incorporated under and governed by the Act on Investment Trusts and Investment Corporations, for asset management and investments. In practice, these are used almost solely for J-REITs.

The form of trusts typically used as vehicles holding securitised assets is limited to ordinary trusts formed and established under the Trust Act. The other possible forms under Japanese law are:

- **TMS.** This is a special kind of trust for securitisation and other structured transactions. It is governed and regulated by the Securitisation Act. Although in practice this type of trust has rarely been used, it has recently been expected to be used for an issuer entity of Islamic bonds (*Sukuk*) in the form of trust beneficial interests (quasi-bond beneficial interests or *J-Sukuk*) after the implementation of certain amendments to the Securitisation Act and other relevant statutes in 2011.
- **Investment trust (*toshi shintaku*).** This is a special kind of trust designed for asset management and investments. It is governed and regulated by the Act on Investment Trusts and Investment Corporations. In practice, this is used solely for the purposes of mutual funds or unit trusts (*toshin*).

Setting up an SPV

Requirements for incorporation of companies such as KKs, GKs, TMKs or investment corporations include the:

- Preparation of the articles of incorporation of the SPC (*teikan*, or in relation to investment corporations, *kiyaku*).
- Execution and delivery of capital contributions relating to the SPC.
- Registration of the incorporation of the SPC with the competent legal affairs bureau.

Trusts are usually settled by agreement between the settlor and the trustee. Since the end of September 2008, a declaration of trust is a valid method to establish a trust. A securitisation transaction using a declaration of trust by the originator has been introduced and sold to investors, although the form is still relatively rare.

Legal status of SPVs

An SPC has its own legal personality. Trusts used as SPVs (whether TMS or other types of trusts) do not have their own legal personality and their assets are held by and under the name of the relevant trustees. However, the trust assets would not be made available to the trustee's own creditors as long as the trustee had sufficiently segregated the trust assets from its own assets (and/or assets of other trusts for which it is acting as a trustee).

The commonly used forms of investments extended to, or made into, SPCs are:

- Bonds.
- Commercial paper.
- Loans.
- Preferred shares.
- TK interests (which arise from and are governed by a bilateral agreement (*tokumei kumiai* agreement) between a business operator and a financing entity, which is economically similar to a limited partnership).

For trusts used as SPVs, trust beneficial interests having priority over the most junior class of classified trust beneficial interests and/or loans extended to trusts are used. Bonds issued by a trust are generally rare.

Ownership of SPVs

To set up an SPC as an orphan company, the common shareholder or member of the company is usually a general incorporated association (*ippan shadan hojin*, a non-profit corporation) in which membership without contribution, and contribution without voting rights, are both permitted.

For trusts used as SPVs, a trust beneficial interest is usually divided into senior portions, which are sold and held by investors, and a junior (subordinated) portion, which is retained and held by the relevant originator. Generally, the trust agreement provides for mechanisms by which the rights and authorities of the subordinated beneficiary (that is, the originator) are limited to the fullest extent possible to meet the demands and expectations of investors. In many cases, particularly relating to fundamental matters such as whether to authorise the trustee to reschedule or amend the conditions relating to underlying trust assets, determinations are made by exercising investors' voting rights in a meeting of senior beneficiaries, rather than conferring the right or power to determine these matters on the originator. However, where US GAAP applies to the originator, structures that limit the discretion of investors, the

originator and the trustee (if relevant) are usually used (to achieve qualifying special purpose entity (QSPE) status under the US GAAP).

Regulatory requirements

For TMKs and TMSs, certain regulatory requirements under the Securitisation Act and rules made under it apply. These regulations include a requirement to file the following with the competent government agencies:

- A written "asset liquidation plan" (Asset Liquidation Plan) relating to the securitisation transaction in which the relevant TMK takes part.
- Charter documents and so on of the TMK.
- Annual operation reports of the TMK.

5. Is the SPV usually established in your jurisdiction or offshore? If established offshore, in what jurisdiction(s) are SPVs usually established and why? Are there any particular circumstances when it is advantageous to establish the SPV in your jurisdiction?

Recently, most SPVs used for securitisation have been established in Japan. Limited liability CHs (which were later abolished and, instead, general incorporated associations were introduced) were used as the parent SPCs (instead of Cayman SPCs). Use of domestic SPCs, instead of Cayman SPCs or other foreign SPCs, at both the asset holding level and the parent level, allow market participants to save time and costs relating to translation and so on. This makes it easier to monitor transactions following closing.

Ensuring the SPV is insolvency remote

6. What steps can be taken to make the SPV as insolvency remote as possible in your jurisdiction? In particular:

- **Has the ability to achieve insolvency remoteness been eroded to any extent in recent years?**
- **Will the courts in your jurisdiction give effect to limited recourse and non-petition clauses?**

It is possible to minimise insolvency risks by using the following methods:

- The parent entity of the SPV being an orphan SPC (that is, an SPC which is independent from, and not controlled by, any of the relevant transaction parties, and which would not have any incentive or motive to exercise its discretion, or other rights, including voting rights in favour of a particular transaction party).
- Any business, other than the relevant securitisation transaction, being prohibited and/or restricted under the relevant transaction documents and/or charter documents.
- Hiring of employees being prohibited or restricted.
- Any act changing its organisation, such as mergers, being prohibited or restricted.
- An independent director being appointed.
- An external credit enhancing instrument(s) being used.
- Carefully drafting terms and conditions of transactions agreements, such as waterfall provisions and limited recourse provisions.
- Powers vested in shareholders, members, beneficiaries or trustees of the SPV being properly restricted.
- Non-petition covenants being obtained from parties concerned, which are generally considered to be likely to be legal and effective, except for those by directors.
- There have been no negative developments on the ability to achieve insolvency remoteness in recent years in Japan.

Ensuring the SPV is treated separately from the originator

7. Is there a risk that the courts can treat the assets of the SPV as those of the originator if the originator becomes subject to insolvency proceedings (substantive consolidation)? If so, can this be avoided or minimised?

With proper incorporation and administration of the SPC, the legal personality of an SPC is separate from that of an originator. Therefore, any underlying asset transferred to an SPC is not regarded as being vested in the originator, as long as the corporate veil is not pierced (where its legal personality would be disregarded in connection with the matter(s) in question). This is also true of cases where a trust is used as an SPV, because trust assets are regarded as being vested in the relevant trustee and are treated separately from the settlor (that is, the originator) and the trustee.

If the originator collects payments or repayments on the underlying assets as a servicer or otherwise, it is possible that the money that the originator temporarily takes custody of for the SPV can be treated as vested in the assets of the originator when the originator becomes insolvent. Therefore, measures must be taken to protect against this risk. Possible solutions include an SPV reserving a certain amount of money payable to the originator to retain its ability to set off against the collected money, and appropriate and proper drafting of back-up servicing triggers and mechanisms. There is no corresponding concept of substantive consolidation adopted under or by Japanese insolvency law.

For the risks of re-characterisation and avoidance issues, see *Question 16* and *Question 17*.

THE SECURITIES

Issuing the securities

8. What factors will determine whether to issue the SPV's securities publicly or privately?

Currently, very few securitisation products (that is, securities issued by the SPV such as shares, bonds, trust beneficial interests or TK interests) are issued and placed with investors through public offerings, except for JHF RMBS and J-REITs. The other securitisation products in Japan are usually only issued to institutional investors, therefore there is no need to make a public offering which results in statutory disclosure requirements.

9. If the securities are publicly issued:

- **Are the securities usually listed on a regulated exchange in your jurisdiction or in another jurisdiction?**
- **If in your jurisdiction, please identify the main documents required to make an application to list debt securities on the main regulated exchange in your jurisdiction. Are there any share capital requirements?**
- **If a particular exchange (domestic or foreign) is usually chosen for listing the securities, please briefly summarise the main reasons for this.**

Choice of exchange

Equity securities issued publicly are usually listed on regulated exchanges in Japan, such as the Tokyo Stock Exchange (TSE). However, it appears that securitisation products have never been listed in Japanese markets, except for equity interests in J-REITs which are listed on regulated exchanges in Japan (most of which have been listed on the TSE). The TSE seems to be the most distinguished market in trading volume and reputation in relation to J-REITs and other types of securities.

Securitisation products issued in Euro-Yen markets are usually listed on a foreign exchange, such as the Irish Stock Exchange or the Luxembourg Stock Exchange, to provide more liquidity to investors.

Application for listing

It is not practicable for a securitisation SPC to list its bonds on a Japanese trading market. For example, listing criteria for bonds for the TSE include:

- For domestic issuer's bonds, the issuer already being a listed company on the exchange (with limited exceptions).
- For foreign issuer's bonds, that the issuer substantially satisfies the same requirements that apply for a company to become a listed company on the exchange.

It is difficult for securitisation SPCs to satisfy these requirements. Therefore, it is highly unlikely, if not impossible, that a securitisation SPC (whether a domestic SPC or a foreign SPC) will list its debt securities on a Japanese exchange.

However, it might be feasible to list in the TOKYO PRO-BOND Market, a trading market only for professional investors operated by the TSE, where eligibility criteria for listing debt securities are that:

- A credit rating is obtained.
- The principal underwriter is registered on the Lead Managing Underwriter List at the TSE.

However, no securitisation product has been listed on there to date.

Constituting the securities

10. If the trust concept is not recognised in your jurisdiction, what document constitutes the securities issued by the SPV and how are the rights in them held?

The trust concept has been recognised in Japan since the early 20th century. Trust beneficial interests are used in securitisations as a type of financial instrument, together with other types of instruments such as shares, bonds, commercial paper or loans.

TRANSFERRING THE RECEIVABLES

Classes of receivables

11. What classes of receivables are usually securitised in your jurisdiction? Are there any new asset classes to have emerged recently or that are expected to emerge in the foreseeable future?

Recently, a large proportion of securitisation products in Japanese markets have involved residential mortgage loans. RMBS are the most frequently issued products, which are issued for the purposes of capital relief rather than financing. While many commercial mortgages, auto loans, consumer loans, lease payment and credit card receivables have been, and are still being, securitised (typically to gain alternative financing for originators), the market size of securitisation of these receivables has shrunk since the beginning of 2008.

The market has frequently seen repackaging products that re-securitise existing securitisation products as underlying assets, including CDO squareds (that is, CDOs that are re-securitised as underlying assets). Other than those products, securitisation of asset classes known as exotic assets, such as receivables relating to franchise guarantees, can also be seen. Recently, the market has seen the emergence of the following types of securitisation products:

- Healthcare J-REITs.
- J-REITs acquiring property overseas under a statement issued by the Financial Services Agency (FSA) which confirmed that J-REITs can hold up to 100% of the equity of foreign real estate companies in certain foreign countries.
- Private (unlisted) J-REITs.
- Project bonds (ABS/ABL) backed by solar power project loans.
- Infrastructure funds that invest in infrastructure assets, including renewable energy facilities, power grids, and transport and transmission networks.
- Contractually covered bonds.

In addition, the MLIT is currently discussing introducing securitisation of public real estate.

Transferring the receivables from the originator to the SPV

12. How are the receivables usually transferred from the originator to the SPV? Is perfection of the transfer subject to giving notice of sale to the obligor or subject to any other steps?

In many cases, receivables are transferred to the SPV through either:

- Assignment by a sale and purchase.
- Entrustment under a trust agreement.

For synthetic securitisation, instruments or methods used to transfer risks are:

- Loan participations or sub-participations.
- Credit default swaps (CDSs).
- Guarantees.

Declarations of trust have become possible since the end of September 2008 (*see Question 4, Setting up an SPV*).

The perfection of a transfer differs depending on the subject of the transfer. For example, if real estate is transferred, the transfer is perfected by registration in a property registry (*fudosan toki-bo* or *toki-kiroku*). With receivables, the transfer is perfected by:

- The consent of, or notice to, the relevant debtor by an instrument bearing a certified date (stamped by a notary, for example).
- Registration in the relevant registry (a notice to the relevant debtor satisfying certain formalities is also required to perfect against the debtor).

For a transfer of trust beneficiary interests, the transfer is perfected by the consent of, or notice to, the relevant trustee by an instrument bearing a certified date (stamped by a notary, for example).

There is no special rule, requirement or exemption that applies specifically to a transfer of receivables in a securitisation transaction.

13. Are there any types of receivables that it is not possible or not practical to securitise in your jurisdiction (for example, future receivables)?

Under the amended Civil Code, future receivables (regardless of the type of receivable) are clearly described as capable of being transferred and perfected in the same manner as current receivables. However, this can be considered void because it is against public policy, depending on the length of time during which the assigned receivables accrue or are generated. Therefore, it is necessary to limit this time to a reasonable period.

It is also difficult to securitise receivables that are subject to contractual restrictions (even though the effect of which has been weakened by the amendment of the Civil Code) or legislative restrictions or prohibitions (*see Question 15*). However, even if certain restrictions against a transfer apply, a synthetic securitisation or a securitisation by declaration of trust is possible and these securitisations have been executed in Japanese securitisation markets.

14. How is any security attached to the receivables transferred to the SPV? What are the perfection requirements?

Generally, security interests (such as mortgages, pledges, security interests by way of assignment (*joto-tanpo-ken*) and reserved ownerships (*ryuho-shoyuken*)) are, or are considered to be, automatically transferred with the transfer of the relevant receivables secured by law, without any separate action or agreement. If it is unclear if an automatic and accompanying transfer occurs by law, the transaction parties carefully document the accompanying transfers in the relevant transaction documents.

Security interests securing unspecified claims (that is, where secured obligations are not necessarily specified), such as umbrella mortgages (*ne-teito*) and umbrella pledges (*ne-shichi*), are not automatically transferred by law together with the assignment of the secured claims. Therefore, it is necessary to agree and document the transfer of these security interests (where possible) in the relevant transaction documents, which, in most cases, require the consent of the mortgagors, pledgors and other interested parties.

The perfection requirement for mortgages is registration in the relevant property registry.

The perfection requirement for pledges, security assignments, or reserved ownerships of tangible movable properties (excluding ships, aircraft, automobiles, and so on) is, with few exceptions, either:

- Delivery (although not necessarily physical delivery) of the relevant tangible movable properties to the holder of the security interest.
- Registration.

The requirements for perfection for pledges on, or security assignments in, receivables are either:

- Notice to, or the consent of, the relevant debtor by an instrument bearing a certified date (stamped by a notary, for example).
- Registration (a notice to the relevant debtor satisfying certain formalities is also required to perfect against the debtor).

The perfection requirement for pledges over trust beneficiary interests is notice to, or the consent of, the relevant trustee by an instrument bearing a certified date (stamped by a notary, for example).

Prohibitions or restrictions on transfer

15. Are there any prohibitions or restrictions on transferring the receivables, for example, in relation to consumer data?

Contractual restrictions

If receivables with a contractual prohibition on transfer are transferred in breach of the prohibition, the transferor is liable to compensate the debtor's damages, and the transferee can hold joint or separate contractual or tortious liability, but the transfer itself is deemed effective. Under the amended Civil Code, even if the transferee has knowledge of, or is grossly negligent concerning, the contractual prohibition, the transfer is still effective; however, the debtor can refuse to perform its obligation unless the transferee demands performance by the transferor within a reasonable period and the transferor fails to perform within such a period.

Legislative restrictions

There are some receivables whose transfer is prohibited or restricted by legislation. For example, the transfer of receivables based on social insurance, such as health insurance or pension insurance, is prohibited by relevant statutes. In addition, a transfer of future receivables can be determined to be void (*see Question 13*).

Avoiding the transfer being re-characterised

16. Is there a risk that a transfer of title to the receivables will be re-characterised as a secured loan? If so:

- **Can this risk be avoided or minimised?**
- **Are true sale legal opinions typically delivered in your jurisdiction or does it depend on the asset type and/or provenance of the securitised asset?**

Depending on the terms of the transaction, there is a risk that the transfer can be re-characterised as a secured loan. If a transfer is re-characterised as a financial transaction (that is, a loan with security, particularly in a reorganisation procedure (*kosei-tetsuzuki*) under the Corporate Reorganisation Act (*Kaisha-kosei-ho*) or Act on Special Measures for the Reorganisation Proceedings of Financial Institutions (*Kinyu-kikan-to no Kosei-tetsuzuki no Tokurei to ni Kansuru Horistu*), the SPV (or investors) only has preferential entitlement to receive distributions in accordance with the reorganisation plan. Further, the amount of the SPV's (or investors') claim can be reduced in the reorganisation plan, which results in investors not receiving the amounts from the cash flow generated from the relevant asset that they expected before the reorganisation.

To minimise this risk, the interested parties must ensure the transaction is recognised as a true sale (that is, a transfer is not and would not be deemed to be a transfer made to provide a security interest). There is no regulatory authority or legal precedent relating to the true sale determination. Interested parties are advised to avoid, if possible, any feature or condition in the transaction that can or will result in (or lead to) the assertion or conclusion that the parties intended to conduct a loan with security transaction.

While there are several factors (such as credit enhancements provided by the originator not being excessive) seen as favourable in the determination of a true sale, none of them are an absolute legal condition. Therefore, thorough examination is required in any given case. In most cases, rating agencies demand that legal opinions be obtained and submitted to them in relation to the true sale nature of the transaction, as a condition of their credit ratings of the securitisation products.

Ensuring the transfer cannot be unwound if the originator becomes insolvent

17. Can the originator (or a liquidator or other insolvency officer of the originator) unwind the transaction at a later date? If yes, on what grounds can this be done and what is the timescale for doing so? Can this risk be avoided or minimised?

The originator can unwind the transaction at a later date if:

- A termination right under the Civil Code arising from a breach of contract or liability for defect warranty is exercised. Under the Civil Code, the buyer has a statutory right to terminate the relevant sale and purchase contract if there is breach of contract by the seller, or when a latent defect is found in relation to the object of the sale transaction. In many other cases, the drafting of transaction agreements or of the transaction structure does not sufficiently prevent the exercise of these termination rights. Therefore, the risks must be factored into the pricing rather than being absorbed through the structuring.
- Avoidance rights under the insolvency statutes (Bankruptcy Act (*Hasan-ho*), Civil Rehabilitation Act (*Minji-saisei-ho*), Corporate Reorganisation Act and Act on Special Measures for the Reorganization Proceedings of Financial Institutions), nullification rights under the Trust Act (in cases where trusts are used as SPVs) or nullification rights under the Civil Code are exercised and upheld by the competent courts. Avoidance rights under the insolvency statutes can be exercised by the originator, a liquidator or any other insolvency officer of the originator. In contrast, nullification rights under the Trust Act or the Civil Code can be exercised by a creditor to the originator if the relevant transaction is conducted by the originator when it has already become insolvent or when it is on the verge of insolvency. Therefore, in closing a securitisation transaction, careful and thorough attention must be paid to the credit standing of the originator and other criteria for the exercise of such rights (including the appropriateness of the amount of consideration paid for the transfer of the securitised assets).
- The underlying receivables (that is, securitised assets) arise from a bilateral contract under which each of the parties has yet to complete the performance of their obligations (bilateral executory contract), and this contract is terminated. Under the insolvency statutes, in insolvency procedures, the insolvent debtor or the liquidator or insolvency officer can choose to terminate the bilateral executory contract. In concluding a securitisation, it is advisable to take the existence and the degree of these risks into consideration.

Establishing the applicable law

18. Are choice of law clauses in contracts usually recognised and enforced in your jurisdiction? If yes, is a particular law usually chosen to govern the transaction documents? Are there any circumstances when local law will override a choice of law?

The governing law of a contract can be specified by agreement of the parties. It is common to choose Japanese law in domestic transactions, although the laws of any other jurisdiction can be chosen in cross-border transactions.

This is subject to the following:

- Certain mandatory rules, for example on consumer or labour contracts, cannot be overruled or pre-empted by agreement.
- For the assignment of, or the creation of a pledge over, rights in personam (such as receivables and debt securities), in relation to the effect against the obligor or other third party to the assignment or the creation of the pledge, the law governing these rights overrides any other agreed governing law.
- For the assignment of, or the creation of a pledge over, shares or other equity, in relation to the effect against the issuer or other third party to the assignment or the creation of the pledge, the law governing the incorporation of the issuer overrides any other agreed governing law.
- In relation to the transfer or creation of rights *in rem* (such as ownership or mortgage) in tangible movable properties or real estate, the law of the jurisdiction where the relevant property or real estate exists governs matters relating to the effect of the transfer (including its legal formality requirements).
- The application of foreign law is denied if it results in a conclusion that is contrary to Japanese public policy.
- Corporate matters (such as shareholders' rights) are automatically governed by the law under which the corporation was incorporated (not the law of the jurisdiction of the corporation's principal place of business). However, to prevent "corporate law shopping", under Japanese law no foreign company (that is, a company incorporated or established under foreign law) that has its head office in Japan, or whose main purpose is to conduct business in Japan, is allowed to continuously carry out transactions in Japan.

SECURITY AND RISK

Creating security

19. Please briefly list the main types of security that can be taken over the various assets of the SPV in your jurisdiction, and the requirements to perfect such security.

Where securitisation products take the form of a loan, lenders' right(s) are usually secured by assets of the SPV. However, it is practically difficult, if not impossible, to issue bonds secured by the relevant collateral, due to the burdensome requirements, regulations and legal constraints in the Secured Bond Trust Act (*Tanpo-tsuki-shasai-shintaku-ho*). The main types of security that can be taken over the assets of an SPV are as follows:

- **Mortgage.** Mortgages (including umbrella mortgages) are commonly used in relation to real estate. Registration in the relevant property registry is necessary to perfect a mortgage.
- **Pledge.** For financing transactions involving receivables and trust beneficiary interests, pledges (including umbrella pledges) are one of the principal forms of granting security. For pledges over receivables, a pledge is perfected by notice to, or the consent of, the relevant obligor by or with an instrument bearing a certified date, or registration of the pledge. Registration only has the effect of perfection against third parties (in contrast to perfection against the obligor). A separate notice set out under the relevant statute is required to perfect against the obligor. To perfect pledges over trust beneficiary interests, notice to, or the consent of, the relevant trustee must be given by or with an instrument bearing a certified date.
- **Security assignments.** These are used in relation to financing transactions involving receivables and tangible movable properties. For tangible movable properties, a security assignment is perfected by delivery, which includes not only actual delivery but also constructive delivery. For receivables, the perfection requirements for assignments of receivables apply (*see Question 12*).
- **General security (*ippan tanpo*).** TMK bonds are secured over all property belonging to the issuer TMK, unless otherwise provided by the Asset Liquidation Plan under the Securitisation Act. A general security is a kind of statutory lien granted by

virtue of law without any requirement for creation. For a general security over real estate, registration in the relevant property registry is necessary to perfect the general security.

If no security is granted, or if it is difficult to grant security, it is common practice to:

- Provide substitute mechanisms, such as a negative pledge clause.
- Incorporate other similar covenants and contractual arrangements.

For further information on taking security over assets in Japan, see *Lending and taking security in Japan: overview*.

20. How is the security granted by the SPV held for the investors? If the trust concept is recognised, are there any particular requirements for setting up a trust (for example, the security trustee providing some form of consideration)? Are foreign trusts recognised in your jurisdiction?

Security for investors is rarely granted unless securitisation products sold to investors are structured as loans (*see Question 19*). If such security is granted, it is probably held by investors themselves rather than a security trustee. However, following the introduction of the new Trust Act, it has been made clear that the establishment of security trusts is allowed, and security interests granted can be held by the security trustee in favour of the secured creditors as beneficiaries of it. While there have been media reports relating to the use of security trusts in syndicated loans, security trusts have rarely been used. In addition, a parallel debt structure using joint and several claims (or obligations of active solidarity), which has been clearly provided for under the amended Civil Code, might be possible where only a security agent (not a trustee) will have security interests in favour of the lenders.

Trusts set up under foreign laws are recognised in Japan. However, careful determination of the governing law is required, as the statute providing for the choice of law does not explicitly address governing laws for trusts. Further, it is necessary to ensure the trustee does not violate or fail to comply with the Trust Business Act (*Shintaku-gyo-ho*).

Credit enhancement

21. What methods of credit enhancement are commonly used in your jurisdiction?

The methods of credit enhancement can be divided into internal credit enhancement and external credit enhancement.

Internal credit enhancement

In Japanese securitisation transactions, typical methods to achieve internal credit enhancement (that is, credit enhancement mechanisms incorporated into the structure, such as cash flow arising from or generated by the securitised assets, but which are independent from the creditworthiness of any specific transaction parties) are as follows:

- **Creation of subordinated tranches.** Typically, securitisation products, that is, securities issued by or from SPVs, are divided into multiple tranches. As a minimum, there are usually senior tranches that are sold to investors and a subordinated (junior) tranche which is usually retained and held by the originator of the transaction. However, if the credit enhancement provided by the originator is too large (that is, if the subordinated piece is too large in relation to the size of the senior pieces) the true sale nature of the transaction as a whole is jeopardised. Therefore, the originator must not provide too large a credit enhancement. Mezzanine tranches may also be sold to other investors, to provide credit support for the investors in the senior tranche(s). In many cases, subordinated tranches represent the over-collateralised portion of the assets being transferred to the SPV.
- **Creation of retained spread.** A mechanism called a default trap is often used which allocates to the resources an amount for principal payment for the senior tranche, from excess interest spread, corresponding to the amount of defaulted underlying receivables returned to the originator, excluding the amount repurchased by the originator.
- **Repurchase options and obligations.** In many transactions, the originator is entitled to repurchase underlying receivables, typically when the receivables became defaulted receivables. Alternatively, the originator must repurchase underlying receivables in whole or in part, depending on the circumstances, for example:
  - if there is a misrepresentation in the representations and warranties by the originator; or
  - if there is a breach of covenant by the originator.
- These repurchases also function as credit enhancement provided to the investors by, and with costs borne by, the originator. However, since the provision of too large a credit enhancement by the originator jeopardises the true sale nature of the transaction, the extent to which these repurchase options or obligations apply must be carefully drafted and sized appropriately.
- **Cash reserve.** In many cases, cash reserves are funded by the SPV retaining a part of the proceeds from the sale of the securitisation products. Therefore, the cash reserve is also viewed as an internal credit enhancement provided at the risk of, and with costs borne by, the originator. This means that the size and purpose of the cash reserves needs to be carefully designed so the true sale nature of the transaction as a whole is not jeopardised. It is usually necessary to distinguish between cash reserves for providing credit support and cash reserves for liquidity support (*see Question 22*).
- **Early amortisation.** By requiring that the loans to, or securities issued by, the SPV are redeemed if and when certain trigger events occur, this mechanism provides some comfort to investors because investors are repaid or otherwise paid before the securitised assets incur losses exceeding, for example, the size of the subordinated piece.

External credit enhancement

In Japanese securitisation transactions, typical external credit enhancements (that is, credit enhancements provided by, and relying on the creditworthiness of, third-party providers are as follows:

- **Letters of credit/commitment line.** In most ABCP programmes, credit enhancement is provided by the sponsoring banks in the form of letters of credit or extension of commitment lines. Asset-backed securities (ABS) and other categories of securitisation can also feature letters of credit or commitment lines as external credit enhancement.
- **Guarantee, surety or insurance.** Similar to letters of credit or commitment lines, external credit enhancement providers can provide credit support to the transaction through a guarantee. As with letters of credit and commitment lines, since the credit support would rely on the creditworthiness of the provider of the guarantee, following the recent financial markets turmoil, there are fewer parties with both sufficient credit and the willingness to provide such credit support.
- **Credit derivative.** As an alternative to insurance, guarantee or surety, for example, a credit protection can be purchased through a CDS.

Risk management and liquidity support

22. What methods of liquidity support or cash reservation are commonly used in your jurisdiction?

Common methods of liquidity support in Japan are:

- **Cash reserves.** As with cash reserves for credit enhancement purposes, liquidity support is provided to transactions through the SPV retaining a part of the cash proceeds of the securitisation products sold to investors.
- **Letter of credit/commitment line.** A letter of credit or a loan facility in the form of line of credit (a commitment line) is sometimes used for liquidity support to securitisation transactions.

CASH FLOW IN THE STRUCTURE

Distribution of funds

23. Briefly set out the main points of the cash flow index in your jurisdiction. In particular, will the courts in your jurisdiction give effect to "flip clauses" (that is, clauses that allow for termination payments to swap counterparties who are in default under the swap agreement, to be paid further down the cash flow waterfall than would otherwise have been the case)?

Typical cash flow waterfalls in Japan are not significantly different from standard cash flow. The detailed priority of payments and cash flow mechanics are established in the relevant transaction documentation on a case-by-case basis, with the order of payment being influenced by various factors, such as tax, valuation of assets and negotiating position of various parties.

The flip clauses are not common in Japan and their validity is not clear, although it likely could be structured as a variation of a subordination clause that would be given effect by courts.

Profit extraction

24. What methods of profit extraction are commonly used in your jurisdiction?

It is common for the originator to receive compensation or consideration for the value of the credit enhancement it provides to the transaction, such as payments as distributions on:

- The subordinated trust beneficial interests.
- TK interests.
- Preferred equity of the (originator-owned or held) SPC.

In addition, the originator can in some cases take fees for:

- Administering the receivables contracts and collecting the receivables.
- Arranging or managing the portfolio of receivables.
- Acting as a swap counterparty.

However, controlling receivables after the receivables are transferred to the SPV can raise doubts as to whether the transaction is a true sale.

THE ROLE OF THE RATING AGENCIES

25. What is the sovereign rating of your jurisdiction? What factors impact on this and are there any specific factors in your jurisdiction that affect the rating of the securities issued by the SPV (for example, legal certainty or political issues)? How are such risks usually managed?

The ratings assigned to the debts of the Japanese national government are, according to:

- **Moody's.** Long-Term Rating of A1. According to Moody's, this rating reflects the government's significant credit strengths, including a large, diverse economy with a strong external position, very high institutional strength and a very strong domestic funding base (Moody's Investors Service Singapore Pte. Ltd., *Rating Action: Moody's downgrades Japan to A1 from Aa3; outlook stable*, as of 1 December 2014).
- **Standard & Poor's.** Long-Term Issuer Credit Ratings of A+ for debts denominated in a foreign currency and in JPY, and T&C Assessment (the rating associated with the probability of the sovereign restricting non-sovereign access to foreign exchange needed for debt service) of AA+.
- **Fitch.** Long-Term Issuer Default Ratings of A for debts denominated in a foreign currency and in JPY.

It seems that no specific consideration has been given to country risks, such as legal certainty or political issues. Due to the frequent occurrence of earthquakes in Japan (such as the Great East Japan Earthquake), securitisation products relating to real estate are rated on the premise that these products are influenced by seismic risks. However, seismic risks are usually hedged by earthquake insurance, or by keeping geographical variance in relation to the overall portfolio.

In addition, due to the global COVID-19 pandemic and the resulting stress on economic activity, Standard & Poor's and Fitch have stated a possible downgrade of their sovereign ratings for certain countries. With regard to Japan's rating, Fitch has pointed out that Japan's fiscal policy response, which included increasing public debt, may put pressure on the country's rating.

TAX ISSUES

26. What tax issues arise in securitisations in your jurisdiction? In particular:

- **What transfer taxes may apply to the transfer of the receivables? Please give the applicable tax rates and explain how transfer taxes are usually dealt with.**
- **Is withholding tax payable in certain circumstances? Please give the applicable tax rates and explain how withholding taxes are usually dealt with.**
- **Are there any other tax issues that apply to securitisations in your jurisdiction?**
- **Does your jurisdiction's government have an inter-governmental agreement in place with the US in relation to FATCA compliance, and will this benefit locally-domiciled SPVs?**

Transfer tax

No transfer tax applies to the transfer of receivables. However, the following taxes can apply:

- **Registration and licence tax (*toroku-menkyo-zei*).** This is levied on registration applicants, including for registrations of assignment of receivables or security interests in real estate. The rate for the registration of transfers of mortgages in real estate is 0.2% of the tax base of the receivables amount (or a maximum amount for umbrella mortgages (*ne-teito*)) unless otherwise reduced.

- **Stamp tax** (***inshi-zei***). This is levied by the national government on the parties to various contracts, including sale contracts or transfer agreements. For example, a contract:
  - for the assignment of real estate is subject to a stamp tax of up to JPY480,000, depending on the value of the contract;
  - for the assignment of receivables or trust beneficial interests is subject to a stamp tax of JPY200.

Withholding tax

Income tax is withheld from earnings of non-residents such as:

- Interest on bonds that are not held under the book-entry transfer system.
- Dividends of surplus from corporations.
- Profit dividends from TK operators.
- Profit dividends from certain kinds of trusts.

15.315% of interest or dividend income from bonds or listed shares (20.315% if combined with local tax) or 20.42% of loan interest from borrowers or profit dividends from TK operators is withheld as income tax, except for cases where recipients are exempted entities (such as certain financial institutions satisfying certain requirements).

Other tax issues

For financial instruments involving the use of an SPC or certain kinds of trust that are deemed to be a corporation for tax purposes (such as TMSs), there is an issue of double taxation arising from corporation tax being levied on such SPVs (separately from, and in addition to, the tax imposed at the investor level). However, this does not apply to TMKs, TMSs and J-REITs that satisfy certain criteria (including more than 90% of the distributable profit being distributed as dividends), which are essentially treated as pay-through entities for tax purposes (that is, the payment of dividends to their shareholders is taxed only in their hands). For example, the qualifying criteria for TMKs include that:

- All of the TMK bonds are expected to be held by certain qualified institutional investors (including another TMK satisfying certain requirements), or all of the preferred equity interests were subscribed for by certain qualified institutional investors, or other alternative requirements are satisfied.
- Over 50% of preferred equity interests (and certain common equity interests) on an issued amount basis are planned to be offered (allotted or offered, for common equity interests) in Japan.

To avoid the issue of double taxation in using a GK or KK as an SPC, TK interests are often used to pass, tax free, all the profits and losses to the investors. TMKs, TMSs and J-REITs can also be used to achieve pass-through entity status for tax purposes (*see above*).

FATCA compliance

The Japanese government has an inter-governmental agreement with the US in relation to FATCA compliance (the Statement of Mutual Cooperation and Understanding between the U.S. Department of the Treasury and the Authorities of Japan to Improve International Tax Compliance and to Facilitate Implementation of FATCA (June, 2013), as modified by the Additional Statement to Modify Certain Parts of the Statement of Mutual Cooperation and Understanding between the U.S. Department of the Treasury and the Authorities of Japan to Improve International Tax Compliance and to Facilitate Implementation of FATCA (December, 2013)). This provides that Japanese FFIs, including securitisation SPCs, are exempted from withholding tax under the FATCA if they register as FFIs with the IRS and implement the requirements of an FFI Agreement, without entering into FFI agreements with the IRS (*paragraph 1 of Section 3 of the Statement*).

RECENT DEVELOPMENTS AFFECTING SECURITISATIONS

27. Give brief details of any legal developments in your jurisdiction (arising from case law, statute or otherwise) that have had, or are likely to have, a significant impact on securitisation practices, structures or participants.

The Act on Specified Joint Real Estate Ventures had virtually prohibited an SPC with a TK-GK scheme from acquiring real estate directly. However, recent amendments that came into force in December 2017 have enabled such a scheme under special regulations, with some tax exemptions for certain situations.

Statutory disclosure requirements on ABS were tightened in December 2014 by a regulatory amendment (including disclosure of significant obligors and representations and warranties). However, since during the last decade ABSs have been issued through private placement and are not subject to statutory disclosure requirements, this amendment has had very little actual impact on recent securitisation practices.

A bill introducing stricter control of Specially Permitted Business for Qualified Institutional Investors, Etc. under Article 63 of the FIEA, including, for example, the enhancement of business conduct regulations and enforcement, was enacted in June 2015. Article 63 of the FIEA exempts SPCs with TK-GK schemes from registration requirements as financial instruments business operators for their private placement and investment management activities, if there is at least one qualified institutional investor and at most 49 other investors. The details of the new regulations under the amended FIEA, which will include a limitation on the qualifications to be an investor under this exemption, will be proposed by the FSA within a few months.

On 15 March 2019, the FSA published a series of amendments to the regulations on the regulatory capital requirements for securitisation products, applicable to Banks; the amendments became effective on 31 March 2019 (*see Question 3*).

An amendment to the Civil Code entered into force on 1 April 2020. While the amendment does not appear to have brought about any drastic changes to securitisations, it includes changes to general rules relating to joint and several claims, warranties against defects, transfers of claims, and guarantees, that will cause some changes to contract documents.

OTHER SECURITISATION STRUCTURES

28. What other structures, including synthetic securitisations, are sometimes employed in your jurisdiction?

A number of balance-sheet synthetic CDOs have been introduced and placed on the market. In balance-sheet synthetic CDOs, the typical structure is as follows:

- The originating bank purchases credit protections from an SPV by entering into CDS transactions with the SPV, in which financial assets such as loans and bonds held by the originator are designated as reference obligations.
- Under the CDS transactions, the originating bank pays a CDS premium to the SPV periodically.
- The SPV typically opens and maintains a bank account with the originating bank in its own name. The SPV deposits into the bank account the entire amount of the proceeds from the sale of the securitisation products (that is, the bonds or other securities issued by or from the SPV).

- The SPV services its debts owed to investors with the amounts received from the originating bank, such as the CDS premium and the interest payments on the bank deposit.
- The bank account is provided to the originating bank as collateral for the SPV's obligations under the CDS. This enables the originating bank to achieve credit risk mitigation under the domestic rules based on the Basel Accord.
- If a credit event occurs in relation to the reference obligations (or reference entities), the SPV applies the funds in the bank account to credit protection payments to the originating bank. An amount equivalent to the relevant protection payment paid to the originating bank is then deducted from the amount of principal to be repaid to the investors in relation to securitisation products.

These balance-sheet synthetic CDOs are often used by depository financial institutions to manage their risk assets portfolios and to achieve capital relief under the capital adequacy rules.

Most SPVs only issue a single series of financial instruments, with master trust structures and ABCP conduits being the only practical exceptions. Certain legal obstacles have limited market participants' willingness to establish a structured investment vehicle (SIV) programme and only a quasi-SIV programme has been introduced in Japan.

For real estate securitisations, the most common structures involve the transfer of interests in real estate conducted indirectly through transfers of trust beneficial interests. In this case, the seller or originator of the real estate commonly both (in the following order):

- Entrusts the real estate to a trustee under a trust agreement (converting the ownership interest in the real estate into a trust beneficial interest).
- Transfers the trust beneficial interest to the SPV for securitisation purposes.

However, these steps need not be applied if either:

- The transaction is conducted under and in compliance with the Act on Specified Joint Real Estate Ventures.
- The SPV is a TMK (a corporate form chosen to use a transaction scheme that is not subject to the Act on Specified Joint Real Estate Ventures).

REFORM

29. Please summarise any reform proposals and state whether they are likely to come into force and, if so, when. For example, what structuring trends do you foresee and will they be driven mainly by regulatory changes, risk management, new credit rating methodology, economic necessity, tax or other factors?

On 1 February 2020, the UK began the process of withdrawal from the EU. Major Japanese financial institutions have their operating base in the UK, from where they provide various financial services, including securitisation products, across the EU. For instance, it is an important prerequisite for their business in the UK that the "single passport system" applicable to the EU member states allows them to operate inside the entire EU. If their operating base in the UK loses their passport rights as a result of Brexit, they might face difficulties in continuing their financial business in the UK and might be forced to relocate their operations from the UK to another country in the EU. However, it is difficult to foresee at the moment what impact Brexit might have on their financial business, since it is unclear what form the UK's post-Brexit relationship with the EU might take in the area of financial regulations. It is therefore necessary to closely watch the future negotiation between the UK and the EU.

30. Has the nature and extent of global, regional and domestic reforms had a positive or negative affect on revitalising securitisation in your jurisdiction?

Tightening of the treatment of (re)securitisation products in the Basel Accord might have had a negative impact on revitalising securitisation in Japan.

Practical Law Contributor profiles

Hajime Ueno

Nishimura & Asahi

T +81 3 6250 6275
F +81 3 6250 7200
E h_ueno@jurists.co.jp
W www.jurists.co.jp/en
Professional qualifications. Japan, 1999; New York, 2005

Areas of practice. Structured finance; acquisitions finance; capital restructuring; leveraged finance; banking; insolvency and restructuring; M&A.

Takanobu Yamamoto

Nishimura & Asahi

T +81 3 6250 7390
F +81 3 6250 7200
E tak_yamamoto@jurists.co.jp
W www.jurists.co.jp/en
Professional qualifications. Japan, 2017

Areas of practice. Structured finance; real estate finance; project finance; renewable energy; banking; corporate governance.