



NO&T Real Estate Legal Update

不動産ニュースレター

July, 2025

Real Estate Legal Update No.6

Infrastructure, Energy & Environment Legal Update No.3

Legal Considerations for Data Center Development and Operation Project (2) - The Nature of Customer Contracts, Permits and Licenses, and Power Procurement -

Makoto Saito

Shinichiro Horaguchi

Yoshihisa Watanabe

Ramsay Randall

Introduction

In the previous issue, we discussed the main legal considerations related to structuring the development and operation of data centers¹. This newsletter complements the first by addressing matters related to the operation of data centers.

A data center is both a real estate-related business and collection of various services. There is no single law regulating data centers; rather, various laws and regulations may apply depending on the service content, structure, and physical configuration. Additionally, because data centers are relatively new businesses and their business content is rapidly evolving, it is not uncommon for new issues to arise when applying various laws and regulations that were not previously considered².

This newsletter will provide an overview of the legal nature of contracts with customers, which are central to the data center business, as well as the main regulations applicable to the data center business. We will also explain the legal considerations for power procurement, an essential element in the operation of data centers³.

The Legal Nature of Contracts with Customers

In order to discuss the regulations applicable to the data center business, it is necessary to first describe the legal nature of the contracts that data center operators and customers enter into regarding the data center business.

In hyper-scale data centers, it is typical for a data center operator to grant customers the right to use space within the data center, as well as to provide power, air conditioning, and various ancillary services. The legal nature of the contracts between data center operators and customers concerning these matters can vary. If the emphasis is on the granting of the right to use space within the building, the contract could be considered a property lease

¹ "[Legal Considerations for Data Center Development and Operation Project \(1\) - Structuring Issues -](#)" (NO&T Real Estate Legal Update No. 5/NO&T Infrastructure, Energy & Environment Legal Update No. 2)

² In particular, for businesses such as mega cloud service providers that operate globally, there is a high need to standardize operations internationally. The challenge lies in reconciling the requirements for unified operations with the unique regulations specific to Japan.

³ As in the previous article, this newsletter will primarily discuss hyperscale data centers.

agreement. On the other hand, if the focus is on the provision of services, it may be considered a service contract (i.e., a service provision agreement). In practice, there are often cases where the contract does not clearly specify that it is either primarily space-related or service-based, or where other forms of agreements are adopted in which the nature of the agreement is similarly difficult to classify.

In Japan, however, it is important to note that if a contract is classified as a building lease agreement, the mandatory provisions of the Act on Land and Building Leases (the "ALBL") will apply thereto⁴. Specifically, this entails that, unless it is a fixed-term building lease agreement (ALBL, Article 38), the landlord's ability to refuse a lease renewal requires justifiable grounds (ALBL, Article 28), thus limiting the landlord's ability to terminate the contract. Additionally, the tenant would have the right to request a rent reduction (ALBL, Article 32).

In this regard, even if a part of a building is divided by barriers or other means and has a structure and scale that allows for exclusive control, it is considered a "building" under the ALBL⁵. However, there are also cases where the ALBL has been found not to apply to portions of a building⁶. For data centers, applicability will likely be determined based on facts such as the scope of the area used by the customer, its independence, the possibility and method of modification, the method and manner of external access, and whether the data center operator can enter the relevant portion of the building.

It should be noted that even if the contract between the data center operator and the customer is named a service contract, colocation contract, license agreement, etc., or stipulates that no leasehold right arises or that the ALBL does not apply, this will not necessarily prevent the application of the ALBL, and the decision as to whether the ALBL applies will be based on the actual circumstances of the use of the property⁷.

Furthermore, especially when adopting GK-TK structures or TMK structures, in addition to the regulations applicable to each entity (typically, the prohibition on engaging in other businesses for TMKs), it is necessary to consider the various regulations applicable to the services provided to customers, as will be explained in the following section 3. In light of these considerations, it may become necessary to carefully consider the structure, parties, and content of contracts with customers with respect to which entity should provide which services to the customers⁸.

Main Regulations Applicable to the Data Center Business

Various regulations may apply to the data center business, and the following provides an overview of major regulations related to the provision of services to customers that often become points of discussion in the development and operation of data centers⁹.

⁴ It should be noted that if the leasing of a building (including a part of a building) is involved, the mediation of such a contract could fall under real estate brokerage (Real Estate Brokerage Act, Article 2, Item 2), and the Real Estate Brokerage Act may apply. When a data center operator itself engages in contract negotiations with customers, it does not fall under the definition of a real estate brokerage. However, depending on the structure, the entity that is a party to the contract with the customer and the entity that actually negotiates with the customer may differ. In such cases, the entity negotiating with the customer may require a license (Real Estate Brokerage Act, Article 3, Paragraph 1) and may also need to provide an explanation of important matters (Real Estate Brokerage Act, Article 35).

⁵ Although it is a case related to the Act on Building Leases, reference can be made to the Supreme Court Judgment dated June 2, 1967, Minshu Vol. 21, No. 6, p. 1433.

⁶ There is a Tokyo District Court judgment dated June 30, 2008, Hanji No. 2020, p. 86, which denied the application of the Land and House Lease Act by considering factors such as the inclusion of parts like corridors that are not subject to rent within the contract area, the lack of unique locking facilities or independent entrances from outside, and the history of moving the leased area and increasing the contract area. On the other hand, there is a Tokyo District Court judgment dated July 15, 1996, Hanji No. 1596, p. 81, which affirmed the application of the Tenant Protection Act to a bread section within a supermarket. This section had a unique entrance that allowed direct access from a public road separate from the supermarket's entrance and, while there were no doors separating it from the other sections of the supermarket, it was considered an independently partitioned area. Moreover, regarding the so-called case leases in department stores, it is generally considered that the Land and House Lease Act is not applicable (see Supreme Court Judgment dated February 18, 1955, Minshu Vol. 9, No. 2, p. 179).

⁷ See the aforementioned Tokyo District Court Judgment dated July 15, 1996, and Tokyo District Court Judgment dated November 11, 2014, WLJPCA11118015.

⁸ For hyperscale data centers, there may be a requirement to standardize contracts with customers internationally. Whether it is possible to modify or adjust these contracts with customers due to circumstances arising from structures and regulations in Japan will be a matter of negotiation with customers. Additionally, when involving multiple entities, it is important to note that the creditworthiness of each entity may also become an issue.

⁹ Although this newsletter does not cover this topic, various regulations related to the buildings and equipment of data centers, such as the Building Standards Act, the Fire Services Act, and the Electricity Business Act, must also be considered during structuring.

1. Telecommunications Business Act

The use of telecommunications equipment to mediate the communications of end-users, or otherwise making telecommunications equipment available for end-user communication is categorized as telecommunications services (Telecommunications Business Act, Article 2, Item 3). In order to operate a telecommunications business, i.e., a business providing telecommunications services¹⁰, as a general rule it is necessary to either register (Telecommunications Business Act, Article 9) or submit a notification (Telecommunications Business Act, Article 16), and attention must be paid to regulations under the Telecommunications Business Act.

Where real estate companies and similar entities develop buildings equipped with power supply facilities and earthquake resistance facilities and lease them as server installation locations to telecommunications business operators, this is deemed not to fall under telecommunications services because it merely involves leasing space as real estate business. However, if the service provider itself procures telecommunications lines and provides them to service users, it is considered a resale of telecommunications services and requires registration or notification as a telecommunications business¹¹.

In many cases, notification alone, without registration, is sufficient for data centers. However, in practice, it is often necessary to consult with the competent communications bureau and to present them with a network configuration diagram.

Regarding special purpose companies (hereinafter TMKs or SPCs), it is considered difficult for them to be the entities responsible for registration or notification due to the prohibition on TMKs engaging in other businesses. Therefore, in a TMK structure, it is necessary to consider leasing the data center to a data center operator or having another SPC as a master lessee, and having this data center operator or SPC perform the registration or notification.

2. Construction Business Act

In data centers, even after the initial construction work is completed and operations have commenced, it is often necessary to carry out additional work, such as electrical work in response to customer requests or customer replacements. The business of contracting the completion of such work falls under the legal definition of construction business (Construction Business Act, Article 2, Paragraph 2). With the exception of minor work, where the contract amount for a single project does not exceed 5 million yen, any such post-completion work requires a construction business license (Construction Business Act, Article 3; Enforcement Order of the Construction Business Act, Article 1-2, Paragraph 1)¹².

In this regard, if the data center operator directly contracts with a licensed contractor for construction work with respect to assets that belong to the data center operator, or if the customer does so directly for assets that belong to the customer, no unique issue presents itself. Depending on the structure, however, multiple parties such as the customer, the data center operator, and the SPC owning the building may be involved in contracting for construction work, and it could become an issue whether the data center operator or the SPC is engaging in actions that qualify as construction business as the prime contractor¹³.

3. Security Business

In data centers, it is necessary to ensure physical security at all times. Regarding on-site security at data centers, if this is conducted "in response to the needs of others" (i.e., if security is provided for any parties other than the data center operator itself) as part of so-called facility security services¹⁴, it falls under the legal definition of security services (Security Services Act, Article 2, Paragraph 1), and it is necessary to obtain relevant certification

¹⁰ Businesses related to the provision of broadcasting station facilities services as stipulated in the Broadcasting Act, Article 118, Paragraph 1 are excluded from telecommunications businesses (Telecommunications Business Act, Article 2, Item 4).

¹¹ Ministry of Internal Affairs and Communications "Telecommunications Business Entry Manual [Supplementary Edition]" August 18, 2005 (Revised January 30, 2023), p. 22

¹² It should be noted that for electrical work, regardless of whether the contract amount for a single project is less than 5 million yen, registration, notification, and other procedures based on the Act on Ensuring the Proper Operation of Electrical Work Business are required.

¹³ For special purpose companies (TMKs) within a TMK structure, if they are found to be engaging in activities that fall under construction business, in addition to issues of violating the Construction Business Act, there may also be adverse implications for tax-conduit requirements due to violations of the prohibition against engaging in other businesses.

¹⁴ These are defined as business operations that involve guarding against and preventing incidents such as theft in offices, residences, theaters, parking lots, amusement parks, etc. (Security Services Act, Article 2, Paragraph 1, Item 1).

under the Security Services Act with respect to the provision of such services (Security Services Act, Article 4).

For data center operators who own or lease entire buildings and conduct security operations within their own operated data centers, the security services can be organized as an activity carried out as their own business rather than "in response to the needs of others." Similarly, it is considered acceptable for such data center operators to contract security services to a security company. However, similar to the case of construction businesses, when multiple parties are involved, it may become an issue whether the data center operator or SPC is engaging in security services (including cases where services are subcontracted from a security company).

4. Waste Management and Public Cleansing Act

Regarding waste generated at data centers, it must be disposed of in accordance with the regulations of the Waste Management and Public Cleansing Act (the "Waste Management Act"). Business operators are responsible for the proper disposal of waste generated from their business activities (Waste Management Act, Article 3, Paragraph 1). Industrial waste (Waste Management Act, Article 2, Paragraph 4) must also be disposed of by the business operator itself (Waste Management Act, Article 11, Paragraph 1). If the transportation or disposal of industrial waste is entrusted to another party, this must be an industrial waste collection and transportation operator, an industrial waste disposal operator, or another person specified by the Ministry of the Environment as stipulated in the Waste Management Act, Article 14, Paragraph 12. A management manifest must also be issued at the time of transfer of the industrial waste (Waste Management Act, Article 12-3).

As mentioned above, ownership of various assets in data centers can be a complex determination varying on a case-by-case basis, and it is often difficult to determine which entity is the waste generator in the data center for waste management purposes. It is also important to note that, under the Waste Management Act, as a general rule it is prohibited to re-entrust the collection, transportation, or disposal of industrial waste to a third party, except when strict criteria are met (Waste Management Act, Article 14, Paragraph 16).

If the customer is the waste generator for industrial waste, the customer may need to arrange for collection and transportation or disposal with industrial waste collection and transportation operators or industrial waste disposal operators. Moreover, attention should be paid to whether the data center operator is considered to be entrusted with the disposal of industrial waste generated by the customer's operations, as this may require a permit under the Waste Management Act (Waste Management Act, Article 14, Paragraphs 1 and 6).

Procurement of Electricity

In operating a data center, a vast amount of electricity is consumed. It is estimated that electricity costs account for up to 25% of the operating costs, including equipment, buildings, and personnel expenses¹⁵. Furthermore, to attract hyperscalers that demand carbon-free energy sources, data centers face increasing pressure to not only improve energy efficiency but also to procure large and stable amounts of renewable energy-derived electricity from external sources.

There are several methods to procure electricity derived from renewable energy, but recently the direct procurement of renewable electricity from specific renewable energy power producers (a power purchase agreement or PPA) has been a commonly used method (including by data center operators). For data centers specifically, an offsite PPA is the most likely method of procurement, pursuant to which renewable energy produced by power generation facilities operated by distantly-located third-party power producers (e.g., wind farms in rural areas) is supplied to data centers near metropolitan areas.

Corporate PPAs come in two forms: (1) physical PPAs, by which electricity is supplied to consumers via the power grid, transferring both electricity and environmental attributes from the power producer to the consumer; and (2) virtual PPAs, by which the power producer sells electricity on the market or to other businesses, while the consumer also physically draws electricity from a retail electricity provider other than the power producer,

¹⁵ Expert Meeting on the Development of Digital Infrastructure (such as Data Centers) (2nd Meeting) Distributed Material Document 3 "Expert Meeting on the Development of Digital Infrastructure (such as Data Centers) (2nd Meeting)" (November 15, 2021), p. 4

separating and transferring only the environmental attributes¹⁶ to the consumer.

In the case of a physical PPA, the transfer of electricity (accompanied by environmental attributes) from the power producer (owner of the renewable energy generation facility) to the consumer (such as the data center operator) requires registration as a retail electricity provider under the Electricity Business Act, because it constitutes retail supply (providing electricity in response to general needs). Consequently, a retail electricity provider must mediate between the power producer and the consumer, with the power producer supplying renewable electricity to the retail electricity provider, and the consumer directly purchasing renewable electricity from the retail electricity provider.

On the other hand, a virtual PPA involves the power producer separating the environmental attributes from the electricity and providing only the environmental attributes to a specific consumer, while setting a fixed price known as a strike price with the consumer and reconciling the difference between the market price of electricity and the strike price.

There are many points to consider when introducing any form of corporate PPA. For instance, in a physical PPA, consumers like data center operators must assume the credit risk of the retail electricity provider to some extent. In a virtual PPA, consumers take on the risk of price fluctuations in the electricity market, so they must consider risk mitigation measures with respect to same. Furthermore, negotiating a corporate PPA contract, whether for a physical or a virtual PPA, typically involves significant effort. For power producers, the offtake agreement is key to both recovering the development costs of renewable energy generation facilities developed with substantial investment, as well as to ensuring returns. If the power producer has obtained financing through project finance, the preferences of the lenders also must be taken into consideration. The consumer must ensure that negotiations with the power producer take into consideration key commercial terms, such as contract duration, terms of supply for electricity and environmental attributes, payment conditions, and the allocation of risks related to regulatory changes and force majeure.

Moreover, in the development and operation of a data center, other electricity-related issues must be considered based on the specifics of the project. These include determining who should own the power reception equipment (the SPC or another party), which entity should be the consumer entering into the retail supply contract with the retail electricity provider, and whether it is possible to supply electricity received through a single power reception facility (bulk power reception) to customers located in multiple buildings. These decisions should take into consideration not only the Electricity Business Act but also regulations under the Act on Securitization of Assets and other relevant laws, so careful attention is required.

¹⁶ As a general matter, these environmental attributes comprise (i) non-fossil value: the value that can be accounted for in the non-fossil energy source ratio calculation under the Act on Sophisticated Methods of Energy Supply Structures, (ii) zero-emission value: the value with a CO₂ emission factor of 0 kg-CO₂/kWh under the Global Warming Countermeasures Act, and (iii) environmental display value: the value that a retail electricity provider can display and assert as added value to customers.

[Authors]

**Makoto(Mack) Saito, Partner**

makoto_saito@noandt.com, +81-3-6889-7223

Makoto Saito is a partner at Nagashima Ohno & Tsunematsu. His practice focuses on real estate transactions and M&A transactions. He also advises many domestic and foreign clients on health care related matters and other general corporate matters.

He was shortlisted for a finalist of Dealmaker of the Year at the ALB Japan Law Awards 2025, chosen for the Best Lawyers in Japan 2026 (Real Estate), elected as a Leading partners (Real estate and construction) in The Legal 500 Asia Pacific 2025, and elected as a Notable practitioner (M&A, Real estate acquisitions) in IFLR1000 2024.

**Shinichiro Horaguchi, Partner**

shinichiro_horaguchi@noandt.com, +81-3-6889-7388

Shinichiro is involved principally in the area of real estate transactions, including formation and management of J-REITs and private funds investing in real estate, real estate financing, real estate securitization and M&A of real estate-related businesses, overseas real estate development by Japanese real estate-related companies, project finance, energy, and other infrastructure-related transactions.

He was selected as a Best Lawyers in Japan (Project Finance and Development Practice, Real Estate Law and Structured Finance Law) in The Best Lawyers in Japan (2019-2026) and elected as a Next Generation Partner (Real estate and construction) in The Legal 500 Asia Pacific (2019-2025).

**Yoshihisa Watanabe, Partner**

yoshihisa_watanabe@noandt.com, +81-3-6889-7677

Yoshihisa is actively involved in resources and energy, construction and infrastructure, project finance, structured finance, J-REITs, real estate transactions, M&A/corporate, agriculture, forestry and fisheries, and carbon neutrality and sustainability law.

He was selected as a Rising Star Partner (Project Development and Project Finance) in IFLR 1000 (2022-2024), chosen for the Best Lawyers in Japan 2024-2026 (Real Estate), elected as a Next Generation Partner (Projects and Energy) in The Legal 500 Asia Pacific 2024-2025 and shortlisted for Young Lawyer of the Year at the ALB Japan Law Awards 2024.

**Ramsay Randall, Foreign Lawyer**

*Not admitted in Japan

ramsay_randall@noandt.com, +81-3-6889-7260

Ramsay joined Nagashima Ohno & Tsunematsu's Tokyo office as a foreign lawyer after practicing as a real estate finance attorney in New York. In addition to commercial and large-scale residential real estate finance transactions, he has worked on a broad range of infrastructure and energy sector projects.

This newsletter is given as general information for reference purposes only and therefore does not constitute our firm's legal advice. Any opinion stated in this newsletter is a personal view of the author(s) and not our firm's official view. For any specific matter or legal issue, please do not rely on this newsletter but make sure to consult a legal adviser. We would be delighted to answer your questions, if any.

NAGASHIMA OHNO & TSUNEMATSU

www.noandt.com

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan

Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com



Nagashima Ohno & Tsunematsu, based in Tokyo, Japan, is widely recognized as a leading law firm and one of the foremost providers of international and commercial legal services. The firm's overseas network includes locations in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi, Jakarta* and Shanghai. The firm also maintains collaborative relationships with prominent local law firms. The over 600 lawyers of the firm, including about 50 experienced lawyers from various jurisdictions outside Japan, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter. (*Associate office)

If you would like to receive future editions of the NO&T Real Estate Legal Update by email directly to your Inbox, please fill out our newsletter subscription form at the following link: https://www.noandt.com/en/newsletters/nl_realestate/.

Should you have any questions about this newsletter, please contact us at [<nl-realestate@noandt.com>](mailto:nl-realestate@noandt.com).

Please note that other information related to our firm may be also sent to the email address provided by you when subscribing to the NO&T Real Estate Legal Update.