APPIL (Asian Principles of Private International Law) and its Perspective Regarding International Jurisdiction

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1. Introduction: APPIL project

APPIL is an acronym of "Asian Principles of Private International Law". The first iteration of this project will be published in the year 2019 both in the form of a book and an on-line version[1]. The outline and résumé of forthcoming APPIL on Civil and Commercial Matters (it will be titled : APPIL 2018 or 2019, or even differently; provisionally hereinafter cited as APPIL 2018) has been already published at least partly[2]. Here, I aim to introduce another part of APPIL 2018 on International Jurisdiction, as a co-author, and attempt to examine its feasibility both in practice and academically. The analysis and opinions presented below are only from this author, and do not represent any of the other members engaged in the APPIL project.

The APPIL project has been undertaken so far mainly by private international law academics from Asian and other regions around the world. We have had many conferences and meetings to draw up the principles of private international law on civil and commercial matters from 2015-2018 (and also planned in 2019 to finalize the principles). Discussions are based on the presentation from each meeting and conference, and materials presented by rapporteurs. One of the most important materials presented here is the "National Report" from each country or region[3]. It is already almost impossible to define a country in the context of private international law in Asia, so we intentionally avoid using the word "country" on the APPIL project, but rather "jurisdiction" or state. In terms of (at least a part of) APPIL 2018, International Jurisdiction, it might sound confusing, but should be "swallowed" because of political and diplomatic complications in Asia. Here, APPIL jurisdictions are designated just as the regions or the legal areas, and International Jurisdiction refers to the competence of the public judicial authority (hereinafter just the court) to judge

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1) Most likely Hart Publishing.

2) W. Chen & G. Goldstein, The Asian Principles of Private International Law: objectives, contents, structure and selected topics on choice of law, Journal of Private International Law, 13:2 (2017), 411-434; N. Takasugi, Asian Principles of Private International Law, Doshisya Law, Vol. 69 (No. 7) (2018), 277-294 (in Japanese).

3) Cited later. Some of them are already under the up-date or even amended in legislation.

cases which involve international elements[4].

At least ten parties from APPIL jurisdictions were responsible for presenting national reports. The limitation of the number was primarilly due to financial considerations[5]. Additionally, some representatives of those ten parties also drew up the APPIL 2018 on Civil Commercial Matters, which consists of four parts, namely 1. International Jurisdiction, 2. Choice of Law, 3. Recognition and Enforcement of Foreign Judgements, and 4. Judicial Support of International Commercial Arbitration. The national reports were presented from 10 jurisdictions (APPIL jurisdictions): China (Mainland), Hong Kong, Indonesia, Japan, Korea (South), Philippine, Singapore, Taiwan, Thailand and Vietnam[6].

APPIL 2018 was originally planned to be published much earlier. One of the main causes for this delay[7] is the on-going discussion on the part of International Jurisdiction, which is precisely what I am trying to examine here. As the rapporteurs on this part have changed at least three times, there remains a slight difference of opinion between co-authors about how to fix each principle. Particularly each of them seems to have different opinions and perspectives. Especially, as "principle" of laws, the range of their expected application seems to be different. This kind of difference might reflect an aspect of difficulties in drawing up rules acceptable to all of the APPIL jurisdictions and the wider area[8]. Fuethermore, I believe it important to indicate the background discussion on the subject of international jurisdiction here even before publishing the complete version of APPIL 2018[9].

APPIL 2018 will be acknowledged as "the first harmonization effort" or "first voice of Asia"[10]. So, it is very important for me to set the direction we are going at this very first stage: even as a "principle", either trying to fix the discrepancy of each APPIL 2018 jurisdictions as much as possible, or to present the "common core" of this topic, like a kind of "restatement" of our jurisdiction, as well as adding more grounds of international jurisdictions[11]? Some draft provisions of APPIL 2018 presented now seem to be drawn up on the basis of former direction, but I support rather as well as on the basis of the reality

4) It is not easy to distinguish between "international" and "domestic". On the discussion, we avoided to discuss on this distinction. The general consensus seemed on the followings: the situation in which one or of the elements which constitute a civil or commercial matter is foreign to the others or multi-jurisdictional is "international".

5) APPIL project is mainly (but not only) supported financially by the Japanese Society for the Promotion of Science (JSPS): Naoshi Takasugi "Asian Principles of Private International Law (APPIL)" (2012-2016); Naoshi Takasugi "Expansion, Improvement and Implementation of Asian Principles of Private International Law (APPIL)" (2017-).

6) The national reports were presented in 2015, so we need some up-date after 2016. For example, In Vietnam, Codes of Civil Procedure was amended in 2015.

7) Originally APPIL was expected to be published in 2018 as "APPIL 2018".

8) It is not so surprisingly.

9) As a result, the published principles might be (even much) different from those presented here.

10) Op. cit. Chen/Goldstein.

11) I would say the former approach is "ambitious" or "leading", the latter "mild" or "realistic".

of APPIL jurisdictions[12].

2. International Jurisdiction: conceptional background in terms of APPIL 2018

The legal concept of "Jurisdiction" concerning Private International Law (expressed in English) is equivocal in the world, especially for jurisdictions based on "Civil Law" systems[13]. Roughly, it can be divided into two interpretations: (1) In a wide sense: a judicial sovereign power or authority and the range it covers. It is defined in general by the constitution or International agreements binding individual governments including its judicial bodies; (2) In a narrow sense: The power of the judicial body or authority (hereinafter the court) to judge the individual case. APPIL 2018 Jurisdictions dealt with the wider sense of the interpretation, while this paper deals with the second narrower sense.

There is, at least *prima facie*, a relatively big discrepancy between laws of APPIL 2018 jurisdictions on the topic dealt with in this part, as National Reports from each jurisdiction in 2016 show[14]. While some of the other parts of APPIL 2018 try to grasp the APPIL-jurisdiction-wide common rules as wide as possible or even challenge to expand them, I would rather like to define those rules more modestly. The backgrounds of such a modest ruling are mainly:

(1) The international jurisdiction is a kind of "entrance" to allow the court to judge issues with foreign elements presented before it (more broadly, public authorities).
(2) It also functions as "indirect" jurisdiction at least *mutatis mutandis*, if the recognition and/or enforcement of foreign judgements are requested. The venues or connecting factors provided to grant the international jurisdiction are or can be applied as a (at least *de-facto*) condition to recognize and/or enforce the foreign judgements[15].

If we can extract common "core" rules concerning the international jurisdiction from laws of APPIL jurisdictions, judges (including officers of public authorities: hereinafter just the court or the judge) in each jurisdiction will grant their own jurisdiction to be exercised over cases with foreign elements without anxiety, relying on or referring to APPIL 2018.

12) Which approach is better, ambitious or mild? Provisionally I am on the latter side. It must depend, however, on the legislators, legally and politically not easy to set the approach. In this article, I just present my analysis on my own responsibility.

13) Among APPIL jurisdictions: Japan, China, Taiwan, Thailand, Vietnam, Indonesia, Korea and Philippine are following generally "Civil Law System", while Singapore and Hong Kong "Common Law System". Certainly, there could be another categorizing, like "hybrid of both", "Islamic Legal System" or "Communistic Legal System". Here I just follow the traditional old categories.

14) As mentioned above, Vietnamese Civil Procedure law has also amended its regulation on International/Domestic jurisdiction in 2015.

15) Among the APPIL 2018 jurisdictions, some do not have a statutory rule on the recognition/enforcement of foreign judgments (Thailand, Indonesia).

They neither have to worry about exercising exorbitant jurisdiction, nor concern themselves with whether its judgement would not be recognized in foreign jurisdictions or states because of lacking "indirect" jurisdiction[16].

Here our priority should be set to extract the "common core" rules on jurisdiction. It means, at the same time, that we are not expecting to hang a "ceiling" limitation on the exercise of the judicial powers of each APPIL jurisdiction. A court in APPIL jurisdictions is, no doubt, free to exercise its own judicial sovereign power based on jurisdictional grounds outside APPIL 2018. We simply indicate that its exercise of judicial power might be questioned in the other APPIL jurisdictions, especially if its judgment would be addressed to be recognized or/and enforced in foreign jurisdictions or states.

Although not all APPIL jurisdictions are members of the Hague Conference on PIL, its processes to draft conventions and projects to harmonize the laws of its member states are fruits of the tremendous efforts and compromises of people involved for a decades-long history. In addition, some CAPPIL[17] members are also those of Hague Judgments Project. So, we can find no reason not to refer "Draft Convention of the recognition and enforcement of foreign judgements in civil or commercial matters, prepared by the Special Commission of May 2018"[18] and its background discussion. Methodologically, the rules on "indirect jurisdiction" of the Hague 2018 Draft Convention can be a newer model for APPIL 2018 on "direct" jurisdiction. Referring to both the rules of the Draft Convention and those of APPIL jurisdictions, we might be able to extract the common core rules not only in APPIL jurisdictions but much wider as well.

It is no doubt desirable to draw up rules on international jurisdiction that should not lead the court to an exorbitant jurisdiction[19]. Meanwhile, APPIL 2018 is sizeable challenge in Asian states, since it is too easy to say that some of the jurisdictional rules in APPIL jurisdictions are exorbitant[20]. A historical account, especially deprivation of sovereign power in the colonial regimes, could be a factor that has led to such a common practice in Southeast Asia, that a number of judiciaries reserve their power to exercise over cases that should rather be heard in other jurisdictions. Thailand is a good example of this. Its provisions in the civil procedure code recognize an extremely inclusive range of jurisdiction that could overtake almost all disputes containing foreign elements into the arm of the judiciary.[21] Nevertheless, exercising its jurisdiction, even if it could be regarded as

16) Even in Thailand and Indonesia, the foreign judgement cannot be ignored at all. At least, the judgements itself or the facts which the judgements contain can be presented as "evidences" to be applied.

17) Committee of APPIL: not formal but in fact the group of rapporteurs and/or authors of APPIL 2018.

18) And other former draft conventions and preparatory documents attached (https://www.hcch.net).

19) The question, how to judge whether the excise of its jurisdiction is exorbitant, is left in anyway.

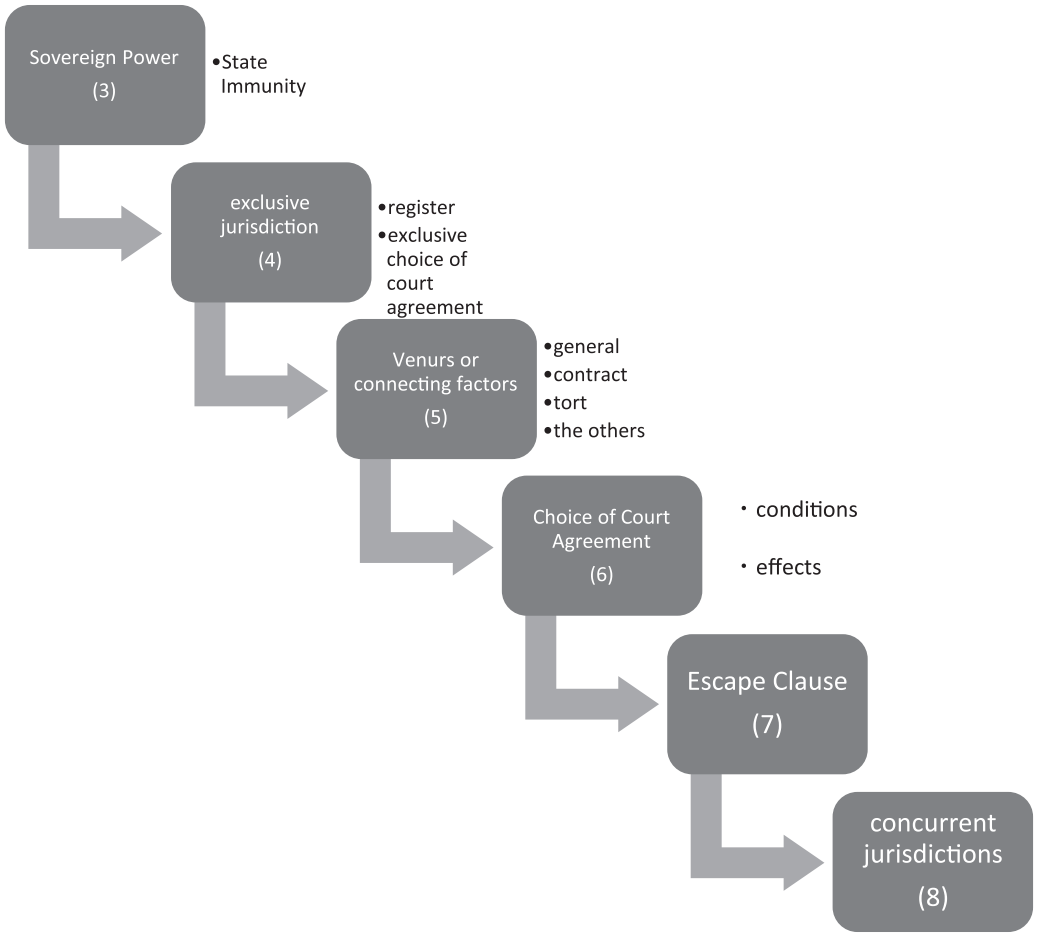
20) For example, in some APPIL jurisdictions "*forum actoris*" is granted as a general jurisdictional ground. Domicile/(habitual) residence of the plaintiff is accepted in Hong Kong, Indonesia, Philippine, Thailand (Nationality as well). In Mainland China, it might be granted as a general jurisdictional ground.

21) Please see Thai Civil Procedure Code.

"exorbitant", indicates the protection of the rights of individuals (in some cases it is also a human right guaranteed by the constitution), especially the plaintiff. Here, we agreed with that "*forum actoris*" as a general ground of jurisdiction is exorbitant. The other factors related to the cause of action, however, are also controversial. If we can include an "escape clause" (1.6) in this principle, the practical problem aside in practice must be minimized. We need much more effort and time to set up "ideal" rules on International Jurisdiction.

It should be always borne in mind that the allocation of international jurisdiction should be based on rational and fair bases. It should be consistent with the reasonable expectations of the parties, and "fair trial" between parties, e.g. proving the cause of his/her action or petition for the plaintiff or petitioner on one hand, and the defense against it for the defendant or respondent on the other.

Although the order of Articles below (could be changed later) is different, the structure of issues discussed below is:



3. Sovereign Judicial Power

Article 1.1 – Immunity of Sovereign State on Civil and Commercial Matters

(1) Unless otherwise provided in a treaty between a foreign state and a forum state or in rules of international law, a foreign state does not have an absolute immunity in lawsuits relating to civil and commercial matters in which such a foreign state or a juristic person partially or wholly owned or administered by the state and that are filed in the forum state.

(2) In case that a foreign state or a juristic person partially or wholly owned or administered by the foreign state has filed a complaint against an individual, a juristic person, a foreign state, a juristic person partially or wholly owned or administered by a foreign state before a forum court, and the forum court does not dismiss the complaint on the basis of state immunity, the defendant is entitled to file a counterclaim against the plaintiff.

There is still a big discussion as to whether or not we shall insert this kind of provision concerning State Immunity in APPIL 2018. This issue is obviously within the range of Public International Law. It might be not adequate to draw any provision on it here. In reality, however, the public authorities or even the foreign states have been designated as a defendant in the proceedings before the court of APPIL Jurisdictions. Especially, at least some Asian states are economically developing rapidly and even radically under the initiatives of state governments. The state itself even plays a role as an investor or an investee concluding international contracts with the foreign private sector. So, we think it rather fair to draw a rule on State Immunity, even if it might be unnecessary. It can be also mentioned that some Asian states are communist, where all property could be legally owned by the state in principal. As a result of this political regime, private persons might be able to make their transaction only with less freedom than the other states, or jurisdictions.

According to general rules of international law, a sovereign state in its private, merchant-like or commercial act (*acta jure gestionis*) is not immune like its public or government act (*jure imperii*). In other words, a foreign state or juristic person partially or wholly owned or administered by such a foreign state can be sued in a forum state for a dispute arising from civil or commercial matters. This has become a general rule of public international law.

However, in Asia the spectrum of tolerance on this principle seems to be different from the universal practice and variation from one to another Asian state. The exhaustive abolition of immunity for private, merchant-like or commercial acts of States in Asia can be subject to scrutiny.[22] Reasons for the scrutiny can be different. For example, filing a lawsuit

22) Marlar Maw, State Immunity and Current States' Judicial Practices, p. 361-362, in http://dspace.lib.↗

against a King in a foreign court even on civil and commercial matters if his majesty has acted in the name of state is totally offensive in the eyes of Thai people and judiciary. Even though this does not have evident jurisprudence, it is commonly known in that country.

The likelihood is that Asian States are careful in exercising their jurisdiction over a foreign state, and their expectation to be treated alike by a foreign forum state is not beyond reasonable expectation. The wording of the proposed text is significantly different from the general rule of international law, especially the customary rule of international law that basically does not uphold the immunity of states in civil and commercial matters.

The selected terms, "rules of international law" instead of general rules of international law, clearly suggest that sub-regions in Asia may develop regional or specific rules of international law[23] on the subject through their practices. Whether prospective rules undergo a convergence or divergence with/from the universal rules is hard to foresee. For that reason, it is worth mentioning on this topic, even if it should be mainly discussed in Public International Law, simply: State Immunity is not absolute, and hopefully defined as we set above.

If an Asian forum state has endorsed the immunity of a foreign state, of course conflicts rules shall have no place to operate. If it has rejected the immunity, conflicts rules can operate dependent on the national codification. Having a foreign state or corporation partially or wholly owned or administered by a foreign state filed before a forum state does not prevent such a forum state from applying conflicts rules.

The second paragraph involves the right to file a counterclaim, which is basically possible within the procedural law of Asian states.

4. Exclusive Jurisdiction

Article 1.2 – Exclusive Jurisdiction

In the APPIL jurisdictions, the following actions are under the exclusive jurisdiction of the relevant courts, unless otherwise provided in the law of the forum state:

(a) in action related to a registration, jurisdiction where the register is kept;
(b) in action related to the validity of an intellectual property right or neighboring right, jurisdiction where an intellectual property right or neighboring right is granted or registered;
(c) in action related to validity of the constitution, the nullity or the dissolution of companies or other juristic persons, or associations of natural or juristic persons, or of the

↘ niigata-u.ac.jp/ dspace/bitstream/10191/6381/1/01_0035.pdf

23) Please see e.g. Colombian-Peruvian Asylum Case, Judgment of November 20th, 1950 ICJ Report, p. 266.

validity of the decisions of their organs, jurisdiction where the company, juristic person or association has its seat or habitual residence defined in Article 2.3 (2).

The listed venues or connecting factors that point to the exclusive jurisdiction of the forum state are among the most common of APPIL-jurisdictions[24], and most of them are similar to non-Asian countries, especially European jurisdictions as evidenced in Article 22 of the Brussels Regulation.

However, some APPIL jurisdictions have specified exclusive jurisdiction on particular cases, for example, harbor operations and succession of Mainland China, insolvency of Indonesia, and transportation contracts of Vietnam, among others.

Whether the location of the property is an exclusive jurisdictional ground in action related to rights *in rem* tenancies or an immovable property is controversial among APPIL jurisdictions. Especially the location of the immovable property designates an exclusive venue for the action related to an immovable in some APPIL jurisdictions. As a matter of fact, however, other jurisdictions such as Japan and others do not designate locations of the immovable property as a venue or connecting factor to admit the court to exercise its jurisdiction exclusively. Here, as just an example, Japanese Code of Civil Procedure Art. 3-3 is called for, where the location of the immovable property is just one option, not exclusive, to grant the jurisdiction of Japanese courts. The very simple ratio is, we do not have to set this as an exclusive one. A typical example is: Two Japanese conclude the rental-contract of a vacation-condominium located in Thailand. The dispute arises as to the payment of the rent. I cannot find any reason to deny the jurisdiction of Japanese courts completely. Generally, as long as we can have the escape-clause, the Japanese court seizing the case can deny its jurisdiction, if the judge considers the exercise of it as inappropriate. I think, even if the issue arises from the rights in *rem* or immovable property, the flexible exercise of the jurisdiction must be more desirable in international cases.

It should be noted that the exclusive jurisdiction on juristic person as set forth in (c) is not commonly stated in codifications of all APPIL jurisdictions. The insertion of this has a hortatory objective to harmonize rules of private international law of these APPIL jurisdictions. There remains however a problem concerning what is considered a seat of the juristic person. To answer this, focus can be made to the rule on habitual residence under Article 2.3 of the APPIL that points to the principal place of business or its registered seat. Which one shall prevail over another depends on the decision of the forum.

24) Please see the national reports of Mainland China, Taiwan, Korea, Singapore, Thailand, Japan, and Vietnam.

5. The Venues or Connecting Factors

(1) General

1.3 – General Jurisdiction

(1) The court of APPIL jurisdictions shall have the competence to resolve disputes between parties in civil and commercial matters if the defendant has his/her habitual residence in its territory. If the defendant is a legal person, its habitual residence is its seat or habitual residence defined in Article 2.3(2).

(2) The court of APPIL jurisdictions shall have the competence to resolve disputes between parties in civil and commercial matters if the defendant has his/her/its substantial property in its territory.

a) The Principle of "*actor sequitur forum rei*"

Both paragraphs of Article 1.3, unlike some other provisions in the APPIL, are agreed upon by most APPIL jurisdictions. Most countries rely on habitual residence of natural and legal persons. There are, however, variations in legal terms, which could render slightly different results if the forum is requested to accept or dismiss a case. Taiwan, Thailand, Vietnam and Japan, for example, have not introduced the term "habitual residence" into their codifications, but rather use the term "domicile"[25].

b) *Forum atoris?*

Particular cases are seen in very few countries, typically Thailand[26], which still upholds domicile and nationality of the plaintiff as the basis for filing litigation[27]. This, however, is not included in Article 1.3 since these connecting factors have been proven over time as less functional and practical than habitual residence, and this is also an exorbitant jurisdiction in the eyes of private international law. It seems to be another side of the rules spectrum that tends to gradually efface in the future.

It should be noted that in meetings, our scholar delegates have expressed their consensus on the approach toward habitual residence even though some of our delegates' jurisdictions still rely on domicile or nationality as a connecting factor for general jurisdiction. The convergence of the views is significant, and should support the proposi-

25) The difference of the concepts between "domicile" and "habitual residence" cannot be easily defined. Following the Hauge Judgement project or the other instruments, we choose here uniformly habitual residence instead of domicile. Domicile is generally defined by the domestic law of each APPIL jurisdiction, and can be sometimes impossible to ascertain by the foreign court or foreigner (no matter national or legal person). Generally, domicile is not adequate to use as a connecting factor in international instrument.

26) Hong Kong, Indonesia, Philippine and maybe Mainland China are also acknowledged the domicile/habitual residence designating "*forum actoris*".

27) See also the other parts of APPIL 2018.

tion of rules contained in this Article 1.3.

As regards the habitual residence of a legal person, this Article follows the rule set forth in Article 2.3 that makes reference to the principal place of business or the registered seat of a legal person. This has also received consensus from all scholar delegates and resonates common rules of most APPIL jurisdictions on the subject.

c) The special venue for enforcement of the judgement

General jurisdiction based on substantial property seems to be a particular basis for filing litigation in APPIL jurisdictions. This could be exorbitant, but is surprisingly common in these jurisdictions. Only Hong Kong and Korea do not recognize the substantial property location as the basis for filing litigation. This venue is, however, functional if concern is regarded at the time when recognition and enforcement of foreign judgment is sought. The acceptance of this basis for filing litigation can prevent legal uncertainty when the recognition and enforcement of judgment is sought in these APPIL jurisdictions, many of which do not have clear rules on this problematic matter. In order to avoid legal uncertainty arising from the situation that a judgement rendered in an APPIL jurisdiction can be recognized and enforced in another jurisdiction, we shall have another legal hard instrument like a convention. As a principle of soft law, we had to abandon drawing up a rather stricter rule.

If the court of APPIL Jurisdictions acknowledges that it is exorbitant to exercise its jurisdiction only based on the location of the property of the defendant, it can decline the case according to Article 1.6.

(2) Venues (connecting factors) according to the individual cases

1.4 – Jurisdiction for Obligations Arising out of Contractual and Tortious Matters

(1) In matters relating to contract, a person may be sued in a court that has jurisdiction over the place of conclusion of the contract or the place of performance of the contractual obligation;

(2) In matters relating to tort, delict or quasi-delict, a person may be sued in a court that has jurisdiction over the place where the tort has been committed or the injury occurs.

(3) In matters relating to the right in *rem* in tenancy or an immovable, a person involved in such right may be sued in a court that has jurisdiction over the place where the immovable property locates.

(4) In case that a legal person is sued in a court which has jurisdiction only over the branch, agency or the other establishment of it, the court can exercise its jurisdiction also over the legal person itself, if such subsidiary has concluded the contract or directly involved in tort, delict or quasi-delict.

These provisions set additional special venues to the general jurisdiction under Article 1.3, which is based on habitual residence of the defendant. These general and special venues stand completely in the same row. The venues set in both provisions can be concurrent[28]. The person that has a habitual residence in a state can be sued in a different one in matters relating to contract or tort if there exists one of the connecting factors as provided in this Article.

a) contract

For contractual matters, many APPIL jurisdictions share a common rule that recognizes the jurisdiction of the forum state over place of conclusion of the contract as well as place of performance of the contractual obligation. This is different from a similar rule contained in Brussels I Regulation, which prefers the place of performance of the contractual obligation to the place of conclusion of the contract. This can be a trend of Asian countries if in due course of time they experiment as European countries did, and found that the place of conclusion of the contract becomes less functional than another consideration[29].

The minority of the APPIL jurisdictions does not specify two such connecting factors within their codification. Unlike the majority of its neighbors, Thailand, for example, uses "cause of action" as a basis for its judiciary to resolve disputes, and when it comes to contractual matters, this is generally meant to be the place where the contract has been concluded. It can be interpreted as place of performance of the contractual obligation, but this is not a mainstream interpretation. Such a minority approach is not formulated in our proposed principle.

As to the contract in which both parties obliged to perform, an interpretation problem can arise: Which place is admitted as a jurisdictional ground? On this stage of setting soft-law principles, we should leave the answer to the practice.

b) tort

For tortious claims, most of the APPIL jurisdictions share a common rule that points to both the place where the tort is committed and the place where the injury occurs. Minority uses either of these connecting factors. Only Thailand, again, does not share similar rules as other countries for tort conflicts; its connecting factor is based on cause of action[30], which basically points to the place where tort has been committed when it comes to dispute arising out of tort matters.

c) *Rem* jurisdiction

In almost all of APPIL jurisdiction, this kind of *rem* jurisdiction is granted.

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28) As a result, *Lis Alibi Pendens* situation (see. 1.7) is inevitable even within APPIL jurisdictions.

29) Laws of Japan, Taiwan, Korea and Vietnam do not adopt the place of the conclusion of the contract as an independent jurisdictional ground.

30) Please see Section 4(2) of the Civil Procedure Code.

d) Branch, agency and the other subsidiaries of legal persons

If a branch, agency or the other subsidiary is involved in the case arising out of the contract or tortious circumstance, we cannot find any reason to reject the place of such subsidiary as a venue to be the basis of jurisdiction.

e) Perspective

The coverage of Article 1.4 is just a general rule of jurisdiction in contractual and tortious matters. Since rules of international jurisdictions, as well as the other fields of PIL, are continuing the process of specialization to a large extent. Special jurisdictions relating to contracts of special characters are ascertained especially for insurance, employment, consumer, and SMEs contracts, among others. Likewise, disputes arising from tort matters are more specific, such as tort relating to transportation, environment, nuclear, publication, internet, and competition, among others, all of which require specific rules of international jurisdiction.

Particularly the lawyers of APPIL 2018 jurisdictions are desirably expected to examine the feasibility of this part of APPIL 2018 in more specified categories of contracts and torts. As an alternative so far, we might be able to add an article concerning this principle such as: The court of APPIL jurisdictions shall take into account the disequilibrium between the parties involved to grant its jurisdiction over the case.

6. Choice of Court Agreement

1.5 – Choice of Court Agreement

(1) On granting its jurisdiction, the court of APPIL jurisdictions shall also consider the agreement made with the choice of court between the parties. This agreement can be either derogative and prerogative.

(2) On granting jurisdiction based on the choice of court agreement, the court of APPL jurisdictions shall take into account the disequilibrium of the bargaining power between the parties constituting such agreement.

This provision is an aspect of the principle of party autonomy. It is, however, different from the variants of party autonomy in choice of law in judicial proceeding, choice of law in arbitration, and arbitration clause.

The law of most of APPIL jurisdictions granted the intentions of parties as a connecting factor to establish the jurisdictional ground. There can be, however, observed differences in detail. Some require additionally another connection with the forum, while some do not. As the jurisdictional power is a part of the sovereign power, the question, if party's intention can deprive its power from the state, and even yes, how and under which condition it can be admitted, is up for discussion not only in APPIL jurisdictions but also

all over the world.

A good balance between party autonomy and sovereign power cannot be found. Therefore, on this APPIL stage, we would be better to give up drawing a strict rule instead adopting a guideline to accept the choice of court agreements generally. More detailed conditions to be added in APPIL should be left to future projects.

In some APPIL jurisdictions which admit the choice of court agreements very widely, also take into account the situation in which such agreement can be abused by the party who has an overwhelming bargaining power to compare with another party, for example, company v. consumer, employer v. employee. So, we think it necessary to set an article such as paragraph 2.

7. Escape Clause

1.6 – Escape Clause

The Court of APPIL jurisdictions may decline to exercise its jurisdiction over the case, even if it admits its own jurisdiction according to principles above or its own law.

As mentioned above, we still have a great discrepancy within the rules to admit jurisdiction over individual cases even among APPIL Jurisdictions. Some venues or connecting factors set by such rules might be seen as exorbitant. Even some rules of this chapter of APPIL might be in case, e.g. the general venue based on the location of property of the defendant, the place of conclusion on the contract case, the place of the tortious act committed, etc.

As a principle, APPIL cannot set rigid provisions which cannot be accepted by even one of the APPIL jurisdictions. So we set venues or connecting factors in this chapter as modestly as possible. As the cost of this kind of courtesy, each court of APPIL jurisdictions shall have its discretion to decline the action taken by the plaintiff, if the exercise of the jurisdiction over the case seems exorbitant, especially from the viewpoints of the reasonable expectations of the parties and the fair trial of proceedings.

This clause is compatible with the doctrine of forum non convenience in common law, and also the general clause adopted in some civil law systems to admit the court to decline cases on its own motion, if it is acknowledged that the case shows little connection with the forum in such exceptional circumstances.

Needless to say, the right to justice is priority. “No jurisdiction over the case” at all cannot be acceptable.

8. Concurrent Jurisdictions

1.7 – *Lis Alibi Pendens*

> Where proceedings involving the same cause of action and between the same parties are brought in the courts of different states, any court other than the court first seized may, where appropriate, decline jurisdiction or suspend the proceeding in favor of that court.

Although also in this part we pursue to harmonize the jurisdictional rules among APPIL jurisdictions, *lis pendens* situations are inevitable. The jurisdictional grounds set here can be concurrent in each case, except they are exclusive. How to handle such *lis pendens* situations cannot be found uniformly in APPIL jurisdictions. The common law approach can provide a guide to solve the problem, but it depends on how to judge *forum convenience* or *non convenience*, or the behavior of the parties under the pressure of civil contempt. This approach cannot be unconditionally accepted in APPIL. At the same time, APPIL 2018 also sets provisions concerning the recognition and enforcement of foreign judgements. In these cases, we cannot even ignore situations in which the concurrent exercise of jurisdiction over the case with the same cause of action in different states is possible.

Here, we try to draw a provision to admit the court a great discretion to deal with the *lis pendens* situation in as flexible a way as possible. *Forum non convenience* approach is not certainly excluded. Another approach, like just suspending the proceedings on the discretion of the court (with conditions) is also possible.

The focus of this article is concerned with "any" court other than first seized. If we could agree with what *forum* most *convenience* in the future, this article would be amended.

9. Conclusion

The Asian region is, like many other areas in the world, characterized by a coexistence of different governments (including the court) based on different political, diplomatic and economic policies of their own. Even if we could already succeed in extracting the common core of APPIL jurisdictions here, it should be noted: it is far from enough. Besides the difference of each policy adopted, there remain so many topics, which have yet to be discussed, and about which, in the future, we should attempt to draw up rules and harmonize the laws of APPIL jurisdictions. Generally, I would like to pick up some perspectives:

(1) Softer, soft or even rigid law?

As a group of academics, setting principles on Private International Law is the maximum of what we can do for now. However, it is obviously desirable to draw up the rules of law in a more rigid way in order to harmonize the laws of APPIL jurisdictions. At least in APPIL 2018, we have shown that it is not impossible. The next step concerns International Family Law. It will be interesting to watch how it works both in theory and practice.

(2) Equalize disparities between states and persons

It is widely conceived especially after the "industrial revolution" in the 19th century. Disparities among private persons are an ongoing discussion of the law in the world. Especially consumer protection and employee protection have been, is, and will be a key area of discussion world-wide. On the level of private international law, some APPIL jurisdictions have special rules for the protections both in choice of law and international-jurisdictional law.

Legal education is also very important. ASEAN states are, for example, working hard on this topic. How to harmonize the lawyer education system among APPIL jurisdictions is also expected to be discussed.

(3) Environmental protection

Human beings cannot live without influencing the *status quo* of nature or other human beings. Needless to say, it does permit us to damage the environment of nature or others as we wish. Not only public law, but also private law can contribute to this kind of protection including PIL. Particularly, special rules both in the choice of law and the international-jurisdictional law, environmental protection can be expected.

(4) Institutional development

Establishment of Institution at least for the APPIL project is also desirable. The language barrier is a typical example of the difficulties of our project, and must be addressed in order to reach the precise legal information in APPIL jurisdictions. The fate of Private International law is inevitability in the application of foreign laws. It is sometimes very difficult, or even impossible, especially for judges to interpret foreign laws applying to specific cases. The institution which can give enough information to the lawyer in APPIL jurisdictions should be strongly expected.