

# INTRODUCTION TO PACL

*Jungjoon Ka\**

---

*PACL stands for Principles of Asian Contract Law. This appellation follows the example of the preceding efforts of the PECL. PACL is proposed to serve as the legal source to solve the disputes from international transactions in Asia.*

*PACL can provide the standard for any countries' efforts for assimilation of their laws; and further, PACL can benefit a wider base than the case in which only two countries are engaged in talks for harmonization between them. PACL have pursued the comparative law approach and the approach of reasonableness. Although an Asian country can choose to adopt any European Civil Law system, that legal system implanted in the Asian cultural milieu is likely to change into something very different from its original form. That is why PACL tries to use two approaches despite the similar origin.*

*PACL has five divisions in the draft articles so far. It includes General Provisions, Formation of Contract, Validity of Contract, Performance, and Non-Performance. As the managing committee was formed by the three pioneers ie China, Japan and Korea, each of the five parts contains the input and contribution from one of these three countries as the responding nations to the initial draft articles. Unlike the PECL where they enjoyed the support of EU, PACL does not have the privilege of support from the regional political community.*

*While PACL is to reflect the unique traditions and legal cultures of Asia, PACL should not stop there. We should also strive further to make the norms of PACL have equal standing with other international model laws, and at the same time, be accessible and practical in commercial transactional practices.*

---

## **I ABOUT PACL**

PACL stands for Principles of Asian Contract Law. This appellation follows the example of the preceding efforts of the Principles of European Contract Law (PECL).

---

\* SJD, Law Professor of Hankuk University of Foreign Studies, at Seoul in Korea. This paper was based on the paper of Dr Lee, Young-June "Into PACL from Korean Contract Law". Attorney Ahn, Taeyong prepared the draft for this paper.

Like its sister projects, PACL sets its eye on high expertise and professional standards, aiming at achieving worldwide compatibility, but at the same time mindful of the particularities of Asian legal regime and other international projects on contract law. The final draft of PACL could be one of "model laws" to be adopted at international level. With reference to the amended version of Civil Code in other countries, PACL mimics an international framework that provides for the legal resource for the understanding of contractual terms for the purposes of litigation or mediation.

### ***A Goals***

PACL is dynamic in the way that it serves its purposes as the legal source to solve the disputes from international transactions, a reliable source of reference for the revisions and amendments to national law, and a compilation of various theories that has been defined, discussed and analysed.

PACL has the following specific goals: (1) Research and analysis of laws, cases, theories and practices in Asian contract law; (2) preparation of model law by harmonization of many jurisdictions of Asia; (3) assist in amendment of Civil Codes in Asia which are undertaken by a number of Asian countries including Japan and Korea; (4) to serve as a reference point for international arbitration and other cross-border transactions in Asia; and finally, (5) PACL wishes to be developed into a treaty like CISG.

### ***B Beginning and the Current Status***

Let me brief you on the past, present and future of PACL.

Dr Young-June Lee has represented Korea's Research Institute for Asia Private Law and has hosted a forum in 2007 on the topic of harmonization of East Asian contract law in Korea. In that forum, we had excellent presentations by Prof Yang He-sung and Prof Wang Li-ming of China, and Prof Kitagawa of Japan. The participants in that forum agreed and acknowledged that the work for harmonization of Asian contract law was in urgent need of attention and effort for harmonization should commence as soon as practicable.

Then, in September 2009, at Qinghua University of China, Dr Young-June Lee of Korea, Prof Han Shiyuan of China, and Prof Naoki Kanayama of Japan, these founding scholars from different legal jurisdictions made their first agreement to kick start the project of PACL. Since then, PACL has held various forums in Tokyo, Beijing, Ho Chi Min City, and Seoul. In these forums, participating members prepared and discussed extensively the draft articles on (I) General Provisions of contract law, (II) Formation of contract, (III) Validity of contract, (IV) Performance and non-performance of a contract.

Now, PACL has grown from a handful of active participants to more than 30 members from 12 different jurisdictions around Asia. The member countries are Cambodia, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Myanmar, Nepal, Taiwan, Thailand, and Vietnam. I strongly believe these are non-exhaustive.

## ***II ACTIONS TAKEN BY PACL***

Many actions have been taken to achieve the goals of PACL during the last three and a half years. PACL had its first forum in March 2010 in Tokyo, Japan on discussion of General Provisions. In August 2010, PACL held another forum in Ho Chi Min City, Vietnam targeting on its agenda to deliberate on the section of Formation of Contract. Later in December of the same year, the forum was held in Seoul focusing on Non-performance of contract. It was followed by another PACL forum held in Osaka, Japan on March 2011 to discuss the Validity of Contract, and in September at Beijing, China on the deliberation of the provisions of Performance of contract. Then, in December 2011 at Seoul's second forum of PACL discussion on Non-Performance of contract. In 2012, PACL held two forums, one in Tokyo, Japan, in March to review the outstanding issues deserving attention, and the other in Seoul, Korea, in December to review the discussions on Performance and Non-Performance of contract.

### ***A Overview and Responsibility***

PACL has five divisions in the draft articles. It includes General Provisions, Formation of Contract, Validity of Contract, Performance, and Non-Performance. As the managing committee was formed by the three pioneers ie, China, Japan and Korea, each of the five parts contains the input and contribution from one of these three countries as the responding nations to the initial draft articles. In other words, Japan is responsible for General Provisions, Formation of Contract, and Validity of Contract whilst China is responsible for Performance, and Korea will be given the task of drafting articles on Non-Performance of contract. Once the initial draft is prepared by respective national teams, it is then ready for further deliberation and revision to the drafts in each plenary sessions of PACL.

Thus, despite the young age of this project, the members of PACL have actively pursued its goals, holding eight international forums ranging over all five sections of the contract law. PACL is now considering publication of its initial endeavours in order to lay foundations in preparation for its second phase of deliberation.

So far PACL has drafted five chapters and still needs more discussion because the articles in draft are relatively brief. They are fewer than there was supposed to be and legal requirements and effects are not provided in detail. Some

indispensable articles are added because of their roles and importance that flows from it.

The following is the formation of PACL and titles of provisions—

BOOK	I	:	GENERAL PROVISIONS
BOOK	II	:	CONTRACTS IN GENERAL
	CHAPTER 1	:	PRINCIPLES
	CHAPTER 2	:	FORMATION OF CONTRACT
	CHAPTER 3	:	INTERPRETATION OF CONTRACT
	CHAPTER 4	:	VALIDITY OF CONTRACT
	CHAPTER 5	:	PERFORMANCE
	CHAPTER 6	:	NON PERFORMANCE

**BOOK I: GENERAL PROVISIONS**

CHAPTER 1: SCOPE OF THE PRINCIPLES REGARDING CONTRACT

I.-1:101: Application of the Principles of Contract Law

**BOOK II: CONTRACTS IN GENERAL**

CHAPTER 1: PRINCIPLES

SECTION 1: PRINCIPLES

II.- 1:101: Fundamental principles of contract  
[Section 2: Definitions]

CHAPTER 2: FORMATION OF CONTRACT

SECTION 1: GENERAL PROVISIONS

II.-2:101: Good faith and fair dealing  
II.-2:102: Manifestation of intention  
II.-2:103: Interpretation of manifestation of intention

SECTION 2: FORMATION OF CONTRACT

II.- 2:204: Contract formation in general

II.-2:205: Offer and acceptance

II.-2:206: Revocation of offer

II.-2:207: Rejection of offer

II.-2:208: Extinction of offer

II.-2:209: Time of conclusion of the contract

II.-2:210: Late acceptance

II.-2:211: Modified acceptance

II.-2:212: Breaking off of negotiations

CHAPTER 3: INTERPRETATION OF CONTRACT

II.-3: 101: Interpretation of contract

II.-3: 102: Language discrepancy: provisional

II.-3: 103: Standard form contract

II.-3: 104: Merger clause

CHAPTER 4: VALIDITY OF CONTRACT

## SECTION 1: GROUNDS OF INVALIDITY

- II.-4: 101: Scope
- II.-4: 102: Mandatory provisions
- II.-4: 103: Initial Impossibility
- II.-4: 104: Mental Capacity
- II.-4: 105: Mental Reservation
- II.-4: 106: Fictitious Manifestation of Intention
- II.-4: 107: Mistake
- II.-4: 108: Fraud
- II.-4: 109: Misrepresentation
- II.-4: 110: Threat
- II.-4: 111: Third Party's Conduct
- II.-4: 112: Excessive Benefit or Unfair Exploitation
- II.-4: 113: Contracts infringing fundamental principles or mandatory rules

## SECTION 2: EFFECTS OF INVALIDITY

- II.-4: 201: Notice of Avoidance
- II.-4: 202: Time Limits
- II.-4: 203: Confirmation
- II.-4: 204: Effects of Invalidity
- II.-4: 205: Extent of Invalidity
- II.-4: 206: Damages

## CHAPTER 5: PERFORMANCE

### SECTION 1: GENERAL PROVISIONS

- II.-5:101: Principles of performance
- II.-5:102: Effect of performance

### SECTION 2: THE THIRD PARTY IN PERFORMANCE

- II.-5:201: Performance by a third party

- II.-5:202: Stipulation in favour of a third party

### SECTION 3: TIME OF PERFORMANCE

- II.-5:301: Determination of the time of performance
- II.-5:302: Early performance
- II.-5:303: Order to perform reciprocal obligations
- II.-5:304: Right to withhold performance

### SECTION 4: PLACE OF PERFORMANCE

- II.-5:401: Determination of the place of performance
- II.-5:402: Determination of the place of business
- II.-5:403: Change of the place of performance

### SECTION 5: CONTENTS OF PERFORMANCE

- II.-5:501: Quality of performance
- II.-5:502: Determination of price
- II.-5:503: Form and currency of payment
- II.-5:504: Partial performance
- II.-5:505: Choice among alternative obligations
- II.-5:506: Appropriation of performance
- II.-5:507: Acceptance of performance in lieu
- II.-5:508: Costs of performance

## CHAPTER 6: NON-PERFORMANCE OF THE CONTRACT

### SECTION 1: GENERAL PROVISIONS

- II.-6:101: Non-performance
- II.-6:102: Refusal to Perform
- II.-6:103: Fundamental Non-performance
- II.-6:104: Extension of Time for Performance
- II.-6:105: Notice of Lack of Conformity
- II.-6:106: Cumulative Remedies

### SECTION 2: SPECIFIC PERFORMANCE

- II.-6:201: Suspension of Performance
- II.-6:202: Monetary Obligation
- II.-6:203: Non-monetary Obligation
- II.-6:204: Other Remedies Available

### SECTION 3: REDUCTION OF PRICE AND CURE

- II.-6:301: Right to Reduce the Price
- II.-6:302: Cure before the Due Date
- II.-6:303: Cure after the Due Date

- II.-6:304: Cooperation to Cure

### SECTION 4: TERMINATION

- II.-6:401: Manners of Termination
- II.-6:402: Grounds for Termination
- II.-6:403: General Effect of Termination
- II.-6:404: Time Limit for Termination
- II.-6:405: Restitution
- II.-6:406: Scope of termination
- II.-6:407: Anticipatory Non-performance

### SECTION 5: COMPENSATION OF DAMAGES

- II.-6:501: Right to Damages
- II.-6:502: Scope of Damages
- II.-6:503: Substitute Transaction and Current Price
- II.-6:504: Interest in Arrear
- II.-6:505: Mitigation of Damages
- II.-6:506: Liquidated Damages
- II.-6:507: Currency by Which Damages Are to Be Measured

### SECTION 6: EXEMPTION, ETC.

- II.-6:601: Impediment
- II.-6:602: Change of Circumstances

As seen in 'II.-5:102: Effect of performance', from the above titles of provisions, PACL is under discussion where it is supposed to be. It is about the Subrogation Right and the Avoidance Right by a Creditor. Some argument is that they may not be appropriate as a part of Performance. The opposite argument is that they are supposed to be there because they are practical to particularise specific performance. Specific performance is a kind of right derived from the power to claim against an obligor for breach of contract. The power from this right to claim may have an effect on the third party under certain circumstances of specific requirements. The right of subrogation and right to rescind by a creditor are examples of this explanation. This is commonly understood in China, Japan, and Korea. For the purpose of this discussion, it is explained that they come from external effects from a claim. In fact, they represent the 'other side' of specific performance. This point of consideration encourages the feedback from the

perspective of Chinese Contract law and thus is appropriate to address them under the chapter of 'Performance'. This is aimed to secure a claim arising out of a contract. Since it is appropriate to be regulated in the chapter of 'Performance' or 'Non-performance', the decision was made to put it somewhere in the chapter of 'Performance' after finishing drafts in the chapters of 'Performance' and 'Non-performance'.

### ***B Preparation of Non-Performance Section***

The example given from the Korean team responsible for the drafting of the sections of Non-Performance of contract.

With respect to Non-Performance, the Korean Group presented the draft articles on Non-Performance in 2010. This draft articles were prepared based on the national reports submitted in response to the 80 questions of the questionnaire. The Seoul forum in 2010 finished general discussion of this draft articles. The draft articles and the related materials are published in the Asia Private Law Review's special edition (Dec. 2010). The minutes of the Seoul forum were sent to the members by email. The Korea team received the counter-proposals from PACL Japan Group, and responded accordingly on draft articles of Non-Performance. Prof Lei Chen of Hong Kong submitted a detailed proposal for amendment. These materials too have been put together and provided to all members.

It is remarkable that Japan and Hong Kong's proposals are in general agreement with the 2010 draft articles on Non-Performance in the fundamental structure. That is, the 2010 draft has the following features:

- (1) It starts from the unified concept of non-performance which refers to violation of contractual obligations in a broad sense.
- (2) For remedies, it abandons the distinction of delay, impossibility, and imperfection, and instead adopts the distinction of fundamental non-performance and non-fundamental non-performance.
- (3) Warranty liability is considered essentially as non-performance liability.
- (4) Contract remains effective even in case of initial impossibility.
- (5) It provides for the creditor's obligation to cooperate with the debtor's performance.
- (6) It does not require intention or negligence for non-performance of a contract.

- (7) It has provisions to regulate change of circumstances.
- (8) It exempts non-performance liability in case of certain situations of impediment, such as force majeure.
- (9) It tends to restrict specific performance.
- (10) It views damages as the main remedy for non-performance.
- (11) It allows termination only for fundamental non-performance.
- (12) It considers simultaneous performance as a remedy.
- (13) It permits reduction of price for all cases of imperfect performance.

These positions are close to those of the Common Law and the international model laws. Due to the fact that PACL constantly evolves as a result of feedback, opinions and suggestions from members of various jurisdictions, these features are subject to change and improvement.

### ***III PHILOSOPHY AND METHODOLOGY OF PACL***

#### ***A Philosophy of PACL***

It is fortunate that we see a significant extent of consensus shared among the members of PACL concerning the establishment of PACL. Recently, Prof Omura Asusi of Japan expressed his view on harmonization of East Asian contract law. He said that there can be several ways to achieve harmonization of East Asian contract law: the first would be to prepare the common contract law for East Asia as a whole; the second is that each country tries to assimilate its own law to the laws of other countries so as to reduce inconsistencies among them; the third is for two countries to endeavour to achieve harmonization between them, instead of all countries trying to achieve harmonization of the East Asia region at the same time; the fourth is to prepare a model law which will serve as the reference point for legislation of each country.

The members of PACL believe that the project of PACL is the shortest route to supplement, catalyze, and facilitate all of these approaches. For example, PACL can inform preparation of the common contract law for East Asia as a whole; at the same time, PACL can provide the standard for any country's efforts for assimilation of its laws; and further, PACL can benefit a wider base than the case in which only two countries are engaged in talks for harmonization between them.

We like to note that there are still some opinions which are more cautious or skeptical about the desirability and possibility of PACL. Some opinion says that Europe has a great need for something like Principles of European Contract Law because in Europe, there are apparent divisions of jurisprudence, such as English



law, French law and German law; but such efforts for harmonization are not needed for East Asia because China, Japan and Korea are all the recipients of the European Continental Civil Law.

However, in East Asia alone, there are Common Law jurisdictions such as Singapore and Hong Kong, which are well-known for their respectable legal regimes in international trade. Singapore and Hong Kong are also by far the most preferred places for international arbitration in Asia. Even the legislators of China were greatly informed by CISG and PECL when making its Contract Law of 1999. Even though China is said to follow Germany's Civil Law tradition, its Contract Law does not follow some of the core principles of German Civil Code, such as the doctrine of initial impossibility and the categorization of the mode of non-performance. Recently, China's Supreme Court acknowledged by its judicial interpretation the principle of change of circumstances, although such principle is not contained in the Contract Law of China. Obviously, China's Supreme Court referred to that principle as codified in international model laws.

Although China, Japan and Korea all acceded to CISG, the scope of CISG is limited to sales of goods, and the national laws of those countries largely remain unaffected by the development in CISG. Therefore, we see endless potential in expanding PACL to the world.

Some opinion points out that Europe is ideologically homogenous as it is based on Christianity, whereas Asia has various ideological and cultural differences, such as Buddhism, Confucianism and Christianity, etc, which will make the establishment of PACL far more complex. However, while we do not believe such ideological and cultural differences will dominate in the contract law area, if there is any such cultural uniqueness that should be reflected in PACL, it should be so reflected. Therefore, ideological and cultural diversity are not a hindrance, but an enrichment to PACL.

Unlike the PECL which enjoyed the support of EU, PACL does not have the privilege of the support of the regional political community. However, it should not be a reason to despair. Conversely, the success of PACL can catalyze and facilitate ushering in of a regional political community in Asia. We are highly motivated and dedicated to take a step closer each day to making PACL a phenomenon.

### ***B Methodology of PACL***

There is a big question regarding the methodology of PACL. Whether PACL should pursue the comparative law approach or the approach of reasonableness

remains unsolved even within the managing committee of PACL. On one hand, it is argued that, without reliance on comparative law, PACL is analogous to a tree without the root, a lake without the source of water. This position considers PACL as the restatement of law. On the other hand, however, PACL requires reasonableness exercise, distinct from the national laws and social backgrounds of each Asian country. This position considers PACL as an innovation and that Asian uniqueness is an illusion.

However, on second thoughts, restatement and innovation, comparative law and reasonableness are not readily separable; they often exist in amalgamation; an undivided whole. If you think over this issue, you can understand that good law standardises markets and influences markets efficiency. Reasonableness of a certain provision cannot stand without comparative law base of that provision. Reasonableness in and of itself is closely connected to the cultural and legal perception of Asian practices.

Even where an Asian country chooses to adopt any European Civil Law system, that legal system implanted in the Asian cultural milieu is likely to change into something very different from its original form. The right of the creditor to cancel the transaction between the debtor and the third party is one obvious example. Such creditor's right to cancellation originated from the French law. But this right, when adopted into the environment of, for example, Japan, Korea, and Taiwan, has grown into a system hyperactively used by the creditor to nullify transactions between the debtor and the third party, and the accumulation of case law and theories now excel those of its origin.

In order to have an equal standing with other well-known international treaties like PECL, DCFR, PICC, etc, and to make it an effort of comparable quality and originality, PACL must be based on the positive laws, case laws, theories and transactional practices in Asia. The use of national reports and the questionnaire in preparation of the draft articles of PACL is thus significant to make sure that the law that should be and the law that exists are harmonized.

### ***C The Future of PACL***

In order to speed up the development of PACL, procedural requirements and internal rules are needed in all decision-making process. Currently, PACL conferences adopt a voting system for all decision-making processes. However, matters in regard to voting rights, distribution of votes etc have yet to be determined. As the size of PACL and the number of members increases, such housekeeping matters become a pressing issue for PACL to determine as soon as possible. PACL will pay attention to these issues and will take steps to address them.

Once the housekeeping is done, PACL can look to a bigger project beyond contract law – PACL can expand its activities to law of agency, the typology of various contracts, the law of tort, and the law of securities.

#### ***IV CONCLUSION***

I want to emphasise that while PACL is to reflect the unique traditions and legal cultures of Asia, PACL should not stop there. We should also strive to make the norms of PACL have equal standing with other international model laws, and at the same time, be accessible and practical in commercial transactional practices.

PACL not only contains Asian common matters in transactional practices and usages, cases, and regulations, but it extends to provide for an Asian normative standard for the harmonization of international model law. In addition to drafting of PACL, we are supposed to establish the standard form of contract for common use in international transactions. In order to achieve this, we are required to compile contractual forms used in practice and analyse accordingly. I believe these are the prerequisites to ascertaining the Asian features from Asian customs and usages. Otherwise, I can foresee that we are likely to face endless criticisms questioning the necessity for the establishment of PACL instead of the easier adoption of other model laws from the Western countries.

We are capable of highlighting the best features of the Asian perspective on contract law. Therefore the PACL forum serves as an appropriate and sufficient way to enable scholars to exploit its ability to deliberate thoroughly so as to prove that PACL's objective to harmonise with other model laws is achievable and more reasonable than Western model laws.

Thus, PACL is for establishment of the Principles of Asian Contract Law, and also through this, the establishment of the Principles of World Contract Law. PACL aims at not only contract law principles, but also civil law principles, thus presenting the efforts on our part for the establishment of the Principles of World Civil Law.

