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- A View of Japan and Its Problems -**

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Choice of law in fraudulent transactions – A view of Japan and its problems

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Abstract

The governing law of claims for fraudulent transactions is one of the conundrums of private international law. This topic has sparked heated debate from the nineteenth century to the present. Should it be lex rei sitae, lex loci delicti, lex causae of the fraudulent act, or cumulative application, or dépeçage? Despite numerous debates and recommendations, none have resulted in a comprehensive and all-encompassing solution because they appear to focus on only one aspect of fraudulent transactions. Private international law academics in Japan, for example, and a recent Tokyo District Court case both agreed that there should be a cumulative application since it is vital to protect both the creditor and the transferee's rights. The cumulative application, on the other hand, has been criticized for limiting creditors' relief options and being difficult to apply for. This paper will present the Japanese private international jurisprudence perspective, which has been adopted by other countries as well, such as France, and will highlight the issues in order to find a more appropriate approach to establishing an acceptable and effective choice-of-law rule on fraudulent transactions. As a result, this paper will lead not only to a better knowledge of the governing law on fraudulent transactions in general, but also to its application to analogous situations such as insolvency transaction avoidance or dividend restrictions, among others.

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I. INTRODUCTION

1. Preventing and dealing with fraudulent transactions is a legal concern in many countries. For example, in France, there is a provision for action paulienne set forth in Article 1167 of the Napoleonic Civil Code 1804 (now Article 1341-2)¹; in Germany, the Law on Contesting Legal Acts of a Creditor Outside of Bankruptcy Proceedings (AnfG) was enacted from 1855²; and in the United States, the Uniform Law Commission also introduced a Uniform Fraudulent Conveyance Act from 1918 (UFCA), which was amended in 1985 (Uniform Fraudulent Conveyance Act – UFTA) and in 2014 (Uniform Voidable Transactions Act – UVTA)³. In Japan, the Civil Code of 1896 contains three provisions, from Article 424 to Article 426, that give creditors the ability to set a side a fraudulent transaction⁴. The number of regulations on dealing with fraudulent transactions has expanded to 14 articles as a result of the amendments made in 2017. According to the provisions of Japanese law, a creditor has the right to request a court to declare a transaction causing damage to him or her invalid, unless the third party benefiting from the transaction is unaware that the act causes damage to the creditor (Article 424). In a suit for avoidance of a fraudulent transaction against a transferee/beneficiary, the creditor may demand the return of the property transferred to the transferee/beneficiary as a result of such a transaction. If it is impossible for the transferee/beneficiary to return the property, the creditor may seek reimbursement of the value of the property (Article 424-6). A final and binding judgment approving a creditor’s claim for avoidance of a fraudulent transaction shall be effective against the debtor and all of its creditors (Article 425)⁵.

¹ Art. 1341-2. Le créancier peut aussi agir en son nom personnel pour faire déclarer inopposables à son égard les actes faits par son débiteur en fraude de ses droits, à charge d'établir, s'il s'agit d'un acte à titre onéreux, que le tiers cocontractant avait connaissance de la fraude.

(Provisional translation : *A creditor may also sue in his own name to obtain a declaration that acts performed by the debtor in fraud of his rights may not be enforceable against him. In the case of onerous acts, he can do so only if he establishes that the third party contracting with the debtor had knowledge of the fraud.*)

² Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens (Anfechtungsgesetz - AnfG). The current version is the 1994 revision.

³ As of April 5, 2022, 45 states and districts have enacted the UFTA, while 24 states and districts have enacted or introduced the UVTA. (see: <https://www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49>).

⁴ The term “*Sagaikoitorikeshiken* - right to avoid fraudulent acts” is used in Japanese substantive law. According to Japanese civil law scholars, this regulation can be traced back to “*actio Paulina*” in Roman law and is synonymous with “*action paulienne*” in French law, “*Anfechtungsrecht*” in German law and action for avoidance of/set a side fraudulent acts in common law. (See: Iwaaki Sato, *SAGAIKOITORIKESHIKEN NO RIRON [THEORY OF THE RIGHT TO AVOID FRAUDULENT ACTS]*, University of Tokyo Press (2001), p.290 and others ; Nakanishi Shunji, *SAGAIKOITORIKESHIKEN NO HOURI [LEGAL PRINCIPLE OF THE RIGHT TO AVOID FRAUDULENT ACTS]*, Shinzansha (2011), pp. 8-9. Therefore, although the details of the said regulation in the substantive law of each country may differ, the term “right to avoid fraudulent acts” as used in this paper is to be understood as synonymous with the terms “*actio Pauliana*”, “*action paulienne*”, “*Anfechtungsrecht*”, “action for avoidance of fraudulent acts”, “right to avoid fraudulent acts”, “right to set a side fraudulent transaction” and so on.

⁵ In Japan, the theory of relative avoidance was formed after the judgment of *Taishinin Rengobu*, March 24, 1911, *Minroku* 17, p. 117. One aspect of relative avoidance is that the effect of

2. The substantive law provisions in each country, however, rules vary in terms of requirements and effects of an action for avoidance of fraudulent transactions. In Japan, the action in which the demand for the return of the property is emphasized. In certain nations, however, legal practice does not focus on the validity of the fraudulent transaction, but rather allows claims for damages caused by such fraudulent transaction⁶. Furthermore, the requirements on the statute of limitations for filing a lawsuit, the status of the plaintiff, defendant, and legal consequences are also regulated differently from country to country⁷. As a result, it is a conundrum of private international law as to which country's law of avoidance of fraudulent transactions should be applied when an international case is involved. Should it be *lex rei sitae*, *lex loci delicti*, *lex causae* of the fraudulent act, cumulative application, or *dépeçage*? Currently, each country has its own method, and there is no international agreement on how to deal with fraudulent transactions. This paper will introduce one of the solutions that has gotten a lot of support in recent times. That is the cumulative application of *lex causae* of the creditor's claim against the debtor, as well as the *lex causae* of the fraudulent transaction between the debtor and the transferee/beneficiary. In the event of transaction avoidance in insolvency proceedings, the same method of using a

avoidance does not extend to the debtor. However, Japanese scholars have pointed out that it could not be that the effect would not extend to the debtor, since once the claim for avoidance is granted, the recovery of title to the real estate registration to the debtor and compulsory execution against the debtor's property will be allowed. And it is also said that the main purpose of relative avoidance is to keep the effect of avoidance within the necessary scope, which does not mean that it does not extend to the debtor. Therefore, while the pre-amendment provision (Article 425) only stated that the effect of avoidance "shall have an effect for the benefit of all creditors", without mentioning the effect on the debtor, the amendment provision has clearly stipulated that the final approval judgment of an action to avoid a fraudulent act shall also be effective against the debtor. However, it should be noted that even in this case, the amendment provision does not treat the debtor as a defendant in the action for avoidance of fraudulent acts (Article 424-7 (Defendants and Notice of Action) clearly sets out who shall be the defendant (only the beneficiary and the subsequent acquirer), and that the debtor shall be given notice of the action. See also: Hiroyasu Nakata, Atsushi Omura, Hiroto Dogauchi, and Masami Okino, *KOUGI SAIKENHOU KAISEI [LECTURE ON THE AMENDMENT OF OBLIGATION LAW]*, Shojihomu (2017), p. 140 and following). In this regard, there is a view that the amendment provision changed the traditional theory of relative avoidance and turned to absolute avoidance (Hiroyuki Hirano, *MINPOU IV: SAIKENSOURON [CIVIL CODE IV: GENERAL THEORY OF OBLIGATION LAW]* (2nd Ed), Shinseisha (2017), p. 125; Yoshio Shiomi, *SHINSAIKENSOURON I [GENERAL THEORY OF NEW OBLIGATION LAW I]*, Shinzansha (2017), p. 813), but there is also the view that it is merely a modification of the relative avoidance to the necessary extent that the effect of the avoidance judgment is extended to the debtor (Hiroyasu Nakata and others, *op.cit.*, p.142). It is necessary to pay attention to the implementation of Japanese substantive law in the future, but in any case, the issue of choice of governing law could become an important point of contention in cases involving countries that adhere to the principle that the effect of the avoidance judgment does not extend to the debtor and the creditors who are not the plaintiff, or that require the debtor to be the defendant of the action.

⁶ For example, in the United States, the courts in the cases of *Irving Trust Co. v. Maryland Casualty Co.* (83 F.2d 168), *James v. Powell* (19 N.Y.2d 249), in Germany, Obertribunal Stuttgart (Seuff, Arch.25 No.115(1871) accepted the possibility of the plaintiff claiming damages on a tort basis relating to a fraudulent transaction.

⁷ A. De Lapradelle/J-P Niboyet, *RÉPERTOIRE DE DROIT INTERNATIONAL (T1)*, Recueil Sirey (1929), p.238, paras17-18 pointed out many different points in the substantive laws of countries regarding action paulienne.

combination of two applicable laws is provided⁸. As a result, an examination of the cumulative application would be appropriate not only for regular fraudulent transactions but also for comprehending the insolvency case.

3. In both jurisprudence and legal doctrine, Japan has adopted the cumulative application. As a result, studying legal practice in Japan will provide us with a clear and accurate picture of how to deal with the governing law on fraudulent transactions. Furthermore, it is well known that Japan is a country that promotes international legal cooperation, supporting developing countries in Asia and around the world to reform their legal systems⁹. Much major legislation has been passed in some nations with the help and guidance of Japan's experience¹⁰. Therefore, studying Japanese law will provide a wealth of information for other countries looking to reforming their legal systems by referencing Japanese law.

4. Based on that perception, this paper will clarify how to address the applicable law on fraudulent transactions in Japan (II), thereby providing critical analysis to find a more comprehensive solution to this issue (III). The main purpose of the article is to point out the inadequacies in determining the law applicable to fraudulent transactions, particularly the cumulative application, based on that view showing the diversity in transactions concerning fraudulent transactions.

II. APPLICABLE LAW ON FRAUDULENT TRANSACTIONS IN JAPAN

5. Neither Japanese *Horei* (Act on the Application of Law, enacted in 1898) nor *Tsusokuho* (Act on General Rules for Application of Law, enacted in 2006) clearly regulates the choice of law rule for fraudulent transactions. When enacting *Tsusokuho*, the issue of clearly stipulating the choice of law rule for the fraudulent transactions was considered but was abandoned due to a lack of consensus and the fear that a clear-cut provision would cause confusion. Since there were no court precedents before the Tokyo District Court's March 31, 2015 judgment (not yet published in the official case report), the issue of the choice of law rule for fraudulent transactions has been entirely developed based on academic interpretations. Below, this paper will introduce the interpretations of academic theories, point out the problems with each position, and examine the Tokyo District Court's March 31, 2015 judgment to clarify the problems with the current method of handling the issue of the choice of law rule for fraudulent transactions.

1. Doctrines

6. Currently, there are various doctrines regarding the choice of law rule on fraudulent transactions in Japan. The doctrine of cumulative application is said to be the prevailing doctrine, but the doctrines of *lex fori*, *lex situs*, and *dépeçage* are also widely advocated. The following is a summary of the content and reasoning behind each of these doctrines.

1.1. The doctrine of cumulative application

⁸ For instance, Articles 7 and 16 of Regulation (EU) 2015/848 on insolvency proceedings also provide for the application of the combination of *lex concursus* and *lex causae* of fraudulent transactions with the claim to declare the fraudulent transaction invalid.

⁹ Specifically, through the activities of the Japan International Cooperation Agency (JICA)

¹⁰ For example, Vietnam's Civil Code (including the part on choice of law rules), Cambodia's Civil Code have referenced many regulations from Japan.

7. According to this doctrine, “the problems concerning the requirements and effect of the avoidance of fraudulent transactions are based on the cumulative application of both *lex causae* of the creditor’s claim and *lex causae* of the presumed fraudulent transactions”¹¹. The reasoning behind this doctrine is that (i) the creditor’s right to avoid a fraudulent transaction is recognized as an aspect of the effect of his own claim, and (ii) the protection of the interests of third parties/beneficiaries who are the other party to the fraudulent transaction must be taken into account¹². It means that *lex causae* of the creditor’s claim and *lex causae* of the fraudulent transaction shall be cumulatively applied.

8. However, scholars have also pointed out that applying the governing law of the legal act that is regarded to be a fraudulent transaction is inappropriate because the debtor and third party (beneficiary) are free to manipulate such governing law¹³. For this reason, although basically affirming the cumulative application doctrine, there is an opinion that the content should be slightly revised. According to this view, “basically, the cumulative application is appropriate, but both applicable laws are cumulatively applied only to the requirements for establishing the right to avoid fraudulent acts, and the effect should be solely based on the governing law of fraudulent acts. However, if the debtor and the beneficiary choose an arbitrary governing law, they must be dealt with by public order (Article 42 of *Tsusokuho*) unless the absolute mandatory law is applied”¹⁴. The problems of the cumulative application will be examined in detail in Section III, after giving an actual case in which was applied this doctrine at part 2 of this Section.

1.2. The doctrine of lex fori

9. This doctrine states that the right to avoid a fraudulent transaction is based on the *lex fori*, which is the law of the place of the court dealing with the proceedings¹⁵. The reasons justifying this doctrine are said to be that “the creditor’s right to avoid a fraudulent act is generally not permitted to be exercised outside the court, and in that sense, it is inseparable from the court proceedings”¹⁶, that “the nature of the right to avoid a fraudulent act should be determined as a

¹¹ Yutaka Orimo, *KOKUSAISHIHOU (Kakuron – Shipan) [PRIVATE INTERNATIONAL LAW (Detail - New Edition)]*, Yuhikaku (1972), p. 196; Aki Kitazawa in Yoshiaki Sakurada and Masato Dogouchi, *CHUSHYAKU KOKUSAISHIHOU (Dai 1 kan) [COMMENTARY ON PRIVATE INTERNATIONAL LAW (Vol.1)]*, Yuhikaku (2011), p.573; Yoshiaki Sakurada, *KOKUSAISHIHOU [PRIVATE INTERNATIONAL LAW] [7th Ed]*, Yuhikaku (2020), p. 262

¹² Yutaka Orimo, *supra note 11*, p.195-196; Aki Kitazawa, *supra note 11*, p.574

¹³ Kokusaishihou Rippou Kenkyukai [Working Group on Legislation of Private International Law], “*Keiyaku Fuhoukou ni nado no junkyohou ni kansuru houritsushian (2) [Tentative Draft Law on Governing Law of Contracts, Torts, etc. (II)]*”, *Civil and Commercial Law Journal*, Vol. 112, No. 3, p. 506; Takuya Shima, “*Sagaikouitorikeshiken no junkyohou, Gaikokufudousan no masshyotouki seikyū to senjoku kankatsu jyokou no kankei [Governing law of right of rescission of fraudulent acts in concerning with request for cancellation of foreign real estate registration and exclusive jurisdiction clause]*”, *Jurist No.1494* (2016), p.125

¹⁴ Yuko Nishitani, “*Sagaikouitorikeshiken no junkyohou [Applicable law on the Right to Avoid Fraudulent Acts]*”, *Jurist No.1492* (2016), p. 297.

¹⁵ Working Group on Legislation of Private International Law, *supra note 13*, p.507; Takuya Shima, *supra note 13*, p.125; Asako Matoba, “*Furansu shozai fudousan no zouyo ga sagaikou ni ataru toshite zouyo no torikeshi to shoyukenitentouki no masshyotouki seikyū ga ninyosareta jirei [A case in which a request for cancellation of a gift and registration of ownership of real estate located in France was accepted as a fraudulent act (Tokyo District Court, 31 March 2015)]*”, *JCA Journal*, Vol. 63, No. 10 (2016), p. 24.

¹⁶ Working Group on Legislation of Private International Law, *supra note 13*, p.507

procedural right” and that “by making the right to avoid a fraudulent act the venue, it can be harmonized in the conflict of laws treatment with the right of avoidance in bankruptcy law”¹⁷.

10. With the doctrine of *lex fori*, however, has been argued that there is a potential for forum shopping¹⁸. In addition, whether the right to avoid fraudulent transactions can be classified as a matter of procedural law, and even if it is, whether it can always be addressed to *lex fori*, is debatable. This is because, even when viewed through the lens of Japanese substantive law, the right to avoid fraudulent transactions is regarded to contain both substantive and procedural law characteristics¹⁹. Accordingly, it would not be instantly positioned as a procedural law issue if we determined the essence of the right from the standpoint of Japanese substantive law. Even if we determine the character of the right to avoid fraudulent transactions from the unique perspective of Japanese private international law and position it as a matter of procedural law, this may not be enough to prevent foreign law from being applied. Because the assumption that procedural law matters must always be determined by *lex fori* is being challenged and contested in present Japanese private international law²⁰.

1.3. The doctrine of *lex loci sitae*

11. According to this doctrine, action for avoidance of fraudulent transactions should be governed by the law of the place where the property is located (or would have been located if the fraudulent act had not occurred), since the location may have been fraudulently changed²¹. The reason for this doctrine is that “the ownership of the property that is the subject of the fraudulent act is at the heart of the issue here”²²; and “the relationship between the creditor and the beneficiary in the right to avoid a fraudulent act (...) should be handled by the law of the location of the subject matter that is most closely related to both parties”²³.

12. Since fraudulent acts can take many forms, it’s questionable if the right to avoid fraudulent acts can always be determined as a property rights issue in nature. In addition to transfers of property, for example, when a debtor performs a debt payment (to another creditor) or an act of discharge (to his/her debtor), which “ownership of property” can be focused on to determine the applicable law?²⁴ Even if the nature could be determined as a matter of “attribution

¹⁷ Takuya Shima, *supra note 13*, p.125. However, as the Working Group on Legislation of Private International Law pointed out, consistency in insolvency proceedings cannot be guaranteed if a third party is sued at its domicile, which may be different from the place where the debtor's insolvency proceedings are commenced (debtor's domicile).

¹⁸ Hourei Kenkyukai [Working Group on Law], “*Hourei no minaoshi ni kansuru shomondai (I) – Keiyaku, Saikenjoto nado no junkyohou nitsuite [Issues Concerning Review of Horei (I) - Governing Law for Contracts, Assignment of Claims, etc]*”, Bessatsu NBL Vol. 80, Shojihomu (2003), p. 127.

¹⁹ Iwaaki Sato, *supra note 4*, p. 14; Nakanishi Shunji, *supra note 4*, p. 8-9

²⁰ See: Manabu Iwamoto, “*Gaikoku tetsudukihou no tekiyou ni kansuru ichikousatsu [A Study on Foreign Procedural Law]*”, International Private Law Annual Report No. 18 (2016), pp. 30-54.

²¹ Takao Sawaki and Masato Dogauchi, KOKUSAISHIHOU NYUMON [INTRODUCTION TO PRIVATE INTERNATIONAL LAW] [8th Ed], Yuhikaku (2018), p. 244; Hiroshi Morita, “*Torimodoshiken, Tousantanpoken no junkyohou (Jyo) [Governing Law on Right of Recovery and Bankruptcy Security Interest (I)]*”, NBL No.653 (1998), p. 29

²² Takao Sawaki and Masato Dogauchi, *supra note 21*, p.244

²³ Hiroshi Morita, *supra note 21*, p.29

²⁴ Due to the diverse forms of fraudulent acts, some scholars argue that “the governing law should be determined by focusing on the legal relationship in question as the object of avoidance”

of property”, it would be not appropriate for creditors, debtors, and beneficiaries (as well as other creditors and debtors of the debtor) to apply the laws of multiple countries when the multiple properties subject to the fraud are located in more than one country. And in many cases, the creditor’s claim is not for the transferred property itself, but for damages or reimbursement of the value of the property. This would fall outside the scope of *lex loci sitae*.

1.4. The doctrine of dépeçage

13. This doctrine recognizes the possibility of applying multiple governing laws, but the combination of those governing laws differs from the cumulative application doctrine. According to doctrine of *dépeçage*, in actions for avoidance of fraudulent transactions, people should separate the matters that are governed by the law governing the claim and the matters that are governed by the law governing the fraudulent transaction²⁵. Because the governing law of the three-sided relationship, which also includes the creditor’s right to set a side fraudulent transactions and the right of avoidance under insolvency law, can basically be split into two original internal relationships, with the issue of each internal relationship being handled by the respective governing law²⁶.

14. It is, however, not clear how the governing law of claims and the governing law of fraudulent act can be separated in terms of the matters to be governed by the governing law of claims and the governing law of fraudulent act. And it also appears to be debatable whether only the governing law of the claim and the governing law of the fraudulent act should be allowed to qualify as the governing law. It is likely that matters governed by *lex fori*, *lex loci sitae*, or rather *lex loci delicti* may be present in an action for avoidance of fraudulent acts²⁷. This is due to the

(Tadashi Kanzaki, Yoshihisa Hayakawa, Kazuhiko Motonaga, KOKUSAISHIHOU [PRIVATE INTERNATIONAL LAW] [3rd Edition], Yuhikaku (2012), pp. 235-236). Furthermore, they also suggested that it should be “the governing law of the right that was the subject of the fraudulent act. The “governing law of the right that was the subject of the fraudulent act” here refers to “the law of subject’s location in the case of movable and immovable property, and the governing law of the claim in the case of a claim”. (Working Group on Legislation of Private International Law, *supra note 13*, p. 506).

²⁵ Kazunori Ishiguro, KOKUSAISHIHOU [PRIVATE INTERNATIONAL LAW] [2nd ed.], Shinsei-sha (2007), p. 369. However, he also asserted that “it may be necessary to make a manipulation in an actual case, such as making the law governing the claim = the law governing the fraudulent transaction as much as possible”.

²⁶ Kazunori Ishiguro, KOKUSAISHIHOU [PRIVATE INTERNATIONAL LAW] [New Edition], Yuhikaku (1990), p. 339. However, it should be noted that the same page also states: “It should be appropriate to allow the application of the governing law that determines the original rights and obligations of the person in a position to receive a direct claim based on a three-sided relationship to the extent of protecting that person”.

²⁷ While basically affirming the doctrine of cumulative application or the doctrine of *lex fori*, there are opinions that, as a corollary, the governing law should be determined in an *dépeçage* manner. For example, Yuko Nishitani, *supra note 14*, p. 297, states, “Basically, the doctrine A (i.e., cumulative application) is appropriate, but there may be a method where both governing laws are applied cumulatively only for the requirements for the establishment of the right of avoidance of fraudulent acts; and the effect is exclusively by the governing law of the fraudulent act”. Or, Asako Matoba, *supra note 15*, p. 23, states that “In light of the fact that the right of avoidance of fraudulent acts can be granted only through a court, it has a procedural character. So, both the establishment and effect of the right of avoidance of fraudulent acts should, in principle, be governed by the law of the forum. However, it is also important to note that the

fact that, as noted above, some creditor claims may involve not only the effect of fraudulent transactions, but also damages and ownership.

2. Judicial precedent

15. In Japan, cases directly determining the governing law of the right to avoid fraudulent transactions are rare. Until now, the only case that has attracted the attention of scholars was the March 31, 2015 decision of the Tokyo District Court (hereinafter referred to as the “NAB Case”)²⁸. Although Japan has failed to legislate the governing law of the right to avoid fraudulent transactions, the NAB case clearly adopted the cumulative application doctrine.

2.1. *The fact of NAB case*

16. The plaintiff in this case (hereinafter referred to as “X”) is an Australian Bank (National Australia Bank – NAB), and the defendants are a couple residing in Japan (hereinafter referred to as “Y1” and “Y2”) and their children (Y3, Y4 and Y5). On October 10, 2002, X and Y1 and Y2 entered into a loan agreement governed by Japanese law (hereinafter referred to as “the Loan”). On August 27, 2012, X sent a letter to Y1 and Y2, demanding payment of the full amount of the remaining principal, accrued interest, and late payment penalties under the terms of the Loan for failure to pay the June and July portions of the Loan. Just immediately before X’s letter of demand, on August 17, 2012 (Y1 and Y2 disputed the date as April 1, 2010, but it was not accepted), Y2 and Y2 donated real estate located in France (hereinafter referred to as “the Estate”) to their children, Y3, Y4, and Y5 residing in Japan, based on Article 935 of the French Civil Code²⁹ (hereinafter referred to as “the Donation”), and on September 7, 2012, the procedures for registration of transfer of ownership (hereinafter referred to as “the Registration”) were completed.

17. Although X’s claims in this case concern whether the benefit of time has been forfeited and whether the currency conversion was lawful, they also concern whether the right to avoid the fraudulent act could be exercised. With regard to the right of avoidance of a fraudulent act, X claimed that “Since the Donation was made pursuant to Article 935 of the French Civil Code and the Estate is located in France, French law should be the governing law with regard to the right to avoid the fraudulent act concerning the Donation. (...) Even if the law applicable to the right to avoid the fraudulent act concerning the Donation is Japanese law, (...) X may exercise the right of avoidance of fraudulent acts in accordance with Article 424(1) of the Civil Code to set a side the Donation and seek cancellation of the Registration based on the Donation”. He also sought a declaration for avoidance of the Donation and cancelation of the Registration “on a principal basis, based on the provisions of the French Civil Code, that the Donation fraudulently infringing X’s rights, is invalid as a fraudulent act, and is ineffective at least in relation to X, and

system of the right of avoidance of fraudulent acts is a system for preparation for execution, and the law of the location of the property as the place of execution should be referred to in such a way that the occurrence of effects that the law of the location of the property does not recognize as the effects of the exercise of the right of avoidance of fraudulent acts is not allowed”.

²⁸ While the case is not published in the official case report, it can be viewed at Westlaw Japan. The case number is 2015WLJPCA03318016.

²⁹ **Article 935 of the French Civil Code**

“A donation made to an unemancipated minor or to a major under tutorship must be accepted by his tutor, in conformity with Article 463, in the Title Minority and Emancipation. Nevertheless, the father and mother of an unemancipated minor, or the other ascendants, even during the lifetime of the father and mother, although they are not tutors of the minor, may accept on his behalf.”

that there was no reason under Japanese law to refuse X's execution of his rights over the Estate"; "preliminarily, based on the right of avoidance of fraudulent acts under Article 424(1) of the Civil Code of Japan".

2.2. Decision of the Court

18. In response to X's claims, the Tokyo District Court judged as follows. "Act on General Rules for Application of Law (Law No. 78 of 2006) does not contain any explicit provisions regarding the governing law of the right to avoid fraudulent acts. Therefore, when examining the governing law of the right to avoid a fraudulent act, since the right to avoid fraudulent acts is a system to preserve the property liable for the realization of the claim, it is considered necessary that the right to avoid fraudulent acts, which is the preserved claim, should be allowed by the governing law of the claim. In addition to this, considering that the act subject to avoidance is a legal act between the debtor and a third party, it is necessary to consider the interests of the third party as well, and therefore, the avoidance claim must be recognized by the governing law of the legal act subject to the avoidance. In this way, with regard to the governing law of the right to avoid fraudulent acts, it is appropriate to apply cumulatively the governing law of the claim that is the preserved claim and the governing law of the legal act that is the subject of the avoidance, and to recognize its exercise and effect within the scope recognized by both laws".

19. Based on this premise, the court concluded that: "since Japanese law is the governing law of the Loan, the governing law of the right to demand payment of the Loan, which is the preserved claim, is Japanese law. (...) Since the Donation is made pursuant to Article 935 of French law, the governing law of the Donation, the act subject to avoidance claim, is French law. (...) If Japanese law, which is the governing law of the preserved claim, and French law, which is the governing law of the legal act subject to avoidance claim, are applied cumulatively and the effect is recognized to the extent that both laws are recognized, the conclusion is that it is appropriate to recognize the effect to the extent of the effect of the right to avoid fraudulent acts under Article 424(1) of the Japanese Civil Code" (This is because the scope of the effect set forth in Article 424(1) of the Japanese Civil Code is narrower than the effect under the French Civil Code)³⁰.

20. This judgment has suffered a lot of criticisms from Japanese private international law scholars, from both supporters and opponents of the cumulative application doctrine. The criticisms mainly revolved around the difficulty of cumulative application of the two governing laws, and the potential for error by the courts in determining the scope of effect of an avoidance decision. For example, some argue that "since the effect of Japanese law is stronger, the case should have been subject to the effect of French law, both by cumulative application and by the governing law of the fraudulent act in the end"³¹, and that "comparing Japanese and French law, the Court hold that the cumulative scope regarding the effect of the right to avoid fraudulent acts is the former (thus, the effect of the right to avoid fraudulent acts under Japanese law is relatively weaker), but that is not necessarily the case"³². Next, we will use this case as an opportunity to analyze and critically examine the problems with the doctrine of cumulative application.

³⁰ As far as Article 424(1) is concerned (a claim against a beneficiary), it should be noted that some words was amended in the post-amendment provisions, and that the decision in this case applied the pre-amendment provision.

³¹ Yuko Nishitani, *supra note 14*, p.297

³² Takuya Shima, *supre note 13*, p.125

III. CRITICAL ANALYSIS

1. Problems in the NAB case

21. NAB case adopted the cumulative application doctrine because “the right to avoid fraudulent acts is a system to preserve the property liable for the realization of the claim” and “it is necessary to consider the interests of the relevant third party as well”. Although this reasoning directly adopts the reason of protecting the interests of third parties as stated in the above doctrine, it differs in that it focuses on the nature of “a system to preserve the property liable for the realization of the claim”, rather than something that is recognized as one aspect of the validity of the claim.

22. The question is, however, whether it can be said that “since the right to avoid fraudulent acts is a system to preserve the property liable for the realization of the claim, it is considered necessary that the right to avoid fraudulent acts, which is the preserved claim, should be allowed by the governing law of the claim”. In other words, there is an issue concerning the qualification of the right to avoid fraudulent transactions, and its connecting factor. Since “the realization of the claim” and “preserve the property liable for the realization” do not necessarily have the same dimension, it is necessary to discuss whether the right to avoid fraudulent transactions is only a “realization of the claim” for individual creditors or preservation and recovery of the debtor’s total assets for all creditors. Certainly, it cannot be denied that plaintiff’s petition is ultimately for the “the realization of the claim” since X filed the action for avoidance of fraudulent transaction for the sake of his own claim. It may be possible to apply the governing law of said claim accordingly. However, in a situation where Y1 and Y2 have almost no assets and are bankrupt, X’s claim is effective not only for the realization of its claim but also for other creditors (if any). So in this case, the nature of asset preservation and recovery seems to be more significant. If we focus on the dimension of Y’s total assets, the law of Japan, which is the law of the domicile of Y, the home of Y’s total assets, should be applied to the case. At the very least, if this judgment is based on the reason of preservation of liability property, it makes no sense to attribute it to “the governing law of the claim that is the preserved claim”. The preservation of properties depends on the qualification of the preservation, but rather than saying “the governing law of the claim as the preserved claim”, it would be more logical to apply the law of the forum if the focus is on the procedure, or the law of the location of the property if the focus is on the effect of the preservative disposition³³.

23. And in this case, we could see the problem regarding the protection of the interests of third parties/beneficiaries. In this case, it would not be possible to protect the interests of third parties under the substantive law only by consideration to the governing law of the fraudulent transaction. If the application of the governing law of the fraudulent transaction is deemed to be a protection of the interests of third parties under private international law, it is questionable whether the application of French law as the governing law of the Donation (fraudulent transaction) would really contribute to the protection of the interests of Y3 through Y5 in this case under private international law. This is because it is not in the interest of private international

³³ One of the reasons supporting the doctrine of *lex fori* was the preservation nature of the right to rescind a fraudulent transaction (Paul Lerebours-Pigeonnière, *PRÉCIS DE DROIT INTERNATIONAL PRIVÉ*, Dalloz (1948), p. 474-475). And, as one of the reasons for affirming the consideration of the law of location of the property, the convenience of execution was cited (Asako Matoba, *supra note 15*, p. 23). Although each of these arguments needs to be examined further, under the circumstances, it can be said that the preservation and enforcement nature of the right to avoid fraudulent transactions does not immediately lead to the governing law of the preserved claim.

law to subject Y3, Y4, Y5 to the French law, which has no substantive relationship with the parties to the Donation³⁴.

24. In addition, the question arises as to how it can be applied cumulatively. According to the judgment, the court took the premise that the effect of avoidance is recognized in scope that “both of the governing laws recognize”. However, not a few opinions disagree with the conclusion that “it is appropriate to recognize the effect of the right to avoid fraudulent acts under Article 424(1) of the Japanese Civil Code to the extent of the effect of such right”³⁵. Since not only the requirements for exercising the right to avoid fraudulent transactions but also its effects vary from country to country, the cumulative application would greatly complicate the resolution of cases.

2. Problems of cumulative application in general

25. The doctrine of cumulative application is also adopted in the legal doctrine of many countries, notably France. The legal theories that support the doctrine of cumulative application in Japan also cite opinions of French scholars³⁶. Among them is the opinion of Batiffol. Batiffol argued that “in action paulienne cases, it would be useful to consider the law of the act in question, given the emphasis on actions against third parties who have contracted with the debtor, as dealt with in English and American courts. As Fragistas appropriately suggested, it would be equitable to permit the [action paulienne] lawsuits only insofar as they are simultaneously recognized by both the governing law of the protected claim and the governing law of the fraudulent act. Again, a more restrictive application of the law is justified by the exorbitant character of the [action paulienne] institution”³⁷. Batiffol’s opinion is also supported by many other French scholars³⁸. Batiffol, in turn, was also influenced by the doctrine of Fragistas³⁹, as stated in his opinion.

26. However, scholars who hold to the cumulative application doctrine have also recognized the problems with this doctrine. The solution meets problems in that it is harsh on creditors, who may be forced to lose the protection afforded by the governing law of the claim. On this issue, it is argued that “the solution would be justified by the exorbitant character of the action paulienne, which can lead to the questioning of an act made by a third party, who, in the

³⁴ The judgment held that “Since the Donation was made pursuant to Article 935 of French law, the governing law of the Donation, the act subject to avoidance claim, is French law”. However, it is necessary to examine in detail what the meaning of the fact that “the Donation was made pursuant to Article 935 of French law” is, i.e., whether it governs in personam relationship (donation relationship) between Y1, Y2 and Y3, Y4, Y5, or whether it governs only in rem relationship concerning with the transfer of ownership to Y3, Y4, Y5. In view of the wording of Article 935 of the French Civil Code, since the latter meaning (meaning in rem relationship) cannot be denied, it would be insufficient to conclude immediately that the law governing the Donation is French law without discussing the governing law of the Donation. If Article 935 of the French Civil Code can be interpreted as only governing changes in property rights, then the substantive relation of the Donation is in Japan, and Japanese law should be the governing law.

³⁵ See: *supra note 31, 32*

³⁶ For instance, see Aki Kitazawa, *supra note 11*, p.574

³⁷ Henri Batiffol/Paul Lagarde, *DROIT INTERNATIONAL PRIVÉ* (T2, 7^é), L.G.D.J (1983), p.217

³⁸ Yvon Loussouarn/Piere Bourel/Pascal de Vareilles-Sommières, *DROIT INTERNATIONAL PRIVÉ* (8^é), Dalloz (2004), p.514 ; Laura Sautonie – Laguinie, *LA FRAUDE PAULIENNE*, L.G.D.J (2008), p.664-665

³⁹ Ch. Fragistas, “*Das Anfechtungsrecht der Gläubiger im internationalen Privatrecht*”, *RabelsZ* 12 (1938/39), S.452

case of a gratuitous act, may be in good faith⁴⁰. However, the good faith of the beneficiary cannot be a reason to limit the interests of the creditor. Since the creditor also acted in good faith, for what reason would the interest of one good faith party be prioritized at the expense of the other's⁴¹? Furthermore, how can we determine whether a beneficiary is acting in good faith before the applicable law has been determined, i.e., before the standard of good faith has been established? For example, what happens to a third party who acquires the last property of a debtor who is aware that he is heavily indebted at a correctly valued price? Is that third party acting in good faith? Under French action paulienne, such a third party is considered fraudulent. But what if the law of the legal act in dispute only allows for the relief of such an act if the contracted third party had the intent to harm the creditors of the contracting party⁴²? And the exorbitant character of action paulienne, even if affirmed, would not seem to be a justification for a cumulative application that could limit the revocability of the plaintiff creditor. It is from one of the solutions that we can deal with the exorbitant character of action paulienne to determine the scope of each governing law according to each character, and to apply them in a divided manner.

27. As a problem with the cumulative application doctrine, it is also noted that the parties to a fraudulent transaction can manipulate its governing law, so as to evade the possibility of avoidance. With regard to this issue, it is argued that “the law chosen by the parties must be nullified if it is to apply the law by which they sought to evade obligations to the creditors, and in this case the law of the protected claim must be applied. This is a necessary amendment, but the creditor must bear the burden of proving the evasion in order to benefit from the protection afforded him by the law of claim against the debtor’s fraudulent act⁴³. However, as long as we affirm the principle of party autonomy in private international law, it is unclear how, and under which governing law, to determine the evasion of debtors and beneficiaries. With the criteria for determination unclear, placing the burden of proving the evasion on the creditor would be an excessive burden on the plaintiff creditor. And even if we were to focus on the governing law of a fraudulent transaction, it seems doubtful that compliance with such a fraudulent transaction could subject a creditor who has no connection with that transaction at all.

28. After all the fundamental problem with the cumulative application doctrine may lie in its reasoning⁴⁴. First, even if a creditor’s right of avoidance is recognized as one aspect of the effect of the claim, there are always two claim-debt relationships in the exercise of the right of avoidance of fraudulent acts, and the governing law should be determined by focusing on the effect of either claim. If the issue is not the creditor-debtor relationship, but rather the extinguishment of claims in the debtor-third-party relationship, it may be acceptable to rely solely on the governing law of the debtor-third-party fraudulent act. Second, there is also a serious problem with the rationale of protecting the interests of third parties/beneficiaries. Cumulative application may be good for third parties/beneficiaries by reducing the likelihood of avoidance of a fraudulent transaction. But what about the interests of creditors? Cumulative application

⁴⁰ Laura Sautonie – Laguinie, *supra note 38*, p.665

⁴¹ There is also an opinion that the governing law of *actio pauliana* should be determined flexibly on a case-by-case basis to the extent that judicial interests of good faith/*bonne foi* can be protected. See: Ilaria PRETELLI, *Cross Border Credit Protection Against Fraudulent Transfers of Assets, Actio Pauliana in the Conflict of Laws, Yearbook of Private International Law*, vol XIII (2011), p. 640

⁴² See also: Laura Sautonie-Laguionie, *supra note 38*, p. 667-668

⁴³ Laura Sautonie – Laguinie, *supra note 38*, p.666

⁴⁴ Yoshiaki Sakurada, *supra note 11*, p. 262, emphasizes the need to protect the interests of third parties in the right to avoid fraudulent acts, and agrees with the cumulative application doctrine.

naturally narrows the possibility of recognizing a creditor's claim. Is it not necessary to protect the interests of the creditor that is an aggrieved party⁴⁵? Is it also necessary to protect the interests of third parties when a debtor and a third party conspire to harm the creditor? Most important is whether a consideration of the interests of one party or another in the case is necessary in determining the applicable law? It seems that if we fall into a debate about whether someone's party's interests should be protected when dealing with the governing law regarding fraudulent transactions, we will end up with an inconclusive dispute⁴⁶. Traditional theories of private international law have focused only on the relationship of the case to the states concerned, and even if people take into account an interest's element as in America, it is only stops at the governmental interest, not the interest of a party to the dispute. The interests of which party should be more important and protected is a question of substantive law, and should not be an element influencing the determination of governing law (unless it is contrary to the public order of the forum).

3. Diversity of action for avoidance of fraudulent transactions⁴⁷

29. Thus, the cumulative application doctrine is clearly not appropriate for the treatment of fraudulent transactions. However, amid the confusion of the doctrine, there is one that has been correctly pointed out by scholars who support the cumulative application. That is the exorbitant character of action paulienne, in other words, the diversity of litigations regarding fraudulent transactions. It is undeniable that a variety of legal relationships exist in actions for avoidance of fraudulent transactions. It is also true that the creditor's claims may vary, including invalidation of the fraudulent transaction itself, invalidity in relation to the creditor, attribution of ownership,

⁴⁵ On the contrary, there is also a position that the governing law should be determined with an emphasis on the interests of the victim (creditor). According to this view, "With regard to the creditor's right of rescission, the prevailing theory is also one of cumulative application of the governing law of the claim and the governing law of the (fraudulent) act. Against this position, the same points as for the creditor's right of subrogation are problematic. (...)Is the doctrine of cumulative application, as commonly held, appropriate? Unless the cumulative application of the two statutes both recognize the right of creditor subrogation, (...) the action would not be admissible. This would be problematic from the point of view of the protection of the victim in tort in the case in question. However, even under this doctrine, the application of a law, which does not recognize the right of subrogation of creditors in the circumstances of the case, may be excluded on the grounds that it is contrary to public policy. However, in principle, it would be appropriate to apply only the governing law of the claim (the governing law of the tort) or, if greater emphasis is placed on victim protection, to selectively apply the governing law of the tort or the governing law of the insurance contract". See: Hiroshi Matsuoka and Naoshi Takasugi, KOKUSAIKANKEISHIHOU KOUGI [LECTURES ON PRIVATE INTERNATIONAL RELATIONS LAW] [revised and supplemented edition], Horitsubunkasha (2015), p. 141.

⁴⁶ In fact, some argue that for the purposes of actions for avoidance of fraudulent acts, the governing law should be the one that favors creditors. See: Thomas H. Day, *Solution for Conflict of Laws Governing Fraudulent Transfers: Apply the Law that Was Enacted to Benefit the Creditor*, The Business Lawyer, Vol.48, No.3 (May 1993)

⁴⁷ In the Summer Semester 2020 "Private International Law" class, Professor Hisashi Harata (The University of Tokyo) remarked that it is conceivable to assume that there are many laws that could be qualified as governing law with regard to an action for avoidance of fraudulent transactions in many dimensions. This paper will take this stance and support Professor Harada's argument by examining the diversity of action for avoidance of fraudulent transactions through a critique of the cumulative application doctrine.

or compensation for damages. In the NAB case, the plaintiff claimed not only the avoidance of the Donation, at least in relation to the plaintiff, but also the cancellation of the Registration. Comparatively, in *Irving Trust Co. v. Maryland Casualty Co.*, the plaintiff brought a claim to set aside a transfer of corporate assets under the provisions of the Corporation Law. In response to this claim, the Circuit Court of Appeals, Second Circuit, found that “the validity of the conveyance depends upon the *lex rei sitae*, but any court may compel the tortfeasor specifically to restore the property, whatever the law of the situs (...) The court cannot adjudge the transfers void as to land and chattels outside the state, except as the *lex rei sitae* is the same as section 114⁴⁸. But under his general prayer the plaintiff, if he proves his case, may have a decree as to any of the property transferred directing the defendants to reconvey it, and this he can enforce in personam. Of course, he may also recover damages as a substitute if he so elects”, and clearly recognized the diversity of legal structures regarding fraudulent transactions⁴⁹.

30. If it is affirmed that there are multiple legal relationships and that there can be multiple legal structures in actions for avoidance of fraudulent transactions, then the governing law is not limited to a single one. However, how to combine or apply multiple laws that could be the governing law in a specific case needs to be discussed. Cumulative application, as noted above, is not a good idea. At this time, a *dépeçage* may be the solution. It should be noted that the only way to determine how to divide the governing laws would depend on the parties' claims and legal structure. This is because in a specific case, parties can make various claims and legal structures, and each claim and legal structure has its own governing law. The specific method of allocating the governing law will be the subject of future research. But tentatively, there may be a transactional dimension, a liability action dimension, an individual asset dimension, and a total asset dimension. If the plaintiff claims that the fraudulent transaction itself, or at least in relation to such creditors who are third-parties to the fraudulent transaction, is invalid, then the law governing the transaction in question should be used to decide the case⁵⁰. If the plaintiff claims damages arising out of the fraudulent transaction, then the law of tort would govern. If the plaintiff wants to challenge the transfer of title in conjunction with a fraudulent transaction, *lex rei sitae* would apply. Even if the fraudulent transaction itself were valid and title to the subject matter was lawfully transferred, and the defendant is not liable in tort to the plaintiff, the plaintiff would still be able to argue that this transfer of assets should be set aside as prejudicial to the rights of creditors because the debtor was in bankruptcy when the assets were transferred. In this case, the

⁴⁸ The Stock Corporation Law § 114, N.Y. Consol. Laws ch. 59, provides as follows: Liabilities of Officers, Directors and Stockholders. Except as otherwise provided in this chapter, the officers, directors and stockholders of a foreign stock corporation transacting business in this state, except a moneyed or a railroad corporation, shall be liable under the provisions of this chapter, in the same manner and to the same extent as the officers, directors and stockholders of a domestic corporation, for the making of (1) Unauthorized dividends; (2) Unlawful loans to stockholders; (3) False certificates, reports or public notices; (4) Illegal transfers of the stock and property of such corporation, when it is insolvent or its insolvency is threatened. Such liabilities may be enforced in the courts of New York, in the same manner as similar liabilities imposed by law upon the officers, directors and stockholders of domestic corporations.

⁴⁹ *Irving Trust Co. v. Maryland Casualty Co.* 83 F.2d 168 (2d Cir. 1936)

⁵⁰ In such cases, the governing law of the fraudulent transaction may be chosen by that party and may have no connection with the plaintiff creditor, but if the plaintiff creditor proves and claims based on that governing law, he may be deemed to have voluntarily submitted himself to that law. Since the plaintiff voluntarily submitted himself to the governing law of the fraudulent transaction, applying it should not be a problem.

law of the domicile of the debtor where the total assets are gathered should be applied because the aim of the lawsuit focuses on the total assets of the bankrupt debtor, not on individual items.

31. Based on the diversity of governing laws in actions concerning fraudulent transactions, other related matters can be dealt with. For example, in an insolvency avoidance case, the trustee may assert claims under the Bankruptcy Code, or under the restrictions on dividends and transfers under the Companies Act⁵¹ or under the General Statute of Fraudulent Transactions⁵²⁵³. While most claims in bankruptcy will focus on the total assets dimension of the debtor, the bankruptcy trustee should not be precluded from basing claims on the transactional dimension or the liability action dimension in order to achieve the ultimate goal of creditor satisfaction (and/or corporate reorganization)⁵⁴. This is because various legal relationships, legal structures may be involved in the same facts of fraudulent transactions. The parties then need to formulate the legal structure of their own claims after properly researching the legal relationships hidden in the facts. The court also needs to examine the parties' claims and demands in detail and then determine the governing law according to the dimensions of the claims and demands.

32. The remaining question would be whether, according to the proposed mechanism, plaintiff creditors would have an advantage over defendants in litigation by being able to establish a legal structure. The answer is that it does not. This is because the premise of this mechanism is that the defendant must also follow the governing law of the legal system established by the plaintiff in the first place. For example, as in the NAB case, it should be said that since the plaintiff focuses on the transactional dimension and attempts to make a claim, it will be judged by the governing law of the transaction. Since the governing law of the transaction is one to which the defendant must also be subject in the first place, the plaintiff cannot be said to have the upper hand. The same is true in other cases. In the liability action dimension, the defendant cannot complain because the governing law would be the place where the defendant's action takes place. If it was the individual property dimension, no one would be able to deny that the law of location of the property governs the transfer of ownership. In the total asset dimension, the debtor would be subject to the law of the debtor's domicile, which would reasonably subject all parties involved in the total asset, including the defendant. It goes without saying that the entities in the international community now shall act with attention to all relevant law and order. While it is not possible to apply all of those legal systems to a given lawsuit, choosing one of the laws that those entities adhere to as the governing law in no way gives one side an advantage over the other.

IV. CONCLUSION

33. Summarily, Japanese legal precedent and doctrine have adopted the doctrine of cumulative application for actions concerning fraudulent transactions. But the reasons supporting this doctrine are largely based on substantive law considerations, which make treatment under private international law inappropriate or rather impossible. The cumulative application doctrine scholars, however, correctly pointed out the existence of a diversity of actions for avoidance of fraudulent transactions. With this diversity in mind, it would be advisable to determine the

⁵¹ See: *Irving Trust Co. v. Maryland Casualty Co.* 83 F.2d 168 (2d Cir. 1936)

⁵² See: *MC Asset Recovery, LLC v. Commerzbank AG*, 441 B.R. 791 (2010)

⁵³ In Japan, the governing law of intra-bankruptcy avoidance actions and extra-bankruptcy actions for avoidance of fraudulent transactions is different, regardless of the legal structure of the plaintiff (creditor or trustee). Although I would like to leave the details to a separate study, the basis for the distinction does not seem to be appropriate in my findings.

⁵⁴ Indeed, for instance, Section 544(b) of the U.S. Bankruptcy Code allows a bankruptcy trustee to bring a claim under the governing law of the fraudulent act.

applicable law for each dimension. Whereas it is left to future research to determine what dimensions of fraudulent transaction litigation exist and what specific governing law is applicable to each dimension.

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