

LATHAM & WATKINS



Taking Security in Egypt

A Comparative Guide for Investors

ABOUT THIS GUIDE

In light of Africa's sustained economic growth over the last decade, the continent has become an increasingly attractive destination for investment.

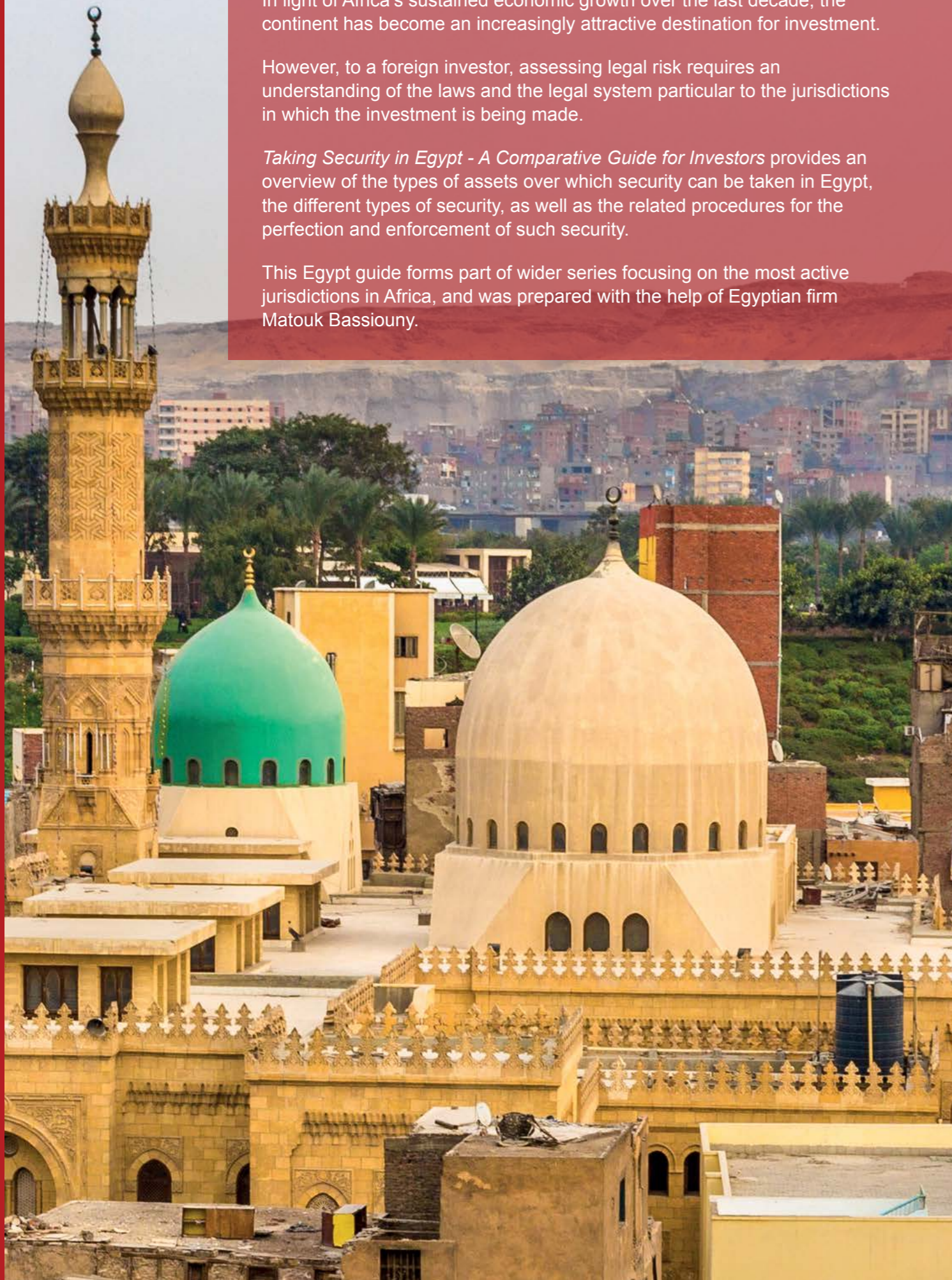
However, to a foreign investor, assessing legal risk requires an understanding of the laws and the legal system particular to the jurisdictions in which the investment is being made.

Taking Security in Egypt - A Comparative Guide for Investors provides an overview of the types of assets over which security can be taken in Egypt, the different types of security, as well as the related procedures for the perfection and enforcement of such security.

This Egypt guide forms part of wider series focusing on the most active jurisdictions in Africa, and was prepared with the help of Egyptian firm Matouk Bassiouny.

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EGYPT

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Egyptian financings?

Shares

A share pledge may be taken over shares in an Egyptian company, by the pledgor and pledgee entering into a share pledge agreement.

Bank Accounts

Although security over bank accounts is not specifically regulated under Egyptian law, customary practice permits cash deposits in designated bank accounts to be pledged if the account holder and the account bank enter into a pledge agreement.

Land

Security over immovable property may be taken by way of an official real estate mortgage over land, buildings, and/or buildings under construction.

Contractual Rights

Security can be taken over contractual rights by way of assignment pursuant to an assignment agreement. Such an assignment agreement must bear a certified date (e.g., by notarisatio) in order to be effective against third parties.

Insurance Proceeds

Security may be taken over insurance proceeds by two means:

- By way of assignment; and
- By endorsement of the insurance policy, which is the method used more commonly in practice.

Authorisations and Licences

Governmental authorisations and licences are issued on the basis of “personal consideration” (*intuiti personae*) under Egyptian law. Accordingly, security may not be taken over such authorisations or licences unless approval is obtained from the competent regulatory authority responsible for issuing such authorisation or licence.

Intellectual Property

Intellectual property such as trademarks, patents and industrial designs are included in a person’s *fonds de commerce*, which may be mortgaged through a *fonds de commerce* mortgage.

Personal Property and Tangible Assets

Security may be taken over movable property by way of a possessive pledge or a *fonds de commerce* mortgage.

Aircraft and Ships

- **Aircraft:** security may be taken over aircraft by way of an official mortgage document, executed before the administrative authority entrusted with the registration of aircraft.
- **Ships:** security may be taken over vessels and vessels under construction by way of mortgage.

Can security be taken over future assets?

Egyptian law prohibits the grant of security over future assets other than rights which have effectively arisen but are not yet due, which may be assigned. By way of example, a pledge over cash deposits in a bank account may be invalidated on the grounds that such pledge covers future money, which may or may not be available at the time of execution of the pledge, unless the pledge agreement includes an assignment of the pledgor’s rights in the account.

Are there any restrictions on who can legally grant and/or hold a security interest?

Any natural person with full capacity to dispose of assets may legally grant and/or hold a security interest. Any company may grant and/or hold a security interest, subject to any restrictions in its constitutional documents.

Egyptian law prohibits the creation of security over any asset which may not be disposed of legally. This includes public monies, namely all real estate and movable property which is designated for the public benefit and owned by the state or public legal persons.

Are security trustees or security agencies recognised under Egyptian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee’s or a security agent’s right in the secured property?

Egyptian law does not recognise the concept of a security trustee. However, the appointment of a security agent is common, especially in the context of syndicated loan agreements. The role, duties and rights of a security agent are regulated by contract, since Egyptian law does not stipulate further requirements as to the enforceability of a security agent’s right in security.

What about third party security?

Third party security is permissible and the entity granting such security may receive a commercial benefit for doing so, however, in case no commercial benefit is obtained, the security grant will be considered a gratuity and shall be subject to provisions regulating gratuity.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

To perfect a pledge over shares that are deposited with the Misr for Central Clearing, Depository and Registry (MCDR) (which includes all shares that are listed on the Egyptian Stock Exchange (EGX) as well as some unlisted shares), the MCDR must be notified of the relevant share pledge so that the MCDR can annotate the share pledge on the MCDR's records.

To perfect a pledge over shares that are not deposited with the MCDR, the share certificates must be transferred to the lender or its third party custodian. The share pledge must then be annotated on the share certificates and the relevant shareholders' ledger.

Bank Accounts

A pledge of cash deposits in a bank account is perfected through the account bank annotating the pledge in its records.

Land

A real estate mortgage is perfected through registering the mortgage (which must be in the correct written form) with the competent notary public office.

Contractual Rights

To perfect an assignment as against the contractual counterparty, the latter must be notified of (or must otherwise acknowledge) the assignment. To perfect an assignment as against third parties, the assignment must bear a certified date.

Insurance Proceeds

To perfect an assignment of insurance proceeds as against the relevant insurer, the latter must be notified of (or otherwise acknowledge) the assignment. To perfect an assignment as against third parties, the assignment must bear a certified date.

Intangible Assets and Intellectual Property

A *fonds de commerce* mortgage is perfected through registration with the notary public and annotation on the mortgagor's commercial register.

Personal Property and Tangible Assets

- **Possessive pledge:** assets subject to a possessive pledge must be transferred to the creditor in order to perfect the pledge.
- **Fonds de commerce mortgage:** a *fonds de commerce* mortgage is perfected through registration with the notary public and annotation on the mortgagor's commercial register.

Aircrafts and Ships

- **Aircraft:** mortgages over aircraft are perfected through an official document written and executed before the administrative authority entrusted with the registration of aircraft. The mortgage must be registered in the aircraft register.
- **Ships:** a maritime mortgage over a vessel or vessel under construction must be registered at the vessels' registry.

What are the fees, costs and expenses associated with creating and perfecting security in Egypt?

- **Mortgage registration fee:** a fee cap of EGP 100,000 is legally applicable to, and payable in respect of, the registration of a mortgage in the event that such mortgage grants a security interest to a bank. The registration fee shall be determined as follows:
 - EGP 25,000 – if the value of the mortgage does not exceed EGP 10 million;
 - EGP 50,000 – if the value of the mortgage does not exceed EGP 20 million;
 - EGP 75,000 – if the value of the mortgage does not exceed EGP 30 million;
 - EGP 100,000 – if the value of the mortgage exceeds EGP 30 million.
- **Notary public fees:** such fees are payable if involvement of a notary public is required as part of any formalities required in connection with the perfection of a security interest (e.g., the establishment of a date certain).
- **Stamp duty:** stamp duty of EGP 0.9 per page is payable on any document which is to be [used] in Egypt. Use of the document entails using it to exercise any function that should or is intended to render its legal effect(s). Further, if the relevant document was issued offshore and was brought into Egypt to be used, the stamp duty shall be due upon its use. In respect to credit facilities and loans presented by banks every quarter in addition to the initial balance of the relevant quarter, they are subject to a proportional stamp duty equivalent to 0.001 every quarter.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

Security over a single asset may be granted to more than one creditor.

- **Registrable security interests:** for a security interest that must be registered (such as real estate and *fonds de commerce* mortgages), the priority of creditors is determined according to the date and time of registration or annotation.
- **Non-registrable security interests:** for a security interest that is not subject to registration (such as bank accounts, movable property, insurance proceeds and assignment of contractual rights) the priority of creditors is determined according to the certified date obtained on the underlying documentation.
- **Shares not deposited with the MCDR:** security over such shares may be granted to more than one creditor through the annotation of subsequent pledges on the share certificates. The priority of creditors will be determined based on the annotation date. While legally permissible, it is not customary for security over such shares to be granted to more than one creditor.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

- **Commercial mortgage:** In order to enforce a commercial mortgage the pledgee must first request payment of the secured debt from the mortgagor, usually through service of an official notice through a court bailiff. If the pledgor does not pay the secured debt within five days following such request, the pledgee may apply to the competent court for a sale order in relation to the pledged assets. Unless otherwise ordered by the court, the sale must be carried out by way of public auction.
- **Fonds de commerce mortgage:** In order to enforce a commercial mortgage the mortgagee must first request the payment of the secured debt from the mortgagor (as well as any other person in possession of the mortgaged asset), usually through service of an official notice through a court bailiff. If the mortgagor does not make payment within eight days of such notification, the mortgagee may submit a petition to the summary judge requesting the sale of the mortgaged asset through public auction. The judge will specify the date and time of the public auction.
- **Real estate mortgage:** In order to enforce a real estate mortgage, a payment default with respect to the secured debt must first have remained outstanding for a period of 30 days, then the mortgagee must request the mortgagor to make payment of such secured debt within a further 60 days. The notification is usually through service of an official notice through a court bailiff. If the mortgagor does not make the due payment, the mortgagee may request the competent judge to issue an exequatur (execution order) of the mortgage agreement as well as an order for seizure of the secured asset. The mortgagee must then notify the mortgagor of the exequatur and grant the mortgagor a period of 30 days in which to make the payment. The exequatur is annotated by the competent notary public. If the mortgagor fails to make the due payment, the secured asset will be sold by public auction under the supervision of the enforcement judge.
- **Share pledge:** In order to enforce a share pledge, the pledgee must first request payment of the secured debt from the pledgor, usually through service of an official notice through a court bailiff. If the pledgor does not make payment within ten days after notification, the pledgee may enforce its rights over the shares in accordance with the EGX sale and purchase rules.
- **Bank account pledge:** In order to enforce a bank account pledge, amounts in the pledged accounts or pledged deposits may be set off against amounts owed by the pledgor to the pledgee. The rights subject to a set-off must be undisputed in order for the application of the set-off.

Are any governmental or other consents required in connection with the enforcement of any category of security interest?

No governmental or other consents are required in connection with the enforcement of any category of security interest.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Egypt?

There are no restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Egypt.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

The Egyptian bankruptcy regime is set out in the Egyptian Commercial Code. Under the Commercial Code bankruptcy proceedings may only be declared by virtue of a court order at the request of the debtor, any of its creditors, or the public prosecutor. The debtor's right to submit such request in order to file for its own bankruptcy is limited to merchants, whether natural persons or legal entities (the latter category to include companies, branches and agencies), who practice their activities in Egypt.

To file for its own bankruptcy, a merchant must submit a request to the competent court within 15 days of the date of the default in paying due amounts for reasons attributable to the merchant's business conditions. This request must include the merchant's commercial records and documents, the reasons for its default, the names and addresses of its debtors and creditors, the amount of debt owed and the security on such debt.

In order to file for its debtor's bankruptcy, the creditor must deposit its statement requesting all necessary protective measures to be taken as well as any evidence for its debtor's refrainment of payment of due debts at the clerk's office in the competent court accompanied by an amount equivalent to EGP 1,000 to meet the costs of publishing the bankruptcy court order. The clerk's office shall then decide upon the soonest hearing and notify the debtor.

Are "company rescue" or reorganisation procedures available?

Protective composition proceedings prior to a declaration of bankruptcy are available. To be eligible to benefit from such proceedings, the relevant person must: (a) have been a merchant for a minimum period of two years prior to filing; (b) be suffering from a turbulent financial status; and (c) be unable to pay due debts for reasons attributable to this turbulent financial status.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

As soon as the court declares a merchant bankrupt, all his debts will be considered due. A creditor who has security over the bankrupt merchant's movable or immovable property is entitled to enforce such security, and is not placed in the group of unsecured creditors.

Where a secured creditor is not able fully to recover the debt after enforcement of security, such creditor is entitled to join the group of unsecured creditors, and will hope to obtain the remaining debt due from the proceeds of liquidation of the bankrupt merchant's assets. The bankrupt merchant's assets will be divided by the number of creditors, each according to the percentage of that creditor's debt.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

Any security granted by the bankrupt merchant from the date on which such merchant has stopped making any payments that are due and payable to its creditors will be unenforceable.

Egyptian law provides for liens of higher priority which will be enforced before any other security. These liens of higher priority vary depending on the nature of the secured asset, especially depending on whether the asset is movable or immovable property.

- Certain preferential creditors must be accounted for in the order of priority in respect of liens attached to movable property that are subject to enforcement. Examples of such preferential creditors are:
 - Amounts Paid To Keep And Maintain The Debtors' Movable Assets;
 - Amounts Due To The Treasury, Including Taxes And Fees;
 - Any Amounts Due To The Seller Of The Movable Asset Subject To Enforcement; And
 - Any Amounts Due To The Partners Who, Along With The Debtor, Own The Movable Asset Subject To Enforcement.
- Certain preferential creditors must be accounted for in the order of priority in respect of liens attached to immovable property that are subject to enforcement. Examples of such preferential creditors are:
 - Amounts due to the seller of the immovable property and its fixtures and fittings (subject to satisfaction of registration requirements);
 - Amounts due to contractors and architects who built the immovable asset subject to enforcement; and
 - Amounts due to the partners who, along with the debtor, own the immovable asset subject to enforcement.

Can debt owed by a company to a creditor be contractually subordinated to debt owed by that company to another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

Egyptian law does not specifically regulate the subordination of debt. In practice, creditors enter into subordination agreements. The treatment of such agreements in the case of the bankruptcy of the debtor has not been sufficiently tested.

How is priority among secured parties determined on the insolvency of the debtor?

Priority among secured parties is determined in the same way as described above.

FOR MORE INFORMATION



Clement Fondufe

Finance, Partner, London/Paris

T +44.207.710.4685
+33.1.40.62.29.90
M +44.74.8470.4723
E clement.fondufe@lw.com



JP Sweny

Finance, Counsel, London

T +44.20.7710.1870
M +44.77.1311.0919
E john-patrick.sweny@lw.com



Afi Narh-Saam

Finance, Associate, London

T +44.20.7710.1074
E afi.narh-saam@lw.com



David Ziyambi

Finance, Associate, London

T +44.20.7710.5807
E david.ziyambi@lw.com

This guide was authored by Latham & Watkins in collaboration with:

Mahmoud S. Bassiouny

DLA Matouk Bassiouny,
12 Mohamed Ali Genah, Garden City,
Cairo, Egypt

T +202.2795.4228
www.matoukbassiouny.com

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LATHAM & WATKINS



LONDON

99 Bishopsgate
London EC2M 3XF
United Kingdom

T: +44.20.7710.1000
F: +44.20.7374.4460

PARIS

45, rue Saint-Dominique
Paris 75007
France

T: +33.1.4062.2000
F: +33.1.4062.2062

Barcelona
Beijing
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