
THE REAL ESTATE LAW REVIEW

SECOND EDITION

EDITOR
DAVID WATERFIELD

LAW BUSINESS RESEARCH

THE REAL ESTATE LAW REVIEW

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THE REAL ESTATE LAW REVIEW

Second Edition

Editor
DAVID WATERFIELD

LAW BUSINESS RESEARCH LTD

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EDITOR'S PREFACE

Following the success of the first edition of *The Real Estate Law Review*, the second edition now extends to some 33 jurisdictions and we are fortunate, once again, to have the benefit of incisive news and commentary from distinguished legal practitioners in each jurisdiction. Each chapter has been updated to focus on key developments in the relevant jurisdiction and their potential impact on the global real estate market. This edition continues to provide an up-to-date picture of real estate activity in each jurisdiction and, therefore, the global real estate market.

International economic and political instability, in particular the eurozone crisis and US fiscal cliff, continues to have a significant impact on the international real estate investment market as investors seek value and a safe haven for their cash. The ongoing scarcity of debt finance also continues to constrain the wider investment market. Although new sources of funding have started to appear, the transition from a dependence on bank lending has been gradual. The challenging economic climate seems likely to continue and practitioners and their clients will need to adapt to the challenges it brings and the investment trends and opportunities that emerge.

The globalisation of the real estate market is a continuing theme that is likely to become more significant to real estate practitioners and their clients with each passing year. The second edition of *The Real Estate Law Review* seeks to build on the achievement of the first by developing an understanding of the law and practice in key jurisdictions while helping to cultivate an overview of the global real estate market.

Once again, I wish to express my deep and sincere thanks to all my distinguished colleagues who have contributed to this edition. I would also like to thank Gideon Robertson and his publishing team for their tireless work in coordinating the contributions from the various countries around the world.

David Waterfield
Slaughter and May
London
March 2013

Chapter 29

TAIWAN

*Yi-Jiun Su and Doris Lin*¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

i Ownership of real estate

Under Taiwanese law,² an individual or an entity may, individually or jointly with others, own freehold title to real property; however, certain categories of land can only be owned by the government, including:

- a* land lying within a certain distance of the coast;
- b* naturally formed lakes that are needed for public use and the land within a certain distance of those lakes;
- c* navigable waterways and the land within a certain distance of these waterways;
- d* waterways and lakes within city and town areas, and the land within a certain distance of the waterway banks or lake shores;
- e* public thoroughfares;
- f* land with mineral springs;
- g* land with waterfalls;
- h* land with water sources for public use; and
- i* scenic spots and historic remains.

ii System of registration

Registration is required to establish title to real property.³ To obtain a lawful title to a newly constructed building, the owner must file an application with the land office for an inspection of the building before obtaining an occupancy permit. After the inspection

1 Yi-Jiun Su is a partner and Doris Lin is an associate partner at Lee and Li, Attorneys-at-Law.

2 An English translation of the Land Act and other relevant laws can be found on the online database of the Ministry of Justice at <http://law.moj.gov.tw/eng/Law/LawSearchLaw.aspx>.

3 Article 758 of the Civil Code.

is completed, the occupancy permit is obtained, and a survey map is issued, the owner must register its ownership with the land office,⁴ which will then issue a title deed (i.e., ownership certificate) of the building to the owner.

Changes in ownership of real property in Taiwan will not take effect until the changes are registered with the land office. In other words, a purchaser will not be the legal owner of the real property until the registration with the land office is completed. Upon application for title transfer jointly filed by the seller and the purchaser, the land office will retrieve the title deed held by the seller. Upon completion of registration, the land office will issue a new title deed to the new owner. Encumbrances (e.g., mortgages) created over real property will not take effect unless they are registered with the land office, in which case relevant documents, including the title deed of the mortgaged property, must be submitted. All registered particulars (except for protected identifiable personal information) are accessible to the public on the online database of the land office. To make transaction prices of real estate more transparent and accessible to the public, effective on 1 August 2012, the Ministry of the Interior ('MOI') established a registration system under which the purchaser, land administration agent (i.e., scrivener) or broker of a given real property transaction must register the actual transaction price of real estate within 30 days of the completion of the title transfer.

iii Choice of law

Theoretically, foreign law can be recognised as the governing law for transactions involving real property in Taiwan by Taiwanese courts, provided the relevant provisions of such foreign law and the consequences of their application are not found to contravene public policy or good morals. Nonetheless, as Taiwanese law requires all matters related to rights and interest in, or partition or division of real property to be subject to the jurisdiction of the court where the real property is located, in order to avoid any conflict-of-law issues it would be advisable for parties to such transactions to adopt Taiwanese law as the governing law of their contracts.

II OVERVIEW OF REAL ESTATE ACTIVITY

Although property ownership in Taiwan is mainly freehold, long-term leaseholds are becoming more common, particularly in Taipei City and for government build-operate-transfer infrastructure projects, where a right of *superficies* is granted to project companies qualified under the Act for Promotion of Private Participation in Infrastructure Projects ('the PPP Act'). The PPP Act provides preferential tax and financing treatments for investors of infrastructure projects. Also, under the PPP Act, the Taiwanese government may assist investors in acquiring land necessary for infrastructure projects.

⁴ Articles 78 and 79 of the Regulations Governing Land Registration.

Generally, leasehold titles, except for leasehold of land for constructing buildings, are valid for up to 20 years; however, rights of *superficies* over state-owned land can be valid for up to 70 years.⁵ Renewal options depend on the contract terms.

Strata titles are fairly common in large urban properties. The Regulations on Management of Apartment Buildings were introduced in June 1995 to standardise building management and maintenance practices. Taiwan has a strata title system under which one may own real property jointly with others but still have proportionate ownership rights, *pro rata* to its share of the real property, and may transfer such rights without the consent of the other co-owners.

Taiwan's real property market, whether commercial or residential, has been booming for the past few years, primarily as a result of the improved relations between Taiwan and mainland China,⁶ low interest rates and increased loan availability. Despite the introduction of a special tax (discussed in detail in Section IV, *infra*) and other anti-speculative measures, particularly the compulsory registrations of and public access to the actual transaction prices of real property implemented by the MOI starting from 1 August 2012 (see Section I, *supra*), to cool down the residential property market, housing prices continue to surge. Addressing the problems arising from uneven supply and demand in the real property market has thus become a major challenge for the Taiwanese government.

III FOREIGN INVESTMENT

In Taiwan, foreign investment is mainly regulated by the Statute for Investment by Foreign Nationals and the Statute for Investment by Overseas Chinese. Both statutes allow foreign-invested entities and foreign individuals to receive the same regulatory treatment as local companies and individuals. Compared with 10 years ago, foreign investors now face fewer restrictions investing in real property in Taiwan;⁷ nowadays, they can buy real property in Taiwan subject to prior government approval, which is granted in most cases.

The available investment structures have evolved over the years, with many forms of ownership such as sole ownership, co-ownership, ownership through a sale and leaseback, and investment trust, to name a few. The investment structure adopted varies from one investor to another, depending on their business needs, tax planning and investment objectives. There are three major groups of foreign investors in the real property market: individual investors, corporate investors and institutional investors.

5 Article 5 of the Measures on Creation of *Superficies* over State-Owned Not for Public Use Land, last amended on 13 September 2012.

6 The Economic Cooperation Framework Agreement ('ECFA') was signed on 29 June 2010. The agreement is seen as a historic breakthrough in the relations between Taiwan and mainland China.

7 On 15 November 2001, the Measures Governing Foreigners' Procurement of Rights in Domestic Land were substantially amended to relax restrictions on foreign investment in real property.

Corporate investors purchase real property mainly to meet their operational needs while institutional investors purchase real property for capital gains and rental income. They can both invest in real property in Taiwan in either of two ways. First, in a case of ownership through a subsidiary, a foreign entity may purchase real property in Taiwan through a Taiwanese subsidiary. By doing so, the foreign entity may indirectly own real property in Taiwan through holding equity interest in a Taiwanese company that directly owns the real property. As the subsidiary is regarded as a Taiwanese entity, it can avoid the legal requirements applicable to a foreign entity when purchasing real property in Taiwan, discussed in detail below.

In a case of ownership through a branch, a foreign entity may purchase real property in Taiwan through its branch.⁸ Unlike a subsidiary, however, a branch, being an extension of the foreign entity's head office, is not considered a Taiwanese entity; hence, the foreign entity, despite having established a branch, must meet the following conditions to qualify to purchase real property in Taiwan:

- a* the jurisdiction where the foreign entity was incorporated allows Taiwanese entities and individuals to own real property there (reciprocal treatment);
- b* the real property to be purchased is not 'restricted land';⁹
- c* the real property is purchased for its own use, investment or public interest and is used as a:
 - residence;
 - place of business, office building, shop or factory;
 - church;
 - hospital;
 - school for children of foreign nationals;
 - diplomatic and consular building or office buildings of organisations for the promotion of public welfare;
 - cemetery; or
 - construction recognised and approved by the authorities as important to Taiwan's major infrastructure, economy, or agricultural or husbandry industry; and
- d* prior approval from the city or county government with jurisdiction over the real property has been obtained.

In general, the approval mentioned in condition (d) can be obtained within around 14 days of the government's receipt of the application, as long as conditions (a) to (c) have been met. Any subsequent change in the ownership or use of the real property purchased under the second of these options requires prior approval from the city or county government.

8 The foreign entity must be recognised and establish a branch in Taiwan in accordance with the Company Act before being duly registered as the owner of the real property.

9 The term 'restricted land' means the following: (1) forest land, (2) fishing grounds, (3) hunting grounds, (4) salt fields, (5) land with mineral deposits, (6) sources of water supply, (7) land with fortresses or other military establishments, or (8) land adjacent to national frontiers.

Either of the foregoing options may enable a foreign entity to hold real property in Taiwan; however, as the two options have different tax implications, most foreign investors seek advice from local counsel and tax advisers to carefully weigh their choice of investment structure.

For Chinese investors,¹⁰ because of the political tensions across the Taiwan Strait, Chinese investment in Taiwan's real property market was prohibited prior to 2002. Although most regulatory restrictions were relaxed in 2010, Chinese investors are still subject to more legal hurdles¹¹ than their foreign counterparts.

IV STRUCTURING THE INVESTMENT

i Subsidiary versus branch

While the time, money and procedure required to establish a subsidiary are similar to those for establishing a branch, these two investment structures may differ in many ways.

Limit on liability

The liability of a subsidiary is limited to the amount of capital contributed by the shareholders, while that of a branch will be extended to the foreign head office.

Tax implications

A subsidiary must set aside 10 per cent of its annual after-tax profit as legal reserve prior to distribution of profit. In addition, any expatriation of dividends to foreign shareholders is subject to a 20 per cent withholding income tax (unless a tax treaty provides a lower withholding rate). But neither of these two requirements applies to a branch.

Corporate governance

A subsidiary must hold a shareholders' meeting at least once a year (or a board meeting if it is a single-shareholder company); however, a branch need not do so.

Eligibility to purchase real property

As discussed in Section III, *supra*, a subsidiary, being considered a local entity, need not meet the four conditions in the second option (ownership through a branch).

Disposal of real property

Owning real property through a subsidiary may have more flexibility in terms of disposal because the foreign parent company may choose to have the Taiwanese subsidiary sell the

10 Legal entities in which Chinese investors hold 30 per cent or more of the total shares or that are controlled directly or indirectly by Chinese individuals or entities are considered Chinese entities. Their investments in Taiwan are limited to certain businesses.

11 The Measures Governing Chinese People's Procurement, Creation or Transfer of Rights in Real Property in Taiwan and the other information relevant to the restrictions on Chinese investment in real property in Taiwan can be found on the website of the Ministry of the Interior at www.land.moi.gov.tw.

real property, or sell its shares in the Taiwanese subsidiary. There is also a third disposal method for institutional investors who indirectly own a Taiwanese subsidiary through a holding company set up in a third jurisdiction. These institutional investors can dispose of their real property in Taiwan by selling the shares in the holding company; for a branch, the foreign entity may only sell the real property.

As tax implications are usually the major concerns of foreign investors, ownership through a branch is a more popular investment structure, in particular, for institutional investors whose investment objectives are for capital gains and rental income despite the limited choices on how to dispose of the real property.

ii Property transfer versus share transfer

As discussed above, to dispose of the real property, foreign entities may have the owner of the property sell the real property (a property transfer) or sell the shares in the owner (a share transfer). These two transactions carry different tax implications.

Property transfer

For a property transfer, certain transfer taxes, including corporate income tax (17 per cent of the net income), land value incremental tax ('LVIT')(ranging from 20 per cent to 40 per cent based on the increase in the land value during the period from the purchase to the subsequent sale), value added tax on building and stamp duty, will be incurred. In practice, the seller and the purchaser would retain a scrivener to calculate the relevant transfer taxes and fees to ascertain the possible transaction costs before signing a formal agreement.

In addition to transfer taxes, a special property tax will be incurred, which is payable by the seller according to the Statute for Selective Commodities and Services Tax, which took effect on 1 June 2011. This special tax, which is better known as the luxury tax, is levied on a transfer of real property (including a building and the land on which the building is located; and urban land for which a building permit can be issued) at 15 per cent of the sale price if the property is sold within the first year of purchase and at 10 per cent if the property is sold in the second year of purchase.

Share transfer

The tax implications of a share transfer are less complicated. For a subsidiary of a foreign parent company, the transaction is only subject to a securities transaction tax at 0.3 per cent of the sale price, and any capital gains generated from the transaction are not taxable; however, the capital gains, if any, will be included in the calculation of the basic income and may be subject to an alternative minimum tax under the Income Basic Tax Act. The threshold and tax rate are NT\$2 million and 10 per cent of net income. If the alternative minimum tax exceeds the regular income tax calculated in accordance with the Income Tax Act, the difference will be payable as tax.

The transfer of the shares in a foreign entity will not trigger any tax liability in Taiwan.

V REAL ESTATE OWNERSHIP

i Planning

The use of real property is subject to applicable zoning rules. A developer must obtain a building permit before constructing buildings and an occupancy permit before occupying or using the buildings. The permitted uses of each unit of the building will be stated on the occupancy permit, and any change to such permitted uses requires prior written approval from the authorities. Therefore, an investor should check the zoning of the real property it plans to purchase and the permitted uses of the building located there in order to confirm whether the target real property can be used for the intended purposes. The zoning information can be obtained as long as the lot number of the land is available to the investor. The owner can be asked to provide the occupancy permit.

ii Environment

The use of land should comply with applicable environmental laws and regulations. If the activities carried out on the land fall within the scope prescribed by the authorities (usually relating to those industries potentially and most likely to cause pollution) pursuant to the Soil and Groundwater Pollution Remediation Act ('the SGWPRA'), an inspection should be conducted to confirm whether there is any pollution before the land or any buildings located thereon can be transferred. If any soil or groundwater pollution is found, remedial actions must be taken and any party suffering damage from the pollution may seek compensation from the polluter and the owner. A gross violation of the SGWPRA carries criminal liabilities. As pollution not only has an adverse impact on the value of the property but also carries legal consequences, the results of due diligence on soil or groundwater pollution usually have a significant role in foreign investors' decisions on whether to purchase a specific piece of real property.

iii Tax

In addition to the transfer taxes and special tax explained above, a land or building owner must pay the land value tax or the house tax, as the case may be. Land value tax is payable on an annual basis to the city or county; it ranges roughly from 1 per cent to 5.5 per cent of the difference between the starting cumulative value and the current assessed and publicly announced land value. House tax is an annual tax assessed on all buildings; it ranges from 1.2 per cent to 5 per cent of the current assessed value of buildings, depending on their use.

iv Finance and security

Commercial properties include multi-family apartments, office buildings, retail space, hotels and resorts, warehouses, and other commercial properties. For most commercial property transactions, foreign investors get financing from commercial lenders such as banks or other financial institutions; however, due to the higher risks associated with commercial properties, the loan-to-value ratios offered by commercial lenders in Taiwan are usually between 50 per cent and 70 per cent.

The most common form of security in Taiwan is a mortgage. A mortgage over real property, including land and buildings, has to be registered with

the land office in order to be valid. The foreclosure of a mortgage generally takes around three months to complete.

VI LEASES OF BUSINESS PREMISES

The Civil Code and the Land Act are the two major laws that regulate leases in Taiwan. While the Civil Code contains provisions on lease agreements in general, the Land Act contains provisions on, *inter alia*, (1) administrative matters such as cadastration, land registration, land use, land tax and land expropriation, (2) lease of houses, building sites and farmland, and (3) tenants' rights, such as restrictions on the termination of lease by landlords, and maximum rental for residential housing. According to judicial decisions, tenants of commercial buildings are not entitled to all the protection afforded under the Land Act to tenants of residential buildings (such as apartments).

In Taiwan, the market for leasing commercial and residential properties is fairly active. Lease terms, except for the lease for the construction of buildings, cannot be longer than 20 years¹² and are generally for five years or longer for commercial properties, and one year or longer for residential properties. In addition, any real property lease for more than one year must be in writing,¹³ otherwise, the lease will be deemed a lease for an indefinite term, which both parties may terminate at will by prior notice. If, after the expiry of a lease, the tenant continues to occupy the leased premises or to generate profit therefrom, and the landlord does not object, the lease will be deemed to be for an indefinite term.¹⁴

If the tenant is in possession of the leased premises when the landlord transfers the leased premises to a third party, the lease will bind the third-party transferee. This rule does not, however, apply to leases of over five years or of indefinite duration unless the leases concerned have been notarised.¹⁵

In Taiwan, most landlords require a security deposit equivalent to two months' rent or more. For residential properties, the maximum security deposit that landlords may demand by law is equivalent to two months' rent.¹⁶

Should the parties to an indefinite-term lease have a dispute over the rent because of a change in the value of the leased premises, either party may ask the court to adjust the rent,¹⁷ unless the lease agreement already provides a rent adjustment mechanism.¹⁸ For commercial properties, it is common for the landlord and the tenant to stipulate in their lease agreement a provision on the adjustment of rent every two to three years based on a fixed percentage or based on a floating index to be announced by the government. It is

12 Article 449 of the Civil Code.

13 Article 422 of the Civil Code.

14 Article 451 of the Civil Code.

15 Article 425 of the Civil Code.

16 Article 99 of the Land Act.

17 Article 442 of the Civil Code.

18 Supreme Court Judgments No. 86 *Tai-Shang-Zi-Di*-1613 (1997) and No. 88 *Tai-Shang-Zi-Di*-287 (1999).

also common for the operator of a department store or a shopping centre to require that the shop tenant pay the rent consisting of a fixed monthly rent or a turnover monthly rent, or both.

The Civil Code requires a tenant to return the leased premises to the landlord upon the expiry of a lease without indicating whether the returned leased premises should be restored to its original state; however, tenants that remove the fixtures attached by them to the leased premises should restore the leased premises to its original state.¹⁹ In Taiwan, most lease agreements contain a provision on the return of the leased property, which is negotiable. The tenant would usually be required to return the leased premises either in its original state except for normal wear and tear; or on an 'as is' basis.

For a master lease, landlords generally procure fire insurance to cover the replacement cost of the entire leased building. Master tenants are usually required to purchase (1) all-risk construction and installation insurance to cover the full cost of construction with limits customary for such activities on the leased premises, (2) general commercial liability insurance against liabilities such as bodily injury, death and property damage, and (3) fire insurance covering the full replacement cost of the leasehold improvements and their personal property on the leased premises. Sub-tenants are commonly required to purchase similar types of insurance for their leased premises.

In practice, most master tenants usually choose to sign a memorandum of understanding ('MOU') or letter of intent ('LOI') with their landlords to lay out the major lease terms and conditions (although neither the MOU nor the LOI may necessarily be binding) even if a definitive lease agreement is signed later.

VII DEVELOPMENTS IN PRACTICE

In the residential property market, Taiwan has one of the highest housing ownership rates in the world, while social housing accounts for less than 10 per cent of households. At present, housing ownership – especially in urban areas of Taipei – is increasing. As housing supply has fallen short of demand over the years, residential property prices have been rising since the SARS epidemic ended in 2003.

Compared with other Asian countries, Taiwan has had one of the most vibrant commercial property markets over the years, with insurance companies, developers and foreign equity funds being the major market players. As commercial property prices in Taiwan keep soaring, many investors are keen to tap the opportunities in this sector despite the low gross rental yields. The most direct way for the insurance companies or foreign equity funds to invest in the commercial property market would be acquiring commercial property (with financing from local syndicated banks), receiving stable rental yields by succeeding the existing lease (if any), and realising considerable capital gains by selling the property within a certain number of years of acquisition.

As insurance companies are active participants in Taiwan's commercial real property market, to enhance the supervisory controls over insurance companies' real property investment and internal regulation for the insurance industry, the Financial

19 Paragraph 2, Article 431 of the Civil Code.

Supervisory Commission ('FSC') amended the Criteria and Principles for Determining Instant Utilisation and Profitability from Real Property Investments of Insurance Companies, effective on 19 November 2012. While the amended criteria help maintain insurance companies' operational stability, the criteria to be met by insurance companies to be able to participate in real property investment have become more rigid.

VIII OUTLOOK AND CONCLUSIONS

According to recent government research, Taiwan's housing prices hit a record high in the second quarter of 2011 and continued to climb in 2012. To curb rapidly soaring housing prices, address the problems from uneven supply and demand in the market, and protect the public's right to affordable housing on 13 December 2011 the Legislative Yuan enacted the Housing Act and amended the Land Expropriation Act, the Real Estate Brokering Management Act, the Land Administration Agent Act and the Equalisation of Land Rights Act.

Under the new regulations, central and local governments have to build public houses, 10 per cent of which must be rented to disadvantaged groups. Moreover, land must be expropriated with compensation calculated at the market value, rather than the current assessed land value. Also, to increase transparency in the real property market, since 1 August 2012 it has become a compulsory requirement for the purchaser, the land administration agent or the real property broker of a given transaction to register the actual transaction prices within 30 days of the completion of the title transfer in order that the public may have access to such information. With public access to actual transaction prices of real property, conveyancing taxes (mainly the LVIT and the deed tax, which have long been underestimated because of the lower government assessed value) are expected, in the near future, to be levied according to actual transaction prices.

As affordable housing is at the top of its agenda, the Taiwanese government will in all likelihood introduce more measures to regulate the residential property market, which as a result would remain a highly restricted sector for foreign investment. On the other hand, further regulatory relaxation is expected in both the commercial property and the infrastructure sectors because of the economic momentum the country enjoys and the low level of potential social problems. In fact, the Taiwanese government has welcomed foreign investment in commercial properties and infrastructure projects in recent years.

In terms of possible political risks, the Taiwan political environment should remain stable in the coming years in view of the efforts by the government to maintain peaceful ties with mainland China and to spur economic growth.

The risk of a property bubble burst is fairly low because the government has pledged to control the price hike in the residential property sector, and property prices in Taiwan are moderate compared to those in other major Asian countries. Despite the recent global economic downturn caused by the sovereign debt crisis in Europe and the fiscal crash in the US, it is generally believed that commercial property demand, especially in the urban areas of Taiwan, will remain strong because of the influx of foreign capital, low lending interest rates, moderate property prices and a higher demand driven by increasing numbers of tourists from mainland China. All these can create a more vibrant and dynamic real property market in the next few years.

Appendix 1

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Yi-Jiun Su, a partner at Lee and Li, Attorneys-at-Law, is qualified to practise law in Taiwan and New York. Ms Su specialises in the areas of real property, construction and infrastructure, corporate investment, government procurement, and dispute resolution. Along with extensive experience in handling conveyancing, international engineering and construction works for a wide range of clients from different jurisdictions, she has represented investors, developers, equity funds, retailers and wholesalers, hotel and resort operators, contractors, and consortia in matters involving conveyancing, leasebacks, public auctions of large properties, government procurement, and investments in and construction of power plants and other worldwide infrastructure projects. Ms Su has also represented several multinational companies in international construction disputes.

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Doris Lin, an associate partner at Lee and Li, Attorneys-at-Law and a member of the Taipei Bar Association, focuses her practice on real estate transactions, cross-border investments, mergers and acquisitions, antitrust law, international trade law, labour law, insurance and securities laws. Ms Lin has more than 10 years of experience in these fields, and has assisted both local and foreign clients in the purchase of real estate, cross-border investments, mergers and acquisitions, and international trade investigations. She has also been counsel to the Chinese National Federation of Industries for many years.

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