IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 72

Admiralty in Personam No 60 of 2019
(Summons No 2432 of 2019)

Between

(1) AS Fortuna Opco BV
(2) AS Fortuna Shipco CV

… *Plaintiffs*

And

(1) Sea Consortium Pte Ltd
(2) APL Co Pte Ltd
(3) Ocean Network Express Pte Ltd
(4) All other persons claiming or being entitled to claim damages by reason of, or arising out of, the vessel "AS Fortuna" running aground at or around Guayaquil, Ecuador on or around 13 September 2018
(5) X-Press Container Line (UK) Ltd
(6) Comercializadora & Exportadora de Cacao Joerbry SA

… *Defendants*

GROUNDS OF DECISION

[Admiralty and Shipping] — [Limitation of liabilities] — [Tonnage limitations]

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AS Fortuna Opco BV and another
v
Sea Consortium Pte Ltd and others

[2020] SGHC 72

High Court — Admiralty in Personam No 60 of 2019 (Summons No 2432 of 2019)
Pang Khang Chau J
11, 26 November, 6 December 2019

14 April 2020

Pang Khang Chau J:

Introduction

1 By this limitation action, the Plaintiffs sought to limit their liability and constitute a limitation fund in respect of claims arising from the running aground of the vessel *AS Fortuna* ("the Vessel") at or around Guayaquil, Ecuador on or around 13 September 2018 ("the Incident").

2 The 1st Plaintiff is the registered owner of the Vessel. The 2nd Plaintiff is a limited partnership organised under the laws of the Netherlands, of which the 1st Plaintiff is the General Partner. The Defendants are potential claimants against the Plaintiffs and/or the Vessel in respect of the Incident.

3 None of the Defendants contested the Plaintiffs' entitlement to limit liability and constitute a limitation fund. They also did not oppose the Plaintiffs'

application to have the limitation fund constituted by way of a letter of undertaking from a Protection and Indemnity Club ("LOU"). The only issues in dispute before me were:

(a) the applicable interest rate to be provided for in the LOU in respect of the period *after* the constitution of the limitation fund ("the post-constitution interest rate"); and

(b) the appropriate costs order to be made.

These are my grounds of decisions on the foregoing two issues.

Interest rate on limitation funds

4 The parties were in agreement that:

(a) the limitation fund should include interest from the date of the Incident to the date of constitution of the limitation fund ("the pre-constitution interest"), calculated at 5.33% *per annum*;

(b) this pre-constitution interest rate is applicable to both funds constituted by payment into court and funds constituted by production of LOUs;

(c) a shipowner constituting a limitation fund by payment into court need not concern itself with post-constitution interest, as it is expected that the fund would earn interest while remaining in court, and the interest so earned would be added to the fund for the benefit of persons claiming against the fund; and

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(d) conversely, provision ought to be made for post-constitution interest where a limitation fund is constituted by way of a guarantee or LOU.

5 Regarding the appropriate post-constitution interest rate, the Plaintiffs proposed the rate of 2% *per annum* while the 2nd and 3rd Defendants proposed the rate of 5.33% *per annum*.

Parties' submissions

6 The Plaintiffs brought to my attention the following local precedents concerning limitation funds constituted by production of LOUs:

(a) *Pacific International Lines (Pte) Ltd and others v Govan Mani & Co Pty Ltd and others* HC/ADM 17/2016 (28 March 2017) ("*Pacific International Lines*") which fixed both the pre- and post-constitution interest rates at 5.33% *per annum*;

(b) *Thoresen Shipping Singapore Pte Ltd and others v Global Symphony SA and others* HC/ADM 46/2017 (25 July 2017) which fixed the pre-constitution interest rate at 5.33% *per annum* and the post-constitution interest rate at 2% *per annum*; and

(c) *Falcon Grace Pte Ltd and others v Vopak Terminals Singapore Pte Ltd and others* HC/ADM 116/2017 (19 April 2018) which fixed the pre-constitution interest rate at 5.33% *per annum* and the post-constitution interest rate at 2% *per annum*.

7 The Plaintiffs submitted that the guiding principle is that the claimants' position should not differ depending on whether the limitation fund is constituted by payment into court or by production of an LOU. If the limitation

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fund were paid into court, it would earn interest while the moneys remained in court, but the interest so earned would not be as high as 5.33% *per annum*. Therefore, the post-constitution interest rate applicable to a limitation fund constituted by way of an LOU should not be 5.33% *per annum*. Instead, it should approximate the interest that would be earned by moneys paid into court. The Plaintiff suggested that 2% *per annum* would be a good approximation.

8 The 3rd Defendant made two submissions. First, 2% *per annum* was probably an underestimation of the interest that could be earned on moneys paid into court. Secondly, since the Plaintiffs were not paying the limitation fund into court, they would retain the use of the moneys and would likely generate a higher return for themselves compared to the interest that could be earned on moneys paid into court. The Plaintiffs should therefore pay more in post-constitution interest than the interest which could be earned on moneys paid into court.

9 The 2nd Defendant submitted that there was a clear difference between payment into court and production of an LOU. In the latter case, the shipowner retains continued use of the moneys after the limitation fund is constituted, in the same way that it had use of the same moneys prior to the constitution of the fund. Therefore, if 5.33% *per annum* was a fair interest rate to adopt for the period before the constitution of the fund, it should equally apply to the period after the constitution of the fund.

10 The Plaintiffs responded that fixing the post-constitution interest rate at 5.33% *per annum* would discourage the use of LOUs to constitute limitation funds. It would also remove the incentive to constitute limitation funds early in cases where the limitation fund is constituted by way of an LOU.

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Analysis

11 Pursuant to s 136 of the Merchant Shipping Act (Cap 179, 1996 Rev Ed) ("MSA"), the Convention on Limitation of Liability for Maritime Claims (adopted on 19 November 1976) 1456 UNTS 221 (entered into force 1 December 1986) ("1976 Convention") is given force of law in Singapore (with the exception of Arts 2(1)(*d*) and (*e*) thereof).

Pre-constitution interest rate

12 Art 11(1) of the 1976 Convention provides for a limitation fund to be:

> … constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which [the person constituting the fund] may be liable, *together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund*. [emphasis added]

The italicised text in the above quotation refers to pre-constitution interest on the limitation fund. As the 1976 Convention is silent on the interest rate to be applied in computing this pre-constitution interest, the matter falls, by virtue of Art 14 of the 1976 Convention, to be governed by the law of the State in which the fund is constituted. In this regard, s 139(1) of the MSA provides that the Maritime and Port Authority of Singapore ("MPA") "may, from time to time, by order prescribe the rate of interest to be applied for the purposes of paragraph 1 of Article 11 of the Convention". To date, no such order has been made.

13 The question therefore arises as to how the applicable interest rate may be determined in the absence of such an order. Section 139(1) of the MSA is drafted in a permissive, as opposed to mandatory, manner. It does not provide that the pre-constitution interest rate to be applied *shall* be as prescribed by the MPA. Instead, it merely empowers the MPA to prescribe the interest rate to be

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applied *if it chooses to do so*. The court is therefore not precluded, in the absence of orders made pursuant to s 139(1) of the MSA, from determining the pre-constitution interest rate in accordance with the general law, including case law.

14 As noted in *The Funabashi* [1972] 1 WLR 666 ("*The Funabashi*") at 668C, the "Admiralty court has always awarded interest on a limitation fund". Initially, English courts took reference from the statutory interest rate on judgment debts (see *eg*, *The Theems* [1938] P 197 at 201). In later years, they took reference instead from how pre-judgment interest on debts and damages were determined (see *eg, The Funabashi* and *The Garden City (No 2)* [1984] 2 Lloyd's Rep 37 at 51). In Singapore, s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed) leaves the award of pre-judgment interest to the discretion of the court. In practice, Singapore courts generally award pre-judgment interest at the same rate as the statutory interest rate on judgment debts, which currently stands at 5.33% *per annum* (O 42 r 12(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") read with para 77(5) of the Supreme Court Practice Directions).

15 In the light of the foregoing, I accepted the parties' agreed position that a pre-constitution interest rate of 5.33% *per annum* was appropriate.

Post-constitution interest rate for limitation funds constituted by LOU

16 As for post-constitution interest, since no written grounds were issued in any of the three local cases cited at [6] above, I was not able to discern why the post-constitution interest rate was 5.33% *per annum* in one case and 2% *per annum* in the other two cases. I therefore had to consider the issue from first principles.

17 As a starting point, the 1976 Convention is silent on whether a limitation fund constituted by producing a guarantee (or LOU) should provide for post-

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constitution interest. The only guidance given in the 1976 Convention is that the guarantee (or LOU) should be "acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority" (Art 11(2)). In this regard, the relevant Singapore legislation is O 70 r 36A(1)(*b*) of the ROC, which provides that the court may allow a limitation fund to be constituted "by producing a letter of undertaking from a Protection and Indemnity Club acceptable to the Court". The question therefore was what provision ought to be made for post-constitution interest in order that an LOU may be "considered to be adequate by the Court" and/or "acceptable to the Court".

18 In my view, for an LOU to be adequate or acceptable, it should place the claimants in a position no worse than if the limitation fund had been constituted by payment into court. I therefore considered that an LOU ought to make provision for post-constitution interest at a rate which approximates the interest which could be earned on a limitation fund paid into court during the period that the fund remains in court.

19 There is no need for the court to go beyond this principle and take into account any higher returns that the shipowner could generate for itself by retaining the use of the moneys representing the limitation fund. If a shipowner considers it financially advantageous to constitute a limitation fund by production of an LOU where doing so would not make the claimants worse off, I did not think considerations of fairness and equity require the court to cream off any such financial advantage. The court's role in this regard should be focused on ensuring that the claimants are not made worse off by the shipowner's decision to constitute the limitation fund by production of an LOU.

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20 To apply the foregoing principles, I sought information from the Supreme Court Registry on the amount of interest earned previously on limitation funds paid into court. I was informed that these funds had not earned any interest in the past. This was because, unlike court orders for payment into court of proceeds of judicial sale of vessels, previous orders to pay limitation funds into court did not contain a direction pursuant to O 90 r 12(4) of the ROC to deposit the moneys in an interest bearing bank account. In my view, there is no reason in principle why such a direction should not be made in relation to limitation funds paid into court. In future, parties seeking to constitute limitation funds by payment into court should include a prayer for a direction under O 90 r 12(4) of the ROC in their applications, so that claimants are not shortchanged by the failure to earn interest while the limitation fund remains in court.

21 On the assumption that, in future, all payments of limitation funds into court would be accompanied by a direction under O 90 r 12(4) of the ROC, I sought information from the Supreme Court Registry on the amount of interest earned previously on moneys paid into court pursuant to other types of applications where a direction under O 90 r 12(4) of the ROC had been made. The data revealed that the interest rate depended on when the payment in was made, as well as when the rollover of bank fixed deposits occurred during the time the moneys remained in court. In recent months, the interest rate had been as high as 2.27% *per annum*.

Conclusion on post-constitution interest rate

22 In the circumstances, I decided that 2.5% *per annum* would be an appropriate post-constitution interest rate. It approximates the actual interest rate obtainable on money paid into court, with a slight buffer built in so that claimants are not made to bear the risk of interest rate fluctuations while the LOU remains in force.

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Costs of uncontested limitation decrees

23 The 3rd Defendant submitted that the Plaintiffs should pay the Defendants' costs as that was the "usual order". The 2nd Defendant echoed the 3rd Defendant's position and further submitted that the costs to be paid by the Plaintiffs should include the costs of investigative work undertaken by the Defendants in order to decide whether to contest the Plaintiffs' right to limit liability. In support of the foregoing contentions, the 3rd Defendant brought to my attention the following passage from Griggs, William & Farr, *Limitation of Liability for Maritime Claims* (Informa, 4th Ed, 2005) ("*Limitation of Liability for Maritime Claims*") at p 72:

> *(ii) General costs of limitation*
>
> It is submitted that in all cases involving limitation the claimant will need to establish liability, the size of the limitation fund and the amount of the likely claim before deciding whether it is necessary (or feasible) to challenge the [shipowner's] right to invoke limitation. *The reasonable costs of this important initial investigative work should be recoverable from the [shipowner].* The claimant will be exposed in relation to his own costs and those of the [shipowner's] if he pursues the issue of limitation beyond that point.
>
> [emphasis added]

24 The Plaintiffs responded that, while the 2nd and 3rd Defendants' submissions may reflect the position before the 1976 Convention, that position should no longer apply under the 1976 Convention. This was because the 1976 Convention reversed the burden of proof for breaking limits. Consequently, the Plaintiffs should be liable only for the costs incurred in establishing the matters for which the Plaintiffs bore the burden of proof, and should not be liable for the costs of investigative work undertaken by the Defendants in order to decide whether to contest the Plaintiffs' right to limit liability.

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Analysis

25 It would be convenient to begin the analysis with the case of *The "Alletta" (No 2)* [1972] 2 QB 399 ("*Alletta (No 2)*"). The case concerned a limitation action brought pursuant to s 503 of the Merchant Shipping Act 1894 (c 60) (UK), under which the shipowners bore the burden of proving that the occurrences in respect of which limitation of liability were sought took place "without their actual fault and privity". The first defendants in *Alletta (No 2)* unsuccessfully contested the plaintiffs' entitlement to limit liability. On the issue of costs, Dunn J held as follows (at 405E):

> In exercising my discretion, I propose to follow the practice long established in the Admiralty court and to order the plaintiffs to pay the costs of obtaining an *undefended* decree, but so far as the costs of the contested issue of actual fault and privity are concerned, those costs will follow the event and will be paid by the first defendants to the plaintiffs. [emphasis added]

26 As for the exact form of the order to give effect to Dunn J's ruling, the plaintiffs submitted that the plaintiffs should pay the defendants' costs down to 9 July 1968, and the first defendants should pay the plaintiffs' costs thereafter. The plaintiffs reasoned that, as 9 July 1968 was the date the summons came before the registrar and he ordered pleadings, the limitation decree could have been made by the registrar on that day had there been no contest by the first defendants. The first defendants submitted that 11 October 1971 would be the more appropriate date, as that was the date of the order for directions. Dunn J picked 1 July 1971 as the appropriate date, giving the following reasons (at 405H–406A):

> I bear in mind that under the Rules of the Supreme Court defendants to limitation actions are entitled to time for further inquiries before a decree is made, even a decree by the registrar, and that in this case as in many cases foreign owners and evidence of foreign practice were involved. Therefore I do not think it reasonable to assume that the registrar would have

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> made an order on July 9, 1968. Reasonable time must be given to parties and their advisers to investigate the plaintiffs' case and to decide whether or not to dispute it. In this case discovery was given by the plaintiffs by November 1970 and, doing the best I can between the parties, I think that July 1, 1971, is a reasonable date by which the defendants should have completed all inquiries.

27 Although *Alletta (No 2)* was a decision on costs in a contested application, Dunn J had equated the "costs of obtaining an undefended decree" with the costs incurred till 1 July 1971. It was therefore a premise of *Alletta (No 2)* that, in an uncontested application, the plaintiff should pay the defendant's costs reasonably incurred in investigating the plaintiff's case in order to decide whether or not to dispute it.

28 *Alletta (No 2)* was subsequently considered in *The "Capitan San Luis"* [1993] 2 Lloyd's Rep 573 ("*Capitan San Luis*"), which similarly involved a contested application where the claimant unsuccessfully contested the shipowner's right to limit liability. On costs, the main issue was whether the principles laid down in *Alletta (No 2)* should continue to apply, now that Art 4 of the 1976 Convention placed the burden on a claimant contesting limitation to prove that the loss resulted from the shipowner's "personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". Clarke J held that those principles should no longer apply, remarking (at 578) that:

> There is a radical difference between the case where the shipowner must prove that the damage occurred without his actual fault or privity before he is entitled to a decree and the case where the shipowner is entitled to a decree unless the claimant proves either that he intended to cause the loss or that he acted recklessly and with knowledge that damage would probably result.

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29 Clarke J went on to hold (at 579) that:

> … the shipowner must pay the costs of proving those matters which he must prove in order to obtain a decree and that the claimant must pay the costs of investigating and determining the facts which the Convention provides that he must prove if, at the end of the day, he fails to establish those facts.

This holding consists of two limbs. First, the shipowner should pay the costs in relation to those matters for which the burden of proof lies on it. Secondly, the claimant should pay the costs of investigating and determining the facts for which the burden of proof lies on it, *if it fails to establish those facts*.

30 The first limb is phrased in a manner which applies to both contested and uncontested applications (in the same way that the first limb of the ruling in *Alletta (No 2)* was applicable to both contested and uncontested applications). The second limb is phrased in a manner which applies only to contested applications. In other words, *Capitan San Luis* did not deal directly with what the position ought to be for the costs items referred to in the second limb *in an uncontested application*. Nevertheless, the clear implication, from the way *Capitan San Luis* departed from *Alletta (No 2)*, is that the shipowner no longer has to pay the claimant's costs for these items even in an uncontested application under the 1976 Convention.

31 What then of the passage from *Limitation of Liability on Maritime Claims* cited by the 3rd Defendant at [23] above? I did not think that passage supported the 2nd and 3rd Defendants' position. While the passage states that the "costs of this important initial investigative work should be recoverable" by the claimant from the shipowner, the use of the word "this" indicates that the "investigative work" contemplated relates only to the matters listed in the preceding sentence – *ie*, liability, size of the limitation fund and amount of the

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likely claim. The list does not include matters which, pursuant to Art 4 of the 1976 Convention, the claimant must prove in order to break limitation.

32 Having said that, I should also point out that it was not entirely clear to me why the list in the passage includes "liability" and "amount of the likely claim". Since the 1976 Convention does not place on the shipowner the burden of proof for these two matters, I did not see why the shipowner should bear the claimant's costs of looking into these two matters.

33 Having established that, in an uncontested application, the shipowner need not pay the claimant's costs of investigating and determining the facts for which the burden of proof lies on the claimants, the question that remained was whether the court should swing to the other end of the spectrum and require claimants to pay the shipowner's costs in relation to such matters even in an uncontested application.

34 In the present case, after the application was filed, the 2nd and 3rd Defendants sought information from the Plaintiffs concerning the Incident in order to decide whether to oppose the Plaintiffs' application to limit liability. Several rounds of requests and voluntary disclosures took place before the 2nd and 3rd Defendants decided not to contest the Plaintiffs' right to limit liability. No applications were made for discovery under O 70 r 37(6) of the ROC.

35 While the Plaintiffs would have incurred costs in attending to the 2nd and 3rd Defendants' requests, I did not think the 2nd and 3rd Defendants should be asked to pay such costs. In this regard, O 70 r 37(6) of the ROC provides that where it appears to the Registrar that "any defendant has not sufficient information to enable him to decide whether or not to dispute that the plaintiff has a right to limit his liability", directions shall be given to enable the defendant

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to obtain such information. This underscores that procedural fairness requires claimants to be provided with such information, which are often known only to the shipowner. Imposing this category of costs against the claimants would hamper legitimate requests for such information.

Conclusion on costs

36 In the light of the foregoing discussion, the following principles should apply to costs of *uncontested* limitation decrees:

(a) The shipowner should pay the claimants' costs in relation to those matters for which the burden of proof lies on the shipowner. These would include establishing the shipowner's *prima facie* right to limit liability pursuant to Arts 1, 2 and 3 of the 1976 Convention and determining the limitation amount pursuant to Arts 6 and 7 of the 1976 Convention. Where an LOU is used to constitute the limitation fund, it will also include establishing the LOU's adequacy and acceptability.

(b) In respect of matters for which the burden of proof lies on the claimant (*eg*, facts required to break limitation pursuant to Art 4 of the 1976 Convention), while the claimant is entitled to seek and be given such information as to enable it to decide whether or not to dispute the shipowner's right to limit its liability, each party should bear its own costs in this regard.

(c) Where an application for discovery is made pursuant to O 70 r 37(6), the costs of such discovery application should follow the event.

(d) The foregoing principles are subject always to costs being in the discretion of the court.

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37 For the foregoing reasons, I ordered the Plaintiffs to pay the Defendants' costs in relation to:

(a) the establishment of the Plaintiffs' *prima facie* right to limit liability pursuant to Arts 1, 2 and 3 of the 1976 Convention;

(b) the calculation of the size of the limitation fund; and

(c) the consideration of the adequacy and acceptability of the draft LOU.

I also ordered each party to bear its own costs in relation to investigative work done to allow the Defendants to decide whether to invoke Art 4 of the 1976 Convention.

Epilogue

38 After I granted leave for the Plaintiffs to constitute the limitation fund by producing an LOU, the Plaintiffs deposited the executed LOU in court on 29 November 2019. On 4 December 2019, the Plaintiffs filed an application for leave to replace the LOU.

39 The need for such replacement arose from Art 8 of the 1976 Convention, which requires the limitation amount to be converted from Special Drawing Rights into the national currency of the State in which limitation is sought, based on the conversion rate prevailing on the date of constitution of the limitation fund. In the case of an LOU, this would refer to the conversion rate prevailing on the day that the LOU is produced in court. However, the conversion rate prevailing on any particular day is not published by the International Monetary Fund until after the close of business in Singapore for that day. This means that, at the time the LOU is produced, the shipowner would not know for certain the

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prevailing conversion rate for that day. The shipowner would only know what the applicable conversion rate is *after* it had produced the LOU.

40 A practice has therefore arisen whereby the shipowner would first produce an LOU using an estimated conversion rate (usually, the conversion rate prevailing on the day before) ("the Initial LOU"). If it turns out that the actual conversion rate prevailing on the day of production of the Initial LOU differs from the estimated conversion rate used in the Initial LOU, the shipowner would replace the Initial LOU with another LOU using the correct conversion rate. I saw no objection to this practice, as any perceived irregularities about the Initial LOU having used the wrong conversion rate would be cured by the replacement LOU. I therefore granted the Plaintiffs' application and ordered that the replacement LOU be treated as if it had been deposited in court on 29 November 2019.

41 By way of guidance for parties, I would suggest that future applications should include a prayer for leave to replace the Initial LOU in the manner described above. This would obviate the costs and trouble of taking out a separate application after depositing the Initial LOU in court. This was the approach adopted in *Pacific International Lines* ([6(a)] *supra*).

Pang Khang Chau
Judge

Chen Zhida and Huang Peide (Helmsman LLC) for the plaintiffs;
Ganesh Bharath Ratnam (Gurbani & Co LLC) for the first and fifth defendants;

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Ang Hui Ming Vivian and Douglas Lok Bao Guang (Allen & Gledhill LLP) for the second defendant;
Loo Dip Seng (Ang & Partners) for the third defendant;
The fourth defendant not present and unrepresented;
Yeo Wen Yi Brenna (Joseph Tan Jude Benny LLP) for the sixth defendant.

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