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The Uniform Rules for Demand Guarantees (URDG758) entered into force on 1 July 2010. How do these new rules stack up against existing industry standards? The differences are significant according to Michael Evan Avidon who compares key features of several URDG articles to those of ISP98, UCP600, and New York's UCC Revised Article 5 governing LCs. In offering his analysis, Avidon identifies some pluses and minuses of using the new URDG with an emphasis on forecasting possible problem areas and considering viable solutions.

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A US PERSPECTIVE ON THE NEW URDG758 COMPARED TO ISP98, UCP600 AND THE NY UCC

By Michael Evan AVIDON[1]

Introduction

The Uniform Rules for Demand Guarantees, 2010 Revision, International Chamber of Commerce Publication No. 758 (URDG), became effective on 1 July, 2010.[2] The URDG is a revised set of rules for demand guarantees and counter-guarantees.[3]

This article focuses on significant substantive differences between the URDG and ISP98,[4] UCP600[5] and New York Uniform Commercial Code Revised Article 5 (NY UCC), with an emphasis on possible stumbling blocks in the URDG and proposed work-arounds.

Although the URDG addresses "demand guarantees" and "counter-guarantees", any signed undertaking that provides for payment against presentation of a complying documentary demand can be made subject to the URDG, if so desired. Regardless of its label, a typical demand guarantee or counter-guarantee would qualify as a "letter of credit" under the NY UCC as it is basically an engagement to pay upon a complying documentary presentation.[6] Accordingly, it is useful to compare the new URDG to established letter of credit practices and laws such as ISP98, UCP600, and the NY UCC to illustrate some advantages and disadvantages of using the new URDG.

As a matter of convenience, this article follows the order of the URDG.[7]

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2. The prior version of the URDG was published in 1992 and set forth in ICC Publication No. 458. This article does not compare new URDG758 to prior URDG458.

3. A counter-guarantee is a demand guarantee issued to one person to provide it with credit support to induce it to issue its own guarantee to another person. URDG Article 2. A typical pattern would be that Instructing Party A in Country A requests Bank A to issue its counter-guarantee to Bank B in Country B to induce Bank B to issue a demand guarantee to Beneficiary B, to whom Instructing Party A owes some underlying obligation.

4. The International Standby Practices 1998, ICC Publication No. 590 (ISP98).

5. The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 (UCP600).

6. NY UCC § 5-102(a)(10) ("Letter of Credit" means a definite undertaking … by an issuer to a beneficiary … to honor a documentary presentation by payment or delivery of an item of value).

7. Though the URDG is labeled "Uniform Rules", the URDG is divided into "Articles" like UCP600, rather than into "Rules" like ISP98 or into "Sections" like the NY UCC.

Analysis

Article 1 – Application

URDG Article 1(b) provides that where a demand guarantee is issued subject to the URDG at the request of the counter-guarantor, the counter-guarantee shall also be subject to the URDG *unless* the counter-guarantee excludes the URDG. Note, however, that the reverse is *not* true. Issuing a counter-guarantee subject to the URDG (of which the ultimate beneficiary of the resulting demand guarantee may or may not be aware), does not make the resulting demand guarantee subject to the URDG. None of ISP98, UCP600 or the NY UCC contains a similar rule for the analogous situation where one letter of credit backs up another letter of credit. Each letter of credit is independent and stands on its own in terms of its governing law and any practices to which it is subject.

Article 2 – Definition of "Applicant".

In letter of credit parlance (including under ISP98 Rule 1.09(a), UCP600 Article 2, and NY UCC § 5-102(a)(2)), the term "applicant" usually refers to the person who applies to the bank (or a non-bank issuer) for issuance of a letter of credit, and may also include the person (sometimes called the "account party") for whose account the letter of credit is issued (the person whose underlying obligation is supported by the letter of credit) if that is a different person. In contrast, under URDG Article 2, the term "Applicant" refers to the person indicated in the guarantee as having its obligation supported by the guarantee. This may or may not be the person who applied to the guarantor for issuance of the guarantee. The person who applies for issuance of a guarantee and agrees to indemnify the guarantor is referred to in the URDG as the "Instructing Party". These differences in terminology between letter of credit practice and demand guarantee practice may be confusing and lead to errors unless care is taken to learn the differences.

Article 2 – Definitions of "Demand Guarantee" and "Counter-Guarantee".

The URDG definitions of the terms "demand guarantee" and "counter-guarantee" make clear that the label or name on an undertaking (e.g., "guarantee," "letter of credit," etc.) does not determine the nature of the undertaking. What is important is what triggers the issuer's obligation to pay the undertaking – is it the presentation of a specified document (e.g., stating that the borrower failed to repay the loan) or is it the occurrence of an underlying fact (e.g., the fact that the borrower failed to repay the loan)?

In the US, the term "guarantee" usually refers to an accessory or dependent undertaking (e.g., guarantor promises to pay lender if borrower in fact defaults) rather than to a letter of credit or other independent documentary undertaking (e.g., guarantor promises to pay lender if lender certifies in writing that borrower has defaulted). Unless US business people, banks, lawyers, and courts become more familiar with URDG-governed guarantees, there is a significant risk in the US that these undertakings will be mistaken for accessory or dependent guarantees (and be made subject to a host of defenses, such as suretyship defenses) rather than recognized as independent documentary undertakings akin to traditional letters of credit (and subject to very few defenses, such as fraud). This risk of confusing dependent and independent guarantees exists outside the US as well but may be greater in the US where independent guarantees are rare and letters of credit are governed by well-established statutory law in the form of Uniform Commercial Code Article 5.

Article 3 - Interpretation.

Under URDG Article 3(a),

branches of a guarantor in separate countries are treated as separate entities. A similar concept is expressed in UCP600 Article 3. However, under ISP98 Rule 2.02, this concept is *not* limited to branches in different countries but applies to all branches (e.g., if the New York Branch issued a standby and the Chicago Branch was the transferring bank, the two branches would be treated as separate entities under ISP98). The NY UCC § 5-116(b) treatment of bank branches is closer to the ISP98 treatment than the URDG and UCP600 treatment.

Article 4 – Issue and effectiveness.

Similar to ISP98 Rule 2.03, under the URDG a guarantee is considered issued when it leaves the guarantor's control. However, unlike ISP98, the URDG does not provide rules that distinguish undertakings that state they are not "issued" or "enforceable" from those that state they are not "available", "operative", "effective", or the like – the later types of undertakings under ISP98 are considered issued (and so cannot be unilaterally cancelled by the issuer) but are not available to be drawn upon until the specified triggering event occurs. NY UCC § 5-106(a) provides that a letter of credit is issued and becomes effective when the issuer "sends or otherwise transmits it to the person requested to advise or to the beneficiary." UCP600 does not define when issuance occurs.

Article 7 – Non-documentary conditions.

The URDG is similar to ISP98 Rule 4.11, UCP600 Article 14(h) and NY UCC § 5-108(g) in that non-documentary conditions are to be disregarded. However, the URDG adds an exception that non-documentary conditions are *not* to be disregarded to the extent that information in any required documents conflicts with such conditions. This URDG rule makes it tricky for document examiners to know when to disregard or require compliance with non-documentary conditions. It also makes it difficult for document examiners to switch from examining presentations under ISP98 standbys to examining presentations under URDG-governed demand guarantees (or UCP600 letters of credit for that matter). Banks may want to provide extra training or use different specialists to examine presentations under ISP98 standbys than URDG-governed guarantees or UCP600 letters of credit.

Article 10 - Advising of guarantee or amendment.

Note that the URDG does not include the concept of a confirming bank or a confirmation as in ISP98 Rule 2.01(d), UCP600 Article 8, or NY UCC § 5-107.

Article 14 – Presentation.

Under clause (a)(i) of URDG Article 14, a presentation may be made only at the place of issuance of the guarantee or such other place as is specified in the guarantee. Unlike ISP98 Rule 3.14(b), the URDG does not provide for the guarantor after issuance to designate a different place for presentation (even if the original place is closed) unless the guarantee expressly permits such designation. Neither UCP600 nor the NY UCC contains this useful ISP98 provision either.

URDG Article 14(a)(ii), read together with the Article 2 definition of the term "expiry", literally allows presentation to occur until midnight of the applicable day, whether or not the guarantor's office is still open for business, which raises obvious practical issues. In contrast, ISP98 Rule 3.05(b) provides that a presentation after the close of business at the place of presentation is deemed to have occurred on the *next* business day (even if that causes the presentation to be deemed non-complying), and UCP600 Article 33 provides that a bank has no obligation to accept a presentation outside its "banking hours".

URDG Article 14(a)(ii) poses operational difficulties for banks. For instance, if a guarantee expires on a Tuesday, how is the bank to know if presentation was made on Tuesday after business hours but before midnight (and therefore apparently must be paid if the documents comply) or made after midnight early Wednesday morning before the bank reopened for business (and therefore must be rejected as untimely)? To avoid this problem, banks may wish to include appropriate language in their guarantees.

In clause (b), the URDG introduces the novel concept that a presenter may provide the required documentation for a complying demand piecemeal if it so notes in its partial presentation and if the presentation is ultimately completed before the guarantee expires. This effectively shifts from the presenter to the guarantor the burden of storing and caring for documentation until a demand is finally complete. Under ISP98, UCP600, and the NY UCC, an issuer is permitted to return incomplete, non-complying documents to the presenter.

Note that URDG Article 14(c) allows electronic presentation if the guarantee so provides, but if the type of electronic format is not specified, any format that can be authenticated is allowed (including paper format). ISP98 Rule 3.06 generally requires that documents be in paper format unless otherwise specified in the standby, except that where only a demand is required to be presented, (i) SWIFT or a similar authenticated means may be used where the beneficiary is a SWIFT participant or a bank and (ii) the issuer in its sole discretion may accept a demand in a non-paper medium. UCP600 contemplates the use of paper documents unless otherwise specified in the letter of credit, which may be done by indicating that the letter of credit is subject to the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP). Under eUCP Article e4, an eUCP credit must specify the format in which electronic records are to be presented. If the format is not so specified, it may be presented in "any format", which appears to mean any electronic format and to exclude paper format. *See* eUCP Article e3(b) (definitions of terms "electronic record", "format", and "paper document"). The NY UCC is quite flexible, as it defines the term "document" to include:

> "a draft or other demand, document of title, investment security, certificate, invoice, or other record, [or] statement …
>
> (i) which is presented in written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in [Section 5-108(e)]; and
>
> (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral."
>
> NY UCC § 5-102(a)(6).

Article 15 – Requirements for demand.

URDG Article 15(a) requires presentation of a statement by the beneficiary indicating that the applicant is in breach of the underlying relationship and how it is in breach, whether or not the demand guarantee explicitly requires presentation of such a statement. A similar requirement is set forth in URDG Article 15(b) for counter-guarantees. These controversial provisions are *not* requirements under ISP98, UCP600 or the NY UCC. The beneficiary of a letter of credit governed by those rules or laws need only present the documents specified in the letter of credit.

The URDG requirement for

presentation of a default statement that is not expressly mentioned in the guarantee is a potentially fatal trap for both beneficiaries and guarantors. A beneficiary that is unaware of this requirement may fail to present the statement and may be unable to cure if the guarantee expires in the meantime. A guarantor that fails to require the statement may jeopardize its right to reimbursement. Beneficiaries and guarantors may protect themselves by using the option under Article 15(c) to expressly exclude any requirement for presentation of a default statement under Article 15(a) or (b). Banks may also want to include protective provisions in their reimbursement agreements. Note that the URDG Article 15(c) exclusion procedure must be followed if the parties wish the guarantee to be payable in non-default situations (like a commercial letter of credit or a direct-pay standby letter of credit that is intended to be drawn upon in the ordinary course as a payment mechanism rather than only upon a default).

URDG Article 15(d) provides that neither a demand nor a supporting statement may be dated prior to the date the beneficiary is entitled to present a demand. Presumably the date reference is to the date of issuance of the guarantee or to a provision in the guarantee that provides that it is not available or not operative until some specified date. However, Article 15(d) may give rise to arguments that the "date" referred to is determined under the underlying relationship between the beneficiary and the applicant – but how would the guarantor know that date and how would that square with the guarantee being independent of the underlying relationship?

Finally, the URDG does not contain a specific rule covering the situation where the guarantee provides that the demand must be accompanied by presentation of the original guarantee, but the original guarantee has been lost, stolen or destroyed. Neither UCP600 nor the NY UCC contains such a rule either. ISP98 Rule 3.12 provides a clear rule for that circumstance: the issuer may, in its discretion, insist on presentation of the original or provide a replacement guarantee. Under the URDG, UCP600, and the NY UCC, the beneficiary would presumably not be entitled to payment if it failed to comply with a requirement to present the original guarantee or letter of credit. It is not uncommon for letters of credit and reimbursement agreements to include provisions to deal with letters of credit that are lost, stolen, or destroyed and this may become the case for URDG-governed guarantees as well.

Article 16 – Information about demand.

URDG Article 16 is another controversial provision. Notwithstanding the intended independent nature of a guarantee under the URDG, Article 16 requires the guarantor to inform the instructing party or counter-guarantor of its receipt of any demand, and of any request in the alternative for the extension of the expiration of the guarantee. No such requirement is included in UCP600 or the NY UCC and it was specifically negated in ISP98 (Rule 3.10).

More than one URDG commentator has noted that the URDG is not clear whether such notice must be given *before* payment is made under the guarantee. A prudent guarantor will want to either (i) give such notice to the instructing party prior to making payment or (ii) include appropriate language in its reimbursement agreement permitting it to delay or dispense with such notice.

Article 19 – Examination.

URDG Article 19(b) requires that data in a required document not conflict with data in "that document, any other required document or the guarantee." This is similar to UCP600 Article 14(d) but different than ISP98 Rule 4.03 and the NY UCC, which simply require each document to comply with the terms of the letter of credit. Under the URDG, the guarantor is required to examine documents for conflict with each other whether or not specifically required under the terms of the guarantee. To make matters more unwieldy for the guarantor, URDG Article 19(b) must be read in conjunction with URDG Article 7 ("Non-documentary conditions") discussed above, and data contained in conditions that otherwise must be ignored must be checked for conflicts with required documents. A guarantor may wish to limit all or a portion of these duties by so providing in its reimbursement agreement.

URDG Article 19(e) provides that the guarantor "need not" recalculate a beneficiary's calculations. What if it does and that calculation reveals an error? Is the presentation then non-conforming and required to be rejected?

Article 20 – Time for examination of demand; payment.

Under URDG Article 20(a), the guarantor has five business days following the day of presentation to examine the demand (similar to UCP600 Article 14(b) – five banking days). ISP98 has a useful provision (Rule 5.01(a)(iii)) not contained in the URDG or UCP600 that the time for calculating when notice of dishonor must be given begins on the business day following the *business day* of presentation. This adds clarity to the situation where a presentation is delivered to the bank on a day on which it is not open for letter of credit or guarantee business.

URDG Article 20(b) is potentially troublesome. It provides, "When the guarantor determines that a demand is complying, it shall pay." What does "when" mean in this context? Immediately? Promptly? In the usual and ordinary course of its business? Within a business day thereafter? What if the guarantor determines that the demand complies moments before its regular close of business? Surely it should not be not required to stay open and effect payment that evening. If the guarantor does not pay quickly enough to suit the beneficiary, is the guarantor liable for interest for the period of delay? Guarantors can protect themselves from the risk of being liable for late payment by including appropriate language in the guarantee (in the case of potential liability to the beneficiary) or in the reimbursement agreement (in the case of potential liability to the instructing party). UCP600 Article 15(a) and (b) are similarly problematic. ISP98 Rule 2.01(c) provides greater clarity – the issuer pays timely if it pays within the time to give notice of dishonor, which includes a three–business day safe harbor. NY UCC § 5-108(b) provides that the issuer has a reasonable time to pay not to exceed the seventh business day after the day of its receipt of the presentation. It is not uncommon in US standby letters of credit to specify a different period of time (usually a shorter time period) for the issuer to pay or give notice of dishonor.

Article 23 – Extend or pay.

Under clause (a) of URDG Article 23, the guarantor has the *option* to suspend payment for up to 30 days while deciding how to act. This time period is exclusive to the URDG.

Article 24 – Non-complying demand, waiver and notice.

Unlike ISP98 Rule 5.01 which specifically fixes "within three business days" as a reasonable period for notice of dishonor and "beyond seven business days" as unreasonable, the URDG states that notice must be sent "without delay" but not later than close of the fifth business day. "Without delay" is not defined and could be argued to be just one or two business days and expose the guarantor to liability for delay if it takes longer to send the notice. Also, the URDG is not clear as to the beginning point from which to measure whether the guarantor acted "without delay". Is it when the guarantor's first document examiner found a discrepancy, when the guarantor completed its examination (which may involve multiple examiners), or when the guarantor finally decided to reject the demand (which may be after considering whether to seek, or seeking, a waiver of discrepancies from the instructing party)? These issues are critical, as the severe penalty for taking too long is preclusion under URDG Article 24(f). Neither ISP98, UCP600, nor the NY UCC requires that notice be given "without delay" (as opposed to within a "reasonable time" or within a specified period of time). ISP98 Rule 5.01(a)(i) even provides a "safe harbor" for issuers – notice given within three business days after the business day of presentation is deemed to be not unreasonable and therefore does not trigger the preclusion penalty. Banks may wish to protect themselves from this URDG risk by including appropriate provisions in their guarantees or reimbursement agreements.

Article 25 – Reduction and termination.

Under URDG Article 25(c), if a guarantee does not state a date of expiration or an expiration event, it automatically terminates on the third anniversary of the date of issuance, and any related counter-guarantee expires 30 days later. There is no similar provision in ISP98 or UCP600. Article 5 of the NY UCC provides a one-year termination for letters of credit with no stated expiration date and a five-year termination for letters of credit that state they are perpetual (§ 5-106).

Note the difference between ISP98 Rule 3.13(a) and URDG Article 25(d). Under ISP98, if the last day for presentation stated in a standby (whether the expiration date or other day when documents must be received) falls on a non-business day, presentation may be made on the next business day. Under the URDG, on the other hand, only if the expiration date itself falls on a non-business day will the presenter be granted the extension. UCP600 Article 29(a) appears to be closer to the ISP98 rule than the URDG rule.

Article 26 – Force majeure.

Under URDG Article 26(a), the force majeure extension provision applies only to events occurring to the guarantor, *not* the beneficiary. (*See*, for example, the ICC statement[8] on the recent Icelandic volcano eruptions and the resulting delays in the delivery of documents.)

URDG Article 26(b) provides for an extension of time for presentation due to force majeure (unlike UCP600 and the NY UCC) *but* such extension runs for a maximum of thirty days from the expiration date of the guarantee (unlike ISP98 Rule 3.14(a), which extends the last day of presentation to thirty days after the place of presentation re-opens). In other words, if the force majeure event continues for 31 days or more after the scheduled termination date, the guarantee is terminated. Note, however, that if presentation was made in a timely fashion, but the guarantor was prevented from making payment due to force majeure, the guarantor must pay when the force majeure ceases *even if* the guarantee has expired in the interim (and the guarantor may present demand to any counter-guarantor within thirty days after the force majeure has ceased – not from when the guarantor has resumed

8. "The effect of the Icelandic volcano eruption on presentations of documents under transactions subject to ICC rules", available on ICC website at: http://www.iccwbo.org/policy/banking/index.html?id=36106.

business). Another difference between the URDG and ISP98 is that under ISP98 the extension is granted only if the force majeure event prevented the presentation. The URDG seems to allow presentation to be made during the extension period even where the event permitting a demand to be made first occurs during the extension period. This can be advantageous for a beneficiary that would not have been permitted to make a complying demand had there been no force majeure event and had the guarantor remained open through the stated expiration date of the guarantee.

Still another difference between the URDG and ISP98 is that ISP98 covers closure for any reason but the URDG is limited to closure for force majeure. This may lead to disputes under the URDG whether a particular closure is due to force majeure or some other cause that does not trigger the extension provisions.

The extension for force majeure also applies to a presentation made prior to the force majeure event but not yet examined during the five-business day period provided in URDG Article 20 – such inspection period commencing again from the day on which it was interrupted after the force majeure ceases for a combined total of five business days.

Article 30 – Limits on exemption from liability.

URDG Articles 27-29 list matters for which the guarantor is exempted from liability, such as the accuracy of any legal document presented to it, losses due to transmission delays or translation errors, or acts of another party. However, these exemptions are limited by Article 30, which requires the guarantor to act in good faith. URDG 758 contains no definition of good faith. In Article 5 of the NY UCC, good faith is defined as "honesty in fact in the conduct or transaction concerned". The Article 5 drafters specifically rejected the suggestion that good faith also require observance of "reasonable commercial standards of fair dealing" as is required under other Articles of the Uniform Commercial Code. Presumably the NY UCC definition will be applied in a NY UCC-governed undertaking in the absence of express language in the undertaking to the contrary. ISP98 does not use or define the term "good faith". UCP600 uses the term "good faith" in Article 34, but it is used in the context of the good faith of other persons, not the issuer.

Article 33 – Transfer of guarantee and assignment of proceeds.

Partial transfers of transferable guarantees are prohibited under URDG Article 33(a), like the rule under ISP98 (Rule 6.02(b)(ii)) but unlike UCP600 (Article 38(d)) and NY UCC (§ 5-112), which do not prohibit partial transfers of transferable undertakings. Also, a transferable URDG-governed guarantee may be transferred more than once, like the rule under ISP98 (Rule 6.02(b)(i)), but unlike UCP600 (Article 38(d)), which explicitly prohibits successive transfers unless otherwise provided in the letter of credit. NY UCC § 5-112 does not contain a rule explicitly permitting or prohibiting successive transfers of transferable letters of credit.

Under URDG Article 33(b), even if a guarantee states that it is transferable, the guarantor may nevertheless object to the transfer or set conditions therefor. It is not clear whether US courts will follow this rule and permit guarantors to refuse to recognize legally permissible transfers where the transferor and transferee are willing to sign the guarantor's standard transfer form and pay all applicable fees. NY UCC § 5-112(b) permits an issuer to refuse to carry out a transfer if (i) it would violate applicable law or (ii) there has been a failure to comply with any requirement stated in the letter of credit for transfer or any other condition imposed by the issuer that is within standard practice or otherwise reasonable in the circumstances.

URDG Article 33(d)(ii) contains a requirement not found in ISP98, UCP600, or the NY UCC that the transferor provide a signed acknowledgement by the transferee of the transferee's acquisition of the transferor's rights and obligations in the underlying relationship. Guarantors should implement procedures to comply with this rule or exclude its application.

Article 34 – Governing law.

URDG Article 34 provides rules for determining the governing law of a guarantee. Neither ISP98 nor UCP600 contains any such rules. NY UCC § 5-116 contains rules for choice of law and specifies governing law where none is chosen. Whether or not to follow the URDG rules for determining governing law will likely be one of the first issues faced by courts adjudicating disputes under URDG-governed guarantees. New York courts (and courts of other US jurisdictions that have enacted UCC Revised Article 5) are likely to give effect to the choice of the URDG pursuant to NY UCC §§ 5-116(a) and (c) and 5-103(c).

Article 35 – Jurisdiction.

URDG Article 35 has no counterpart in ISP98 or UCP600. It specifies an exclusive place for the resolution of disputes. This may work well where there is a demand guarantee but no counter-guarantee. However, where there are both, that "exclusive" place can be different for the guarantor than the counter-guarantor (which is likely as they will often be located in different countries). This exposes them to the risk of inconsistent judgments (e.g., a court in Country A may hold that Guarantor A is obligated to pay under its demand guarantee but a court in Country B may hold that Guarantor A is not entitled to be paid under the counter-guarantee in its favor from Guarantor B). The parties may wish instead to agree on exclusive jurisdiction in a single jurisdiction for both guarantees. NY UCC § 5-116(e) permits great freedom in selecting the jurisdiction for disputes under documentary undertakings.

Conclusion

As shown, the URDG has some significant differences with ISP98, UCP600, and the NY UCC. Some of these differences appear to be advantages and others appear to be disadvantages. Time will tell how these new rules of practice fare in the US where users are more familiar and comfortable with standby letters of credit and their terminology and rules. ■

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