

# Analysis of Approaches for the Identification and Application of Commercial Customs in Civil Adjudication

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**Abstract:** In modern commercial practice, commercial customs, as autonomous norms derived from transactional practices, play a significant role in maintaining transactional efficiency and security. However, in civil adjudication dominated by statutory law, the accurate identification and appropriate application of commercial customs still face challenges such as ambiguous theoretical definitions, inconsistent identification criteria, and unclear application logic. This paper, based on the fundamental theoretical definition of commercial customs, clarifies their legal connotation, characteristics, and status as a source of law. It then systematically constructs an identification mechanism for commercial customs in civil adjudication, including identification criteria, review requirements, burden of proof, and conflict resolution approaches. On this basis, the paper explores the dimensions of applying commercial customs, analyzing their application principles, hierarchy of validity, methods of harmonization with legal provisions, and requirements for judicial reasoning. Finally, it proposes pathways to improve the system for identifying and applying commercial customs, focusing on theoretical framework construction, integration of procedural norms, and coordination with general civil norms. This study aims to provide a systematic approach for the standardized operation of commercial customs in civil adjudication, fostering an organic integration of legal stability and commercial autonomy.

**Keywords:** commercial customs; civil adjudication; identification mechanism; application pathways; status as a source of law; normative adaptation

## Introduction

Commercial customs are autonomous behavioral norms formed by commercial entities through long-term transactional activities, reflecting the inherent logic and professional rationality of commercial practice. In civil adjudication, the identification and application of commercial customs serve not only as technical means to fill gaps in statutory law but also as a crucial bridge connecting state-enacted legislation with the spontaneous order of the market. However, due to the lack of systematic theoretical definition of commercial customs, judicial practice faces issues such as ambiguous identification criteria, arbitrary application procedures, and insufficient reasoning. These problems lead to uncertainty in adjudication outcomes and undermine the stability of transactional expectations. Therefore, a systematic study of the approaches for identifying and applying commercial customs in civil adjudication holds significant theoretical value and practical necessity. This paper aims to clarify the legal attributes of commercial customs and construct a logically coherent framework for their identification and application, thereby providing clear methodological guidance for judicial practice and promoting the specialization and standardization of commercial adjudication.

## 1. Basic Theoretical Definition of Commercial Customs

### 1.1 Analysis of the Legal Connotation and Characteristics of Commercial Customs

Commercial customs refer to behavioral rules formed within specific commercial fields through long-term, stable, and widespread commercial transactions, which are commonly recognized and consciously followed by the relevant trading communities. The core of their legal connotation lies in their nature as autonomous norms. They originate from the collective pursuit of transactional efficiency and predictability by commercial entities, and are externalized as an order arrangement not directly

established by state coercive power. Compared with general social conventions, commercial customs possess distinct technical and evolutionary characteristics. Their content is closely centered on professional areas such as transaction models, settlement methods, and risk allocation, and they continuously adjust and evolve alongside the development of commercial practice.

The legal characteristics of commercial customs are primarily manifested in their normativity and perceived binding force. Normativity is reflected in their ability to guide and constrain the behavior of unspecified commercial entities, thereby forming a de facto order. Perceived binding force requires that such norms be widely recognized within the relevant commercial community and believed to possess obligatory effect, which constitutes the socio-psychological foundation for commercial customs to attain legally cognizable status. Together, these two elements form the key criteria that distinguish commercial customs from mere transactional practices or industry conventions, providing intrinsic standards for judicial identification. Furthermore, commercial customs typically exhibit strong objectivity and verifiability. Their content is often embodied in standard contract clauses, guidelines issued by industry associations, or widely accepted operational procedures. This makes them easier to ascertain and confirm through external evidence in judicial proceedings compared to civil customs, which rely more heavily on internal conviction<sup>[1]</sup>.

### ***1.2 Normative Distinction Between Commercial Customs and Civil Customs***

The normative distinction between commercial customs and civil customs is rooted in the fundamental differences in value foundations and behavioral logic between commercial relations and general civil relations. Civil customs primarily govern daily life relations based on family and community, with a value orientation often leaning towards ethics, fairness, and local consensus, emphasizing the stability of static property ownership and personal relationships. In contrast, commercial customs serve profit-oriented business activities, with their core values focusing on safeguarding transactional security, enhancing efficiency, and facilitating capital circulation. They reflect a forward-looking arrangement for dynamic transactional processes and future risks.

This divergence in values leads to differences in their normative composition and application logic. Civil customs are typically more localized, conservative, and flexible, and their content may vary significantly across different communities. In contrast, due to their trans-regional, industry-based nature, commercial customs exhibit greater uniformity and technical specificity. Their content is often more precise and tends to be codified to meet the demands of large-scale, standardized transactions. When judicial intervention is required, the examination of civil customs may focus more on their role in supplementing principles of fairness and public morals. For commercial customs, however, priority must be given to respecting their inherent commercial logic and efficiency rationale. The focus of judicial review should be on whether they have fostered a stable and reasonably anticipated transactional environment, preventing general civil notions from inappropriately eroding established commercial order that possesses professional rationality. This distinction requires judges to apply different degrees of judicial restraint and intensity of review when applying these norms.

### ***1.3 The Status of Commercial Customs as a Source of Law in the Statutory Legal System***

Within the statutory legal system, the status of commercial customs as a source of law manifests as a supplementary and interpretative secondary source. They do not directly supersede the primary authority of statutory law but rather provide adjudicators with concrete grounds for filling gaps or interpreting juristic acts when statutory law contains lacunae, grants authorization, or is ambiguous in its provisions. This status is affirmed by the principled clauses of the civil code, thereby granting commercial customs a formal avenue of entry into the codified legal system. Their function lies in mitigating the inherent lag and abstract nature of statutory law, introducing dynamic market rules into judicial adjudication.

The validity of commercial customs as a source of law is not automatically established; it must undergo value filtering and legitimacy review through judicial procedures. They must not contravene mandatory legal provisions or fundamental principles such as public order and good morals. The review process is essentially one of balancing the autonomous order embodied by the customs with the overarching values of the legal system, requiring judges to assume the dual roles of "filter" and "converter." The efficacy of commercial customs that have been screened and confirmed does not originate from themselves. Rather, through their absorption, recognition, and restatement in judicial adjudication, they are transformed into persuasive reasoning within individual cases. This process is not

a simple adoption of facts but a creative activity of "translating" social norms into legal argumentation. Consequently, while safeguarding the authority and unity of the legal system, it achieves an organic integration of substantive commercial norms with the formal legal order, thereby enhancing the law's capacity to respond to economic and social life<sup>[2]</sup>.

## **2. The Identification Mechanism of Commercial Customs in Civil Adjudication**

### ***2.1 Identification Criteria and Review Requirements for Commercial Customs***

The identification of commercial customs must satisfy dual criteria: objective and subjective. The objective criteria require that the behavioral pattern demonstrates long-standing nature, stability, and pervasiveness within a specific commercial field. Long-standing nature focuses on the time span over which the practice has formed; stability emphasizes the relative fixity and repeatability of its content; and pervasiveness refers to its widespread acceptance and application within the relevant trading community. The core of the subjective criteria lies in the "perceived binding force" (opinio juris), meaning that practitioners in that field generally regard this behavioral pattern as a binding norm, not merely a convenient option. These two criteria are intrinsically linked: the objective behavioral pattern is the external manifestation of the subjective belief, while the subjective belief is the internal driver that endows the objective pattern with normative force. In practical application, the objective and subjective criteria are not mechanically superimposed but require comprehensive judgment and dynamic balancing. Particularly in emerging industries or rapidly evolving business models, pervasiveness and the "perceived binding force" may be established based on a relatively short period of practice and the early adoption by industry leaders. In such cases, the requirement for "long-standing nature" should be applied with appropriate flexibility to accommodate the pace of commercial innovation.

For commercial customs preliminarily identified, judicial review is required to determine their admissibility. The primary review requirement is legality, meaning the content of the custom must not violate mandatory provisions of laws and administrative regulations, nor contravene public order and good morals. Legality serves as the baseline threshold for a commercial custom to enter the judicial arena. The second requirement is a review of reasonableness, which aims to assess whether the custom aligns with the fundamental rationales of commercial activities, such as efficiency and security, and whether its arrangement of rights and obligations is obviously unfair. This review does not constitute a reassessment of business decisions but rather serves as necessary judicial correction for extreme unreasonableness, ensuring the inherent justice of the custom itself. Furthermore, the review process implicitly includes a procedural requirement: the identification and introduction of the custom should not substantially deprive the parties of their litigation rights or result in a surprise adjudication. During the review, the judge should anticipate its potential legal effects and provide necessary explanations, thereby safeguarding the fairness of the litigation procedure<sup>[3]</sup>.

### ***2.2 Burden of Proof and Methods of Ascertainment for Commercial Customs***

The party asserting the application of a specific commercial custom generally bears the burden of proving both the objective existence of that custom and the specifics of its content. They must demonstrate that the custom meets the aforementioned identification criteria and constitutes a recognized behavioral rule within the relevant commercial field. The standard of proof required is a high degree of probability, not merely the provision of isolated transaction examples. The opposing party may present counter-evidence to prove that the custom does not exist, lacks pervasiveness, or that they neither knew nor should have known of it. The allocation of the burden of proof follows the fundamental principle of "he who asserts must prove," while also considering the proximity of evidence and the capacity to provide proof. In specific circumstances, mitigation or a shift in the burden of proof may occur. For instance, for fundamental transactional customs widely known within an industry, the asserting party may only need to provide *prima facie* evidence. If the opposing party denies it, the burden of proof may then shift. This flexible arrangement aims to balance litigation fairness with the efficiency of fact-finding.

The court bears an auxiliary duty to investigate and ascertain commercial customs *ex officio*. The methods of ascertainment are diverse and may include reviewing written evidence such as standard industry contracts, self-regulatory rules, and technical standards provided by the parties. Referring to written explanations issued by credible industry organizations or expert consultation opinions

constitutes an important approach to clarifying the content and validity of a custom. During court investigations, judges may also form their convictions with the assistance of inquiries directed at parties or witnesses possessing professional knowledge. The ascertainment process emphasizes the comprehensive evaluation and cross-verification of various information sources, aiming to reconstruct an accurate picture of commercial practice and avoid a partial or erroneous understanding of the custom's content. In this process, judges must assess the probative value of different types of evidence: codified industry norms typically carry stronger probative force; individual contract clauses need to be evaluated in light of their scope of application; expert opinions require consideration of their objectivity and neutrality. Ascertainment is not merely fact-finding but also an activity of norm construction based on evidence.

### ***2.3 Resolution of Identification Conflicts and Integration of Adjudicative Logic***

The identification process may give rise to multiple conflicts, including horizontal conflicts between customs from different regions or specialized industries, and vertical conflicts between commercial customs and general civil notions or legal principles. To resolve horizontal conflicts, the rules of "specific customs prevailing over general customs" and "customs jointly known or should have been known by the parties taking precedence" are typically followed. Adjudicators need to investigate the true intention of the parties and the specific context of the transaction to determine the particular custom most applicable to the disputed relationship. For vertical conflicts, a deeper level of value balancing and normative harmonization is required<sup>[4]</sup>.

The integration of adjudicative logic requires judges to establish a systematic analytical framework from the identification stage itself. The identification of commercial customs should not be treated as an isolated fact-finding activity but must be considered proactively within the entire process of legal application. The conclusions drawn from identification must connect seamlessly with subsequent stages of legal discovery, interpretation, and application. When multiple potential customs are identifiable, the choice of which custom enters the judicial purview inherently involves a preliminary assessment of its future legal and social consequences. This consistency in adjudicative logic ensures a smooth transition from identification to application, prevents contradictions in reasoning or surprise judgments caused by a disconnect between the identification stage and judicial reasoning, and upholds the internal unity and predictability of judicial decisions. At a deeper level, the refinement of the identification mechanism ultimately serves the coherence of legal argumentation. It enables rules originating from commercial practice to be embedded within judicial documents in a logically rigorous and value-harmonized manner, thereby enhancing the professional authority and persuasiveness of the judgment.

## **3. Dimensions of Applying Commercial Customs in Civil Adjudication**

### ***3.1 Application Principles and Hierarchy of Validity for Commercial Customs***

The judicial application of commercial customs follows two fundamental principles: supplementary application and priority of autonomy. Supplementary application means their primary function is to fill gaps or ambiguities in statutory law; they may only be invoked as a basis for adjudication when the law contains no provision or its provisions are unclear. Priority of autonomy emphasizes that within the commercial sphere, especially regarding customs commonly followed by commercial entities based on reasonable expectations, they should be given precedence over general civil norms or concepts. This respects the particularity of commercial relations and the autonomous arrangements of the parties. These two principles jointly delineate the boundaries and scope for customs to intervene in judicial adjudication, preventing their unlimited expansion. Supplementary application demonstrates respect for the authority of national legislation, while priority of autonomy acknowledges the space for commercial self-governance. The tension between them precisely constitutes the core domain for the exercise of judicial discretion. The judge must exercise careful discretion in specific cases to avoid the mechanical application of either principle<sup>[5]</sup>.

Regarding the hierarchy of validity, commercial customs that have passed the review for legality hold a lower validity than the mandatory norms of laws and administrative regulations and must not contravene them. However, in relation to default norms within the law, commercial customs, by virtue of embodying the collective will and professional arrangements of commercial entities within a specific field, may attain de facto priority of application within that domain. When norms from multiple levels could apply to a case, determining their validity requires a comprehensive consideration combining the

nature of the norms, the intent of the parties, and the transactional context. This forms a flexible framework for considering the order of application: "mandatory norms-(confirmed) commercial customs-default norms." This framework is not a rigid hierarchical ranking but rather requires judges to make contextualized determinations. When the industry-specific needs reflected by a commercial custom are sufficiently compelling and reasonable, it may even substantially reshape the allocation of rights and obligations between the parties by influencing the interpretation of the "reasonableness" of a default norm, thereby demonstrating its vitality as a substantive commercial norm.

### ***3.2 Approaches for Harmonizing Commercial Customs with Legal Provisions***

The harmonization between commercial customs and statutory legal provisions is primarily achieved through an interpretative approach. When legal provisions are abstract or leave room for interpretation, commercial customs can serve as a crucial reference for interpreting the parties' declarations of intent, determining the content of contract clauses, or understanding the meaning of industry terminology. This makes the application of law more aligned with commercial reality. Such interpretation does not create new rules but rather incorporates the wisdom of commercial practice within the legal framework, thereby enhancing the acceptability and appropriateness of adjudicative outcomes. For instance, when determining whether a party's actions constitute a "reasonable period" or "timely notification," the prevailing operational customs within the relevant industry often become the most persuasive objective standard, thereby concretizing and contextualizing uncertain legal concepts.

When legal provisions contain gaps or explicitly authorize reliance on customs, commercial customs serve an independent gap-filling function. The key to harmonization lies in examining the consistency of normative purposes and values. Even if the content of a custom does not entirely align with the literal meaning of a legal provision, if its core spirit aligns with the objectives-such as transactional security and efficiency-that the legal norm seeks to achieve, and it does not violate mandatory systemic principles, reconciliation and integration between the custom and the legal system can be achieved through purposive restriction or expansive interpretation. The harmonization process requires adjudicators to go beyond simple literal comparison and delve into the substantive rationale behind the norms. A deeper level of harmonization manifests as a mechanism of "norm competition and selection": when a mature and reasonable commercial custom can functionally replace an outdated default norm, its consistent preferential application in judicial practice can, in fact, generate a "bottom-up" pressure for rule evolution, promoting the renewal and development of the law itself<sup>[6]</sup>.

### ***3.3 Requirements for Reasoning and Argumentation in Adjudication Applying Commercial Customs***

The application of commercial customs in judicial documents must be supported by full and rigorous reasoning and argumentation. Its core lies in completing the justification for transforming a "factual practice" into a "normative basis for adjudication." The argument must first demonstrate the identification process, clearly stating the specific grounds for concluding that the custom meets the criteria of objective existence and perceived binding force, and elucidating the reasons for it passing the reviews of legality and reasonableness. This part constitutes the factual and logical premise for application and must avoid treating the custom as a self-evident premise used directly. The argumentation should reveal the chain of reasoning from specific evidence (such as model contracts, industry standards) to abstract normative requirements. This makes the "normativity" of the custom objectively perceivable and verifiable, rather than relying on the judge's subjective assumptions.

A deeper requirement for argumentation lies in the necessity to explicitly articulate the reasons for choosing to apply this specific custom, rather than other rules (including specific legal provisions or other customs), to resolve the dispute in the present case. The reasoning should integrate the specific circumstances of the case, analyzing how this custom concretely influenced the rights and obligations of the parties and why its application can resolve the disputed issues more justly and effectively. Ultimately, the argument must connect the effects of applying the custom with the overall values of the legal system, demonstrating that the adjudication in this case does not deviate from the fundamental framework of the legal order but rather vividly embodies and enriches that framework within the commercial sphere, thereby enhancing the legitimacy and persuasiveness of the judgment. An exemplary judicial document involving commercial customs should present, through its reasoning, a complete and closed loop of argumentation: moving from "commercial practice" to "custom identification," then to "norm application," and finally returning to "legal values." This process not only addresses the individual case but also, through the public articulation of adjudicative reasoning, shapes future behavioral expectations and normative understanding.

## 4. Pathways for Improving the System for Identifying and Applying Commercial Customs

### 4.1 Systematic Construction of the Theoretical Framework for Commercial Customs

Current theoretical discussions on commercial customs are often dispersed across theories of legal sources, contract interpretation, or commercial law principles, lacking an integrated systematic framework addressing their own generative logic, normative structure, and basis of validity. The primary task of systematic construction is to clarify the core categories of commercial customs as an independent normative type and to delineate their genealogical relationship with related concepts such as transactional practices, industry standards, and standard contract terms. This theoretical construction must not remain at the level of describing external features but needs to delve deeper into their internal workings. It requires exploring how repeated practice, within the context of commercial autonomy, coalesces into behavior rules with normative binding force—that is, the transformation mechanism from "fact to norm." Elucidating this mechanism necessitates employing analytical tools from legal sociology and law and economics to examine how information dissemination, reputation mechanisms, and enforcement of sanctions within commercial communities collectively underpin the binding force of customs. This provides a more solid theoretical foundation for their judicial identification.

The construction of a systematic theory requires the introduction of a multi-dimensional analytical framework. A temporal dimension examines the balance between the dynamic evolution and relative stability of customs. A spatial dimension investigates their scope of application and conflict rules across different levels, such as regional, industry-specific, or international. An efficacy dimension necessitates a refined distinction of the varying strength of their operative force in different contexts, such as their differing effects when serving as an interpretative basis, a supplementary rule, or even grounds for displacing default norms. A well-structured and logically coherent theoretical system can provide stable yet flexible conceptual tools and value guidance for judicial identification and application, transcending the fragmented accumulation of case-specific experiences. Future theoretical construction must pay particular attention to how new transaction models in the digital context—such as platform rules and algorithmic practices—challenge and reshape traditional theories of custom. It must explore whether the criteria for judging their conformity with requirements like "long-standing nature" and "pervasiveness" require adaptive adjustments to maintain the theory's explanatory and guiding power over commercial practice.

### 4.2 Standardized Integration of Identification and Application Procedures

Identification and application are inherently sequential and mutually influential stages within the judicial process. However, in practice, a procedural disjunction often occurs, where the identification stage is confined to fact-finding, and legal evaluation is only conducted during the application stage, leading to repetitive reviews or logical discontinuities. Standardized integration aims to incorporate both stages into a coherent judicial reasoning process. This requires establishing a set of standardized procedural guidelines covering the entire sequence from a party's assertion and presentation of evidence, to the court's investigation and ascertainment, and finally to the judge's review, confirmation, selection for application, and comprehensive reasoning. The core of these guidelines lies in organically embedding substantive review requirements, such as legality and reasonableness, into each procedural node from the initiation of identification to the final adjudication. This integration does not pursue procedural rigidity but rather aims to enhance the operability and predictability of the process by clarifying the tasks and connection points at each stage. Particular attention should be paid to designing differentiated review focuses and standards for first-instance and appellate trials, reflecting their distinct functional roles<sup>[7]</sup>.

The key to integration lies in strengthening judges' obligations for clarification and disclosure of their inner conviction throughout this process. During the identification stage, the judge should appropriately guide the parties to present evidence and debate effectively concerning the constituent elements of the custom. After preliminarily confirming the existence of a custom, the judge should clarify its potential legal effects for the parties and solicit their opinions regarding its potential relationship with legal norms. This integration makes the litigation procedure itself an arena for testing and screening commercial customs. Through sufficient procedural safeguards, it enhances the accuracy of the identification outcome and the legitimacy of subsequent application decisions, prevents surprise adjudication, and ensures transparency and predictability in the judicial process. The deeper value of procedural integration lies in its transformation, through the adversarial and dialogic nature of litigation, of the review of commercial customs from a unilateral judicial determination into an argumentative

process involving active participation by the parties and a full clash of evidence and reasoning. This itself constitutes another substantive test of the custom's reasonableness and makes the final adjudicative conclusion more likely to gain acceptance from the parties and the industry.

#### **4.3 Coordination Mechanism Between Commercial Customs and General Civil Norms**

The vitality of commercial customs stems from their unique commercial logic, yet their integration into the judicial system must address potential tensions with general civil norms, such as the principle of fairness, acquisition in good faith, and equivalence of rights and obligations. Constructing a coordination mechanism does not seek a rigid hierarchical ranking but rather aims to establish a set of contextualized balancing methods and interpretative rules. The primary principle is "domain distinction." This means that in disputes involving purely commercial relations or between commercial entities, priority should be given to respecting the values of efficiency, security, and the doctrine of appearances embodied in commercial customs. When a case involves a commercial entity and an ordinary civil party, a more cautious review of the custom's application is necessary, with greater consideration given to protecting the rights and interests of the potentially vulnerable party. This distinction requires the judge to make an accurate initial determination regarding the nature of the legal relationship involved in the case, and based on this, establish the starting point for value balancing and the appropriate level of scrutiny.

The coordination mechanism is methodologically reflected as "interpretative reconciliation." When a custom and a general norm appear to conflict on the surface, efforts should be made to explore their compatibility at the level of underlying legal principles through interpretation. For example, flexible concepts within general civil norms can be given a specific interpretation aligned with commercial practice within a commercial context. Simultaneously, it is necessary to acknowledge the space for necessary "validity deference." This means that if the application of a commercial custom, while not violating mandatory provisions, creates a severe and irreconcilable conflict with fundamental civil values in a specific case, the judge may exclude its application based on overarching principles. However, this necessitates an exceptionally heavy burden of reasoning. This coordination mechanism aims to preserve the internal unity and flexibility of the legal system, allowing commercial customs to enrich the legal order without undermining its foundations. From a broader perspective, the process of coordination is also one through which the content of general civil norms themselves is continuously enriched and developed. The novel elements of rationality carried by commercial customs can, through judicial screening and recognition, be gradually absorbed and transformed into new interpretations of legal principles, thereby propelling the legal system to respond to the needs of a commercial society in an evolving manner.

### **Conclusion**

This paper constructs an integrated framework encompassing theoretical definition, identification mechanisms, and application dimensions by systematically analyzing the approaches for identifying and applying commercial customs in civil adjudication. The study clarifies the legal connotation of commercial customs as autonomous norms and their supplementary status as a source of law, delineating the fundamental distinctions between commercial customs and civil customs in terms of their value foundations and normative logic. Its core contribution lies in establishing identification criteria centered on "objective pervasiveness" and "subjective perceived binding force (opinio juris)," along with admissibility requirements involving reviews of legality and reasonableness. It also systematically elaborates on the specific pathways for harmonizing commercial customs with statutory law when they serve as interpretative references or gap-filling norms. This research provides a systematic solution to address the adjudicative uncertainty arising from ambiguous standards and arbitrary procedures in judicial practice, thereby fostering an organic integration of commercial autonomy rationality and legal stability.

Looking ahead, future research and practice should deepen efforts in the following directions. At the theoretical level, attention must be paid to the challenges posed by new transaction models in the digital era, such as platform rules and algorithmic practices, to the traditional constitutive elements of customs, thereby promoting the adaptive development of identification criteria. At the procedural level, it is necessary to further integrate and refine the standardized processes from assertion and evidence presentation to review and reasoning, strengthening judges' obligations for clarification to ensure substantive determinations are justly safeguarded by procedure. At the level of normative coordination,

efforts should focus on developing more flexible, contextualized balancing methods to dynamically reconcile the efficiency logic of commercial customs with the fairness values of general civil norms. Through continuous theoretical reflection and institutional refinement, the judicial application of commercial customs can become more rigorously and predictably integrated into a unified legal order while respecting commercial autonomy.

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