

- Provisions relating to
1. Incorporation of companies;
 2. Drafting of MOA/AOA,
 3. Applicable sections and recent changes under Companies Act, 2013



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Status of the Company Law



- Company Law comprises of:
 - Companies Act, 2013
 - Companies Act, 1956
 - Rules made thereunder
 - Notifications
 - Circulars

Types of Companies



- Types of Companies - Private Company; Public Company ; **One Person Company (OPC)**.
- Private Company
- Section 2(68) defines “private company” means a company and which by its articles,—
 - (i) restricts the right to transfer its shares;
 - (ii) limits the number of its members to two hundred:
 - ✦ Joint holders treated as one
 - ✦ Employees/ex-employees who have taken shares while in employment excluded.
 - (iii) prohibits any invitation to the public to subscribe for any securities of the company; and
 - having a minimum paid-up share capital of ~~one lakh rupees or such higher paid-up~~ share capital as may be prescribed,

Types of Companies



- **Public Company**
 - Section 2(71) defines “public company” means a company which—
 - (a) is not a private company;
 - (b) has a minimum paid-up share capital of ~~five lakh rupees or such higher paid-up capital~~, as may be prescribed:
 - Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles ;
- **One Person Company**
- 2(62) defines “One Person Company” means a company which has only one person as a member;

Definitions



- Sections 2(42) defines “foreign company”
 - means any company or body corporate incorporated outside India which—
 - ✦ (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - ✦ (b) conducts any business activity in India in any other manner.

Definitions (Contd.)



- **Promoter [Section 2(69)]**
 - “promoter” means a person—
 - (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
 - (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
 - (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:
 - Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;

Definitions (Contd.)



- **Small Company [Section 2(85)]**
 - “small company” means a company, other than a public company,—
 - (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; ~~or~~ and
 - (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:
 - Provided that nothing in this clause shall apply to—
 - (A) a holding company or a subsidiary company;
 - (B) a company registered under section 8; or
 - (C) a company or body corporate governed by any special Act;

Definitions (Contd.)



- **Subsidiary company [Section 2(87)]**
- “subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company—
- (i) controls the composition of the Board of Directors; or
- (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:
- Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.
- *Explanation.*—For the purposes of this clause,—
- (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;
- (b) the composition of a company’s Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- (c) the expression “company” includes any body corporate;
- (d) “layer” in relation to a holding company means its subsidiary or subsidiaries;

Dormant Company



- **Dormant Company [Section 455]**
 - Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.
- **Inactive Company**
 - “inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

Dormant Company



- **Significant Accounting transaction means** any transaction other than:
 - (a) payment of fees by a company to the Registrar;
 - (b) payments made by it to fulfil the requirements of this Act or any other law;
 - (c) allotment of shares to fulfil the requirements of this Act;
 - (d) payments for maintenance of its office and records

Dormant Company



- Other provisions relating to Dormant company
- Register of Dormant Companies
- To retain the status
 - Have minimum number of directors
 - File such documents as may be prescribed
 - Pay such annual fees as may be prescribed
- To convert into Active status
 - Make an application and file such documents as may be prescribed and pay such annual fees as may be prescribed
- ROC shall have power to strike off the name of a dormant company

Types of Companies



- Companies with charitable objects [Section 8]
- (1) Where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company—
 - (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other useful object;
 - (b) intends to apply its profits, if any, or other income in promoting its objects; and
 - (c) intends to prohibit the payment of any dividend to its members,

Formation of Companies



- Conception
- DIN procedure for the applicant of Reservation of name
- Reservation of name
- DIN procedure for Directors
- Drafting MoA and AoA
- Other Documents to be readied for filing
- Corrections, if any {re-submission}
- Certificate of Incorporation

DIN



- Section 153 – Every individual intending to be appointed as Director to make an application for allotment of DIN as per prescribed Rules
- Section 154 – Central Govt. to allot DIN
- Section 155* – Prohibition to obtain more than one DIN
- Section 156* – Director to intimate the DIN to the company.
- Section 157 – Company to inform the ROC about DIN
- Section 158 – Obligation to indicate DIN in every return, information or particulars furnished to ROC

DIN



- **Rules 8 -12 relate to DIN procedures**
 - DIR 2 – Form of consent to act as Director
 - DIR 3 – Application for allotment of DIN
 - DIR 3C – Intimation of DIN to ROC
 - ~~DIR 4 – Verification of applicant for DIN~~
 - DIR 5 – Application for surrender of DIN
 - DIR 6 – Intimation of changes in particulars of Directors
 - DIR 7 – Verification of applicant for change in particulars in
DIN
- ***Section 159 – Penalty for contravention of Section 155 and 156 –**
 - Imprisonment of upto six months
 - Fine of upto Rs. 50,000/-
 - Fine of Rs. 500 per day in case of continuing default

Formation of Companies



- Memorandum of Association –
 - Name Clause
 - Domicile Clause
 - Objects Clause
 - Capital Clause
 - Liability Clause
 - Subscription Clause

 - Formats – *Schedule I Tables A - E*

Name Clause



- Application for acquiring DIN by the applicant:– Refer Sections 153 – 159 of the Companies Act, 2013 and Rules 9 – 12 of the Companies (Appointment and Qualification of Directors) Rules 2014
- Undesirable name Refer Rule 8 of Companies (Incorporation) Rules, 2014.
- Application for Reservation of Name (Form INC. 1)
- Drafting of Memorandum & Articles of Association of the proposed company. Name of the company should be as approved by the ROC
- Name Clause

UNDESIRABLE NAMES



- Rule 8 specifies the rules in regard to what are undesirable names:
 - Using different phonetic spellings or spelling variations shall not be considered as distinguishing one name from another. Illustration (For example, P.Q. Industries limited is existing then P and Q Industries or Pee Que Industries or P n Q Industries or P & Q Industries shall not be allowed and similarly if a name contains numeric character like 3, resemblance shall be checked with ‘Three’ also;)
 - The proposed name is vague or an abbreviated name such as ‘ABC limited’ or ‘23K limited’ or ‘DJMO’ Ltd: abbreviated name based on the name of the promoters will not be allowed. For example:- BMCD Limited representing first alphabet of the name of the promoter like Bharat, Mahesh, Chandan and David:

UNDESIRABLE NAMES



- Rule 8 specifies the rules in regard to what are undesirable names:
 - It is not in consonance with the principal objects of the company as set out in the memorandum of association; Provided that every name need not be necessarily indicative of the objects of the company, but when there is some indication of objects in the name, then it shall be in conformity with the objects mentioned in the memorandum;
 - h. If the proposed name is the Hindi or English translation or transliteration of the name of an existing company or limited liability partnership in English or Hindi, as the case may be.

UNDESIRABLE NAMES



- Rule 8 specifies the rules in regard to what are undesirable names:
 - The addition of words like New, Modern, Nav, Shri, Sri, Shree, Sree, Om, Jai, Sai, The, etc. Does not make a name distinguishable from an existing name and similarly, if it is different from the name of the existing company only to the extent of adding the name of the place, the same shall not be allowed; such names may be allowed only if no objection from the existing company by way of Board resolution is submitted;
 - The addition of an internet related designation, such as .com, .net, .edu, .gov, .org, .in does not make a name distinguishable from another, even where (.) is written as ‘dot’;
 - The proposed name is identical with or too nearly resembles the name of a company or limited liability partnership incorporated outside India and reserved by such company or limited liability partnership with the Registrar:

UNDESIRABLE NAMES



- Rule 8 specifies the rules in regard to what are undesirable names:
 - The proposed name include words such as ‘Insurance’, ‘Bank’, ‘Stock Exchange’, ‘Venture Capital’, ‘Asset Management’, ‘Nidhi’, ‘Mutual fund’ etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA etc. have been complied with by the applicant;
 - The proposed name includes the word “State”, the same shall be allowed only in case the company is a government company;



- Rule 8 specifies the rules in regard to what are undesirable names:
 - The applicant shall declare in affirmative or negative (to affirm or deny) whether they are using or have been using in the last five years , the name applied for incorporation of company or LLP in any other business constitution like Sole proprietor or Partnership or any other incorporated or unincorporated entity and if, yes details thereof and No Objection Certificate from other partners and associates for use of such name by the proposed Company or LLP, as the case may be, and also a declaration as to whether such other business shall be taken over by the proposed company or LLP or not .

UNDESIRABLE NAMES



The name shall be considered undesirable, if-

- i. It attracts the provisions of section 3 of the Emblems and Names (Prevention and Improper Use) Act, 1950 (12 of 1950);
- ii. It includes the name of a registered trade mark or a trade mark which is subject of an application for registration, unless the consent of the owner or applicant for registration, of the trade mark, as the case may be, has been obtained and produced by the promoters;
- iii. It includes any word or words which are offensive to any section of the people;

UNDESIRABLE NAMES



6. The following words and combinations thereof shall not be used in the name of a company in English or any of the languages depicting the same meaning unless the previous approval of the Central Government has been obtained for the use of any such word or expression-

- | | | |
|-----------------|--|---|
| a. Board; | l. Small Scale Industries; | v. Development Scheme; |
| b. Commission; | m. Khadi and Village Industries Corporation; | w. Statute or Statutory; |
| c. Authority; | n. Financial, Corporation and the like; | x. Court or Judiciary; |
| d. Undertaking; | o. Municipal; | y. Governor; |
| e. National; | p. Panchayat; | z. The use of word Scheme with the name of Government (s) , State , India, Bharat or any government authority or in any manner resembling with the schemes launched by Central, state or local Governments and authorities; and |
| f. Union; | q. Development Authority; | |
| g. Central; | r. Prime Minister or Chief Minister; | |
| h. Federal; | s. Minister; | |
| i. Republic; | t. Nation; | |
| j. President; | u. Forest corporation; | aa. Bureau |
| k. Rashtrapati; | | |

Name Clause



- Where the application for availability of name was made by furnishing wrong or incorrect information:
- A) where the company is not incorporated : Cancel the reservation of name, and the applicant shall be liable to a penalty upto one lakh rupees
- B) where the company is incorporated :
 - Show cause to be issued
 - Direct the company to change its name within 3 months after passing Ordinary resolution
 - Strike off the name of the company
 - Make a petition for winding up of the company

Name Clause



- Application for change of name
 - Form No. INC. 24
 - Special Resolution – [File Form no. MGT. 14]
 - Reasons for change of name
 - Relevant extract of minutes/resolutions
 - Certificate of Incorporation pursuant to change of name will be issued by ROC in Form No. INC. 25. Change of name effective from the date of issue of such certificate

Domicile Clause



- A company shall on or from the fifteenth day of its incorporation and at all times thereafter have a registered office capable of receiving and acknowledging all communications and notices addressed to it. (Form INC. 22)
- Verification of the registered office:
 - Registered document of title or Notarised copy of lease/rent agreement
 - Authorisation from the owner/authorised occupant
 - Document of connection of utility service depicting the name of the owner

Domicile Clause



- In case of change of Registered office from one State to another:
 - Special Resolution [File Form no. MGT. 14]
 - Application for approval to Regional Director in Form No. INC. 23
 - Copy of Memorandum and Articles of Association
 - Copy of extract of minutes
 - Copy of challan for fees paid
 - Letter of Authority.
 - Advertisement to be published in Form No. INC. 26
 - File Form No. INC. 28 after the order is passed by the Regional Director.

Domicile Clause



- In case of change of Registered office from one State to another (Contd.) :
 - Form No. INC. 22 for giving notice to Registrar of Companies after approval from RD is received.
 - List of debentureholders, depositors, creditors or lenders and a notice to them seeking objections, if any.

- Other requirements (Section 12)
 - Paint or affix its name and address outside its registered office
 - Engrave its name on the company seal
 - Print name, registered office address, **CIN**, website address, contact details on all its business letters, billheads, letter papers, notices, and other official publications (Rule 26)

Objects Clause



- Objects clause to state
 - A) The objects for which the company is incorporated
 - B) any matter considered necessary in furtherance thereof
- In case of registration or approval from sectoral regulators is required, a declaration shall be submitted at the time of incorporation that the objects shall be pursued only after such registration/approval.
- Form No. 13 and 16 changed

Objects Clause



- Change of objects for which money is raised through prospectus:
 - Send Notice for passing resolution through postal ballot to the members/shareholders. Notice to contain the following particulars: the total money received, utilised for the objects, unutilised money (raised through prospectus), justification, estimated impact on the earnings/cash flow and other relevant information. The place from where a copy of the resolution to be passed can be obtained. The notice should be hosted on the company's website.
 - Special Resolution [File Form no. MGT. 14]

Capital Clause



- Types of shares
 - Equity Shares
 - ✦ Equity with differential rights
 - Preference Shares
- The number of shares, each subscriber to the MoA agrees to subscribe, which shall not be less than one share, shall be indicated opposite/against his name.

Liability Clause



- Limited by Share Capital
- Limited by Guarantee
 - With share capital
 - Without share capital
 - ✦ Right to participate in the divisible profits to a person other than a member is void
- Unlimited Company

Subscription Clause



- The MoA and the AoA shall be signed each of the subscribers giving their name, address, description and occupation, before at least one witness who shall sign giving the same details and state that:
 - “I witness to the subscriber(s), who has/have subscribed and signed in my presence (date and place); Further I have verified his/her/their identity details for their identification and satisfied myself of his her/their identification particulars as filled in.”
- Rules specify in case where:
 - The subscriber is an illiterate
 - The subscriber is a foreign national residing outside India.

Formation of Companies



- Articles of Association
 - Entrenchment provisions [Section 5(3)]
 - The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.
 - Formats – *Schedule I Tables F - J*

Formation of Companies



- Certificate of Incorporation (Form INC. 11)
- Copies of documents in relation to the registration of the company, and filed with the Registrar at that time, should be maintained and preserved till the dissolution of the company.
- Consequences of formation of the company on the basis of false or incorrect information
- Commencement of Business
 - Declaration – ~~(FORM INC. 21)~~
 - Proof of address - verification of address (alongwith Form INC. 22)
Proof of Registered Office – Deed/Agreement/Rent Receipt. Copy of recent (not older than two months) utility bills at the address.
NOC to use the office as registered office from the owner.

Formation of Companies



- Documents to be submitted for incorporation of a company, (other than OPC and company with licence under Section 8):
 - Application for Incorporation of Company (Form INC. 7)
 - Declaration regarding compliance (Form INC. 8)
 - Affidavit regarding his non-conviction in any offence or guilty of any fraud or misfeasance or for any breach of any duty under the company law during the last five years (Form INC. 9)
 - Form for verification of signature of subscribers (Form INC. 10). NOC in case there is change in promoters.
 - Address for correspondence till the registered office is established.

Formation of Companies



- Documents to be submitted for incorporation of a company, (other than OPC and company with licence under Section 8) (Contd.):
 - Memorandum and Articles of Association
 - Particulars of subscribers including proof of identity, proof of residence and PAN Card. Proof of nationality in case of foreign nationals.
 - Particulars of first directors including proof of identity, proof of residence and PAN card.
 - Consent and other directorships/interests of the first directors
 - Entrenched Articles of Association, if any.

Formation of Companies



- Form No INC 29 – Integrated Incorporation form
- Visit the website: www.ebiz.gov.in and register yourself.
- Comprehensive site MCA21; FEMA etc., about 11 out of 20 services proposed
- Six page comprehensive form for company registration, PAN, TAN and ESI.
- Prior reservation of name not necessary.
- Verification of address to be done or within 15 days of incorporation. If documents not attached, the address will be treated as address for correspondence and not as registered office.
- Can have MoA and AoA as per templates. Form INC 30 for MoA and Form INC 31 for AoA for clauses contained in Schedule I as applicable.
- DIN Nos will be also allotted on the basis of documents filed.

Formation of Companies



- **One Person Company**
 - Deemed to be a private company
 - MoA shall indicate the name of the other person (Form INC. 2) to be filed at the time of incorporation, with his prior consent (Form INC. 3), who shall in the event of the subscriber's death or his incapacity to contract, become the member of the company.
 - Withdrawal of consent by such other person (Form INC. 4) within thirty days of such withdrawal
 - Subscriber may change the name of such other person (Form INC. 4) within thirty days of the intimation to the company.
 - Duty of the subscriber to notify the change in the name of such other person (Form INC. 4).

Formation of Companies



- One Person Company (Contd.)
- Only a natural person who is an Indian citizen and resident in India can incorporate an OPC or be a nominee for the sole member of a OPC.
- Resident shall mean a person who has stayed in India for > 182 days in the immediately preceding calendar year.
- One person can form only one OPC.
- Minors cannot be members or hold shares.

Formation of Companies



- One Person Company (Contd.)
- Restrictions:
 - Cannot be converted into a company with licence u/s 8 of the Act.
 - Cannot carry on non-banking financial investment activity including investment in securities of any body corporate.
 - Cannot voluntarily convert into any kind of company unless:
 - ✦ Two years have elapsed since the date of incorporation of the OPC – Form INC. 6)
 - ✦ The paid up share capital is increased beyond Rs. 50 lakhs (being the threshold limit of paid up share capital).*
 - ✦ The average annual turnover during the immediately preceding three financial years (relevant period) exceeds Rs. 2 crores.*
 - ✦ * to be mandatorily converted – Rule 6(1). (Form INC. 5)

Formation of Companies



- Documents to be submitted for incorporation of an OPC:
 - Application for Incorporation of OPC – Form INC. 2
 - Nominee Consent Form – Form INC. 3
 - Affidavit regarding his non-conviction in any offence or guilty of any fraud or misfeasance or for any breach of any duty under the company law during the last five years (Form INC. 9)
 - Form for verification of signature of subscribers (Form INC. 10).
 - List of all the companies having the same registered office, if any.
 - Particulars of member including proof of identity, proof of residence and PAN Card.
 - Particulars of nominee including proof of identity, proof of residence and PAN Card.
 - Proof of Registered Office – Deed/Agreement/Rent Receipt. Copy of recent (not older than two months) utility bills at the address. NOC to use the office as registered office from the owner.



- **Minimum Subscribers :**
 - OPC - One
 - Private Company – Two
 - Public Company – Seven
- **Minimum Directors**
 - OPC – One
 - Private Company – Two
 - Public Company – Three
- **Maximum Directors – Fifteen**
- **Privileges extended to OPC, small companies, private companies, government companies and Section 8 companies**

Formation of Companies



- Documents to be submitted for incorporation of a company with licence under Section 8 :
- To the Regional Director:
 - Reservation of Name (Form INC. 1)
 - Application for licence under Section 8 (Form INC 12)
 - Memorandum and Articles of Association (Form INC. 13*)
 - Declaration by a chartered accountant/company secretary/cost accountant, regarding compliance (Form INC. 14)
 - Declaration by the applicant in Form INC. 15
 - [Form No. INC. 26, in case of existing company applying for licence u/s 8(5)]

Formation of Companies



- Documents to be submitted for incorporation of a company with licence under Section 8 (Contd.) :
- To the Regional Director (Contd.):
 - The copies of Balance Sheets, Profit & Loss Account of the immediately preceding two financial years.
 - The statement showing in details of assets and liabilities of the company- as on the date of application or in a such extended period or within thirty days presecding that date,
 - An estimate of future annual income and expenditure for next three years
 - Certified copies of resolutions passed in general board meetings relating to registration of the company u/s 8.

Formation of Companies



- Documents to be submitted for incorporation of a company with licence under Section 8 (Contd.) :
- To the Registrar of Companies:
 - Reservation of Name (Form INC. 1)
 - Memorandum and Articles of Association as approved by the Regional Director (Form INC. 13)
 - Copy of licence under Section 8 issued by the Regional Director [Form INC. 16* (new company) or Form INC. 17 (existing company), as the case may be]
 - Declaration regarding compliance (Form INC. 8)
 - Address for correspondence till the registered office is established.

Formation of Companies



- Documents to be submitted for incorporation of a company with licence under Section 8 (Contd.) :
- To the Registrar of Companies (Contd.):
 - Affidavit regarding his non-conviction in any offence or guilty of any fraud or misfeasance or for any breach of any duty under the company law during the last five years (Form INC. 9)
 - Form for verification of signature of subscribers (Form INC. 10). NOC in case there is change in promoters.
 - Particulars of subscribers including proof of identity, proof of residence and PAN Card. Proof of nationality in case of foreign nationals.
 - Particulars of first directors including proof of identity, proof of residence and PAN card.
 - Consent and other directorships/interests of the first directors

Formation of Companies



- **Commencement of Business**
 - All companies, whether public or private, can start business operations only after obtaining the Certificate for commencement of Business
 - Declaration prior to the commencement of business/exercising borrowing powers (Form No. INC. 21)
 - Specimen Signatures – (Form No. INC. 10)
 - Certificate of registration from RBI, in case of NBFCs

Formation of Companies



- Conversion of company of any other kind into Section 8 company
 - Apply for licence under Section 8 to the Regional Director (RD) in Form No. INC 18 alongwith the following documents:
 - Memorandum & Articles of Association as approved by the RD.
 - Copies of resolutions passed at the Board Meetings relating hereto-above.
 - Notice of the general body meeting and a copy of special resolution passed relating hereto-above.
 - Certificate from CA/CS/CWA in practice
 - Statement of Assets and Liabilities duly certified by the auditor within 30ndays thereof.
 - Audited financial statements and annual returns for immediately preceding two years
 - Written consent/NOC from lenders/creditors, if any.

Formation of Companies



- Conversion of company of any other kind into Section 8 company (contd.)
 - NOC from sectoral regulatory authority such as Chief Commissioner of Income Tax, Income Tax Officer, Charity Commissioner, Chief Secretary, State Government having jurisdiction over the company. Proof of notice given to such sectoral authorities to be attached.
 - Details of donation/grants etc received since incorporation..
 - Declaration that no portion of the income of the company or property had been paid or transferred, directly or indirectly, as dividend or bonus or otherwise to members or any persons claiming through them
 - Advertisement to be published in two local newspapers and hosted on the company's website (Form No. INC 19)

Formation of Companies



- Conversion of Public into private company or private into public company
 - File Special Resolution (Form No. INC. MGT. 14)
 - Application to ROC Form No. INC. 27
 - Certificate of Incorporation pursuant to change of name will be issued by ROC in Form No. INC. 25

- Notice of Order of any Court or any other competent authority

Notify ROC in Form No. INC. 28.

- Alteration of Memorandum of Association
 - Objects Clause
 - Capital Clause

- Provisions relating to
1. Incorporation of companies;
 2. Drafting of MoA and AoA
 3. Applicable sections and recent changes under Companies Act, 2013



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