

Aviation Finance & Leasing

In 27 jurisdictions worldwide

Contributing editor
Mark Bisset



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GETTING THE
DEAL THROUGH 

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Aviation Finance & Leasing 2015

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Belgium

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Verhaegen Walravens

Overview

1 To which major air law treaties is your state a party? Is your state a party to the New York Convention of 1958?

Belgium has ratified the following conventions:

- the 1933 Rome Convention for the unification of certain rules relating to the precautionary arrest of aircraft. The convention was ratified by law of 11 September 1936 and became effective in Belgium on 24 February 1937;
- the 1944 Chicago Convention on international civil aviation. The convention was ratified by the law of 30 April 1947 and came into effect on 2 December 1948; and
- the 1948 Geneva Convention on the international recognition of rights in aircraft was ratified in 1993. The Convention entered into force on 20 January 1994, however, no implementation measures have been taken and, as a consequence, rights in aircraft cannot be registered in any public registry.

Belgium has not ratified the Cape Town Convention on International Interests in Mobile Equipment.

Belgium is a party to the New York Convention of 1958. The Convention entered into force on 25 November 1975. Belgium has made the reciprocity reservation (article I(3) of the Convention), and therefore Belgian courts will apply the New York Convention only to awards made in the territory of another contracting state.

2 What is the principal domestic legislation applicable to aviation finance and leasing?

The contract of leasing is not governed by any special provision of Belgian law.

A Royal Decree of 1967, concerning the status of companies offering financial leasing, contains a definition of what should be considered as a finance lease. To be considered as a finance lease under Belgian law, the contract must concern equipment exclusively used by the lessee for its professional needs. The equipment must be bought by the lessor in order to lease it to the lessee and the term of the lease should match the expected life span of the equipment. Moreover, the contract should provide for a purchase option in favour of the lessee at lease end and for a value that should match the expected residual value of the equipment at lease end.

3 Are there any restrictions on choice-of-law clauses in contracts to the transfer of interests in or creation of security over aircraft? If parties are not free to specify the applicable law, is the law of the place where the aircraft is located or where it is registered the relevant applicable law?

The Belgian International Private Law Code provides that rights in rem over an aircraft registered in a public registry are governed by the law of the state where the registration has taken place.

Under Belgian law, the parties to a sale agreement may freely choose the law applicable to the sale. No special formalities (such as registration in public registries) are required to complete the sale, and the parties are therefore free to choose the applicable law to the sale of the aircraft. However, Belgian law will determine if the aircraft can be sold, and the type of rights that should be transferred to the buyer.

As regards security over aircraft, the only form of valid security over a Belgian registered aircraft is a Belgian law pledge. It is highly unlikely that

Belgian courts would recognise and enforce an English law mortgage over a Belgian registered aircraft.

Title transfer

4 How is title in an aircraft transferred?

Under Belgian law, there are no special formalities to be fulfilled in order to transfer title over an aircraft. Belgian law does not even require that the contract of sale be in writing.

However, a sale agreement is usually concluded between the parties. If the parties have not agreed otherwise, title is transferred and the sale is enforceable between the parties as soon as they have reached an agreement on the object of the sale and on its price, even if the aircraft has not yet been delivered or the price paid.

Most aircraft sales in Belgium are documented by an acceptance certificate or a bill of sale. However, under Belgian law these documents are not necessary.

5 What are the formalities for creating an enforceable transfer document for an aircraft?

Under Belgian law, a sale agreement does not need to be in writing to be valid and enforceable. However, a written document is needed as evidence of the agreement reached.

In case of litigation, and if Belgian courts are competent, they may require that the relevant agreement be translated in the language of the procedure, which could be French, Dutch or German depending on the competent Belgian court.

Registration of aircraft ownership and lease interests

6 Identify and describe the aircraft registry.

The Belgian aircraft registry is an operator registry. The owner of the aircraft does not appear on the registry or on the registration certificate.

Aircraft used in private or commercial operations are registered under the name of the operator. No specific engine registry is available in Belgium.

We are not aware of any well-used 83-bis arrangements in place between Belgium and other jurisdictions.

7 Can an ownership or lease interest in, or lease agreement over, aircraft be registered with the aircraft registry? Are there limitations on who can be recorded as owner? Can an ownership interest be registered with any other registry? Can owners', operators' and lessees' interests in aircraft engines be registered?

Aircraft are registered under the name of the relevant operator or the owner if this is the same as the operator. In order to register an aircraft, the operator must file several documents with the Belgian Aviation Authority to prove its title (ownership or lease) over the aircraft.

Even though these documents are needed for registration, they are not, strictly speaking, registered in the aircraft registry. The Belgian Civil Aviation Authority only issues a registration certificate under the name of the operator. The Belgian CAA does not issue any declaration or other form of acknowledgement of the identity of the owner, even if they are in possession of the relevant purchase or lease agreement.

As a general rule, the Belgian Civil Aviation Authority will only register aircraft owned by European citizens or companies having a domicile in

Belgium; or aircraft leased, under a finance lease, by a European citizen or a company domiciled in Belgium; or an aircraft leased, under an operating lease, for a term of at least six months.

There are currently no other registries where the right of ownership or the lease of an aircraft or an engine may be recorded in Belgium.

8 Summarise the process to register an ownership interest.

In order to register an aircraft in the Belgian registry, the operator (or the owner if the owner will operate the aircraft) must fill in a form available on the website of the Belgian Civil Aviation Authority, and provide the same authority with the following supporting information and documents:

- a full description of the aircraft and its habitual base;
- if the applicant is the owner or the lessee of the aircraft;
- identification of the applicant and, in case of a physical person, a copy of his or her identity card or, in case of a company, a copy of its articles of association;
- evidence of title on the aircraft (a copy of the invoice, the lease agreement, etc);
- a DL2 certificate showing that the aircraft has been duly imported into Belgium;
- if the aircraft was previously registered abroad, the deregistration certificate from the country of previous registration; and
- evidence of payment of the relevant administrative fee (a nominal amount).

Registration may be completed in a very short time if all of the documents are in order. The applicant usually liaises with the Belgian CAA in advance of delivery and, if all of the documents have been received in an appropriate form, registration is usually completed on the same day as delivery, or at the latest on the subsequent day.

The theory of accession exists in Belgian law, but it was created for, and is mainly applied to, real estate cases. We are not aware of any case law in Belgium considering that an engine accedes the airframe of another owner when it is installed on it. However, we cannot exclude that the accession theory may be applied to engines in Belgium. This is why, in practice, parties affix plates on the engines and enter into recognition of rights agreements or similar cooperation agreements in relation to engines.

9 What is the effect of registration of an ownership interest as to proof of title and third parties?

The Belgian registry is not an ownership's registry, but an operator's registry. Registration in the Belgian aircraft registry has no any effect on the underlying title.

If the owner and the operator are the same person, and the aircraft has been registered in the name of the owner, the registration certificate may be used as supporting evidence of ownership, but additional evidence will be needed to support any claim in this respect.

10 Summarise the process to register a lease interest.

It is not possible to register a lease interest in Belgium.

A copy of the lease agreement will usually be provided to the Belgian Civil Aviation Authority in order to proceed with registration, but the filing of the lease with the Aviation Authority cannot be considered as a registration.

11 What is the regime for certification of registered aviation interests in your jurisdiction?

A Belgian registration certificate contains information about the aircraft and about the operator. Until a few years ago, the Civil Aviation Authority accepted that the name of the lessor or the owner be indicated on the registration certificate. This is no longer possible.

The certificate does not contain any pledge or mortgage details for the aircraft, and no separate engine certificate is issued.

12 Is an owner or mortgagee required to consent to any deregistration or export of the aircraft? Must the aviation authority give notice? Can the operator block any proposed deregistration or export by an owner or mortgagee?

Only the operator is authorised to deregister an aircraft registered with the Belgian registry. The aviation authority does not usually give notice to the lessor or the mortgagee, as they do not appear on the registration certificate.

However, the law on air navigation provides that an aircraft is automatically deregistered from the Belgian registry if the relevant lease agreement is terminated. In such a case, the aviation authority must notify the operator. A deregistration certificate is delivered by the aviation authority to any interested party.

13 What are the principal characteristics of deregistration and export powers of attorney?

It is market practice to grant lessors or owners a deregistration power of attorney for Belgian registered aircraft. Various types of deregistration powers of attorney are possible, but as a general rule they grant to the lessor or the owner the possibility to deregister the aircraft from the Belgian aircraft registry, and to export the aircraft in case of default of the lessee.

Under Belgian law, a power of attorney, although expressed to be irrevocable, may nevertheless be revocable in certain circumstances including bankruptcy, going into administration or judicial reorganisation of the principal, and the powers of the attorney may be limited in cases of conflict of interest with the principal.

The validity of a deregistration power of attorney is, moreover, subject to Belgian law on air navigation, and in particular to the provisions of the law (relating to the application for registration) which explicitly enumerates the persons authorised to apply for registration (and deregistration) of an aircraft.

14 If the Cape Town Convention is in effect in the jurisdiction, describe any notable features of the irrevocable deregistration and export request authorisation (IDERA) process.

Belgium has not ratified the Cape Town Convention.

Security

15 What is the typical form of a security document over the aircraft and what must it contain?

Under Belgian law, the only available form of security over a Belgian-registered aircraft is a Belgian pledge.

The relevant pledge agreement may be concluded in English, and cannot be registered in any public registry.

For a Belgian pledge to be enforceable, the pledgor cannot be in possession of the asset (the 'dispossession requirement'). This means that, in case of a loan coupled with a pledge, the borrower or owner of the aircraft cannot grant a pledge over the asset. The structure which is usually used is that of a loan to a special purpose vehicle (SPV) that then leases the aircraft to the operator. The SPV will grant a pledge in favour of the lenders, and the operator will agree to act as third party pledge-holder. This structure requires the drafting of an additional document which is a triparty agreement among the pledgor, the pledgee and the third party pledge-holder.

The law on security interests over moveable goods has recently been changed in Belgium. The new legislation was meant to come into effect by 1 December 2014. However, new legislation has postponed the date of entry into force of this new regime until 1 December 2017. The new regime introduced by the law provides that a pledge over a moveable asset may be perfected without the need for dispossession. Instead of the dispossession, a Belgian pledge will now need to be registered in a national electronic registry, and therefore the owner of the pledged asset could also be the pledgor.

16 What are the documentary formalities for creation of an enforceable security over an aircraft? What are the documentary costs?

There are no special documentary formalities for the creation of a pledge over an aircraft.

However, as soon as the new electronic national registry becomes operational, pledges registered in such registry (or pledges meeting the dispossession requirement) will be enforceable.

17 Must the security document be filed with the aviation authority or any other registry as a condition to its effective creation or perfection against the debtor and third parties? Summarise the process to register a mortgagee interest.

Under Belgian law, it is currently not necessary to register the pledge agreement with any registry. However, as soon as the electronic national registry becomes operational, pledges should be registered there.

18 How is registration of a security interest certified?

This is currently not applicable in Belgium. As regards the future creation of an electronic national registry, the law indicates that future implementation rules shall determine the applicable formalities for registration.

19 What is the effect of registration as to third parties?

Not applicable.

20 How is security over aircraft and leases typically structured? What are the consequences of changes to the security or its beneficiaries?

Under Belgian law, the only asset-based security available over an aircraft is a pledge. The structure used is that of a triparty agreement where the operator or lessee of the aircraft acts as a third party pledge-holder.

Belgian law does not recognise the concept of trust as a legal institution under domestic law. However, the possible recognition of a trust governed by foreign law must be reviewed on the basis of Belgian private international law rules, and therefore Belgian courts will recognise a foreign trust of this is valid under its applicable law. Under Belgium private international law, the trust is governed by the law chosen by the parties. Such law determines the rules applicable to the trust, the interpretation of the trust and its administration as well as the rights and obligations linked to its administration, the effects of the trust and its termination.

21 What form does security over spare engines typically take and how does it operate?

Two main types of security are available over spare engines: a pledge and a retention of title. As regards the object of the security, the parties are free to identify it and describe it. This entails that a pledge agreement must identify the asset over which it is created. If the description of the scope of a pledge over an aircraft does not include the engines, then they are not subject to the same pledge, which will only cover the airframe.

Given the current applicability of the dispossession requirement, it is quite rare to see engines pledged separately from the airframe. However, this may change with the coming into effect of the new law on security interests on moveable goods.

Enforcement measures**22 Outline the basic repossession procedures following lease termination. How may the lessee lawfully impede the owner's rights to exercise default remedies?**

Self-help remedies are not allowed under Belgian law. If the lessee does not voluntarily release possession of the aircraft, the lessor or lender will have to start court proceedings to obtain interim measures and to repossess the aircraft.

In our experience, the most common procedure to repossess an aircraft if the lessee does not cooperate is to proceed with a conservatory attachment of the aircraft. The conservatory attachment is meant to protect the lessor or lender's rights until an order for repossession is granted.

The attachment may be obtained by unilateral request. Usually a custodian is appointed at the same time. The custodian will ensure that the aircraft cannot be used and is properly maintained during the time necessary to obtain an order of repossession.

The attachment and appointment of a custodian may be obtained within a couple of days.

23 Outline the basic measures to enforce a security interest. How may the owner lawfully impede the mortgagee's right to enforce?

Under Belgian law, the main security interest over an aircraft is a pledge. Under current applicable law, a pledge only gives to the pledgee the right to claim part or all of the proceeds of the sale of the aircraft. Under the new law on security interests on moveable goods, a pledge will give the right to the pledgee to sell or to repossess the aircraft.

In order to enforce a Belgian pledge, after having given formal notice to the pledgor, the pledgee must apply to the president of the competent court to obtain the authorisation to sell the aircraft. This application must be notified to the pledgor, who may submit any defence it might have to the competent court. Once a decision is taken, the pledgee may proceed with the public sale of the aircraft.

With the coming into effect of the new law on pledges, this entire procedure may become obsolete. Indeed, under the new law (see 'Update and trends'), the pledgee is authorised to sell or lease the aircraft without having recourse to a court proceeding. If this has been agreed in the pledge agreement, the pledgee may also repossess the aircraft.

The law provides that the pledgee must act in good faith and in a commercially reasonable manner. This means that, at least for the first implementation of the law, there might be court cases brought by the pledgor to stop the execution on the ground that the repossession of the aircraft has not been done in good faith or in a commercially reasonable manner. This type of litigation might then diminish as the case law better determines the cases where a repossession is considered to be made 'in good faith and in a commercially reasonable manner'.

24 Which liens and rights will have priority over aircraft ownership or an aircraft security interest? If an aircraft can be taken, seized or detained, is any form of compensation available to an owner or mortgagee?

If an aircraft is owned by a third party and then leased to the lessee, the aircraft will not be considered as part of the estate of the lessee and therefore, and as a general rule, creditors of the lessee will not be able to enforce their claims against the aircraft. The same applies to a pledge over an aircraft as, in order to respect the dispossession requirement, the pledgor is usually not the owner of the aircraft.

There are, however, exceptions where creditors of the lessee or pledgor may have a lien or a detention right over the aircraft. These are the cases where a right of detention is granted to the landlord of the hangar where the aircraft is stored, and to the repairmen who have carried works over the aircraft.

In both cases, the landlord and the repairmen may retain the aircraft until their debts have been paid. In order to be allowed to exercise a detention right, it is not necessary that the debtor be the owner of the aircraft. However, the landlord or the repairmen must be in good faith, in other words they must believe that the debtor had the power to conclude an agreement that could give rise to a detention right.

Moreover, in order to exercise a detention right, the claim of the landlord or the repairmen and the asset must be closely interconnected. There is a risk, however, that when works have been carried out on various aircraft on the basis of a global fleet maintenance agreement, the detention right could be exercised on a particular aircraft until outstanding payments relating to another aircraft are settled.

Taxes and payment restrictions**25 What taxes may apply to aviation-related lease payments, loan repayments and transfers of aircraft? How may tax liability be lawfully minimised?**

Lease rentals and loan instalments paid by a lessee or a borrower to lessors or lenders who are not tax residents of Belgium are, in principle, subject to a withholding tax of 25 per cent. However, several exceptions are available under applicable double tax treaties concluded by Belgium with the country where the beneficiary of the payment has its habitual residence.

Belgian VAT is generally applicable to lease rentals and to the sale of an aircraft, when the aircraft is located on Belgian soil or in Belgian airspace. However, if the buyer or lessee is an airline carrying cargo or passengers chiefly on international routes, they will benefit from a VAT exemption and the sale or the lease rentals will not be subject to VAT.

The current rate of Belgian VAT is 21 per cent. In case of a purchase by a buyer that does not benefit from VAT exemption, delivery of the aircraft usually takes place outside of Belgium and the sale agreement is governed by the law of a country that allows transfer of title to occur upon delivery and not upon signing of the sale agreement.

Lease or loan documentation frequently contains gross-up clauses. These clauses are contractual obligations of the lessee or the borrower, and generally not enforceable against third parties such as tax or VAT authorities.

26 Are there any restrictions on international payments and exchange controls in effect in your jurisdiction?

Belgium applies European law concerning free movement of capitals, as well as European rules on anti-money laundering.

Update and trends

The most relevant topic in Belgian aviation finance and leasing is the new legislation on security interests over aircraft and engines.

The most important element of such new legislation was the creation of a National Pledge Register, an electronic, online filing system where security interests could be created by simple registration. The new law was meant to come into force on 1 December 2014, however, the National Pledge Register has not yet been created. On 20 November 2014, the Belgian parliament approved a new law that postponed the coming into effect of the new legislation on security interests from 1 December 2014 to 1 January 2017, unless the National Pledge Register should be finalised before such date.

The new regime for pledges over moveable goods, once such regime would come into effect, opens the doors to new ways of structuring aircraft finance deals. First of all, the law eliminates the disposition requirement that meant that Belgian pledges over aircraft were seldom used. A Belgian pledge will now be perfected by simple registration in the National Pledge Register.

The registration requirement, provided that the registry will be freely accessible to the public (which is currently not the case), should add much needed transparency as the current regime does not provide for any registration in any public registry nor on the registration certificate of the aircraft.

Even more interesting is the fact that engines will also be able to be pledged as they are moveable goods.

The new law on security interests on moveable goods also contains provisions that should facilitate repossession of aircraft when on Belgian soil. Indeed, currently, the pledgee may only sell the aircraft at a public auction and apply the proceeds to its claims. With the coming into effect of the new law, pledgees will have the choice, if they have so agreed in writing with the pledgor, to repossess the aircraft and re-appropriate it, to sell it (at a public auction or through a private sale) or lease it.

Unfortunately, until the National Pledge Register is fully operational, this new legislation will not be applicable and the old regime will continue to apply.

Payments and transfers within Belgium and with foreign countries do not require any prior authorisation. Transactions may be executed in euros as well as in other currencies.

As regards exchange controls, in 1944 Belgium and Luxembourg set up the Belgian-Luxembourg Economic Union (BLEU) and the related Luxembourg Exchange Institute (BLEI) for foreign exchange control purposes. Until 1990, the year when the last foreign exchange control was abolished, the BLEI gathered data that were used to draw up the balance of payment statistics of the BLEU. As of 2002, when the BLEU was integrated within the European Monetary Union, Belgium and Luxembourg must provide separate balance of payments data, and the BLEI has been abolished. Its statistical function has, however, been taken over by the National Bank of Belgium.

27 Are there any limitations on the amount of default interest that can be charged on lease or loan payments?

Parties to a leasing or loan agreement may freely fix the applicable rate in case of default of the lessee or borrower. However, under Belgian law, Belgian judges may reduce the applicable rate if this rate considerably exceeds the damage suffered by the lenders or lessors. As this is a mandatory rule, if a contract governed by a foreign law is judged by Belgian courts, they may apply this rule irrespective of the applicable contractual law.

28 Are there any costs to bring the aircraft into the jurisdiction or take it out of the jurisdiction? Does the liability attach to the owner or mortgagee?

Aircraft used by airlines carrying cargo or passengers chiefly on international routes may be imported into Belgium free of customs duties. Compliance with customs formalities is, however, required. Compliance with customs duties is evidenced by the issue by the Ministry of Finance of a DL2 form in respect of the relevant aircraft. This form should be produced in order to register the aircraft with the Belgian registry.

If customs duties are due, the customs authorities will have recourse against any of the parties involved in the importation of the aircraft into Belgium. These include the owner, the lessor, the lessee, the holder and the consignee or consignee of the aircraft.

Insurance and reinsurance

29 Summarise any captive insurance regime in your jurisdiction as applicable to aviation.

There are no legal requirements in Belgium that insurances be placed with insurers incorporated in Belgium. However, the insurance of Belgian-registered aircraft may be exclusively placed with insurers who are authorised to sell insurances in Belgium, namely Belgian companies, foreign companies acting from a branch in Belgium or EEA companies. The insurance may not be placed with a non-EEA insurer unless such insurer acts through a Belgian branch.

As regards reinsurance, this may be placed anywhere. However, non-EEA companies may only offer reinsurance in Belgium if they have notified the Belgian Financial Services and Market Authority (FSMA), and they have been registered for this purpose with the FSMA.

30 Are cut-through clauses under the insurance and reinsurance documentation legally effective?

Under Belgian law, reinsurance does not create any legal relationship between the insured and the reinsurer. Therefore, in principle, the insured cannot seek payment of indemnity from the reinsurer. Legal scholarship, however, seems to be preferable to the option of including cut-through clauses, enabling the insured to bring an action against the reinsurer in the event of insolvency of the insurer.

31 Are assignments of reinsurance (by domestic or captive insurers) legally effective? Are assignments of reinsurance typically provided on aviation leasing and finance transactions?

No. Assignment of reinsurances is usually provided in Belgian leasing and finance transactions.

32 Can an owner, lessor or financier be liable for the operation of the aircraft or the activities of the operator?

Except for specific cases listed by the law (for example, the liability of the parents for acts committed by their children), Belgian law does not have a general principle of vicarious liability.

The lessor or owner may be held liable for damages caused to third parties by its own actions or inactions on the basis of general principles of tort and extra-contractual liability. To be held liable, the lessor or owner must have committed a fault that caused damage to a third party.

The lessor or owner may also be held liable for any damages caused by the aircraft when it was in their custody.

33 Does the jurisdiction adopt a regime of strict liability for owners, lessors, financiers or others with no operational interest in the aircraft?

There are two main types of strict liability that could be of interest in aircraft leasing transactions.

The first one is linked to the strict liability regime for ground losses. Indeed, Belgium is a contracting state to the Rome Convention of 7 October 1952, on Damage Caused by Foreign Aircraft to Third Parties on the Surface.

Under such Convention, as applied in Belgium, the operator of an aircraft is liable for damage caused by an aircraft in flight or for things or persons falling therefrom. The registered owner of the aircraft is presumed to be the operator and is liable as such unless, in the proceedings for the determination of its liability, it proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

If the person who was the operator at the time the damage was caused did not have the exclusive right to use the aircraft for a period of more than 14 days, dating from the moment when the right to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of the Convention.

The second ground of strict liability is product liability. Under Belgian law, the manufacturer bears strict liability for defective products. According to the law, a product is deemed to be defective when it does not offer the level of safety one can legitimately expect from it. If the manufacturer is based outside the EU, this strict liability will also bear on the importer of the aircraft. Article 4, section 1 of the law describes the 'importer' as the person who, within the course of its economic activity, 'imports' the product within the EU in order to sell or lease it.

However, what is actually meant by 'importing' is not defined by this law. One could perhaps look at the definition of the concept for the purpose of import formalities, set out in the customs and VAT regulations, and how this would apply in the particular circumstances. According to these regulations, it seems that the owner or lessor must be regarded as the importer. However, there is an argument to the effect that the objective

of article 4, section 1 is to impose liability on an entity established within the EU whenever the manufacturer is outside the EU and thus potentially out of reach for liability claims. The notion of 'importer' should thus be interpreted as referring to the first entity based in the EU which brings the goods within it. In this interpretation, the importer should be the operator based in the EU.

34 Are there minimum requirements for the amount of third-party liability cover that must be in place?

Belgium is bound by the provisions of European Regulation 785/2004 on insurance requirements for air carriers and aircraft operators (accidents with respect to passengers, cargo and third parties), and applies the minimum insurance requirements provided in such regulation.



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