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The International Comparative Legal Guide to: **Lending & Secured Finance 2018**

6th Edition

A practical cross-border insight into lending and secured finance

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty one general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 54 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Mexico

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

Mexico and the U.S. are not only neighbours, but strategic partners, whose cultures, nationals and economies are extremely interlinked and interdependent. Among others: (a) Mexico is the second country worldwide in terms of exports to the U.S.; (b) low inflation in the U.S. is dependent on the low costs of the manufacturing industry in Mexico; and (c) 36.3 million out of the 323.1 million U.S. population are identified as having full or partial Mexican ancestry.

2017 was the first year of the Trump administration, which has adopted policies that deeply affect Mexico. Amid these policies are:

- the U.S. tax reform, which will require Mexico to revisit its own tax framework to make it competitive and attractive for U.S. companies doing business in the country;
- the current renegotiation of NAFTA, the result of which may deeply influence both the Mexican and the U.S. economies; and
- in immigration, the building of a wall between the Mexican and U.S. borders, and the termination of DACA.

Furthermore, in 2018, Mexico will have presidential elections, and thus far the left-wing candidate is expected to win, a circumstance which will generate anxiety in the Mexican economy as his policies seem to be antagonistic to the *status quo*.

Despite the foregoing, the structural reforms carried out in the current administration of Enrique Peña Nieto continue to materialise, particularly in the Telecommunications, Infrastructure, Energy, and Gas sectors, which have witnessed significant foreign and domestic investments and thus, notwithstanding the nervousness being generated by the U.S.-Mexico relations and the forthcoming elections, we expect to continue seeing a great deal of economic activity during 2018.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

Over the last six years, since the beginning of the current administration, Mexico has witnessed the enactment of several structural reforms that are transforming the country and are generating significant investments and a relatively good amount of economic activity in the context of the world's economy.

In line with the foregoing, Mexico has seen and will continue to see important financial transactions in the Telecommunications,

Infrastructure, Energy, and Gas sectors, such as: (a) the USD\$2 billion financing of the Red Compartida (the Mexican public telecommunications network), which is one of the largest infrastructure and telecommunications projects in Mexico in recent years, and in which I acted as counsel to the lenders; (b) the financing of the new airport of Mexico City, which is expected to be one of the largest and most sophisticated airports in the world; and (c) several multimillion dollar lending transactions in the Energy and Gas sectors.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes. Guarantees can be created either under Mexican or foreign law, provided that, when created under foreign law, certain provisions shall be included in the foreign documents to ensure enforceability of a judgment thereof in Mexico against the Mexican guarantor.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

Regarding director's liability, there is none from a legal perspective so long as, to the extent applicable, in approving the transaction the directors comply with their statutory duties, which generally are: (a) in private companies, refrain from voting in matters with respect to which they have a conflict; and (b) in public entities, duties of loyalty and care.

In connection with enforcement, there are no concerns except that enforceability can be limited by bankruptcy (*concurso mercantil*), insolvency, liquidation, reorganisation, moratorium, labour, tax and other laws of general application relating to, or affecting the, obligations of debtors and the rights of creditors.

2.3 Is lack of corporate power an issue?

Yes. For a guarantee to be valid (a) the purpose of the company as per its bylaws must include authority for the company to guarantee third-party obligations, (b) as applicable, corporate approvals have to be implemented, and (c) the relevant documents have to be entered into by a duly appointed representative of the Mexican guarantor.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Corporate approvals may be required depending on the bylaws of the company.

Third party consents may be required depending on the contractual obligations assumed by the company.

Generally, no governmental consents/approvals/filings would be required, except for some regulated entities.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

No; however, it is important to note that the enforceability of a guarantee can be limited as provided in question 2.2 above.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

No exchange control.

Regarding enforcement of foreign guarantees, please refer to the answers above and note that provisions of article 1347-A of the Mexican Commerce Code, will need to be fulfilled for a foreign judgment to be enforced in Mexico.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Generally, and except for certain type of public assets, collateral can be created over any type of assets, through security trusts, pledges, and mortgages.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

1. Pledge over Equity Interests: To perfect collateral in Mexico over equity interests issued by a Mexican company, a Mexican stock/partnership interests pledge agreement needs to be implemented, jointly with the delivery to the pledgee of (i) if applicable, stock certificates duly endorsed in guarantee, (ii) evidence of registration of the pledge in the shareholders'/partners' registry book of the issuer, and (iii) stock powers to be exercised upon the occurrence/continuance of an enforcement event.

2. Pledge over Movable Assets: To perfect collateral in Mexico over any type of assets (other than equity interests and real estate), a Mexican floating lien/regular asset pledge agreement needs to be implemented. When structured as a floating lien pledge, the possession of the pledged assets will remain with the pledgor; when structured as a regular pledge, the possession of the pledged assets will be transferred to the pledgee.

In connection with items 1 and 2 above, it is important to note that the signatures of the parties to the equity interests pledge (to ensure priority over tax credits) and the floating lien/regular asset pledge (to comply with perfection requirements under Mexican law), must be ratified before a Mexican notary public, and the

agreement shall be registered at the *Registro Único de Garantías Mobiliarias*. To accomplish the notarial ratification, representatives of such parties must be present at closing to execute the agreement and the ratification deed in front of a Mexican notary public with a valid Mexican law power of attorney. Also, in case the floating lien/regular asset pledge covers any trademarks or other intellectual property registered in Mexico, such pledge shall also be registered at the Mexican Institute of Industrial Property (IMPI). Additional formalities and third-party consents may apply depending on the nature of the grantor and the collateral assets.

3. Security Trust: As an alternative to the pledge structures referred in items 1 and 2 above, and to the mortgage structure referred in question 3.3 below, a Mexican security trust structure can be implemented and used to create, among others, a general security structure encompassing all or a substantial number of the assets of a grantor or a relevant project.

In general, under a trust, the sponsors/security providers will transfer ownership/title of assets to a trustee (a Mexican bank or a financial entity authorised to act as such), with the purpose of (i) securing the payment and the performance of obligations under the relevant financing documents, (ii) managing the collateral assets, and/or (iii) serving as a source of payment of the relevant debt.

The formalities for incorporating, operating and transferring assets to a trust will depend on the nature of the sponsors/security providers and the assets involved. These formalities include the ratification of the signatures of the parties involved and of the trust agreement before a Mexican notary public, and the registration of the trust agreement at the *Registro Único de Garantías Mobiliarias*.

The primary advantages of the trust structure are that it makes the collateral assets remote to the bankruptcy of the sponsors/security providers as there is a "true sale" of the assets to the trustee, and that it gives additional control and enforcement capabilities over the assets in an enforcement event. The primary disadvantages of the trust structure are that it may interfere with the operations of the sponsors/security providers and affect third parties related to their business (as the assets are transferred to a third-party trustee), and that its implementation represents additional costs.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Collateral over Real Estate (land and buildings): To perfect collateral in Mexico over Mexican land and/or buildings, a Mexican mortgage shall be implemented.

- In terms of Mexican law, a mortgage must be granted through a notarial deed and thus representatives of the grantor shall be present at closing in Mexico to execute the same before a notary public with a valid Mexican law power of attorney.
- In addition, and in terms of Mexican law, for a mortgage to produce effects *vis-à-vis* third parties, it shall be registered at the *Registro Público de la Propiedad* of the place where the mortgaged assets are located.
- In connection with the creation of security over machinery and equipment, please refer to question 3.2, item 2.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Please refer to question 3.2, item 2.

Additionally, regarding debtors' notification, debtors are not required to be notified for the collateral to be perfected; however, it

is convenient to carry out notifications so that debtors acknowledge the existence of the collateral and the fact that once and if enforced, they must pay the creditors resulting from the enforcement.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Please refer to question 3.2, item 2.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Please refer to question 3.2, item 1.

Regarding certificate formalities, they depend on the corporate form of the issuer but generally shares are in certificated form.

Regarding the possibility of creating collateral over these assets through foreign documents, this is not possible.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Please refer to question 3.2, item 2.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. Any collateral over assets located in Mexico must be governed by Mexican law.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

In most cases where security is granted, the participation of a notary public is required. Notarial fees are variable and will depend on the type of document and/or security interest being created; these fees are topped out in most cases but can be high (although, in large transactions or when topped fees are high, notaries can and will typically grant fee discounts).

Registration fees for security over real estate are associated with security registration at public registries. All security over real estate must be registered at the local public registry of property for the security to be perfected and opposable to third parties, and fees will also greatly vary from state to state. In most cases, registration fees are also topped out by local authorities, but in some cases special discounts may apply when the security is associated with benefits for the locality or state (i.e., infrastructure, investment, etc.).

While registration of security over assets other than from real estate, such as receivables, cash deposited in bank accounts, inventory and similar assets will typically be required (depending on the type of security being created), documents evidencing security over these movable assets are, as of recently, electronically registered at the *Registro Único de Garantías Mobiliarias*, and there are no material fees payable for such registration.

Please note that, in addition to the above, in some other cases and in certain local jurisdictions, additional taxes or fees may apply on perfection and/or registration of security.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

The time and/or expenses associated with creating, perfecting and registering security in Mexico vary on a case-by-case basis. The number of secured assets, type and extent of security, nature of the assets in security (i.e. real estate, receivables, etc.) all play a role in determining the amount of time and expense.

Registration of real estate-backed security can take anywhere from a few days to a couple of months, depending on the locality where it needs to take place. Registration of security over movable assets can be done in a matter of days and at marginal cost. As for costs associated with creation, notarisation and perfection, please refer to the foregoing answers.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

There can be, if the project involves regulated entities/assets. Security over permits, concessions, procurement contracts, licences and other regulated assets (such as pipelines, water treatment plants, energy plants, mining properties), or over companies or entities that use, procure, manage and/or operate such assets, will typically require prior governmental approval to create security over them (or, at best, prior notice to the relevant authorities).

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No, there are not.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Please refer to questions 3.2, 3.9 and 3.10.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

No, not generally.

5 Syndicated Lending/Agency/Trustee/Transfers

- 5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?**

Yes. Mexico would recognise the role of security agents. In some cases, the granting of a Power of Attorney to the agent by the secured parties to act as such may be advisable.

- 5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

This is not applicable in Mexico.

- 5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?**

Specific contractual requirements may apply. Also, unless the Mexican borrower entity is notified of the assignment, it will be released of its obligations by paying to Lender A.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

- 6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Yes. Withholding taxes generally apply to interest payable to foreign lenders, as well as to the proceeds of a claim or an enforcement of security that are destined for payment of interests, commissions or fees (and not principal). The withholding rate will depend on the underlying transaction, the characteristics and nature of the relevant lender, the applicability of international taxation treaties and other related factors.

Please note that withholding requirements do not apply to Mexican banks and financial entities, which will calculate and pay their taxes in accordance with applicable Mexican tax laws.

- 6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

Mexico has entered into many treaties to avoid double taxation with different countries, and each treaty or agreement provides for

distinct types of privileges, restrictions, fees, and, in some cases, exemptions thereof.

- 6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?**

Foreign lenders are required to pay income tax if they have a permanent establishment within Mexican territory, or when the income comes from sources within the Mexican territory.

- 6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?**

Please refer to section 3.

- 6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.**

No, there are not.

7 Judicial Enforcement

- 7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?**

Yes. Mexican law allows the parties to choose the governing law and submission to jurisdiction; also, Mexican courts will recognise a judgment under a foreign law governed agreement, so long as such foreign laws do not contravene Mexican law principles.

- 7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?**

Please refer to question 7.1.

- 7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?**

Timing depends on the circumstances of the particular cases, applicable foreign governing laws, and applicable foreign jurisdictions, as well as on the consistency with Mexican law principles.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

Yes. Foreclosure of a mortgage or a regular pledge will typically require a summary judicial procedure that would ultimately result in public auctions to sell (or transfer) the collateral as payment to the lenders. For non-possessory pledges and security trusts, it is possible to choose between a judicial and a non-judicial procedure.

As for regulatory consents, typically the same consents required, if applicable, for the creation of security will apply to its foreclosure (especially if the receiver or buyer of the assets is not the same entity as that which requested the original consent), but in many cases, the original consent would cover the ability to foreclose on the assets, subject in some cases to prior notice to the relevant authorities. Also, enforcement can be significantly affected or impacted in case of reorganisations or bankruptcy under applicable law.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

Generally, no; however, restrictions applicable to foreign investors or creditors to own or operate certain assets (restrictions on foreign investment) will apply to foreign investors or creditors in the event of a foreclosure.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

Yes. From the date of the bankruptcy judgment to the end of the reorganisation stage, no claim or foreclosure will be enforceable against the company pursuant to the Federal Bankruptcy Law.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes. Mexican courts have a legal obligation to recognise contractual submission of disputes to international arbitration, as well as international arbitral awards, subject to compliance with procedural and formal requirements under the Mexican Commerce Code and applicable international treaties. Please note that enforcement of an arbitral award may be denied, among other applicable matters if: (i) one of the parties to the arbitration agreement did not have adequate or sufficient legal capacity to enter into such arrangement or such arrangement is not valid under the laws chosen by the parties; (ii) service of process is not correctly and legally completed; (iii) the award refers to a controversy which, under the terms of the arbitration agreement, was not subject to arbitration or contains a decision that exceeds the terms of such arbitration agreement; (iv) the subject matter of the arbitration procedure cannot be arbitrated or the enforcement of the award is contrary to Mexican law, public policy of Mexico, international treaties or agreements binding upon Mexico; or (v) the award is not final in the jurisdiction where it was obtained.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

Mexico's Federal Bankruptcy Law is the general statute governing reorganisation and bankruptcy proceedings throughout Mexico. Reorganisation and/or bankruptcy proceedings will directly affect enforcement of a security for a lender, but the impact will greatly vary depending on the legal robustness of the security received by such lender.

In general terms, and subject to exemptions and rights, the Federal Bankruptcy Law treats a lender secured under a security structure created under a pledge or a mortgage as a secured creditor. Important benefits afforded to a secured creditor are priority ranking, continued ordinary interest accrual, loan currency protection and (subject to some exemptions) ability to participate or not in the eventual creditor agreement that concludes the reorganisation proceeding; in the event no agreement is reached and the relevant company becomes bankrupt, secured creditors have the right to foreclose on their security, and they have the same right if such an agreement is validly reached but not signed by the relevant creditor.

Because, as explained above, under a trust title, the assets that form the trust estate are transferred to the relevant trustee and therefore subtracted from the patrimony of the relevant company; lenders secured by or through a trust have, through this agreement, a bankruptcy remote vehicle under applicable law. Please note, however, that in recent cases, while this remoteness has been generally accepted by Mexican courts, precautionary measures issued by Mexican courts have temporarily frozen enforcement and foreclosure of assets under trusts on the basis, among others, of the need for the company subject to the reorganisation procedure to use such assets for its survival.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

Yes. The Federal Bankruptcy Law and its associated regulations establish clawback rights (general 270 clawback period for fraudulent conveyance) and also sets forth a list which, subject to exemptions and interpretation, sets forth the following ranking priorities for creditors: (i) singularly privileged creditors (i.e. burial and sickness expenses); (ii) secured creditors (those secured with an *in rem* guarantee, such as the pledges and mortgage agreements); (iii) specially privileged creditors; and (iv) common (typically unsecured) creditors. However, please note that credits against the asset mass, such as certain tax or labour credits, debts incurred while at the reorganisation process, asset maintenance and other similar costs, may have higher ranking than secured credits and will typically be paid first.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

Yes. Governmental entities (i.e., states, municipalities, and certain government entities) are not subject to the Federal Bankruptcy Law. However, they can (and have) implemented trust structures to guarantee debt instrument offerings and other forms of financing, even governmental procurement, and ascertain that assets transferred to such trust are considered to be isolated from the reach of said governmental entity and could be subject to the Federal Bankruptcy Law.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes; however, please note that Mexican law does not allow the actual seizing or taking possession of assets through out-of-court proceedings; therefore, any actual seizure or taking possession of project assets prior to the conclusion of an out-of-court proceeding of foreclosure must be undertaken and approved by the applicable courts.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Please refer to question 7.1.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

Sovereign immunity is not recognised in Mexico; thus, a waiver of immunity is generally valid in Mexico.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank versus a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

In general, there are no licencing or other eligibility requirements applicable under Mexican laws.

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

No, there are not.



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José Ignacio Rivero is a business-oriented lawyer with over 15 years of experience providing legal and business advice to clients in banking and finance, capital markets, corporate law, mergers and acquisitions, real estate, and private equity. He has developed a practice focus in structured finance, finance strategy, refinancing, secured loans, among others.

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