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ESTABLISHING TIME LIMITS FOR SEPARATIST CREDITORS TO RELEASE THEIR RIGHTS AFTER AN INSOLVENTION CIRCUMSTANCE STARTS

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ABSTRACT
According to Article 55, paragraph 1 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (Bankruptcy Law and PKPU), creditors who hold pledges, fiduciary guarantees, mortgage rights, or collateral rights for other objects (separatist creditors) may, in theory, exercise their legal rights as if bankruptcy had not occurred. For separatist creditors, it is extremely difficult to carry out collateral execution within the two-month timeframe specified in Article 59, Paragraph 1 of the Bankruptcy Law and PKPU. The purpose of this study is to ascertain if the principle of material rights is violated by setting a two-month deadline for separatist creditors to assert their rights following the commencement of an insolvency crisis. The principles of property rights regulated in Article 21 of the Mortgage Law and Article 27 paragraph (1) of the Fiduciary Law are examined in this research along with the provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU. However, because of the principle of *lex specialis derogat legi generalis*, which is present in both the Bankruptcy Law and PKPU, they have the authority to supersede the Mortgage Rights Law and the Fiduciary Law. The goal of this study is to ascertain whether or not the concept of material rights is violated by setting a two-month deadline for separatist creditors to assert their rights following the onset of an insolvency scenario. In the realm of bankruptcy law in particular, it is hoped that this research will help clarify the two-month period from the onset of an insolvency situation within which separatist creditors can assert their rights in bankruptcy disputes.

KEY WORDS
Bankruptcy, insolvency, material security rights, law.

Indonesia, as a country that prioritizes the importance of the rule of law, must be based on the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) as the state constitution and must implement the values contained in Pancasila as the basic philosophy of the state. All legal regulations made must not conflict with the 1945 Constitution of the Republic of Indonesia, which is the highest source of law in Indonesia (Asnawi, 2016). Every regulation made must be in accordance with the nation's ideals contained in the nation's philosophy. This basis can be seen in Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the Bankruptcy and PKPU Law) in letter a of the preamble. In principle, the bankruptcy law and PKPU are expected to guarantee legal certainty and protection for the community (Ginting, 2018).

The presence of the Bankruptcy Law and PKPU is very important to provide protection in resolving debt-receivable relationships on a pro rata basis (Lie, 2023), Bearing in mind that the capital owned by debtors generally comes from various sources of financing and loans, including banking, investment, bonds, and other agreements that give rise to various obligations that can be valued in monetary terms (Saija, 2016). By considering the domino effect (multiplier effect) that can arise from these debt-receivable relationships, a legal instrument is needed that can provide debt settlement that prioritizes business continuity (going concern) and provides reasonable protection guarantees for various parties in bankruptcy resolution and PKPU (Saputra, 2020).

Debtors who have been declared bankrupt based on a Commercial Court decision originating from a bankruptcy petition can be declared insolvent in accordance with the

provisions of Article 178, paragraph (1), of the Bankruptcy Law and PKPU for several sufficient reasons, namely (Surjanto, 2018): 1) at the receivables matching meeting, no peace plan was offered; 2) the peace plan offered was not accepted; and 3) the ratification of the peace agreement is rejected based on a decision that has obtained permanent legal force. In addition, debtors who have been declared bankrupt based on a Commercial Court decision originating from a PKPU application can be declared insolvent in accordance with the provisions of Article 292 of the Bankruptcy Law and PKPU for several sufficient reasons, namely (Tamba, 2018): 1) the commercial court refuses to ratify the settlement; 2) the peace plan is rejected; and 3) the Commercial Court decision cancels the peace agreement. Whereas in the explanation of Article 292 of the Bankruptcy Law and PKPU, it states: "*The provisions in this article mean that the decision to declare bankruptcy results in the debtor's bankruptcy assets being immediately in a state of insolvency.*"

The interpretation of insolvency conditions has been regulated in the explanation of Article 57, paragraph (1) of the Bankruptcy and PKPU Law, stating: *"what is meant by insolvency is a state of being unable to pay."*

Determining the start of an insolvency situation is related to legal protection and certainty for creditors, especially separatist creditors, to sell debtor collateral, as regulated in Article 59, paragraph (1), of the Bankruptcy Law and PKPU, states (Sibli et al., 2023): *"By still paying attention to the provisions of Article 56, Article 57, and Article 58, creditors holding rights as intended in Article 55 paragraph (1) must exercise their rights within a period of no later than 2 (two) months after the insolvency situation as intended in Article 178 begins paragraph (1)."*

In practice, the provisions of Article 59, paragraph (1), of the Bankruptcy Law and PKPU give rise to problems due to inconsistencies between the article and the explanation of the article, which results in multiple interpretations in its implementation. The discrepancy is that in the article it states that the creditor must exercise his rights if he has already started exercising his rights, whereas in practice, this ultimately causes the sales time to become increasingly unclear. Starting to exercise his rights is considered to be just starting preparations for the sale, and so on. This actually causes the sales time to become increasingly unclear.

The provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which require separatist creditors to exercise their rights within a period of no later than 2 (two) months after the insolvency situation begins, are actually contrary to the provisions of Article 55 paragraph (1) of the Bankruptcy Law and PKPU, which state (Amboro, 2023): *"By still paying attention to the provisions as intended in Article 56, Article 57, and Article 58, every creditor holding a pledge, fiduciary guarantee, security right, mortgage, or collateral right over other objects can execute their rights as if bankruptcy had not occurred."*

The provisions of Article 59, paragraph (1), of the Bankruptcy Law and PKPU are contrary to the principle of civil property rights as regulated in the Fiduciary Guarantee, Mortgage, and Pawn Law, which creditors have the right to execute the existing collateral in the event that the debtor fails to carry out his obligations. The provisions in Article 59, paragraph (1), of the Bankruptcy Law and PKPU giving a period of two months are considered irrational because the sales process requires bidding and agreement time. Therefore, this provision makes things difficult for creditors holding collateral rights and shackles their rights to material collateral obtained based on statutory regulations.

Determining a time limit for separatist creditors to exercise their rights to the collateral object will provide legal protection and certainty for other creditors, namely preferred creditors and concurrent creditors, regarding the debtor's assets if the separatist creditor cannot exercise his or her right to sell the debtor's collateral within the specified time period after the commencement. state of insolvency. Apart from that, debtors who are represented by curators provide legal protection and certainty for them, as regulated in Article 59, paragraph (2) of the Bankruptcy and PKPU Law, state: *"after the time period as intended in paragraph (1) has passed, the curator must demand that the object that is used as collateral be handed over to be sold in accordance with the method as intended in Article 185, without*

reducing the rights of the creditor holding the right to the proceeds from the sale of the collateral."

Based on these provisions, if the separatist creditor cannot exercise his right to sell the debtor's collateral within the specified time period after the insolvency situation begins, the curator must request that the collateral be handed over for sale in public. The provisions of Article 59, paragraph (2), of the Bankruptcy Law and PKPU have unclear formulations, burden creditors holding material security rights, and conflict with the executorial rights of material collateral held by creditors holding material rights. Apart from that, there is a problem for the curator, who has to ask the separatist creditor to hand over the objects that are collateral to be sold in public after a period of two months has expired after the start of the insolvency situation, and there are no legal remedies for the curator if the separatist creditor does not want to hand over the object as collateral to the curator (Sibli et al., 2023). This research examines the provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which conflict with the principles of property rights regulated in Article 21 of the Mortgage Rights Law and Article 27 paragraph (1) of the Fiduciary Law, but with the existence of the principle of lex specialis derogat legi generali, namely the Bankruptcy Law and PKPU, they can override the Mortgage Rights Law and the Fiduciary Law.

METHODS OF RESEARCH

This type of research is normative legal research (Ibrahim, J & Efendi, 2016), namely legal research, which focuses on the study and analysis of positive law and includes various aspects, namely aspects of theory, philosophy, comparison, structure and composition, scope and material, consistency, general explanation article by article, formality and binding force of a law, as well as the legal language used. Researchers try to focus on and answer problems from a legal perspective and ignore norms other than the law.

Due to the fact that this type of research is normative legal research (Ibrahim, 2006), the approach used is a statutory approach and a conceptual approach. A statutory approach is used because what will be studied are legal regulations related to this research, namely bankruptcy laws and regulations. This approach is carried out by reviewing all laws and regulations related to bankruptcy. This approach is also used to find answers to the legal content material formulated in this research.

The conceptual approach is a research approach that is based on the views and doctrines that have developed in legal science. Looking at these views and doctrines, legal definitions and legal concepts will be found, namely those related to the nature and application of theory in accordance with the problem or legal content material to be studied. Through this conceptual approach, it is hoped that legal arguments can be made to answer the legal content material, which is the starting point for research (Rusli, 2006).

RESULTS AND DISCUSSION

Creditors are people who have receivables due to agreements or laws that can be collected before the court. According to the explanation in Article 2, paragraph 1, of the Bankruptcy Law and PKPU, there are three types of creditors: concurrent creditors, separatist creditors, and preferred creditors. Separatist creditors with material security rights have a special position so that their level is higher than that of other creditors, as regulated in Article 1133 and Article 1134 of the Civil Code, as well as Article 55 paragraph (1) of the Bankruptcy Law and PKPU recognizing the position of separatist rights as having priority. There are problems that prevent separatist creditors (creditors with material security rights) from obtaining their rights to be prioritized, namely the provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which are not in line with Article 55 paragraph (1) of the Bankruptcy Law and PKPU, Article 21 of the Law on Mortgage Rights, and Article 27 paragraph (1) of the Fiduciary Law. Article 59 paragraph (1) of the Bankruptcy and PKPU Law states: "*While still paying attention to the provisions of Article 56, Article 57, and Article 58, creditors holding rights as intended in Article 55 paragraph (1) must exercise their rights*

within a period of no later than 2 (two) months after the start of the insolvency situation as intended in Article 178 paragraph (1)."

The provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU state that by still paying attention to the provisions of Article 56, Article 57, and Article 58, creditors hold rights as intended in Article 55 paragraph (1) of the Bankruptcy Law and PKPU (namely mortgage rights, lien rights, fiduciary rights, and mortgage) and must exercise these rights within a period of no later than 2 (two) months after the start of the insolvency situation as intended in Article 178 paragraph (1) of the Bankruptcy and PKPU Law. In the explanation of Article 59 paragraph (1) of the Bankruptcy and PKPU Law, it is stated: *"What is meant by having to exercise their rights is that creditors have started to exercise their rights."* In practice, the provisions governing Article 59 paragraph (1) of the Bankruptcy Law and PKPU give rise to problems due to inconsistencies between the article and the explanation of the article, which results in multiple interpretations in its implementation (Santi Dewi & Ardani, 2020). The discrepancy is that in the article it states that the creditor must exercise his rights if he has already started exercising his rights, whereas in practice, starting to exercise his rights is considered to be just starting preparations for the sale and so on. This actually causes the sales time to become increasingly unclear.

The provisions governing Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which require separatist creditors to exercise their rights within a period of no later than 2 (two) months after the insolvency situation begins, are actually contrary to the provisions of Article 55 paragraph (1) of the Bankruptcy Law and PKPU, which state: "*By still paying attention to the provisions as intended in Article 56, Article 57, and Article 58, every creditor holding a pledge, fiduciary guarantee, security right, mortgage, or collateral right over other objects, can execute their rights as if bankruptcy had not occurred."* In the Forum Group Discussion (FGD), bankruptcy law expert Ricardo Simanjuntak argued that (Simanjuntak et al., 2014):*" "Article 55, paragraph (1), is not excluded. So that is the consistency of Article 21 of the Mortgage Rights Law (if the Mortgage Rights giver is declared bankrupt, the Mortgage Rights holder remains authorized to exercise all rights obtained according to the provisions of this law) and the consistency of Article 27 paragraph 1 of the Fiduciary Law (Fiduciary Recipients have priority rights against other creditors)".* Article 21 of the Mortgage Rights Law states: *"If the Mortgage Rights holder is declared bankrupt, the Mortgage Rights holder remains authorized to exercise all rights obtained according to the provisions of this law."*

The regulatory provisions in the Mortgage Rights Law are in line with the provisions regulated in the Fiduciary Law, which states that fiduciary guarantees are collateral rights over objects for debt repayment. In addition, the provisions in the Bankruptcy Law and PKPU determine that objects that are the object of fiduciary collateral are outside bankruptcy (Silalahi, 2020). Every creditor holding security rights, whether holders of pledges, fiduciaries, or mortgages, has their rights guaranteed by statutory regulations that specifically regulate each material security. Creditors holding collateral rights have been given special privileges in the form of droit de preference (Adjie, 2023), namely that creditors holding collateral rights are given priority so that their receivables are paid first before the receivables of concurrent creditors are paid off from the proceeds of the sale of the debtor's assets, and the rights of creditors holding collateral rights are guaranteed. to obtain repayment from the sale of collateral rights.

The provisions of Article 59, paragraph (1), of the Bankruptcy Law and PKPU are contrary to the principle of civil property rights as regulated in the Fiduciary Guarantee, Mortgage, and Pawn Law, which creditors have the right to execute the existing collateral in the event that the debtor fails to carry out his obligations. The provisions in Article 59, paragraph (1), of the Bankruptcy Law and PKPU giving a period of two months are considered irrational because the sales process requires bidding and agreement time. Therefore, this provision makes things difficult for creditors holding collateral rights and shackles their rights to material collateral obtained based on statutory regulations.

Carrying out collateral execution within a period of two months, as intended in Article 59, Paragraph 1, of the Bankruptcy Law and PKPU, is very difficult for separatist creditors. This provision is, of course, very unrealistic and contrary to the concept of material security

law, which recognizes the rights of creditors holding collateral. There are many factors outside the control of separatist creditors that make the execution of collateral rights protracted. For example, is it possible for a bank to sell a cement factory or a 5-star hotel that is collateral for the bank based on the encumbrance of mortgage rights in just two months? The preparation period, plus the time to find a buyer, for completing the sale and purchase agreement and receiving the money from the sale of the cement factory or hotel can take between 1-2 years, and it is not impossible that it may even take longer than two years.

Apart from that, due to time constraints and a relatively short period of time, separatist creditors, if after the first auction process they sell collateral objects at market value, are not sold, then it is not uncommon for separatist creditors to immediately sell collateral objects at liquidation value in the second auction process, so that the selling value of the collateral object is not optimal. Whereas the auction sale process of collateral objects with liquidation value is within the authority of separatist creditors, in this case, it is not uncommon for bankrupt debtors to feel disadvantaged and take legal action against the sale of collateral objects. Thus, the execution of collateral rights for a separatist creditor, if limited to a period of two months, will be very difficult to carry out, unrealistic, and contrary to universally accepted guarantee law. Apart from that, if the collateral object is sold, the selling value of the collateral object could potentially not reach the maximum selling value.

As is known, debtors who have been declared bankrupt based on a Commercial Court decision originating from a bankruptcy petition can be declared insolvent in accordance with the provisions of Article 178 paragraph (1) of the Bankruptcy Law and PKPU for several sufficient reasons, namely: 1) no plan was offered at the receivables matching meeting.; 2) the peace plan offered was not accepted; and 3) the ratification of the peace agreement is rejected based on a decision that has obtained permanent legal force. Apart from that, debtors who have been declared bankrupt based on the Commercial Court decision originating from a PKPU application can be declared insolvent in accordance with the provisions of Article 292 of the Bankruptcy Law and PKPU for several sufficient reasons, namely: 1) The Commercial Court refuses to ratify the settlement; 2) the peace plan is rejected; and 3) the Commercial Court decision cancels the peace agreement. Whereas in the Explanation to Article 292 of the Bankruptcy Law and PKPU, it states, "The provisions in this article mean that the decision to declare bankruptcy results in the debtor's bankruptcy assets being immediately in a state of insolvency." Therefore, the concept of the time frame between the passing of a bankruptcy decision and the occurrence of an insolvency situation, which is the basis for the authority to execute separatist creditors, needs to be clarified to prevent the time for separatist creditors to execute material guarantees from being reduced.

If you read Article 55, paragraph 1, of the Bankruptcy Law and PKPU, the Bankruptcy Law and PKPU actually recognize the separatist rights of creditors holding collateral rights. However, if you then read Article 59, paragraph (1), of the Bankruptcy Law and PKPU, the separatist creditor's rights to objects that have been encumbered with collateral rights are limited to 2 (two) months for the separatist creditor to sell them themselves (Khisni & Hanim, 2017). The provisions of Article 59, paragraph (1), of the Bankruptcy Law and PKPU are very burdensome for separatist creditors because it is very unrealistic to sell assets of large value in just two months. The irregularities of the Bankruptcy Law and PKPU need to be corrected by not limiting the length of time for the right to execute collateral rights because execution is the right of separatist creditors in accordance with statutory regulations. Therefore, the provisions of Article 59, paragraph (1), of the Bankruptcy Law and PKPU, especially the phrase *"has started exercising his rights,"* need to be emphasized, especially the regulation regarding realistic time limits.

In principle, the material guarantee agreement made between the separatist debtor and creditor is that a legal relationship has been established. According to Maryati Bachtiar, an agreement is a legal act between two or more parties who have agreed to provide binding rights and obligations for the parties. Based on the material security rights agreement that has been made between the separatist debtor and creditor, the agreement is binding on the parties as a law (pacta sunt servanda) in accordance with Article 1338 of the Civil Code,

which states (Siswanta, 2023): *"All agreements made are in accordance with the law, which applies as law to those who make them. This consent cannot be withdrawn other than by agreement of both parties or for reasons determined by law. Agreements must be implemented in good faith."* The agreements made by separatist debtors and creditors are material security agreements that have their own legal rules, namely in the form of pledges, fiduciary guarantees, security rights, mortgages, or collateral rights for other objects. According to Salim HS, guarantee law is the totality of legal rules that regulate the legal relationship between the giver and recipient of collateral in relation to the imposition of collateral to obtain credit facilities. Therefore, it is appropriate that the legal relationship between separatist debtors and creditors be subject to the rules of material security law that regulate it.

In regulating material security rights in the Bankruptcy Law and PKPU, if you look at the provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which are contrary to Article 55 paragraph (1) of the Bankruptcy Law and PKPU, Article 21 of the Mortgage Law, and Article 27 paragraph (1), the Fiduciary Law has created a conflict of norms regarding these provisions. According to Hans Kelsen, norm conflict occurs if in one regulatory product there are two norms that conflict with each other or one norm is not compatible with another norm, so that if one norm is carried out and implemented, it will cause a violation of the other norm. The existence of conflicting norms in Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which conflict with Article 55 paragraph (1) of the Bankruptcy Law and PKPU, Article 21 of the Mortgage Rights Law, and Article 27 paragraph (1) of the Fiduciary Law, has resulted in the absence of legal certainty. for separatist creditors on collateral for their material rights. According to Jan M. Otto, legal certainty requires clear, consistent, and easy-to-obtain laws published by the state and the government to apply these rules consistently and comply with them.

In discussing norm conflicts, it is necessary to first understand the meaning of the word derogation, which is used as part of each rule in norm conflicts, namely the principles of *lex specialis derogat legi generalis*, *lex superior derogate legi inferiori*, and *lex posterior derogate legi priori.* The word derogation in the legal realm means eliminating value, validity, or effectiveness, so that in the context of norm conflict, derogation can be interpreted as eliminating the validity of one norm over another norm. Its function is very important in determining which norms should be prioritized or enforced if there are conflicting norms. As a solution to the problem of conflicting norms in a regulation, a juridical mechanism is needed to determine the validity of a regulation that is considered a contradiction so that it can be determined which norms should be implemented and which norms should be set aside. Based on this, the principle of conflict of norms or legal rules (legal maxim), namely the principle of *lex specialis derogat legi generalis*, is used as test material for problem solving in this research. The principle of *lex specialis derogat legi generalis* means that specific laws (legal norms or rules) negate the applicability of general laws (legal norms or rules) (Djatmiko Andrie et al., 2023). The rationale for prioritizing this special law is that special legal rules are certainly more relevant, compatible, and better adapted to legal needs. In relation to this research, the bankruptcy law and PKPU are *lex specialis*, while the mortgage law and fiduciary law are *legi generalis*. Even though the provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU conflict with the principles of property rights regulated in Article 21 of the Mortgage Law and Article 27 paragraph (1) of the Fiduciary Law, the existence of the principle of *lex specialis derogat legi generalis*, namely the Bankruptcy Law and PKPU, can override the Mortgage Rights Law and the Fiduciary Law, so in the context of bankruptcy and PKPU, the regulation of material security rights remains guided by the provisions in the Bankruptcy Law and PKPU (Wicaksana, 2021).

Furthermore, related to the issue of separatist creditors' rights to objects that have been encumbered with collateral rights, they are limited to 2 (two) months for sale by the separatist creditors themselves, so to guarantee and protect the rights of creditors holding collateral rights who have receivables from debtors, it is necessary to change the provisions in Article 59 paragraph (1) of the Bankruptcy and PKPU Law, among other things: the sales period as regulated in Article 59 paragraph (1) of the Bankruptcy and PKPU Law may be

maintained by adding a more realistic sales period, for example, to 4 (four) months or more, like the opinion of Ricardo Simanjuntak. The reason for the additional time is because it is difficult to get a decent price if separatist creditors are only given two months. Another consideration for adding time is that in carrying out general sales through auction, time is needed for administrative preparation, announcements, and implementation of the auction. Based on Minister of Finance Regulation Number 122 of 2023 concerning Instructions for Implementing Auctions, especially in relation to collateral assets of creditors such as those that require time from administrative preparation, announcement, and implementation of the auction, If the agreed price is not reached, a second auction will be carried out using the same stage process as before, so that the two-month time provided to carry out the sale as in Article 59, paragraph (1) of the Bankruptcy and PKPU Law is unrealistic. Based on this, it is necessary to provide additional time, for example, up to four months or more. If, after four months, the sale is not successful, then it must be handed over to the curator.

CONCLUSION AND SUGGESTIONS

The provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU, which require separatist creditors to exercise their rights within a period of no later than two months after the start of the insolvency situation, are contrary to the provisions of Article 55 paragraph (1) of the Bankruptcy Law and PKPU. The provisions of Article 59, paragraph (1), of the Bankruptcy Law and PKPU are contrary to the principle of civil property rights as regulated in the Fiduciary Guarantee, Mortgage, and Pawn Law, which creditors have the right to execute the existing collateral in the event that the debtor fails to carry out his obligations. The provisions in Article 59, paragraph (1), of the Bankruptcy Law and PKPU giving a period of two months are considered irrational because the sales process requires bidding and agreement time. Therefore, this provision makes things difficult for creditors holding collateral rights and shackles their rights to material collateral obtained based on statutory regulations. The bankruptcy law and PKPU are *lex specialis*, while the mortgage law and fiduciary law are *legi generalis*. Even though the provisions of Article 59 paragraph (1) of the Bankruptcy Law and PKPU conflict with the principles of property rights regulated in Article 21 of the Mortgage Law and Article 27 paragraph (1) of the Fiduciary Law, the existence of the principle of *lex specialis derogat legi generalis*, namely the Bankruptcy Law and PKPU, can override the Mortgage Rights Law and the Fiduciary Law, so in the context of bankruptcy and PKPU, the regulation of material security rights remains guided by the provisions in the Bankruptcy Law and PKPU. In order to guarantee and protect the rights of creditors holding collateral rights who have receivables from debtors, it is necessary to amend the provisions in Article 59 paragraph (1) of the Bankruptcy Law and PKPU, including the sales period as regulated in Article 59 paragraph (1) of the Bankruptcy Law and PKPU. Presumably this will be maintained by adding a more realistic sales period, for example, four months or more.

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