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RESPONSE OF CITY OF LONDON LAW SOCIETY INSOLVENCY LAW COMMITTEE TO THE INSOLVENCY SERVICE CALL FOR EVIDENCE ON THE EUROPEAN COMMISSION RECOMMENDATION ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY

INTRODUCTION

1. We refer to the Insolvency Service Call for Evidence entitled "*European Commission Recommendation on a new approach to business failure and insolvency*" published in February 2015 (the **Consultation**) and to the related Commission Recommendation of 12 March 2014 (the **Recommendation**). This response has been prepared by the City of London Law Society (CLLS) Insolvency Law Committee.

2. The CLLS represents approximately 12,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments.

3. The CLLS responds to Government consultations on issues of importance to its members. The CLLS Insolvency Law Committee, made up of solicitors who are expert in their field, have prepared the comments below in response to the Consultation. Members of the working party listed in the Schedule attached will be glad to amplify any comments if requested.

STRUCTURE OF OUR RESPONSE

4. The Consultation asks whether any aspect of the Recommendation might improve the existing UK Insolvency regime. We have, in the main body of our response, highlighted a limited number of points raised in the Recommendation which may merit further detailed consideration, as they could potentially, with appropriate checks and balances, improve the existing UK Insolvency regime.

5. We have also taken the opportunity, pursuant to the invitation set out in Question 24 of the Consultation, to raise a number of related issues which were not directly addressed the Consultation, but which may also merit further detailed consideration, in order to ensure that the United Kingdom insolvency regime retains its competitive advantage in terms of efficiency and effectiveness.

6. We have set out in the Appendix our responses to the specific Consultation questions, but would emphasise that these should be read in the light of this response as a whole.

WHY MAY THE EXISTING UK INSOLVENCY REGIME REQUIRE REFORM?

7. It is important that any successful statutory regime dealing with restructuring and insolvency is kept up to date, and remains able to address the challenges posed by increasingly complex financial products and changing stakeholder dynamics. Gaps in the legislative framework can be papered over, to some extent, by innovative and inventive uses of existing legislative tools, but this is no substitute for amending the relevant legislation, where necessary, in order to ensure that it remains effective and retains its competitive edge.

8. As experts in the field of restructuring and insolvency, we are very aware that a failure to adapt to changing conditions can potentially cause what was once a market leading product to lose its attraction and thereafter to fade into comparative obsolescence.

9. It is notable, in this respect, that the American Bankruptcy Institute published a comprehensive "root and branch" review of the United States "Chapter 11 bankruptcy" regime at the end of 2014. The aim of this review was to establish whether what is often held out as a "model" bankruptcy regime needed to be amended, in the light of changes to market conditions since Chapter 11 was last comprehensively reviewed in the 1990s.

10. The United States is not alone in seeking to refresh and update its bankruptcy legislation. The Netherlands legislature is, for example, currently considering a draft bill on the continuity of companies (*Wet continuïteit ondernemingen II*) which is intended to create a "state of the art" restructuring procedure which borrows successful techniques and tools from international restructuring practices, drawing in particular on English schemes of arrangement and US Chapter 11 proceedings.

AREAS WHICH MAY BENEFIT FROM FURTHER CONSIDERATION

11. We are not advocating the making of comprehensive changes to existing United Kingdom insolvency legislation, as it generally provides effective and well understood tools with which to deal with companies facing financial distress or insolvency. We would, however, suggest that the following five points raised directly or indirectly in the Consultation may merit further, more detailed, consideration, particularly if these points are being debated in other EC Member States:

(a) whether those who no longer have any economic interest in a business should effectively be able to veto a viable restructuring proposal;

(b) as a linked point, whether, in the interests of transparency, legislation could set out some underlying principles for valuing distressed or insolvent companies;

(c) whether the increasing diversification of the creditor constituency may strengthen the case for a short statutory pre-insolvency moratorium while a restructuring plan is finalised;

(d) whether existing restrictions on contractual termination linked solely to the counterparty's insolvency should be extended; and

(e) whether any actions could usefully be taken to encourage the provision of new lending to companies in financial distress.

12. These are all complex areas, in respect of which there are likely to be a range of (potentially conflicting) views. It may be the case that an informed debate would end up concluding that the existing UK insolvency regime already addresses these issues appropriately. It would, however, be unfortunate if a failure to solicit expert views, and thereby to explore these areas in greater detail, resulted in the UK regime lacking potentially valuable restructuring tools which were available elsewhere.

WHY MAY THESE POINTS REQUIRE FURTHER CONSIDERATION?

Cram-down mechanisms

13. Questions 12 to 14 of the Consultation relate to procedures for cramming down creditor claims. We have previously recommended in this context that the Insolvency Service may wish to consider whether those who no longer have any economic interest in a business (for example shareholders or out of the money junior creditors) should effectively still be able to veto a viable restructuring proposal which has the overwhelming support of those creditors who retain an economic interest in the business.

14. The lack of a statutory mechanism permitting the cram down/elimination of equity and out of the money debt claims is often cited as one of the key deficiencies when comparing United Kingdom schemes of arrangement with Chapter 11 and is therefore one of the areas where the UK may lose competitive advantage. The solution that has been developed by practitioners in the United Kingdom, in order to address this issue, has been to combine a scheme with a pre-packaged administration (to eliminate the equity and junior debt) but this can be unattractive, and it is not always, given the nature of the company's business, a viable option.

15. This is clearly a complex and potentially emotive issue which would require detailed consideration, but we believe that, subject to appropriate checks and balances being put in place, there may be merit in having a statutory mechanism which would:

(i) limit the need for a company's business to be transferred, often by means of a "pre-pack sale", in order to deal with the claims of out of the money creditors; and

(ii) prevent the UK insolvency regime from being perceived (as a result of retaining a veto for out of the money creditors at a time when other EC Member States were potentially limiting this right), as assisting "ransom" creditors whose actions may place a business, and the jobs of its employees, in jeopardy.

16. We note in this respect that, in 2010, Australia adapted a statutory power allowing the court to eliminate the equity in a voluntary administration and Deed of Company Arrangement process. This power has been utilised in a couple of recent Australian restructurings.

17. We do not wish in any way to pre-empt debate on this issue, but one of the various options which might be considered could be to preserve the current status quo in relation to schemes of arrangement but to have a separate, enhanced, cram-down mechanism (similar to that used for schemes) where a company was in administration. In order to protect the new procedure from abuse, it might be that the enhanced cram-down mechanism, which would permit out of the money stakeholders to be disenfranchised, would only be available where an administrator could satisfy the court that implementing this procedure was the best way of satisfying his or her statutory duties. This is, however, only one of a number of potential options which might benefit from further consideration.

Valuation principles

18. While not specifically highlighted in the Consultation, the cram-down point discussed above is inevitably linked to the question of how a business should be valued in order to determine the respective rights and interests of its stakeholders. The issue of valuation remains a topical one and, as noted in our previous July 2010 response, crops up in a number of different contexts, including voting and fairness issues in schemes of arrangement and the price paid for the assets in a pre-packaged sale through an administration or receivership.

19. Notwithstanding the judgment in *IMO Carwash*, many valuation issues remain unresolved; indeed, the *IMO Carwash* case illustrates just how wide-ranging valuation evidence can be, in the absence of clearly defined guidance as to the assumptions that the valuation should be based on.

20. It may be, as previously noted, that these matters are best left to case-law, as each case turns to some extent on its own facts, but given the importance of the issue, we wonder whether, in the interests of transparency, some thought should be given to whether legislation could set out some underlying principles for valuing companies in financial distress.

Restructuring moratorium

21. The Recommendation argues that debtors should have the right to request that a court grants a temporary stay of individual enforcement action. Question 10 of the Consultation asks whether introducing such a stay would improve the existing UK insolvency regime.

22. Members of our committee were, when this issue was raised in 2010, divided in relation to whether a strong case could be made out for a temporary restructuring stay of this nature. Some members gave examples of restructurings where it was necessary to use the stay inherent in a formal insolvency process in order to bind dissenting creditors or where a restructuring almost failed as a result of last-minute creditor action. Others questioned whether the moratorium was the right focus for any legislative change, suggesting that the greater risk was not so much that individual creditors might threaten to destabilise a restructuring at the negotiating stage but that such creditors could derail a restructuring altogether by refusing to consent to it.

23. The position today may be somewhat different, particularly if this issue is being considered in a wider insolvency reform context, given the increasing diversification of the creditor base in many restructurings, and the resulting increased challenges faced by the company or representative creditor groups in communicating directly with the wider creditor constituency. In addition, creditors may have become more used, following the approach adopted in *BlueCrest Mercantile BV v Vietnam Shipbuilding Industry Group,* to courts using their case management powers to impose a short de facto standstill on hostile creditor action while a restructuring plan is finalised.

24. While it may be argued that the *BlueCrest* case represents a solution to some of the practical issues which have been identified, it had limited application. As a stay is entirely dependent on the court's discretion, it may be beneficial for this remedy to be made more certain and for it to be available on a statutory basis.

Extending existing restrictions on contractual termination

25. We noted in our 2010 response that the proposed stay would not prevent counterparties from exercising contractual termination rights. While we agreed that the proposed restructuring moratorium should be no wider than the existing administration stay, and that any changes in relation to the administration moratorium would require extensive thought and consultation, we highlighted the fact that one of the greatest challenges to the successful operation of the existing administration moratorium was that counterparties were able to terminate key contracts simply because a company had gone into administration.

26. This point was reflected in the Insolvency Service's summary of responses to its 2014 consultation on the continuity of supply of essential services to insolvent businesses, which noted that

> "*When a company or individual running a business enters an insolvency procedure, some suppliers may have contractual rights entitling them to terminate the supply contract on account of the insolvency. Where those supplies are essential to the continuation of the business, termination may have an adverse impact on the prospects of a successful rescue of the business and thereby on the amount of money available for creditors*."

27. The draft Insolvency (Protection of Essential Supplies) Order 2015 will partially address this concern by extending the existing statutory restriction on the exercise of contractual termination rights to the suppliers of essential IT and communications services.

28. There would, however, seem to be a good argument in favour of extending this restriction still further, so that (subject to agreed checks and balances, including safe-harbours for close-out netting and set-off in financial contracts), a company should not be deprived of its contractual rights simply because it has gone into administration, provided that (i) it is willing and able to carry on performing the contract in question and (ii) appropriate measures have been put in place to ensure that the contractual counterparty does not lose out financially, as a result of not being able to exercise its insolvency based termination right.

29. We do not, however, believe that such protective measures should include a requirement that an insolvency officeholder should provide a personal guarantee, given the practical and logistical issues surrounding the giving of such guarantees which were highlighted in our October 2014 response to the Insolvency Service consultation on continuity of supply of essential services to insolvent businesses.

New lending

30. Questions 15, 16 and 17 of the Consultation relate to new financing. In response to the specific issue raised in the Recommendation, we do not consider that legislative amendments are required in the United Kingdom to protect the providers of court sanctioned new finance from civil or criminal liability.

31. We do, however, believe that it would be worth considering further whether any additional steps could, or should, be taken to facilitate the creation of competitive DIP finance and exit finance markets in the United Kingdom, particularly as encouraging additional sources of essential ongoing funding for businesses which are being restructured would seem consistent with the emphasis contained in the Graham Review on pre-packs on ensuring the future viability of such businesses.

32. The need to consider this area further is growing, as new money has historically been provided by banks who were already creditors of the company in question. Today, those banks are increasingly selling their debt at an early stage in the restructuring process, with the result that a company's creditors, once a restructuring is under way, increasingly comprise CLOs, hedge funds and bondholders who may be unwilling or unable to provide additional liquidity.

33. This issue is likely to become increasingly significant, as many companies are currently refinancing their debt through the issue of High Yield bonds. The holders of such bonds may be difficult to identify and, even if identified, may be reluctant to engage in the restructuring process, or, more specifically, in detailed discussions concerning the company's liquidity, if it involves them having to accept restrictions on trading their bonds. This is likely to make organising a new facility from existing lenders even more challenging than at present.

34. The potential availability (or lack of) of third party funding with which to address liquidity issues is therefore becoming an increasingly important issue and is sometimes cited as a reason why a Chapter 11 process should be preferred to a UK process for international groups.

35. We therefore believe that there may be merit in identifying any potential bars to the growth of a competitive third party funding market and considering whether any such bars could be addressed without causing any significant disruption to the existing financial markets, as increasing the number of potential sources of funding should benefit all stakeholders.

36. It is possible that one of the main bars to third party funding in a restructuring or insolvency context may be a lack of transparency, which makes it difficult for a prospective lender to identify or price potential opportunities. By way of example, in the US, it is possible to search the court docket for all the documents filed with the court in the context of US Chapter 11 proceedings, including any debtor-in-possession financing agreement, whereas, in the UK, it can often be difficult to get hold of a copy of the order placing the company into administration, let alone any of the agreements entered into by the administrator.

37. We therefore believe that it may be worth exploring with potential providers of third party funding whether lack of transparency is indeed an issue and, if so, whether any practical steps could be taken to address this issue. A dialogue of this nature may also identify other potential bars to third party lenders providing additional liquidity during the restructuring process.

APPENDIX

Question 1: In general do you think the Recommendation, if implemented by Member States, would meet the objectives as set out in Section 1 of the Recommendation?

The Recommendation seeks firstly to "*encourage"* Member States to *"put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty*" and to provide for "*minimum standards on … preventive restructuring frameworks*."

This objective seems to assume that Member States do not already have in place statutory procedures which allow the restructuring of viable enterprises facing financial difficulties. In our experience such procedures already exist in most, if not all, Member States. Some of those procedures are perceived to work more effectively than others, but such differences are generally the consequence of (a) specific policy decisions taken in each Member State as to both the respective rights of each stakeholder group and the role of the court in the process; or (b) the pressures on the court system, which may mean that cases are not heard as promptly as they ought to be. We do not believe that the Recommendation would alter this position.

The Recommendation also seeks to encourage Member States to put in place a framework to *"give honest entrepreneurs a second chance*" and to provide for "*minimum standards"* on the *"discharge of debts of bankrupt entrepreneurs*." In practice, the objective comes down to a proposal that, subject to specified restrictions "*entrepreneurs should be fully discharged of their debts which were subject of a bankruptcy after no later than three years*".

Our views on this proposal were set out in our response, submitted in November 2013, to the Commission's earlier consultation on "*a new European approach to business failure and insolvency*". As stated in that response, setting a maximum length of time to obtain a discharge from bankruptcy seems sensible and three years should generally constitute a suitable deterrent, while also allowing the chance for rehabilitation/recovery.

It is, however, as indirectly acknowledged in Paragraph 32 of the Recommendation, very important to ensure that an officeholder should have the ability to extend this time period where the individual in question has failed to co-operate adequately with the officeholder in the insolvency proceedings, whether through refusing to provide information, failing to disclose assets or otherwise.

Questions 2 to 4 – Definitions

- **Are the terms used by the Commission that are explicitly defined, clear?**
- **Are any of the explicit definitions problematic in a UK context?**
- **Are there any other terms, aside from 'an honest bankrupt' and 'a second chance', used in the Recommendation that would benefit from being better defined or that could be problematic if they were developed into law?**

We consider that most of the terms used by the Commission, aside from '*an honest bankrupt'*, appear to be relatively clear, but that this conceals the complexity of the underlying concepts. In many cases, the terms used are sufficient to illustrate a general concept, but would require further refinement if it became necessary to pin down the detail of what is proposed in the Recommendation.

Turning to the four specifically defined terms:

- We would question the scope of the definition of "*debtor*" as this would, as currently drafted, include banks, insurance companies and entities to which special insolvency regimes apply, given the systemic importance of the business which they conduct. This was not, we assume from Recital 15 to the Recommendation, intentional. The definition may arguably also extend to over-indebted consumers rather than just entrepreneurs, depending on what constitutes their "*activity*". We again assume, from Recital 15 to the Recommendation, that this was not intentional.

- A further issue inherent in the current definition of "*debtor*" is that it requires there to be *"a likelihood of insolvency*". It is assumed that this means that there should be a likelihood that the relevant person would have to initiate formal insolvency proceedings, but this concept may not be appropriate where the proposed legislation would extend to individuals. It is also unclear what level of probability would be required for there to be a "*likelihood*" for these purposes.

- The definition of "*restructuring*" is extremely wide and could, for example, arguably catch a refinancing of a company's existing debt. It is assumed that it was not the intention of those drafting the Recommendation that such day to day actions would fall within the scope of this proposed legislation.

- It is not entirely clear why there needs to be a definition of a *'stay of individual enforcement actions',* given that this concept is, where it is used in Article 10 of the Recommendation, immediately redefined as a "*stay*".

- "*Courts*" are defined as including "*any other body with competence in matters relating to preventive procedures*" It is not entirely clear what is meant, in this context, by "*preventive procedures".* It may be preferable, in the interests of certainty, to use instead the second limb of the definition of "*court*" as it appears in the revised EC Regulation on Insolvency Proceedings, so that the application would have to be made to the judicial or other competent body which would ordinarily be empowered to open insolvency proceedings.

What is, perhaps, surprising is the omission of the concept of "*COMI*" from both the definitions section and the Recommendation as a whole.

Questions 5 to 7 – Availability of a restructuring framework

- **To what extent does the UK regime adequately provide for elements (a) to (e) of the Recommendation?**

- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objectives?**

- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime?**

We agree with the view expressed in the Consultation that the UK already has a strong preventative framework, which is aimed at facilitating business recovery, where possible, rather than liquidation. Our experience would also support the view set out in the Consultation that existing UK procedures are generally considered to rescue businesses faster and at lower cost than many other regimes around the world. This is, however, not to say that the existing restructuring regime cannot be improved. Please refer to the five points summarised in Paragraph 11 of our response which may merit further, more detailed, consideration.

Questions 8 to 11 – Facilitating negotiations on restructuring plans

- **To what extent does the UK regime already deliver the elements in this section of the Recommendation?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objective?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime, for example by introducing additional options for a stay on enforcement action by creditors?**
- **Do you agree with the Recommendation that a restructuring plan process should be commenced without court involvement?**

We agree with the view expressed in the Consultation that the UK regime already offers great flexibility. We also agree that, as stated, implementing a lengthy stay of individual enforcement would be a move away from the existing domestic regime. We do, however, believe that, as noted in paragraphs 19 to 21 of our response, there may now be a case for reconsidering the merits of a short moratorium, particularly given the increasingly diverse nature of stakeholder groups, and the consequent challenges and time delays involved in consulting with them.

Questions 12 to 14 – Restructuring plans

- **To what extent does the UK regime deliver the elements in this section of the Recommendation?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objectives?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime, for example the ability to 'cram down' classes?**

We agree with the view expressed in the Consultation that implementing this aspect of the Recommendation would be a shift away from the existing domestic regime, but we believe that, as noted in paragraphs 13 to 15 of our response, there may be some merit in providing that the objections of certain classes could be overruled where the court is satisfied that the restructuring plan is viable and that the objecting creditor class no longer has any economic interest in the company.

Questions 15 to 17 – New financing

- **To what extent does the UK regime already provide protection for new financing?**
- **Is there anything in the UK regime which supports rescue finance which is not in the Recommendation but delivers the Commission's objective?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime?**

The Recommendation highlights two specific risks, namely that (i) new financing agreed upon in the restructuring plan and confirmed by a court should not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors and (ii) providers of new financing as part of a restructuring plan which is confirmed by a court should be exempted from civil and criminal liability relating to the restructuring process. Neither of these risks is considered to be particularly relevant in a UK context, where new financing is being provided on arms length commercial terms to a company facing financial difficulties.

However, while the UK regime does not provide the means with which to challenge new bona fide financing, it does not necessarily provide a framework to attract and facilitate such financing. This point is discussed in paragraphs 26 to 29 of our response.

Questions 18 to 20 – Second chance for entrepreneurs

- **To what extent does the UK regime deliver a second chance for entrepreneurs through existing insolvency laws?**
- **Is there anything in the UK regime which is not in the Recommendation but delivers the Commission's objective?**
- **Where you believe the UK regime does not meet the criteria, would the Recommendation improve the UK regime?**

We agree with the conclusion reached in the Consultation that UK would not need to take any legislative action to implement the Recommendation on discharge, as in the UK a bankrupt individual is generally automatically discharged from the proceedings on the first anniversary of the bankruptcy order.

This relatively short period prior to discharge is one of the main reasons why the UK bankruptcy regime currently appears attractive to "bankruptcy tourists" from other EC Member States. While not necessarily advocating any change to the current legislation, as this is again a very complex issue which would require further careful and detailed consideration, we would note that such bankruptcy tourism would be likely to continue if the UK retained its current one year limit but other EC Member States adopted the potentially longer "*no later than three years*" discharge period contemplated by the Recommendation.

There is also no formal distinction in UK law between "*honest*" and "*dishonest*" entrepreneurs. As noted in our response submitted in November 2013, to the Commission's earlier consultation on "*a new European approach to business failure and insolvency*", there is an argument, in principle, for distinguishing between "honest bankruptcies" (where insolvency has been caused through no obvious fault of the individual) and other cases, where the individual is seen as having been, to some extent, at fault. Historical precedent and practical experience would, however, both suggest that creating any form of two-track bankruptcy regime would be likely to prove problematic in practice, not least because of the need to reach a consensus as to who would be categorised as an "*honest bankrupt*". The point is, however, largely academic from a UK perspective, given the general availability of a discharge within the period contemplated by the Recommendation.

Question 21 – Forward look

In addition to the issues considered in the recommendation, are there other aspects of insolvency across the EU which the Commission should consider? For example:

- **Developing EU principles for fast, efficient out of court rescue procedures for small companies.**
- **Developing the conditions for rescue finance.**

If so, what should the Commission consider?

We would not encourage the Commission to develop further pan-European insolvency related proposals at this stage. We would, however, encourage the Insolvency Service to consider further, at a national level, the specific areas highlighted in our response, which include consideration of what steps could be taken in order to develop a competitive rescue finance market.

Questions 22 and 23

- **Does the current EU landscape of different domestic insolvency laws create problems in practice? Is it a barrier to cross-border trade and investment in the EU?**
- **Should there be greater harmonisation or convergence of insolvency regimes across the EU? What are the benefits and risks to UK businesses?**

As previously noted, divergences in domestic insolvency legislation are the result of specific policy decisions taken in each Member State as to both the respective rights of each stakeholder group and the role of the court in the process. Questions such as whether (and if so, in what circumstances) the claims of secured creditors, employees or pension funds should be crammed down, or shareholders should be deprived of their equity, go to the very heart of the legal, social, political and economic policy considerations underpinning a Member State's insolvency regime.

We therefore agree with the view previously expressed by the Insolvency Lawyers Association that such matters should be left to national laws to address, not least because any attempt at standardisation would require comprehensive amendments to each Member State's restructuring and insolvency laws, extending into the law governing security and quasi-security techniques (and also, potentially into their company and tax legislation) which would be difficult and costly to implement.

Where there are significant differences which do not result from specific policy decisions, our observation would be that such differences already seem to be gradually disappearing, without the need for harmonisation at EC level, as Member States seek to ensure that their insolvency regime remains attractive for companies seeking to restructure their debts and to deter those companies from forum shopping. In many cases this process has already involved adopting ideas that appear to be successful in the insolvency regimes of other Member States.

We would also note that, even if harmonisation/convergence could be achieved, different cultural approaches and the different speeds with which courts in Member States progress insolvency processes would still create a divergence in practice.

The risk of creating uncertainty in the market by amending existing restructuring procedures which operate successfully, and which are well understood, should not be underestimated.

Question 24: Do you have any other comments?

Please refer to the five points raised directly or indirectly in the Consultation which may merit further, more detailed, consideration, as summarised in Paragraph 11 of our response.

16th March 2015

THE CITY OF LONDON LAW SOCIETY
Insolvency Law Committee

Individuals and firms represented on this Committee are as follows:

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