

Execution of Fiduciary Guarantee at Consumer Finance Institutions

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ABSTRACT

Motor vehicles are a staple need today, so that the existence of consumer finance companies is very much needed by the community. In addition, the high level of need for consumptive goods and the limited ability or purchasing power of most people to buy in cash make consumer finance institutions so much in demand by the community, so that consumer finance institutions (consumer finance) is quite active in supporting the business world in Indonesia, both for new motorcycles and for used motorcycle units as well as financing furniture and electronic goods. Consumer financing activities are carried out by providing installment payment options in accordance with the consumer's ability and long term. Problems arise when installment payments are delayed or even to the act of deliberately transferring the vehicle to another party without the approval of the financing institution. When this happens, the financing institution will finally look for its vehicle rather than looking for a debtor who will definitely not pay installments anymore, for that a third party called a debt collector appears who is invited to work together. The pros and cons of using third-party services are what make the author analyze in this study, because often the use of third-party services will also cause new problems.

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1. INTRODUCTION

The development of the national automotive world and the solution to the high public need for motor vehicles and other consumable goods has made the financial business of consumer finance institutions an option. Even some national banks have also expanded their business by opening this business unit. The consumer finance business is still in great demand by the public because of the ease of requirements.

One example of activities that are included in the business field of a financial institution is a finance company which is a non-bank financial institution.

Forms of business activities of the Finance Company include:

1. Leasing
2. Factoring
3. Credit card business
4. Consumer finance
5. Venture Capital
6. Securities trading

The reason for effective and efficient service, finance companies always use standard contracts, this is because the number of consumers who are given credit facilities is very large, so it will take a long time if they do not use standard contracts.

In Article 1313 of the Civil Code, it is stated that:

"A covenant is an act by which one or more persons bind themselves to one or more persons".

Furthermore, Article 1320 of the Civil Code states 4 conditions for the validity of the agreement, namely:

1. There is an agreement of those who bind him,
2. Ability to make alliances,
3. Certain things,
4. A halal cause.

Article 1320 of the Civil Code which is the principle of constitutionalism, namely where an agreement is valid if there is an agreement. This is related to Article 1338 paragraph (1) of the Civil Code which is also the principle of freedom of contract, so that the agreement made is binding on the parties because it gives rise to rights and obligations for the parties themselves.

A good assessment of the party who will implement the content of the agreement is appropriate. Where propriety is a good faith that must be fulfilled in applying the principle of freedom of contract. This has been regulated in Article 1338 paragraph (3) of the Criminal Code Per.

The principle of good faith contains the understanding that the parties have the freedom to make an agreement according to their will, but good faith is what limits the agreement.

The implementation of consumer financing agreements, in general, agreements are outlined in the form of standard agreements. Where the clause in the standard agreement is made by one of the parties and the other party only signs the agreement that has been made. If the party, in this case the consumer or debtor who does not sign the standard agreement, the consumer will not get the goods that are the object of the agreement. Consumer financing is an agreement based on the principle of freedom of contract as the main principle of contract law. As stipulated in Article 1338 *Juncto* Article 1320 of the Civil Code.

The implementation of agreements generally has a stronger position than consumers who tend to have a weaker

position. So that for the weak party only has two options, namely if the consumer needs the services or goods offered to him, then he must agree to all the terms and comply with the proposed agreement regardless of whether the consumer knows and/or understands the clauses of the agreement or not, and if they do not agree or there is no agreement on the terms proposed to him, So they have to cancel or not make an agreement with the business actor, so in general, the business actor is not clear in explaining the content of the agreement.

Standard agreements are often found to include clauses that regulate dispute resolution methods and exoneration clauses, which are clauses that contain circumstances that limit or even completely remove a responsibility that should be imposed on the business actor. Although there are already permits for hire purchase and buying and selling of installments and rent. The arrangement is not explained in detail regarding the position of buyers and tenants.

In practice, in the agreement, the leasing institution or finance company has a strong position when compared to its buyer or customer, this is because there is a risk that the finance company does not want to take if there is an obstacle in not paying the installments that have been determined by both parties. Therefore, a clause was made that gave the finance company the right to demand and withdraw goods according to the agreement it made. If a problem occurs, what is withdrawn is definitely the object of the agreement, either carried out by the company's employees or using the services of a third party. The problem that then arises is that on the object of guarantee (motorcycle) that is withdrawn, the debtor or consumer who wants the motorcycle back to belong to him, the consumer is given a choice:

1. Pay off all arrears (installments and fines) plus execution administration fees (*repo fee*)
2. Consumers can still continue installments by paying outstanding installments, fines and plus execution administration fees (*repo fees*), so

consumers do not have to pay off all obligations that are not yet due (*Continue Pay*)

The problem that arises and develops today is that creditors in withdrawing the object of the agreement are increasingly blind, they cooperate with external debt collectors who do not understand the debtor's payment history, they only know that the debtor is late and withdraw the object of financing wherever they are. The basis for making a withdrawal can actually be justified if the agreement has been registered until the issuance of the fiduciary certificate, because the value is the same as the court decision, there is executory power and has *the execution parate*. The reality that occurs, in one branch of the finance company's office, the number of bad loans reaches thousands, so that withdrawals made on the road are more effective, because generally the object of financing has been transferred, and if it has to go through a fairly long civil justice process, it is not proportional to the value of the object of financing, especially often the object of the agreement has been stripped or replaced with a fake one.

The longer there is unrest in the community because the withdrawal is carried out tends to use violence and threats, where it has entered the realm of criminal law, on that basis then the state seeks to be present by giving directions in the form of a Constitutional Court (MK) Decision Number 18/PUU-XVII/2019 against consumer financing institutions, in the decision creditors must get the court's determination in withdrawing the financing object, Or creditors can make a direct withdrawal if, *first*, the debtor voluntarily surrenders his vehicle, the *second* debtor admits that he is in default/breach of promise.

2. LITERATURE REVIEW

2.1 An Overview of the Agreement

According to R. Setiawan (1979), the definition of agreement (consent) is a legal act in which one or more people bind themselves or bind each other to one or more people.

Meanwhile, according to Abdul Kadir Muhammad (2000), reformulate the definition of Article 1313 of the Civil Code as follows, that what is called an agreement is an agreement between two or more people who bind themselves to carry out something in the field of wealth.

If you pay attention to the formulation given in Article 1313 of the Civil Code, it implies that from an agreement arises an obligation or achievement from one or more people (parties) to one or more other people (parties), who are entitled to such achievements. This gives an understanding that in an agreement there must be two people who are related to each other, where one party is the party who is obliged to make achievements (debtor) and the other party is the party who is entitled to the achievement (creditor). Each party can consist of one or more people, and with the development of legal science, the party can also consist of one or more legal subjects.

Furthermore, in Articles 1314 and 1313 of the Criminal Code, if further explained by stating that for the achievements that must be performed by the debtor in the agreement, the debtor who is obliged to do so can request a counter-achievement from the opponent of the party or in terms with or without burden.

The two formulations above give meaning to legal science, which clearly and in detail illustrate that basically agreements can give birth to unilateral engagements (where only one party is obliged to excel) and reciprocal engagements (with both parties who excel).

2.2 Default and its consequences

The agreement will generally be terminated with the implementation in accordance with the terms stated in the agreement. The fulfillment of agreements or things that must be carried out is called achievements. With the achievement of the obligations of the parties ends, on the other hand, if the debtor or debtor does not carry it out, it is called a default. Default can be caused by the debtor's fault, which includes:

- a. Intentionality is an act that causes the default to be known to the debtor.
- b. Negligence is that the debtor makes a mistake but the act is not intended to cause a default which then turns out to cause a default.

2.3 Force Forcing Circumstances

Ovemacht means a forced situation. In a case, if the debtor is said to be in a compelling situation so that he cannot fulfill his achievements, the debtor cannot be blamed for the debtor's fault. In other words, the debtor cannot fulfill his obligations because ovemacht is not due to his fault but because of compelling circumstances, then the debtor cannot be held liable to him. Thus, creditors cannot claim damages as the rights of creditors in default. Article 1244 of the Civil Code states:

"If there is a reason for this, the debtor must be punished for costs, losses, and interest, if he cannot prove that the thing was not or did not at the right time when the sentence was carried out, it was because of an unexpected thing that he could not be held responsible for, therefore even if bad faith is not on his part".

Article 1245 of the Civil Code also states that:

"It is not necessary to replace the cost of loss and interest if due to compelling circumstances or due to an unintentional event the debtor is unable to give or do something that is obliged, or because the same thing has committed a prohibited act".

Based on the above articles, it can be concluded that a force majeure situation is a situation where the debtor is prevented from fulfilling his achievements due to an unforeseen circumstance that cannot be accounted for by him, the debtor is released to pay compensation and interest.

2.4 Consumer Finance Institutions

Consumer financing is one of the financing institutions carried out by a financial company (consumer finance company). A consumer finance company is a business entity that carries out financing activities for the procurement of goods based

on consumer needs with an installment or periodic payment system by consumers.

The target consumer/debtor of this type of financing is clearly consumers or the community. Referring to the provisions of the Consumer Protection Law (Law No. 8 of 1999), consumer is any person who uses goods and/or services available in society, either for the benefit of themselves, family, other people or other living beings and not for trading.

The legal institution "Consumer Finance" is used as a translation of the term "Consumer Finance", this consumer financing is nothing but a type of consumer credit. It's just that, if consumer financing is carried out by a financing company, while consumption credit is provided by banks.

Credit facilities for the purchase of motorcycles include consumption credits with the purpose of using them to own motorcycles by consumers. However, the definition of consumer credit is actually substantially the same as consumer financing, namely:

Credits given to consumers for the purchase of consumer goods and services as distinguished from loans used for productive or commercial purposes. Such credit can contain greater risk than ordinary trade credit, and therefore, it is usually given at a higher interest rate.

Decree of the Minister of Finance of the Republic of Indonesia No. 448/KMK.017/2000 concerning Financing Companies, which was later amended by the Decree of the Minister of Finance No. 172/KMK.06/2002 provides the definition of a consumer financing institution as a financing activity carried out in the form of providing funds for consumers for the purchase of goods whose payment is made in installments or periodically by consumers.

Based on this definition, it can be concluded that actually between consumer credit and consumer financing are the same. Only the lender is different. Consumer financing as one of the financing institutions is more in demand by consumers when they

need goods whose payment is made in installments.

Goods that are the object of consumer financing are generally goods such as electronic devices, motorcycles, computers and household equipment that are consumer needs. The amount of financing provided to consumers is generally relatively small, so the risk content that must be borne by consumer finance companies is also relatively small.

2.5 Financial Services Authority (OJK) Regulations related to Consumer Protection

Article 4 of the Financial Services Authority (OJK) Law states that the Financial Services Authority was formed with the aim that all financial services activities in the financial services sector are carried out in an orderly, fair, transparent, and accountable manner, and are able to realize a financial system that grows sustainably, is stable and is able to protect the interests of consumers and the public.

Globalization in the financial system and rapid progress in the field of information technology and financial innovation have created a very complex, dynamic, and interconnected financial system between financial sub-sectors in terms of products and institutions. Some of the things that are of concern to the Financial Services Authority include the supervision of the integrated financial services sector (conglomeration), the same consumer protection practices in all financial services sectors, actions that reflect moral hazards and the suboptimal protection of consumers in the financial services sector.

Consumer Protection in the financial services sector aims to create a reliable consumer protection system, improve consumer differentiation, and foster awareness of Financial Services Business Actors about the importance of consumer protection so as to be able to increase public trust in the financial services sector. The expected tangible results include Financial Services Business Actors paying attention to the fairness aspect in determining the cost or price of products and/or services, the minimum fee-based pricing that does not harm Consumers, and the suitability of

products and/or services offered with the needs and capabilities of Consumers.

Market conduct is applied in a balanced manner between developing the financial services sector and fulfilling the rights and obligations of consumers to increase consumer confidence. Market Conduct is the behavior of Financial Services Business Actors in designing, compiling and delivering information, offering, making agreements, on products and or services as well as dispute resolution and complaint handling.

In line with that, efforts to protect consumers and/or the community are directed to achieve two main goals. First, increasing the confidence of investors and consumers in every activity and business activity in the financial services sector (Market Confidence); and Second, providing opportunities and opportunities for development for Financial Services Business Actors in a fair, efficient and transparent manner and on the other hand Consumers have an understanding of their rights and obligations in relation to Financial Services Business Actors regarding characteristics, services, and products (Level Playing Field). In the long term, the financial industry itself will also get positive benefits to spur increased efficiency as a response to the demand for better service for financial services.

Article 28 of Law No. 21 of 2011 concerning the Financial Services Authority (OJK), states that the OJK is authorized to take measures to prevent losses in order to protect consumers and the public, the Financial Services Authority (OJK) then issued two Circular Letters (SE) related to education and consumer protection effective August 6, 2014. Both are OJK Circular Letter Number 1/SE. OJK.07/20.14 concerning the Implementation of Education in the Context of Improving Financial Literacy to Consumers or the Community and OJK Circular Letter Number 2/SE. OJK.07/2014 concerning Service and Settlement of Consumer Complaints to Financial Services Business Actors.

OJK Circular Letter as an implementing regulation of POJK Number 1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector by paying attention to Article 29 of Law No. 21 of 2011 concerning OJK which mandates OJK to prepare devices, develop mechanisms and facilitate the settlement of consumer complaints harmed by actors in financial services institutions, this arrangement aims to create a dispute resolution mechanism in the financial services sector quickly, cheap, fair and efficient. In fact, this rule was made to increase consumer confidence in financial service institutions.

Consumer Education and Protection (EPK) was formed in order to protect the interests of consumers and the public against violations and crimes in the financial sector such as manipulation and various forms of embezzlement in financial services activities, in accordance with Article 4 of Law Number 21 of 2011 concerning the Financial Services Authority.

The Financial Services Authority's Education and Consumer Protection Division is tasked with increasing public and consumer understanding of Financial Services Institutions (LJK) as well as products and services offered in the financial industry, so that the level of knowledge about the financial industry will increase and ultimately will increase the level of public and consumer needs and trust in financial service institutions and products in Indonesia.

2.6 Consumer Dispute Resolution

The Association of Indonesian Finance Companies (APPI) will form a mediation body to resolve disputes between financing institutions and consumers. The mediation body will be filled proportionally representing the public and financing institutions.

Mediation is carried out in finding a middle way before the problem enters the OJK or so that it does not reach the civil or criminal legal process. So it is hoped that the problem will be solved quickly, at a low cost and maintain each other's good name. A number of problems have arisen, for example,

regarding bail execution officers in the field. Most consumers do not know if the execution officer representing creditors has the authority to execute, because currently every agreement made has been equipped with a fiduciary agreement that has been registered and a fiduciary guarantee certificate has been issued, then there is also a fine calculation that many consumers still do not understand.

On April 10, 2015, as a follow-up to the Financial Services Authority Regulation number 1/POJK.07/2014 concerning alternative dispute resolution institutions in the financial services sector, the OJK has established the Indonesian Financing and Pawnshop Mediation Agency (BMPPI). Here, the OJK plays a role as a regulator who has the task of being a guardian so that the solution of problems in each financial sector can run according to the corridor.

There are regulations both initiated by APPI and OJK, there are actually choices that can be taken by the parties so that the problem is quickly resolved and does not go to court.

3. METHODS

3.1 Types of Research

This research is a field research or often called empirical juridical law research. The specification used in this study is in the form of a case study research with an analytical descriptive description of what is now applicable and what should be applied.

The specification in this study is descriptive, because the data obtained from the research tries to provide an overview of the process and surrounding the problems that exist in the implementation of leasing agreements and analyze them so that a general conclusion is made.

3.2 Method of Approach

Based on the formulation of the problem and the purpose of the research, the approach method used is the empirical juridical approach method. The empirical juridical approach method is an approach that examines secondary data first and then is

followed by conducting primary data research in the field.

The juridical factor is a set of civil law rules in general and regulations related to the field of agreement law as a branch of law and is very closely related to this research material, while the empirical factor is a consumer finance company that enters into an agreement with a consumer.

3.3 Types and Data Sources

The data collected includes primary data and secondary data.

- 1) Primary data, which is data obtained directly from the source, is observed and recorded for the first time. In this study, primary data was collected by means of interviews conducted with company leaders, the legal department of leasing companies, consumers who experienced problems according to the themes that had been determined to be respondents in this study. The interview was conducted using a list of questions. From the preparation of this list of questions, it is hoped that it can facilitate the question-and-answer process and obtain data and information.
- 2) Secondary data, is the acquisition of data by studying documents which includes:
 - a. Primary Legal Materials are binding legal materials consisting of:
 1. Civil Code;
 2. Decree of the President of the Republic of Indonesia Number 61 of 1988 concerning Financing Institutions.
 3. Decree of the Minister of Finance of the Republic of Indonesia Number: 446/KMK.017/1988 concerning Provisions and Procedures for the Implementation of Financing Institutions.

4. Decree of the Minister of Finance of the Republic of Indonesia Number 172/KMK.06/2002 concerning Financing Companies.

5. Financial Services Authority Regulation, POJK No:1/POJK.07/2013

- b. Secondary Legal Materials are legal materials that provide explanations of primary legal materials consisting of books on consumer financing agreements, fiduciary guarantees.

3.1.4 Data Collection Techniques

The techniques in obtaining data used by the author are:

a. Primary data is obtained from:

Field data collection was carried out by means of interviews, both structured and unstructured. Structured interviews are conducted based on a list of questions that have been provided by the researcher, while unstructured interviews are interviews that are conducted without being guided by questions, but are expected to develop according to the answers and the situation that takes place.

Observation is, before conducting an interview, the researcher first makes observations on the Finance Company

b. Data Seconds

Secondary data is obtained from searching for library materials such as books and other laws and regulations

3.1.5 Data Analysis Techniques

The data analysis in this study is carried out qualitatively, that is, all the data obtained is then systematically compiled and analyzed qualitatively, to achieve clarity on the problem to be discussed. Qualitative data analysis is a research method that produces descriptive data analysis, namely what the respondents stated in writing or orally and also their real behavior is researched and studied in its entirety.

The definition of analysis is intended as a logical, systematic explanation and interpretation. Systematic logic shows an

inductive way of thinking and follows the rules in writing scientific research reports. After the data analysis is completed, the results will be presented descriptively, namely by narrating and describing as it is according to the problem being researched. From these results, a conclusion was then drawn which is the answer to the problems raised in this study.

4. RESULTS AND DISCUSSION

4.1 Mechanism of Execution of the Object of Agreement in Material Guarantee

4.1.1 Parate Execution

In all material guarantee institutions, both mortgages, mortgages, dependent rights and fiduciary guarantees, an easy collateral execution system is provided. If the debtor defaults, the creditor is given the authority to carry out easy, simple, and fast collateral execution and it is a legal institution for execution parate. This model is intended to make it easier. Public auction sale of collateral objects. As a result of the debtor's default, the repayment of creditors' receivables is relatively fast. Parate execution. It is an execution that can be carried out by creditors without asking for court assistance or the process of placing collateral. The right of execution that is always ready according to its name "*paraat*" which means that the right is ready in the hands of creditors to be exercised. This is as stipulated in Article 1155 of the Civil Code ("Civil Code"), Article 1178 of the Civil Code, Article 6 jo. Article 20 paragraph (1) letter a of Law Number 4 of 1996 concerning Dependent Rights on Land and Land-Related Objects ("HT Law") and Article 15 paragraph (3) jo. Article 29 paragraph (1) letter b of Law Number 42 of 1999 concerning Fiduciary Guarantees ("JF Law").

4.1.2 Executive Title

In addition, the parate of execution by law provides another execution model through auction, namely the implementation of the executory title of the mortgage guarantee certificate, the certificate of guarantee of the right of dependency and the

fiduciary guarantee certificate where there is an irah "For Justice Based on the One Godhead". This confirms the existence of executory power in mortgage certificates, certificates of dependent rights and fiduciary guarantee certificates so that if the debtor defaults, it is ready to be executed as well as a court decision that has permanent force.

The chief judge will give an order to the debtor to fulfill his obligations, and if the debtor ignores the order, the chief judge will give an execution fiat and order the confiscation of the collateral object to be auctioned in order to obtain repayment for the creditor's receivables.

The existence of this execution model must be based on the existence of a mortgage certificate, a certificate of dependent rights and a fiduciary guarantee certificate where the existence of the certificate is issued if registration is made to the land office for the right of dependency as stipulated in Article 13 of the HT Law, for a fiduciary guarantee to the fiduciary registration office as stipulated in Article 11 jo. Article 14 of the JF Law, then the ship mortgage to the Registrar and Registrar of Ship Names (P3BN) as stipulated in Article 60 paragraph (2) of the Shipping Law. This execution model is not available in the pawn guarantee institution considering that in the pawn guarantee institution there is no provision on the registration of the object of the pledge guarantee.

4.1.3 Sales Under the Hand

In the pledge collateral, it is possible to make a sale under the hand, starting from the sentence stated at the beginning of Article 1155 of the Civil Code, namely "If the parties who promise do not agree otherwise", then the execution of the pawn is carried out in public. From these provisions, it can be concluded that it is possible for the parties to sell under hand the object of the pledge collateral if they agree to it.

Furthermore, based on the Explanation of Article 20 paragraphs (1) and (2) of the HT Law, in principle, every execution must be carried out by public auction because in this way it is expected that the highest price can be obtained for the object

of guarantee. However, if through a public auction it is not expected to produce the highest price, then by deviating from the principle as in Article 20 paragraph (1) of the HT Law, it is given the possibility of executing through a sale under hand as long as it is agreed by the giver and the guarantor and by fulfilling other conditions that must be met. This is emphasized in Article 20 paragraphs (2) and (3) of the HT Law.

In mortgage collateral, if it is based on Article 1211 of the Civil Code, it is not possible to make a voluntary sale, a sale that is justified only by a public sale. However, in practice it is also possible to make an underhand sale of the mortgage collateral object.

Meanwhile, in the case of fiduciary guarantees, it is regulated in Article 29 paragraph (1) letter c and paragraph (2) of the JF Law, that sales under the hands can be carried out based on the agreement of the giver and the fiduciary if in such a way the highest price can be obtained that benefits the parties. The sale shall be carried out after 1 (one) month has passed since it is notified in writing by the giver and/or fiduciary to interested parties and announced in at least 2 (two) newspapers spread in the area concerned.

Based on the explanation above, creditors can choose one of the three methods of execution as described above if the debtor defaults.

The execution of material collateral does not have to be done through an auction, but can be done by selling under hand. Selling under the hand is carried out if in this way the highest property can be obtained that benefits all parties. The requirements that must be met are:

1. It is carried out based on an agreement between the guarantor owner and creditors.
2. The implementation of the sale under hand is carried out after 1 (one) month has passed since it is notified in writing by the creditor and/or the guarantor owner to the interested parties.

3. It is announced in at least 2 (two) newspapers spread across the area concerned.

4. No party has expressed any objections

4.2 Mechanism for Execution of Fiduciary Guarantees After the Issue of the Decision 18/PUU-XVII/2019.

This Constitutional Court decision provides an affirmation regarding the execution of fiduciary guarantees can be submitted to the district court by alternative creditors. The alternative in question is the option if the default agreement is not reached and there is no voluntary surrender of the fiduciary guarantee object by the debtor, then the execution option should not be carried out by the creditor himself, but ask for the help of the district court to carry out the execution. However, the submission to the court is not by filing a lawsuit but in the form of an application for execution with a court determination.

The Constitutional Court's decision applies to all objects of fiduciary guarantees, including fiduciary objects to fixed (immovable) objects that are not encumbered by dependent rights. This is because the fiduciary object of immovable objects that are not encumbered by the right of dependency is one of the types of fiduciary guarantee objects ordered by Article 1 number 2 of the Fiduciary Guarantee Law.

Article 1 number 2 of the Fiduciary Guarantee Law states "*Fiduciary Guarantee is the right of guarantee for movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be encumbered with the right of dependency as referred to in Law No. 4 of 1996 concerning the Right of Dependency that remains in the control of the Fiduciary (debtor), as collateral for the repayment of certain debts, which gives priority to the Fiduciary (creditor) over other creditors.*"

5. CONCLUSION

The implications that arise include the reduction of the executory power of the fiduciary guarantee certificate, the abolition of

the execution parate mechanism, and the inefficiency of handling fiduciary guarantee disputes. While the mechanism is longer and more complicated because the creditor can

only execute the object of the fiduciary guarantee in the event of a default, the default clause has been agreed upon by both parties and there is a willingness from the debtor.

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