

THAILAND

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I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Broadly speaking, the Thai legal system follows the pattern of civil law countries in continental Europe with no concept of binding precedential authority. However, in practice, precedents shall be treated as guidance on how a court would interpret the law.

In relation to bankruptcy and reorganisation in Thailand, these processes are governed by the Bankruptcy Act BE 2483 (1940), as amended (the BA). The BA has been amended several times since its inception; for example, in 1998, after the Asian Financial Crisis, an amendment of the BA introduced the concept of corporate reorganisation into Thai law, and in 1999, the BA was amended by ironing out several difficulties that were being encountered by corporations undergoing reorganisation.

In 1999, a specialist Bankruptcy Court (the Court) was established by the Act on the Establishment of and Procedure for the Bankruptcy Court BE 2542. Currently, the Central Bankruptcy Court, Regional Bankruptcy Court and Supreme Court in the Bankruptcy Division are specialised courts that have separate jurisdictions to adjudicate cases relating to bankruptcy and business reorganisation, and have the power to regulate their own procedures.

It is important to note that the bankruptcy and reorganisation processes can be applied to both private and public companies. However, with respect to individual persons, whereas the bankruptcy process can be applied to an individual person, the reorganisation process applies only to individual persons who are categorised under the BA as a small and medium-sized enterprise (SME).

ii Starting proceedings and control of insolvency proceedings

Bankruptcy

The BA shall govern any insolvent debtor if the debtor is (or has been within the previous year) domiciled or engaged in business in Thailand at the time that a bankruptcy petition is filed against that debtor.² The BA provides for all the properties of a bankrupt debtor located within Thailand. It should be mentioned that foreign bankruptcy proceedings have no effect on the property of a debtor in Thailand.

When a creditor believes that a debtor is insolvent with the debt to such creditor or to another creditor in the amount of not less than 2 million baht (in the case of a corporate

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2 Section 7 of the BA.

debtor) or in the amount of not less than 1 million baht (in the case of an individual debtor), even if such debt that is a liquidated amount is due immediately or will become due in the future, the creditor may file a bankruptcy petition against the debtor.³

The petitioning creditor should normally be an unsecured creditor. However, a secured creditor may file a bankruptcy petition against a corporate debtor only when the creditor is able to enforce payment against the property of the debtor other than the security and the creditor states in the petition that, if the debtor becomes bankrupt, the security will be surrendered for the benefit of all creditors, or, after assessing the security against the amount of debt owed to the creditor, the value of the security is not sufficient to cover the debt in an amount of not less than 2 million baht (in the case of a corporate debtor) or in the amount of not less than 1 million baht (in the case of an individual debtor).⁴

Generally, in the petition, the petitioner has to prove that the debtor is insolvent. In particular, the BA provides a number of assumptions of facts that can be used to consider the debtor as being insolvent, for example, the debtor transfers his or her assets or creates any right over such assets that, if the debtor were a bankrupt, would be deemed as an act of preference, whether such act is carried out within or outside Thailand; or the debtor transfers his or her asset to other persons for the benefit of all creditors, whether such act is done within or outside Thailand. These examples are only presumptions that the debtor is entitled to rebut by proving that he or she is solvent. In practice, debtors would have to prove that they have assets of a value that exceeds their liabilities by referring to their audited accounts (even if such assets were not liquid and their debts could not be paid when they fell due). However, in 2008, there was a case in relation to bankruptcy and reorganisation involving one of the largest petrochemical industry companies in Thailand in which the debtor failed to oppose such presumption. In short, the Thai Petrochemical Industry Public Company Limited (TPI) was the debtor that failed to oppose its bankruptcy and reorganisation on the basis of its audited balance sheet, even though it showed that its assets exceeded its liabilities. The Court ruled that TPI was insolvent because its assets, when valued independently, without taking into account the value recorded in its audited account, were worth less than its liabilities, and because TPI had failed to rebut the presumption of insolvency.

In the hearing of a bankruptcy petition, if the Court is not satisfied with the fact that the debtor is insolvent under the conditions of the BA (as discussed above), the debtor has the opportunity to prove that he or she has the capacity to pay the debt in full. If the debtor is successful, the Court will dismiss the petition.⁵

Even during the dissolution of a debtor that is a registered partnership, limited partnership, limited company or any other types of legal entity, the liquidator of that legal entity can also submit a petition to the Court requesting that the legal entity be declared bankrupt provided that its assets are insufficient to cover the debts, even when the investment contributions and its shares are fully paid up.⁶ However, under Thai bankruptcy proceedings, there is no scheme of voluntary bankruptcy for individual debtors.

In the event that the Court grants a receivership order for liquidation, the control of the debtor's assets will be passed to a government official known as the official receiver, who must call a creditors' meeting to discuss any proposal for composition of the debts by the debtor.

3 Section 9 of the BA.

4 Section 10 of the BA.

5 Section 14 of the BA.

6 Section 88 of the BA and Section 1266 of the Civil and Commercial Code.

The creditors can pass a special resolution, which can be passed by the majority of creditors holding at least three-quarters of the total debt and attending and voting in person or by proxy accepting the debtor's proposal for the composition of debts. However, if no proposal is put forward or the debtor's proposal is rejected, the Court must adjudge and declare the debtor bankrupt, and the official receiver is empowered to solely manage the property of the bankrupt for distribution among all creditors.⁷

After a bankruptcy order is made, the pursuit of any claims the creditor may have against the debtor would be passed to the official receiver exclusively.

In the event that a debtor is adjudicated bankrupt, the official receiver is responsible for collecting the assets of the debtor.

The BA also, in certain circumstances, allows the Court to protect the debtor's property. That is to say, the official receiver is entitled to clawback the debtor's assets by filing a motion to the Court for an order to cancel any fraudulent acts of the debtor. If the fraudulent acts arose within the time period of one year before the application for adjudication of bankruptcy and thereafter, or were gratuitous acts or resulted in the debtor receiving compensation of less than a reasonable amount, it shall be presumed that the debtor and the person enriched thereby knew that such act would be to the prejudice of the creditors.⁸ In addition, upon the filing of a motion by the official receiver, the Court is empowered to cancel any transfer of assets or any act done or permitted to be done by the debtor during the three months prior to an application for adjudication of bankruptcy and thereafter, and with an intention to give undue preference to a creditor.⁹

In addition to the duty of asset collection, the official receiver is also permitted to sell the debtor's assets (either on a going-concern or piecemeal basis) by way of public auction or by other means, as approved by the creditor's committee (if appointed). Nonetheless, the debtor's property that is attached by the official receiver after the granting of a temporary or absolute receivership order (if applicable) cannot be sold until the Court adjudicates the debtor bankrupt. In the enforcement process, a creditor shall file his or her claim with the official receiver within the two months following the date of publication of the order of absolute receivership in accordance with Section 91 of the BA.

However, if the creditor is a foreign creditor domiciled outside Thailand, according to Section 178 of the BA, he or she can claim for repayment of debts in the bankruptcy action upon compliance with the following conditions:

- a* prove that the creditors in Thailand are similarly entitled to claim for payment of debts in bankruptcy actions under the laws and before the courts of the countries of which the foreign creditor is national; and
- b* report the amount of the assets or distribution that he or she has received or is entitled to receive from the same debtor's assets located outside Thailand, if any. If so, he or she must agree to deliver the assets in order to be added to the debtor's assets in Thailand.

Business reorganisation

Under Thai law, apart from the insolvency proceeding, there is also a reorganisation process that allows a company to reorganise under a court process available to rescue a company from falling into insolvency under the BA and to help creditors be fairly paid.

7 Section 61 of the BA.

8 Sections 113 and 114 of the BA.

9 Section 115 of the BA.

The process of approval of reorganisation proceedings can be roughly divided into four phases, as set out below.

Phase one

When the debtor is insolvent or unable to make repayment of debts that became due, and indebted to one creditor or more for a definite amount of not less than 10 million baht, whether such debt is due promptly or in due course, if there are reasonable grounds and prospects to reorganise the business of the debtor, the person under the BA, including creditor, debtor or government agency, may file a petition for business reorganisation with the Court.¹⁰

The petition for business reorganisation should clearly express to the Court that the debtor is insolvent and indebted to the creditor for a total of not less than 10 million baht and there are reasonable grounds with a positive prospect to expect that the business of the debtor can be reorganised.¹¹ Despite this, the debtor is not subject to absolute receivership or dissolution.

The Court shall issue an order for business reorganisation or dismiss the petition for business reorganisation. When deciding whether to issue an order for reorganisation of the debtor's business, the Court will take into account the facts according to the substantive tests of a reorganisation proceeding. If there are reasonable grounds for reorganising the business, and the petitioner has filed the petition in good faith, the Court will issue the order for business reorganisation. Otherwise, the Court will dismiss the petition.

In the procedure of reorganisation, if a reorganisation petition is accepted by the Court, there is an automatic moratorium or an automatic stay preventing, *inter alia*, the creditors from pursuing claims against the debtor and restricting the creditor's right to enforce security. In particular, an action shall not be taken against the debtor in a civil case in respect of the assets of the debtor, nor shall a dispute in which the debtor may become liable or incur damage be submitted to arbitration for decision if the obligation arises before the day on which the Court approves the business reorganisation plan (the reorganisation plan). In addition, no action shall be taken against the debtor in a bankruptcy case. If an action has previously been submitted to arbitration to be decided on, the Court will suspend the arbitral proceeding.

Nonetheless, despite the automatic stay and the conditions attached therewith, the debtor is allowed to continue its normal business operation during the reorganisation pursuant to Section 90/12(9) of the BA. However, the powers and duties of the debtor's executives in managing the business and assets shall cease once the Court has ordered business reorganisation and the Court shall appoint any person or the debtor's former executives to be an interim executive until the plan preparer is appointed. The debtor's assets cannot be sold except in the normal course of business; however, such sale of assets can be otherwise approved by the Court. The debtor is allowed to make payment to creditors who supply goods or services according to the normal and current terms and conditions of any agreements. Any claims arising after the Court's reorganisation order will not be subject to reorganisation proceedings and, if the debtor has incurred such obligations in the normal course of business and as required for the continuation of its operation, the debtor can pay such claims.

Furthermore, there is no legal provision governing the termination of contracts during a reorganisation proceeding. Consequently, these matters are governed by the terms of the

10 Section 90/3 of the BA.

11 Sections 90/6 and 90/10 of the BA.

agreement between the parties. In regard to the enforcement process, the BA also provides that no judgment creditor shall carry out the execution of a judgment over the assets of the debtor if the obligation pursuant to the said judgment had arisen before the day on which the Court approves the reorganisation plan. In the case of the execution of a judgment that has previously been made, the Court will suspend execution of the judgment unless otherwise ordered by the Court at which the petition is filed or the execution of the judgment is fully carried out before the executing officer is aware of the petition having been filed. No secured creditor shall enforce payment of debt against the asset that is the security unless otherwise approved by the Court or after a year following the date on which the Court accepted the reorganisation petition (subject to the extension of time frame by the Court in accordance with the BA). In any case, a creditor shall not seize or sell the debtor's assets.

Phase two

In the second phase, the plan preparer (who will produce the reorganisation plan for the reorganisation process of the debtor) shall be appointed. The Court may appoint the person nominated by the petitioner to be the plan preparer.¹² However, if the Court finds that the person nominated by the petitioner is not suitable to be the plan preparer, or the debtor or objecting creditor nominates another person, the Court will issue an order to the official receiver to call a creditors' meeting in order to consider which person should be elected as the plan preparer.

In the creditors' meeting, if the debtor has not suggested a plan preparer, a resolution electing a person for this role will be passed by the creditors whose debts constitute the majority amount and who cast their votes on the resolution. However, where the debtor has proposed a plan preparer, then such person will prepare the reorganisation plan, unless the creditors whose debts account for not less than two-thirds of the total debts have cast their votes on a resolution deciding that another person will be appointed.

The plan preparer can also be elected during the creditors' meeting and will be appointed providing that the Court approves such election. If the Court disapproves of the appointment it will order the official receiver to call a second creditors' meeting in order to elect a different plan preparer, who is nominated by the creditors or the debtor.

If the second creditors' meeting is unable to elect the plan preparer, the official receiver must call a third creditors' meeting to decide on the appointment, unless the Court exercises its discretion to cancel the business reorganisation order.

If the second creditors' meeting successfully elects the plan preparer, the Court will appoint that person, unless the Court deems it appropriate not to appoint the said person as the plan preparer or the meeting is unable to resolve the election, the Court shall cancel the order of business reorganisation. The power and duties of the plan preparer shall commence on the day the Court gives such order and the power and duties of the official receiver shall cease.¹³

In this regard, the creditors must submit an application for repayment of debt to the official receiver within one month after the order of appointment of the plan preparer is published. A foreign creditor is also required to submit the application without the need to prove to the Court that the creditors in Thailand are similarly entitled to claim for repayment of debts in bankruptcy actions under the laws and before the Court of the countries of which

12 Section 90/17 of the BA.

13 Section 90/24 of the BA.

the foreign creditors are nationals. If the creditors do not file an application within the time limit, such creditors shall forfeit their rights to receive payment. The plan preparer (where appointed) will then produce the reorganisation plan and manage the debtor's business and assets to disburse the debtor's debts within the scope set out by the reorganisation plan, with the exception of the rights to receive dividend.¹⁴ However, the plan preparer shall not distribute, transfer, pay debt or create debt over the debtor's asset unless such act is essential for the debtor's normal course of business or the Court ordered the approval of such act.

The plan preparer shall submit the reorganisation plan to the official receiver within three months after his or her appointment is announced. Despite this requirement, the plan preparer can request a maximum of two extensions and each extension shall not exceed one month. In practice, the plan preparer has a total of five months to prepare the reorganisation plan.

Phase three

With regard to the reorganisation plan, a creditors' meeting must be held to discuss and approve the plan.¹⁵ It must be approved by (1) in the case of a meeting of every group of creditors, a majority of the creditors' meeting with an amount of debts of not less than two-thirds of the total debts of the creditors being present at the meeting, in person or by proxy, and casting their votes, or (2) in the case of a meeting of at least one group of creditors, a majority of the creditors' meeting with an amount of debt of not less than two-thirds of the creditors present in the meeting, in person or by proxy, and casting their votes, and, when counting the total amount of debts owed to all creditors who approved the plan, such amount must not be less than 50 per cent of the total debts owed.

If the creditors do not pass a resolution to accept the reorganisation plan, do not pass any resolution or the creditors do not attend the meeting, the Court will cancel the business reorganisation order.

The reorganisation plan must include the classification of the creditors, which is decided as follows:¹⁶

- a* each secured creditor with a secured debt of 15 per cent or more of the total indebtedness will each be classed as a group;
- b* secured creditors not classified under item *a* will be classed as a group;
- c* unsecured creditors can be classified into several groups (however, unsecured creditors whose claims or interest are identical or similar in material aspects can be the same group); and
- d* creditors who by law or by contract have the right to receive repayment, only after the other creditors have received repayment in full, will comprise one group.

Phase four

If the creditors have passed a resolution accepting the reorganisation plan, the Court will consider it and will issue an order approving the reorganisation plan if it contains all the required items according to the law. It is important to stress that under the reorganisation plan, the rights of the creditors within the same group are treated equally, and the proposals

14 Section 90/25 of the BA.

15 Section 90/46 of the BA.

16 Section 90/42 *bis* of the BA.

for repayment of debt under such plan must be in accordance with the sequence stipulated by the law regarding the distribution of assets in a bankruptcy case (except where those creditors have given their consent for another arrangement). Further, when the reorganisation plan has been successfully implemented, the creditors must receive debt repayments in amounts that are not less than the amount the creditors would have received if the Court had adjudged the debtor as bankrupt.

If the Court has approved the reorganisation plan, the Court shall notify the plan administrator who is responsible for implementing the plan as soon as possible. Once the plan administrator learns of the order, the rights and duties of the plan preparer shall be passed to the plan administrator; this must be done within five years, but the creditors or the debtor can request a maximum of two extensions, and each extension shall not exceed one year.¹⁷

In the event that the debtor's executive, the plan administrator, or the interim plan administrator or official receiver, believe that the reorganisation of the business has been successfully completed under the reorganisation plan, he or she shall promptly inform the Court and ask it to order the termination of the business reorganisation. If the Court agrees that the business reorganisation has been successfully completed, the termination will take place without delay.¹⁸

When the business reorganisation is terminated, the debtor, the creditors and other parties will be affected as follows:¹⁹

- a* Debtor and creditors: the debtor can continue its business as normal and will be free from all debts that occurred prior to the court-ordered business reorganisation, except for debts owed to eligible creditors who have applied for repayment in the business reorganisation.
- b* Debtor's executive: the debtor's executive will again have the authority to manage the debtor's business operations and assets.
- c* Debtor's shareholders: the debtor's shareholders will resume their legal rights.
- d* Debtor's employees and trading partners: although there are no specific provisions concerning how the debtor's employees and trading partners will be affected by the termination of the business reorganisation, since the reorganisation procedure will not cause the debtor's business to cease to operate, the debtor's employees and trading partners will not be affected by the initiation or termination of the reorganisation procedure.

iii Cross-border issues

While Thailand is not a party to any international treaty on insolvency or recognition of foreign judgments, it is generally accepted that a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and shall be considered as the 'best evidence' for the judgment. Foreign judgments should be final and conclusive, not contrary to Thai public policy and given by a court of competent jurisdiction.

The Legal Execution Department under the Ministry of Justice, however, amended the BA by adding new provisions that are in line with the UNCITRAL'S Model Law on cross-border insolvency, including access of foreign creditors and foreign representatives,

17 Section 90/63 paragraph 2 of the BA.

18 Section 90/70 of the BA.

19 Section 90/75 of the BA.

recognition of foreign proceedings and relief, cooperation and direction communication and concurrent proceedings. This new legislation will enhance the capacity to enforce debtor's assets as a means of addressing cross-border issues.

II INSOLVENCY METRICS

Thailand is viewed as a mildly pro-creditor jurisdiction in respect of its bankruptcy regime. In practice, this means that security can be taken and will be recognised, and can be enforced within a reasonable period, taking into account all statutory requirements and procedures that may need to be complied with.

However, it can be difficult to enforce security, and there are significant delays in enforcement. In addition, the reorganisation process may have debtor bias or possible bias against foreign creditors. Much can depend on the facts of the case.

III PLENARY INSOLVENCY PROCEEDINGS

The number of liquidation cases has significantly increased since the BA was amended in 1998. It seems that the Bankruptcy Court and insolvency proceedings are increasingly inspiring confidence. Although the Court has handled mainly small and medium-sized companies, in recent times, there have been more applications for business reorganisation submitted by major companies. The following examples illustrate reputable Thai companies that are currently undergoing insolvency proceedings.

i Sahaviriya Steel Industries Public Company Limited

Sahaviriya Steel Industries Public Company Limited (SSI TH), one of South East Asia's largest flat-steel manufacturers, is undergoing a complex 60 billion baht restructuring. SSI TH is required to enter into the business reorganisation because the major creditors of SSI UK demand it be jointly liable for the obligations of SSI UK under loan conditions as a guarantor. This obligation amounts to approximately 28 billion baht.

The business reorganisation of SSI TH is significant because:

- a* it is critical for the company to resume operations to help stabilise the steel industry in South East Asia;
- b* outstanding debts from creditors are significant in term of lenders' overall debt;
- c* the relevant banks are required by law to have full reserve for such debt; and
- d* the legal work involving the reorganisation plan is complex, based on the financing structure between the company and the financial institutions, its trade creditors and also the progress of the administration proceedings in the UK.

ii Saha Farms Company Limited

The reorganisation case involving Saha Farms Company Limited and its affiliate Golden Line Business Company Limited was the largest ongoing debt restructuring process filed with the Bankruptcy Court in 2014–2015 (in terms of the debt value and the number of creditors).

Saha Farms is a significant player in Thailand's agro-market. It is also one of the country's leading poultry producers and ranks as the biggest Thai exporter of frozen products, with a 22 per cent market share of total exports in this sector. Saha Farms and its affiliates were

responsible for approximately 30,000 employees, although such number has been reduced by around 50 per cent. The value of the creditors' debts for Saha Farms and Golden Line is estimated at more than 35 billion baht.

The business reorganisation of Saha Farms and Golden Line is also significant on a number of different levels.

As a major consumer of one of Thailand's main agricultural products and as a key employer for agri-related workers, like SSI TH, it is critical for the group to resume operations to help stabilise the agricultural industry in Thailand and overseas markets.

Outstanding debts from creditors, including Krung Thai Bank (in addition to new credit lines) amount to more than 35 billion baht. As such, it is significant in terms of lenders' overall debts and capitalisation guidelines.

The legal work involved in reaching approval of the reorganisation plan is based on the structuring requirements of various credit facilities, the aims of diverse creditors, and the fact that the debtors comprise two separate entities.

The total number of creditors to be advised and aligned regarding the reorganisation petition exceeds 8,000. This was one of the largest constituencies of this type in Thailand's history.

IV TRENDS

i The amendment of the BA for the reorganisation of SMEs

In the past, only private companies and public limited companies were able to submit requests for business reorganisation. With the intent of helping potential SMEs that may have faced financial liquidity problems, the government has pushed forward a new reorganisation process to facilitate SMEs and prevent them from falling into bankruptcy. In this regard, Thailand introduced new amended legislation for the BA, which came into force on 25 May 2016 (the Amendment). This Amendment allows SMEs to enter into a form of business reorganisation that is less time-consuming than the normal reorganisation process.

A debtor who is allowed to be placed under business reorganisation according to the Amendment must meet the required conditions, which are that the debtor should conduct an SME in accordance with the laws in relation to the promotion of SMEs, and it should be registered with the Office of SMEs Promotions or another government agency in order to conduct such a business.

A petition for business reorganisation may be filed with the Court if the debtor is insolvent and owes to at least one or more creditors the following amounts depending upon the type of debtor:

- a* at least 2 million baht in the case of an individual;
- b* at least 3 million baht in the case of a limited partnership, registered partnership, non-registered partnership, group of persons or other juristic person specified in the ministerial regulation; or
- c* at least 3 million baht but less than 10 million baht in the case of a private limited company.²⁰

20 Section 90/92 of the BA.

With regard to the Amendment, Thailand is the third country in Asia (after Japan and South Korea) that has undertaken a revision of its law to enable the business reorganisation of SMEs. This will enhance national competitiveness and may affect the World Bank's evaluation of ease of doing business in Thailand in future.²¹

ii New security under Thai law

Thailand's Business Security Act (the Act) came into force on 2 July 2016. It makes significant changes to the regime for creating security in Thailand by, among other things, expanding the types of assets that Thai entities can use as security for their financing. This will provide Thai SMEs greater opportunities to access financing and thereby develop their businesses. It is worth noting that a creditor that accepts a security under the Act is also regarded as a secured creditor under the BA. Under the Thai Civil and Commercial Code, only two types of security interest, mortgage and pledge, can be created. Mortgages can only be created for certain types of assets such as real estate, registered machinery and certain other specific movables. Pledges can be created over movable property but to be perfected the property has to be delivered to and retained by the creditor: as soon as the property is not in the possession of the creditor the pledge ceases to be effective. It is, therefore, not practical to create security over inventory, raw materials or stock in trade, and there are also doubts over the ability to create a pledge over a bank account. There is also no concept of a security over a fluctuating body of assets like the common law floating charge that enables a business to be sold as a going concern.

The Act creates a new method of creating security: the business security agreement. Security may be created over the following assets under a business security agreement:

- a* a business;
- b* a right of claim (which includes a right to receive performance of obligations and any other rights, but excludes a right represented by a written instrument);
- c* movable property used in a business such as machinery or inventory;
- d* immovable property used in a business;
- e* intellectual property; and
- f* other assets to be prescribed by ministerial regulation.

Future assets can also be granted as security under the business security agreement.

Under such an agreement, security is created by a security provider in favour of a security receiver to secure the performance of the underlying debts (the security provider's or a third party's). The security provider can be either an individual or a legal entity (juristic person), while the security receiver must be a financial institution or any other person to be prescribed in a ministerial regulation.

In the case of a business security agreement that creates security over a business, a security enforcer must also be appointed, who will enforce the security created by the business security agreement in the event of a default. A security enforcer must be licensed and registered with the Business Security Registration Office of the Department of Business Development and be qualified, as specified in the Act (i.e., they must have knowledge and experience in law, accounting or business).

21 www.thaigov.go.th/index.php/en/government-en1/item/104104-government-pushes-forward-business-rehabilitation-for-smes.

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