

THE ROMAN EMPTIO-VENDITIO AS A MODERN EXPRESSION OF THE ELECTRONIC CONTRACTING

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ABSTRACT

This paper analyzes the sales agreement or ,emptio venditio” in Roman law, but from the aspect of the new modern age, the age of the Internet and the accessibility of the internet in every home. In that sense, the Electronic Contract is defined as an agreement presented and consummated entirely in an on-line environment; most often on the Internet. In order to form a contract several conditions must be met. In this paper as a part of the Electronic Contract the terms Electronic signing of the agreement and e-commerce are also analyzed together with the way these requirements are carried out in order to form a contract. The uniqueness of forming an electronic contract results in specific measures for the protection of intellectual property rights. A brief overview of the legislation in the Republic of Macedonia regarding the forming of agreements in electronic form is given at the end of the paper.

Key words: Electronic Contract, Electronic signing of the agreement, e-commerce, Intellectual Property Rights, Electronic Signature, Republic of Macedonia



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1. INTRODUCTION

Central and most important agreement in the supply of goods today is the sales agreement (*emptio venditio* in Roman law) by whom was made and until now is performed the transfer of the ownership rights on the goods. With the sales agreement, the man beside their daily needs satisfies the needs of durable nature, so we can eligible say that from the appearance of the commodity production this type of agreement follows the man as his shadow in his everyday life until these days.

The Roman Law as the most perfect of all known rights based of the private ownership, especially the Roman private law as part of the overall Roman law, largely developed, and in the period after the Punic wars precisely and detailed regulated the sales agreement. (Borkovski, Plesis, 2005)

The commodity production and the commodity trade represents the economic base of the Roman slave society and of the following socio-economic arrangements, and also respectively seen for the Republic of Macedonia starting from the arbitrarily socialist society until today's contemporary legal society as from the ideas of the socialism and all the subsequent new trends have led to a different regulation of the property relations. The commodity production and the commodity trade are appearing as a common ground of Roman private law and all the after it, respectively and our rights.

In this context, the agreement for sale as the most important and central agreement in our law basically has retained most of the basic characteristics that he had in the Roman private law, of course adapted to the new legal pattern and the contemporary life in today's legal society .

The historical development of the sales agreement is based on the Roman law, as the basis of any further legal development in each field of the law, and the modern trends in the development of the sales agreement will be considered starting from the independence of the Republic of Macedonia up to this day as a candidate for membership in the European

Union. The EU membership requires implementation of certain rules and regulations, so in the past as a basic legal regulator of signing of the sales agreement appeared the Law on obligations enacted in 2001 (Cavdar, 2011) with changes and amendments, also amended several times in accordance with the recommendations from the European Union. According to those recommendations in our legal system were made a lot of changes and were adopted new laws, so the modern legal regulation of the sale agreement we can see through the Law on Consumer Protection (Official Gazette of RM no 38/2004, 77/07; 103/08; 148/2011), Law on Electronic Commerce (Official Gazette of RM no 133/2007; 17/2011), followed by formation of certain agencies for their implementation, monitoring and sanctioning of their use. Of course we live in a modern, dynamic and open society, where the borders and the distance are not obstacles to buy, cooperate and conclude agreements with citizens of other countries. (Bendeovski, 2007)

The revolution in the comprehending of the sales agreement caused explosive appearance of the Internet as the main channel of the distribution of the goods, services, and even of the managerial and professional work and this phenomenon defines the electronic commerce as a process of purchase, sale, transfer or exchange of the products, services or information via computer networks, including the Internet.

2. WHAT'S AN ELECTRONIC CONTRACT?

An “electronic” contract, also known as a “click-wrap”, click-through”, “web-wrap”, “browse-wrap” or “point and click” contract, is an agreement presented and consummated entirely in an on-line environment; most often on the Internet. That’s terms, generally have categorized online agreements into “clickwrap” agreements and “browsewrap” agreements. Click - wrap agreements, which require a user to check a box or click an icon to signify agreement with the terms, even when the terms appear in a separate hyperlinked Web page but where language accompanying the box or icon indicates that checking the box or clicking the icon indicates assent

to such terms. On the other hand, browsewrap agreements, which presents the terms passively to users in a hyperlink somewhere on a Web page, often at the very bottom of the page in small font, are often unenforceable because it usually cannot be proved the user knew the terms existed or even was aware of the hyperlink.(Stein, Lawrence, 2016)

The term, “wrap” is a misnomer and has nothing to do with the manner in which such agreements are physically presented. Click-wrap or “browse-wrap” agreements take their name from “shrink-wrap” agreements; written paper contracts that were included in the plastic shrink-wrapped packaging containing, most often, computer software. As discussed below, a significant similarity between click-wrap and shrink-wrap contracts relates to their manner of acceptance as legally binding agreements. Users of software purchased in shrink-wrapped packages have been held to have agreed to the terms of a shrinkwrap contract by virtue of opening the package and installing the software. Similarly, in some instances, the courts have held that the web user can be bound by an electronic contract by the simple act of downloading software or purchasing products or services on-line. In both cases, the end user may not necessarily have read, much less understood, the contract. The term “click-wrap” comes from the fact that in order to accept the terms of the contract on-line, the party must “click” with a mouse on an onscreen icon or box.

Electronic contracts are ubiquitous for anyone who wishes to access certain web sites, pay for products or services on-line or even obtain an account with an internet service provider (“ISP”) to access the Internet. (Wittmann,2007)

2.1 Types of Click-Wrap Contracts

In an off-line contract, both parties typically indicate their agreement to the terms and conditions thereof by signing. On-line, only one of the parties (usually, the surfer or person using the computer), signifies acceptance by “signing” in the following ways:

1. Type and Click – the user must type “I accept” or other words in a specified area and then click “send”;

2. Clicking an Icon – the user simply clicks an “I accept” icon to go to the requested page;

3. Scroll and Click – the user must scroll down the terms of the click-wrap contract and then click an icon marked “I accept” or “I agree”.

One of the unique features of a click-wrap contract is that it is a one-sided, “take it-or-leave-it” proposition. Unlike a paper contract, where the parties may vigorously negotiate the terms of the agreement before signing, the user in the on-line environment has no bargaining power. The user must either accept the terms of the click-wrap agreement (which will typically be in favour of the proffering party) or not gain access to the desired webpage, product or service.

The lack of negotiation is partly due to the realities of on-line commerce: it is not logistically possible for the ISP or on-line service provider (“OSP”) to negotiate with each and every user.

The main purposes of click-wrap Agreements are to:

1. ensure contractual certainty;
2. allow access to a particular web site or webpage;
3. download software;
4. purchase a product or service;
5. inform the user of proprietary material on the web site;
6. enumerate a web site’s terms of use or service and privacy policy;
7. impose limitations on the use of downloaded material;
8. make it easier for the ISP or OSP to pursue users for violations or infringement;
9. limit the ISP’s or OSP’s liability for use of content, errors or problems associated with downloaded software, other products or services.

The click - wrap agreements are generally used in three instances: where a term of use must be accepted (with regard to regulating access to certain websites); where an exclusion clause is to be relied upon in an effort to deflect or limit liability; and in software licensing agreements. (Koornhof, 2012)

2.2 Browse-Wrap Agreements

“Browse-wrap” agreements, as distinct from “click-wrap” agreements, do not require the active consent of the user. Acceptance of a browse-wrap is implied from the user’s browsing or other activity on the web site, even if the user has not reviewed the electronic contract. Browse-wrap agreements are typically found at the bottom of a webpage in the form of a link to another page on which the terms and conditions are posted. The user is not required to review the contract, much less access the page where it’s located, in order to proceed.

3. ELECTRONIC SIGNING OF THE AGREEMENT AND E-COMMERCE

The 21st century is a time of expansive technical - technological development. The development of the information technology, enabled rapid expansion of the business around the world, thus are deleted or there are no trade barriers or boundaries.

The Internet allows numerous opportunities for business development through various economic activities such as advertising of the products and services, buying and selling products and services, entering new markets and internationalization of business, exchange business information, electronic mail and computer fax e-sales, e-payment, etc. But to use the Internet is necessary to have hardware to establish a connection to the Internet provider to possess a basic level of knowledge of Computing and others. For all of that is required numerical population with sufficient financial capacity to purchase the necessary equipment and to pay the costs of connecting, and of course to be educated to perceive the capacities and the possibilities offered by the Internet.

3.1. E-commerce

Electronic commerce allows a completely new, revolutionary approach to conducting business. We live in a time where the monitoring and implementation of new technological developments and following of the new trends of trading has become imperative in the modern business world. The best and the most effective way that managers can improve performance and improve the performance of the company is through the implementation of new technologies and engage in electronic commerce. (Electronic trading,2007)

The introduction of electronic commerce requires reorganization and digitization of the business processes in line with the global trends and standards for electronic commerce (including defined standards for digital invoice and digital order). In Macedonia, the big companies are bringing solutions and are making an effort to digitize their existing business processes, while the small companies are implementing partial solutions to digitize only certain operations or parts of those operations. For bigger involvement of small and medium companies in the e-commerce and the online marketing, it is essential to be offered trainings for employees on how to reorganize and digitize the business processes, to accept the electronic documentation standards, and all it will create conditions for inclusion in electronic commerce and the organization of the marketing process through the Internet.

3.2 What is E-commerce?

Electronic commerce is an expression that contains two terms, which are explained below:

The first term “electronic” refers to asset (medium) through which the action is executed. There are many publications, regulations and considerations which this term means any way (form) of communication which excludes physical contact between participants in trade and

incorporate some form electronically. According to this concept in e-commerce trading would go through any of these means (media): phone, fax, telex, internet, intranet ... Unlike this broad understanding of the term “electronic”, the second, narrower thinking and defining this expression includes only transactions that are conducted online, or through the use of the Internet as a medium. (Mihajlovski, 2010)

The second term “trade” refers to the action (transaction) which is conducted through certain electronic means. And here, there are different notions of the term. In one, indirect electronic commerce involves electronic ordering (purchase) of goods that have a material form, must be physically delivered and that depend on numerous external factors, such as the transport system and postal services.

The second, direct e-commerce means electronic ordering, payment and delivery of intangible (untouchable, digital) goods and services, such as for example computer programs or entertainment (music, movies, books). From the above expressed by defining the two notions of electronic commerce for the same we can draw a definition as follows:

The term e-commerce refers to transactions that are conducted online, and exclusively through the web-based applications for trade (transactions through electronic mail are excluded) and who accept goods and services in the material and the immaterial form.(Ibid)

3.3 How works e-commerce?

The e-commerce is based on the use of the Internet as a mean through which the seller and the buyer communicate and enter into the Purchase Agreement, i.e. the order and the payment of products and services. In order to make the order are used web-based software applications, known as the food basket (shopping cart), while for the payment are used special web portals for payment. Main means of payment are the credit and debit cards issued by different international organizations and electronic money as an electronic surrogate of banknotes used for electronic payments. The transaction is realized through special portals payment etc. payment

processors (payment processors). For identification of the buyer often are used the user name and password, while rarely are used more sophisticated forms of identification, such as for example digital certificates. However, for the safety of the transaction is required the seller's website to use system to encrypt transactions (Secure Socket Layer-SSL). Lately is increased the overall safety of transaction by using security code (secure code) of credit cards. (www.mio.gov.mk, 2010)

In the e-commerce re included more countries:

- vendor (online merchant)
- buyer (customer, client)
- banks (bank card issuer of the buyer card and bank service of the merchant), and
- payment processor as an institution that has served portal for payment.

The number of online retailers that can be enormous and the number of payment processors is lower. In fact, the online merchant can not receive orders and charge unless has a contract with the bank through which can charge for transactions that are carried over the Internet, while the bank must have a contract with the payment processor. This “background” way of functioning of the e-commerce increases the security when paying as the most sensitive part of the e-commerce.

c) Intellectual Property Rights in e-commerce

One of the foremost considerations that any company intending to commence ecommerce activities should bear in mind is the protection of its intellectual assets. The Internet is a boundless and unregulated medium and therefore the protection of intellectual property rights (“IPRs”) is a challenge and a growing concern amongst most e-businesses. While there exist laws in India that protect IPRs in the physical world, the efficacy of these laws to safeguard these rights in e-commerce is uncertain. Some of the significant issues that arise with respect protecting IPRs in e-commerce are discussed hereunder.

1. *Determining the subject matter of protection:* With the advent of new technologies, new forms of IPRs are evolving and the challenge for any business would be in identifying how best its intellectual assets can be protected. For example, a software company would have to keep in mind that in order to patent its software, the software may have to be combined with physical objects for it to obtain a patent.

2. *Ascertaining novelty I originality:* Most intellectual property laws require that the work / mark / invention must be novel or original. However, the issue is whether publication or use of a work I invention I mark in electronic form on the Internet would hinder a subsequent novelty or originality claim in an IPR application for the work / invention / mark. An e-commerce company would have to devote attention to satisfying the parameters of intellectual property protection including originality requirements in its works to preclude any infringement actions from third parties who own similar IPRs.

3. *Enforcing IPRs:* As will be discussed under the “Jurisdiction” issue, it is difficult to adjudicate and decide cyber-disputes. The Internet makes the duplication, or dissemination of IPR- protected works easy and instantaneous and its anonymous environment makes it virtually impossible to detect the infringer. Moreover, infringing material may be available at a particular location for only a very short period of time.¹¹ A company must also keep in mind that since IPRs are inherently territorial in nature, it may be difficult to adjudge as to whether the IPR in a work or invention is infringed, if it is published or used over the Internet, which is intrinsically boundless in nature. For example, if ‘Company A’ has a trademark registered in India for software products, but a web portal based in the US uses the same trademark for marketing either software products or for marketing some other goods, it may become difficult for Company A to sue for infringement. Moreover, due to differences in laws of different nations, what constitutes infringement in one country may not constitute infringement in another. Further, even if Company A succeeds in proving an infringement action, since the IPR that it owns is only valid for India, the

scope of remedies that may be available to Company A would be territorial and not global. Thus, the web-portal may be restrained from displaying its site in India or may have to put sufficient disclaimer's on its website. In order to restrain infringement in other countries, Company A may need to file proceedings those countries also. This process may prove to be time-consuming and expensive for the aggrieved Company.

In light of certain technology driven mechanisms such as electronic copyright management systems ("ECMS") and other digital technologies that are evolving to prevent infringement, the recent World Intellectual Property Organisation ("WIPO") Copyright Treaty¹² explicitly mandates that all contracting parties to the treaty shall have to provide adequate legal remedies against actions intended to circumvent the effective technological measures that may used by authors to prevent infringement of their works.¹³ However, these mechanisms may not be commercially viable and their use may also depend on international inter- operability standards, as well as privacy concerns.

4. *Preventing unauthorised hyperlinking and meta tagging:* The judiciary in many countries is grappling with issues concerning infringement of IPRs arising from hyperlinking and meta tagging activities. Courts in certain jurisdictions have held that hyperlinking, especially deep-linking may constitute copyright infringement, whereas meta tagging may constitute trademark infringement. For example, Company A's website provides an unauthorised link to Company B's website, or if Company A's website uses meta-tags that are similar to Company B's trademarks, Company A could be sued for violating Company B's IPRs.

5. *Protection against unfair competition:* Protection against unfair competition covers a broad scope of issues relevant for electronic commerce. So far, electronic commerce has not been subject to specific regulations dealing with matters of unfair competition. Companies on the Internet, have to constantly adapt to and use the particular technical features of the Internet, such as its interactivity and support of multimedia applications,

for their marketing practices. Problems may arise with regard to the use of certain marketing practices such as (i) Interactive marketing practices (ii) spamming (discussed under the “Privacy and Data Protection” section) and (iii) immersive marketing. Further, questions regarding the territorial applicability of such standards would also arise.

3.4 Regulations on e-commerce in Republic of Macedonia

Law on Electronic Commerce (Official Gazette of RM no 133/2007; 17/2011;)

Macedonia relatively late adopted the Law on Electronic Commerce, in 2007 year. This is due to the fact that R. of Macedonia undertakes to harmonize the national legislation with the EU regulations and the EU Directive on e-commerce was adopted in 2000 year. Partial reason for the delay lies in the fact that there was a negative conflict of jurisdiction over which ministry is responsible to prepare the law. The need to bring this law was even greater, considering that in practice there was e-commerce in smaller size which included several Macedonian companies, banks, ISPs, and customers whose number day by day was increasing. The working in low-regulation of transactions, which could easily lead to negative consequences on those who participated in the e-commerce and the potential users and general development of e-commerce in the RM.

The goal with this law was set to introduce a legal framework for the development of the electronic commerce by providing legal certainty in the business relations.

At the same time, the law was supposed to allow the definition of the conditions for security and safety in performing services of the information society (including e-commerce) and the protection of consumers who use such services. The law regulates the basic principles for providing information society services, in particular related to electronic commerce, the responsibilities of providers of information society services, commercial communication and rules concerning the conclusion of contracts in electronic form. The rationale of the law states that it is fully compliant

with the EU Directive on e-commerce. If you perform a comparative analysis and can really conclude it. The Law does not contain substantive provisions beyond those contained in the Directive. The E-Commerce in Macedonia is regulated by a single legal act, which does not mean that other regulations determine the performance of online retailers.

3.5 Other relevant national regulations

In Macedonia there are applicable regulations relevant to electronic commerce. Some of these Provisions go complement or overlap with the provisions of the Law on Electronic Commerce.

1. The Law on Electronic Data and Electronic Signature - give legal validity and evidential force of the data in electronic form and the electronic legal signature and payment operations. The existence and the application of the provisions of this law allows [is, legally, an electronic trading before the adoption of the Law on Trade.(Official Gazette of RM – no 98/08: 34/2001 ; 148/2011)

2. The Law on electronic communications - this law, among other things, sets rules for electronic communication and work of ISPs as a segment of electronic commerce. The provisions of the Law on Electronic Commerce concerning unsolicited (unwanted) commercial communications (spam) and responsibilities of service providers of information society contained in the Law on Electronic Communications. (Official Gazette of RM – no 13/2005;14/2007; 55/2007; 98/2008; 83/10; 13/12; 59/12 ;23/13)

3. The Trade Law - sets the conditions and the manner of conducting of trade on internal and external market, thereby providing a basis for e-commerce. This law of very general and insufficient way defines the electronic commerce, letting to be upgraded by other regulations.(Official Gazette of RM – no 28/2004, 84/2005, 25/2007, 87/2008, 42/2010, 48/2010, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014, 41/2014, 138/2014, 88/2015, 192/2015 ; 6/2016)

4. The Law on Consumer Protection - elaborates in detailed the

rights and the obligations of the parties - the trader and the consumer - the contract concluded at a distance. In this group of contracts are included all contracts in which is used a medium for distant communication (at the conclusion of the contract there is no physical presence of the parties).(Official Gazette of RM – no 38/3004; 77/07; 103/08; 148/2011)

5. Payment Operations Law - This law, among other things, regulates the manner and conditions for issuing electronic money as a payment tool used to make payments online, including the conditions for the establishment of electronic money issuer and the rights and obligations of publisher and owner of the electronic money.

6. The Penalty code- several members of this law are related to cybercrime and its various manifestations. These crimes can be committed in the context of electronic commerce, especially by the seller and the buyer.

3.6 Electronic Signature

A generally accepted definition of electronic signature is that ... “Electronic signature is a string of data in electronic form contained or logically associated with other data in electronic form and is intended to determine the authenticity of the data and the identity of the signatory.” The electronic signature is a technology whose application in the system of electronic things are possible to verify the authenticity of the signer, to protect the integrity of the transmitted data and the irrevocability of the electronic signature of the date of the message or the document. So, analogue to the use of the handwritten signatures in the standard system, the electronic signature is used in the electronic system.(<http://e-biznisi.net/>, 2014)

The importance of the electronic signature is especially in the electronic commerce. Analogueto the signing of contracts in written form, the electronic signature in electronic contracts means to authenticate the parties. Because of its importance in the national legislation are enacted laws to regulate the electronic signatures in the context of trade agreements.

4. ELECTRONIC CONTRACTING IN RM

The agreements may be made electronically, or in electronic form. The offer and the acceptance of the offer may be provided electronically or in electronic form. The agreements concluded by electronic means shall not be adjudicated because it is made by email, or in electronic form. When the validity and the conclusion of the agreement requires the signature of the person will be deemed that this requirement is met by an electronic message signed with an electronic signature in accordance with the regulations on the electronic signatures. The providers of the information society are obliged to the recipient of the service before the conclusion of the contract, in a clear, understandable and straightforward way to provide him the following informations:

- Various technical procedures to follow to conclude the agreement,
- The content of the contract,
- The general provisions as a part of the agreement,
- Whether the signed contract will be archived by the service provider and whether it will be available,
- The technical means for identifying and correcting input errors before making the order, and
- The languages offered for the conclusion of the agreement.

The service provider should give all relevant codes of good practice on which he is signer and the informations on how these codes can be used electronically.

The provisions contained in the agreements in electronic form concluded by the providers of information society services must be made by available to the users of the service in a way that will allow to store and reproduce them. The recipient of the service when placing an order electronically shall ask the service provider to submit a confirmation for the order in a separate e-mail without delay and electronically. The service provider shall provide the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input data

before you make the order, unless the parties are not taken by consumers and are differently agreed.

The order and the confirmation shall be deemed as received when they are accessible for the parties. The agreement in electronic form shall be deemed as concluded at the time when the bidder will receive an electronic message containing a statement that the recipient accepts the contents of the agreement.

The offer and the acceptance shall be deemed received when they become accessible for the parties.

The provisions of the trade or the section for electronic signing of agreement are not valid and the same time point that the conclusion of electronic agreements is not permitted in the following cases:

- Governed by the regulations for family and inheritance,
- That create or transfer rights of real property, except the rental rights
- For which the law requires the involvement of courts, notaries or similar professions
- For given guarantee and for further security, taken by persons that are acting for purposes outside their trade, business or profession. (Mihajlovski, 2010)

5. CONCLUSION

Basis of the preparation of this text was the term of the sales agreement, which was founded in the Roman law (*emptio venditio*) and which has a solid foundation for its upgrade in the later bourgeois social orders, socialist social administration, as well as the legal regulation in today's Macedonian legislation. Certainly the contemporary understanding characteristic of the later social orders, made appropriate changes to the classic understanding of this agreement.

The everyday development of the society and the increasing of the application of the technology in every sphere of the human life caused

modernization and increasing of the technological development. So invoking to the huge advantages of using the technology including the electronic communication, we have witnessed the insertion of the same in every segment of our everyday business.

The sales agreement is one of the most important contracts in the daily trading, so over time with the development of the technology it is up to date with the changes and the needs of the new Internet era. So the sales agreement through the electronic commerce, electronic contracting and the electronic signature, follows the modern trends of development of the business.

The electronic commerce (e-commerce / e-business) allows a completely new, revolutionary approach to conducting of the business. We live in a time where the monitoring and the implementation of new technological developments and following the new trends of trading has become imperative in the modern business world. The best and most effective way in which the managers can improve the performance of the company is through the implementation of new technologies and engage in the electronic commerce. The implementation and the introduction of new rules and principles in the business since the introduction of the same until today is subject of daily changes, criticism and skepticism when introducing them. But following the statistics and research related to this issue the implementation of electronic commerce came across a very positive attitude, and also greatly affirmed my thesis that the modern way of trade and sales agreement have seen through the introduction of e-commerce, a large number of Macedonian citizens and legal entities to benefit from the 21 first century, the century of Internet technology, and also shorten the time spend on the traditional trading and bargaining.

Consequently they tend to a complete change of the system of business, inserting the electronic communication in every segment. So indisputable is the fact that consequently the large corporations need to cut the high cost of contracting “Face to Face” and the introduction of e-contracts certified with the electronic signatures.

All of this is news to us and has a number of small companies that

are skeptical in the introduction of full electronic communication in the daily business operations. In the preparation of this thesis a great benefit was the survey entitled “Representation of the electronic contracting and sales through Internet in the daily trading in R. Of Macedonia” as well as interviews and discussions with people that are executing their trade strictly through Internet. The overall conclusion is that the Internet brought a new revolution in every aspect of the human life, but mostly in the business. Consciously or subconsciously as we need amortization, modernization and regular maintenance of the objects, materials and office supplies, it is also necessary a change, modernization and adaptation of the legal provisions, ranging from the domestic legislation, and consequently the introduction and the adaptation of the international legislation. As a country with candidate member status in the European Union over the past years we have adopted and embraced many directives, instructions and prepared new laws, organizations, councils and etc..

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