

Civil Capacity of Legal Persons under Insolvency Proceedings with Regards to Property Transfer Deeds

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Abstract

The insolvency procedure is a special procedure, derogating from common law regarding the method by which commercial companies identify means of recovery of the activity in delicate moments of their existence. Under this aspect, we will analyze how the civil capacity is affected, the possibility of companies to conclude certain categories of property transfer deeds, both from the perspective of acquiring and from the perspective of alienating these rights. Our analysis will focus on answering to what extent the role of the receiver and the syndic judge represents a limitation of the civil capacity and especially if it can be discussed about a lack of it in the insolvency procedure. We will go through the legislation, jurisprudence, and doctrine at the national level, and where the answers will not be sufficient, we will tangentially analyze, through comparative law, the legislative solutions promoted at the level of European legislation and of other states that share a legal system like the national one.

Keywords: insolvency, legal entities, Law no. 85/2014, civil capacity, transfer of property.

JEL Classification: K15, K22

1. Introduction

The insolvency procedure represents one of the most important national legal norms through which commercial companies are offered a real possibility of recovery when they have financial difficulties. According to art. 2 of Law no. 85/2014², *the purpose of this law is to establish insolvency prevention procedures that debtors in difficulty can resort to and, respectively, collective insolvency procedures to cover the debtor's liabilities, in which the debtor benefits, when possible, of the chance to recover his activity.* It can be observed from the definition of its practical utility an aspect that is of particular importance from the point of view of the study, namely, the coverage of the company's liabilities is sought. This procedure looks with particular importance at the situation of creditors, the primary necessity being their satisfaction through the specific procedures.

In the alternative, when possible, the purpose of the insolvency proceedings concerns the debtor, the legal person, and its recovery³. Conceptually we consider this approach partially wrong, but we can understand it by considering the steps of the procedure that we will develop in the following paragraphs. From the point of view of the social impact, we believe that this procedure should consider equal, in terms of importance, covering the liability, but also the recovery of the legal entity, as the implications are equally harmful for the business environment, but also in consideration of the local communities from the point of view of the local budget and the major risks for employees from the perspective of the lack of jobs in certain sectors. However, although it is not the object of the study, we consider it relevant to present the perspective by referring to the purpose of the procedure.

Insolvency refers to the situation where a legal entity is unable to pay its debts as they fall due from its income. This can be a temporary situation, caused by cash flow problems or short-term economic difficulties, or it can be a permanent situation, where the company is no longer viable. In both cases, legal intervention is required to protect the rights and interests of all parties involved - the debtor, creditors, employees and, in some cases, shareholders or associations and other interested parties. According to art. (5) of Law 85/2014 *insolvency is that state of the debtor's patrimony which is characterized by the insufficiency of funds available for the payment of certain, liquid and due debts and which is presumed when the debtor, after 60 days from the due date, has not paid his debt*

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² Law no. 85/2014 on insolvency prevention and insolvency procedures, published in the Official Gazette, Part I no. 466 of June 25, 2014, with subsequent amendments.

³ See Laura Macgregor (2020) *Partnerships and legal personality: cautionary tales from Scotland*, „Journal of Corporate Law Studies”, 20:1, 237-262, DOI: 10.1080/14735970.2019.1654805.

to the creditor; presumption is relative.

The law provides for two distinct procedures, a procedure through which the debtor tries to recover the company and a procedure through which the debtor can no longer recover the activity. In the first case, we identify the general procedure by its specific stages, following the submission of the application for entry into insolvency, namely the observation period, followed by the period of bankruptcy or the implementation of the reorganization plan and possibly the reintroduction of the company into the civil circuit or bankruptcy if the reorganization plan cannot be carried out. In the second case, the debtor's activity can no longer be recovered, attention being directed to satisfying the creditors, through the simplified procedure. We understand from this that the stages are different, but tangential, in certain ways the general procedure can lead to the same consequences as the simplified procedure, namely the bankruptcy of the companies. Viewed under the part-whole relationship, we can deduce that the simplified procedure, bankruptcy is only a part of the insolvency procedure. In practice, confusion can be created for laymen between the two institutions, therefore we consider this classification useful from a practical perspective.

As for the reasons underlying the financial difficulties, they are multiple and generally start from the faulty administration of legal entities⁴. However, even in the consideration of good administration, the social and economic reality can lead to the emergence of insolvency. Not far from the year 2020 the Covid-19 pandemic had a devastating effect on commercial companies, whether we are talking about suspending activity for long periods of time, affecting supply chains, limiting production and even distribution consisted of an increase of approx. 15% of legal entities entered insolvency in 2022 compared to 2020⁵.

We observe that this reality is continuously relevant on the territory of Romania, in the sense that the analysis of the consequences of this procedure from the point of view of civil capacity is of interest for the legislator, but also for theoreticians and practitioners. Under the aspect of the will to self-determination, we can state that the insolvency procedure introduces certain limitations through institutions designed to control and sometimes even eliminate the possibility of the legal entity to make its own decisions. The present analysis tries to answer the practical challenges regarding the qualification of the intervention of third parties in the life of legal entities.

2. Participants in the insolvency proceedings

In order to analyze the aspects stated in the previous paragraphs, we consider it useful to present the participants in the procedure, their quality, but especially the duties of each one within the general procedure or the simplified procedure. All categories of participants are found in Law no. 85/2014 *on insolvency prevention and insolvency procedures*, the Civil Code, or other special laws.

We believe that firstly we will have to understand who the quality of debtor can have, more precisely to which entities the insolvency procedure can be applied. We discover through art. 3 paragraph (1) from Law 85/2014 that *the procedures provided for by this law apply to professionals, as defined in art. 3 paragraph (2) from Law no. 287/2009 on the Civil Code, republished, with subsequent amendments, except for those for which special provisions are provided regarding the insolvency prevention regime and their insolvency*. We have in the content of this legal text two reference articles, one for the definition of professionals, and the second for the definition of exclusions from special law.

As for professionals, these are those who operate an enterprise, and art. 3 paragraph (3) The Civil Code clarifies what it means to operate an enterprise, revealing an extremely important idea, the procedure provided by Law no. 85/2014 applies both to professionals who have a profitable purpose and to those who do not have a profitable purpose. Thus, we understand that the insolvency procedure applies to commercial companies regulated by Law no. 31/1990 on commercial companies,

⁴ Giedre Mitkute & Joseph Tanega (2011) *Asset protection trusts: a legal and economic analysis of competing regulatory frameworks*, „Law and Financial Markets Review”, 5:1, pp. 46-61, DOI: 10.5235/175214411794390002.

⁵ *Profesioniști intrați în insolvență statistică a ONRC* available at <https://www.onrc.ro/index.php/ro/statistici?id=252> accessed on 12.05.2023.

to professional traders natural persons provided for by Emergency Ordinance 44/2008 on the conduct of economic activities by authorized natural persons, individual businesses and family businesses, but also non-profit organizations legislated by Government Ordinance 26/2000 regarding associations and foundations. We can see that according to the law, a wide spectrum of professionals can be debtors. However, the exclusions are limited and expressly provided by law.

At the same time, the syndic judge has an important role, although there is no express definition, by referring to his duties provided in art. 45 of the Law no. 85/2014 we can understand that it represents the assurance that the procedure is conducted in a legal and fair manner, protecting the rights and interests of all other parties involved. He has a series of responsibilities and duties that position him in a central role, being the one who oversees compliance with all the steps of the procedure.

The judicial administrator/judicial liquidator is a natural or legal person who holds the status of insolvency practitioner, according to the law. The attributions provided by art. 58 of the Law no. 85/2014 lead to the idea that it has the role of administering and supervising the debtor's activity, depending on the lifting or not of its right of administration.

Next, we consider it relevant to define the special administrator, this being the natural or legal person empowered by the professional to represent his interests in the procedure and, when the debtor is allowed to administer his activity, to carry out the administrative acts in his name and on his account. We understand from the very definition that the debtor is limited to certain prerogatives from the full exercise capacity, aspects that we will return to in the following paragraphs.

The last category of participants in the insolvency procedure is represented by creditors, who are the holders of claims on the debtor's assets. The recognition of the creditor quality is not done automatically by identifying the claim, they have the obligation, according to the law, to apply for registration at the bankruptcy mass⁶. Failure to submit the application within the terms and conditions of the law leads to the loss of this quality, in other words, the quality of creditor is a quality that is born under the condition from the opening of the procedure until the deadlines set by the syndic judge. The categories of creditors are expressly and limitedly provided by the Law no. 85/2014, but as they are not the subject of the analysis, we consider that the presentation of the classifications is not required.

3. Civil exercise capacity

Relevant for the understanding of the limitation of certain rights regarding debtors are the provisions of the Civil Code regarding professionals that we cited previously, in conjunction with the provisions regarding civil capacity, especially civil capacity to practice. According to the provisions of art. 209 para. (1) Civil Code, the legal entity acquires the capacity to exercise from the date of its establishment, and the exercise of this capacity is carried out through its administrative bodies. Unlike the provisions of art. 37 et seq. of the Civil Code, which concern the exercise capacity of natural persons, in the case of legal entities there is no other limitation in the sense of the existence of a restricted exercise capacity.

To understand to what extent the provisions of art. 209 of the Civil Code applies to all professionals who can be subject to the capacity of participant as a debtor in the insolvency procedure, through art. 187 of the Civil Code we show that *any legal person must have an independent organization, affected by the achievement of a certain lawful and moral purpose, in accordance with the general interest*⁷. Consequently, all professionals circumscribe themselves to this definition, in

⁶ For a comparative view see: Ram Mohan M. P. (2022) *The role of insolvency tests: implications for Indian insolvency law*, „Indian Law Review”, 6:3, pp. 387-408, DOI: 10.1080/24730580.2022.2129197; Emily Lee (2022) *The cooperation mechanism and legal harmonisation: analysing the past, present and future of mutual recognition and assistance in insolvency proceedings across Mainland China and Hong Kong, with insights from EU insolvency regulations*, „Journal of Corporate Law Studies”, 22:2, pp. 971-1015, DOI: 10.1080/14735970.2023.2212451 and Emilie Ghio, *Redefining Harmonisation* (Elgar, 2022), Chapter 5 *Harmonisation in action: European Insolvency Law*, at 107.

⁷ Law no. 287/2009 regarding the Civil Code, republished in the Official Gazette, Part I no. 505 of July 15, 2011, with subsequent amendments.

which sense we conclude that indeed the legal provisions regarding the exercise capacity of the legal person are applied uniformly, regardless of the law regulating the specific conditions of establishment.

At the same time, the Civil Code does not make any other differentiation or limitation of the exercise capacity of the legal person. However, by reference to the provisions of Law no. 85/2014, we consider that we are facing genuine exceptions to this principle. For clarity, we show that this analysis applies exclusively to the general procedure, not to the simplified procedure as previously defined. It is unequivocal that once the company enters the bankruptcy procedure, it enters the dissolution procedure, from which point its exercise capacity disappears. Eloquent legal texts in this sense are found in art. 245 Civil Code, art. 5 point 45) of the Law no. 85/2014 and other express provisions in the special law.

Next, we show that regarding the general procedure, separate analysis of two situations resulting from the Law no. 85/2014 is required. In the first case we have the situation of the debtor which entered the general procedure whose right of administration is lifted, and in the second case we identify the situation of the debtor whose right of administration was not lifted. We will present the elements that differentiate the two hypotheses, then continuing with the common elements since the law does not make express distinctions between the two. Starting from the very name, certain conclusions result for each situation, the attempt to determine the way in which the elements of civil capacity are transposed by reference to the three types of acts that can be concluded by the natural or legal person in full exercise capacity, respectively acts of conservation, administration, but especially disposal acts.

4. The debtor whose right of administration has been lifted

The lifting of the right of administration is a sanction expressly and limitedly provided for by the Law no. 85/2014. This may occur at the time of the judgment or conclusion of the syndic judge opening the insolvency procedure, or during the period of observation or implementation of the reorganization plan. According to the provisions of art. 85 para. (1) Law no. 85/2014 lifting the right of administration consists in lifting the right of the debtor to conduct his own activity, to manage his own assets and to dispose of them. In this situation, the lifting of the right of administration can be total or partial, the effective method and the conditions under which the right of administration can be exercised being specified in the judgment or conclusion of the syndic judge.

Under these conditions, the natural question arises as to who will manage the debtor's activity. The answer can be found in the provisions of art. 58 para. (1) letter f), the legislator giving the judicial administrator the prerogative to administer the company. Regardless of the moment at which the right to administer the company arises, the judicial administrator will in all cases be the one who will manage the debtor's activity. The legislative solution being unequivocal in this regard.

We further understand that the judicial administrator has full powers to manage the debtor's activity like a statutory administrator, but under the supervision of the syndic judge. It is indisputable that the solution of lifting the right of administration cannot lead to the blocking of the debtor's activity, since such a solution equates in all cases to the impossibility of fulfilling the object of the activity and, implicitly, its bankruptcy. But the solution chosen by the legislator is in the sense of continuing the activity even in the conditions of lifting the right of administration⁸.

5. The debtor whose right of administration has not been lifted

In the situation where the debtor was not granted the right of administration, the General

⁸ Ionel Didea, Diana Maria Ilie, *Restructuring Practice is Now Growing Worldwide Post-Covid Insolvency*, „International Investment Law Journal”, Volume 2, Issue 1, February 2022, p. 21, available here: <http://www.investmentlaw.adjuris.ro/articole/An2v1/2.%20Didea,%20Ilie.pdf>, accessed on 28.03.2023 and Ionel Didea, Diana Maria Ilie, *(R)evolution of the insolvency law in a globalized economy*, „Juridical Tribune - Tribuna Juridica” Volume 9, Issue 1, March 2019, p. 94, available here: <http://www.tribunajuridica.eu/arhiva/An9v1/8.%20Didea,%20Ilie%20%20EN.pdf>, accessed on 29.03.2023. See also Cristina Elena Popa Tache, *Introduction to International Investment Law*, Ed. Adjuris International Academic Publisher, 2020, pp. 28-89; ISBN:978-606-94978-2-1; available here: <http://adjuris.ro/reviste/iiil/E-book%20Cristina%20Popa%20-Tache.pdf>, accessed on 26.03.2023.

Meeting of Associates/Shareholders is responsible for appointing a special Administrator. According to the provisions of Law no. 85/2014, it has the prerogatives of administration. It is eloquent, however, that the management of the company by him can only be done under the supervision of the judicial administrator. Which means that even in this situation we still identify an apparent limitation of the civil capacity of disposal.

According to the provisions of art. 5 point 4 of Law no. 85/2014, the special administrator performs the necessary administrative acts in the name and on behalf of the debtor. Regarding the wording, the idea could emerge that, compared to the categories of acts in the category of those specific to the civil exercise capacity, he cannot also perform acts of preservation and acts of disposition. From this point of view, we appreciate that the wording chosen by the legislator is unfortunate in view of the confusion that could be created. If this were the conclusion, we appreciate that in such conditions the activity of the debtors would be deeply flawed since even the judicial administrator cannot do anything other than supervise the activity of the special administrator, the entire purpose of the law being diverted.

From these considerations, we appreciate that in the situation where the debtor's right of administration has not been lifted, the special administrator can perform the administrative acts in the sense of managing the debtor's activity, and not in the sense previously presented. He can perform all the activities allowed by the general rules and can only be limited to those found in the special rules. Certainly, all this under the supervision of the judicial administrator and under the verification of the syndic judge. In other words, in this situation the prerogatives of the special administrator are to an extent identical to the prerogatives of the statutory administrator.

6. Conclusion of property transfer deeds

Starting from these premises, corroborating the legal provisions presented previously, we can conclude either that the company is in a situation of a lack of civil exercise capacity, a limitation of exercise capacity, or in full exercise capacity.

a) The debtor no longer has civil legal capacity. This option should come naturally under the conditions in which the provisions of art. 85 para. (1) Law no. 85/2014 provides that the lifting of the right of administration consists in the impossibility of the company to conduct its own activity, to administer or dispose of its patrimony. We consider that this option cannot be accepted in the conditions where, being in the observation period or even in the implementation period of the reorganization plan, the company still interacts with its business partners, suppliers, customers, but the lack of exercise capacity implies the automatic entry bankrupt.

Moreover, the special law does not present any rule derogating from the rule provided by the Civil Code except in the previously mentioned sense, namely entering the simplified procedure and implicitly going through the bankruptcy procedure. Under these conditions, we consider that the general rule will be applied which unequivocally stipulates that the legal entity acquires the legal exercise capacity from the moment of its establishment and that it ceases at the moment of dissolution.

There is no differentiation in terms of the solution presented by reference to the situation of the debtor whose right of administration was lifted or the debtor who was not lifted of the right of administration. In any of the two scenarios, the company retains its civil exercise capacity. Whether the company's administration is carried out through the judicial administrator or the special administrator, the debtor continues its activity under the conditions provided by the special law. As we have shown previously, whatever the goals of the insolvency procedure may be pursued, the continuation of the activity being one of how it can achieve them, a lack of the debtor's capacity to exercise is inconceivable.

b) The debtor has limited civil exercise capacity. Considering the provisions of art. 209 of the Civil Code in conjunction with art. 244 of the Civil Code, it appears that, as far as the legal person is concerned, it either has or does not have civil legal capacity. The legislator did not provide the same differentiation as in the natural person in the sense of the existence of conditions in which the civil exercise capacity is restricted or even limited.

However, starting from the delimitations found in art. 38 Civil Code, by reference to the provisions of Law no. 85/2014 we can conclude that we are in a case where the special law deviates from the general norm. It is clear from the provisions of Law no. 85/2014 that the judicial administrator in the management of the company's activity is under the rigors established by the syndic judge and under the control of the creditors' committee or the creditors' meeting. Moreover, the special administrator is in all cases under the supervision of the judicial administrator, any act that the special administrator concludes does not have the visa of the judicial administrator can be annulled on application by the court.

From the point of view of analyzing the similarities, this situation is also encountered regarding the acts of the minor who does not have full exercise capacity. The sanction in both cases is relative nullity, therefore we can consider that we are in the situation of a genuine exception to the provisions of art. 209 of the Civil Code, in the sense that the legal entity in insolvency proceedings has in the conditions for lifting the right of administration.

c) The debtor has full civil exercise capacity. Although we can identify certain rules for confirmation, verification of the acts of the special administrator or even of the judicial administrator, we appreciate that these limitations cannot concern the capacity of the company itself. From the decision-making aspect, even the statutory administrator of a company that is not in insolvency proceedings must, depending on the limits of the mandate, obtain approval from the general assembly. Under these conditions, it is obvious that we cannot discuss the limitation or non-existence of the civil exercise capacity.

All these apparent limitations consider the principles of operation of professionals. They are established and operate on a set of common rules. Whether we are talking about commercial companies, non-profit organizations, or even individual traders, all these forms of organization have representatives, they have management bodies and decision-making bodies. It is natural that in this situation there is a form of hierarchization of the decision that has interest as its legal basis.

Similarly, in the insolvency procedure, there is the discussion about interest, only that the founding members, the general assembly of associates/shareholders were relegated to the background in the view of Law no. 85/2014, since, as we have shown, the main purpose of the procedure is to satisfy the creditors. Therefore, all the decisions that the judicial administrator who manages the company's activity, or even the special administrator who manages, under the supervision of the judicial administrator, the debtor's activity, will have to request and obtain, where the law requires, the approval of either the judicial administrator or the meeting of creditors or the committee creditors. This approval order stems from the fact that the decision-making body regarding the debtor's assets is no longer the statutory general meeting but the general meeting of creditors.

In the consideration of these aspects regarding transferable property deeds they must respect the principle of civil capacity. The company is fully in this capacity, Law no. 85/2014 does not create another distinction, nor does it make any other derogation from common law. However, for the acquisition or alienation of assets from or in the assets of the insolvent company, it is necessary to comply with the procedure provided by art. 87 of Law no. 85/2014, respectively, *the debtor will be able to continue carrying out current activities and can make payments to known creditors, which fall within the usual conditions for exercising current activity, as follows under the supervision of the judicial administrator or under the direction of the judicial administrator*. At the same time, regarding activities that exceed these limits, such as the alienation or acquisition of assets, the performance of any other acts of disposition or administration are subject to the approval of the creditors' committee.

The legislative solution fully respects the model predefined by the Civil Code, and the solution appears to be normal and necessary to protect the creditors against the abuse of the debtor or even the receiver. As we have shown previously, the creditors have an interest in recovering the entire liability or as much of it as possible, precisely for this reason the approval of the creditors is necessary. However, as we have already shown, we cannot discuss a limitation of the entity's capacity, the special law is only intended to ensure a verification mechanism for its representatives to protect those who have an interest in being protected in such a procedure.

Moreover, and by reference to Law no. 31/1990, we can observe that the statutory

administrator does not always have full decision-making powers. Even in such a framework, the Decision of the General Assembly is the one that can confirm or approve the acts of disposal of the administrator, the specific sanction for performing acts exceeding the mandate being also relative nullity. Including regarding the reparation of damages caused by the activity of the administrator, it is similarly regulated in terms of Law no. 31/1990 and Law no. 85/2014, in the sense that mechanisms are presented and ensured through which both the judicial administrator, the special administrator, but also the administrator statutory to be liable for the damages caused.

Even more so about property transfer deeds, it appears necessary to impose a control measure for debtors. It is possible to encounter a situation where the assets of the debtor exceed the liabilities, the state of insolvency being only a liquidity problem. In this situation, according to art. 87 para. (2) the decision to sell some goods from the debtor's property will be taken by the creditors' committee itself in order to cover the liability. In such situations, the judicial administrator or the special administrator are obliged to proceed with the sale.

Another situation that may be of interest to debtors but also to creditors may concern the development of new sources of income through the purchase of goods, the diversification of the portfolio of activities in the sense of diversification of sources of income. Such proposals can come either during the observation period or during the implementation period of the reorganization plan, or even through the reorganization plan itself subject to the creditors' vote.

From a practical point of view, the operating mode of the approval mechanism is subject to the respect of the rights and obligations arising under Law no. 85/2014. We can see that the approval of creditors is not purely formal. As for the mechanism of creditor approval, it respects the mechanisms of the general assembly of associates, respectively a quorum condition and a majority condition are required to be complied.

The meeting of creditors is legally convened, and a decision can be legally adopted in the case of a meeting of a presence of 30% of the total value of the claims and the decision to be taken by the holders of the majority of the claims. As for the creditors' committee, it can be formed, depending on the total number of creditors, from three or five creditors, and decisions within the creditors' committee will be taken by simple majority.

7. Conclusions

The civil capacity of legal entities is essential for the functioning of the modern economy. It allows the creation and operation of entities that can employ resources, produce goods and services, hire employees, and participate in the economic and social life of the community⁹. At the same time, it involves a delicate balance between the permission to act freely and the need to protect the interests of other parties and society¹⁰. It is therefore essential that this capacity be regulated effectively and fairly, in accordance with the principles of civil law. When a company enters the insolvency procedure, its civil capacity undergoes certain changes. Indeed, the company continues to exist as a legal entity and to have civil capacity, but certain rights and obligations are transferred to the judicial administrator or the judicial liquidator, and certain activities are subject to the approval of the judge-syndic.

The dynamics of the decision-making flow have indeed changed, but participation in the civil circuit cannot be stopped. The introduction of creditors into the life of insolvent legal entities is necessary to provide guarantees that the company's liabilities will be covered. It is true that from a practical point of view not all types of debt will be covered in all cases, however it is necessary to ensure a mechanism that provides transparency from the opening of the insolvency procedure.

⁹ See Emily Lee *op. cit.* (2022), p. 971-1015; Alexander A. Kostin & Daria D. Kuraksa (2023), *International treaties on assistance in civil matters and their applicability to recognition of foreign judgments on the opening of insolvency proceedings (reflections regarding the Russian national and international experience)*, „Journal of Private International Law”, 19:1, 113-135, DOI: 10.1080/17441048.2023.2189215.

¹⁰ Helen Anderson (2014), *Directors' Liability for Fraudulent Phoenix Activity — A Comparison of the Australian and UK Approaches*, „Journal of Corporate Law Studies”, 14:1, 139-173, DOI: 10.5235/14735970.14.1.139.

In conclusion, during the insolvency procedure, the civil exercise capacity of a company, although it appears to be significantly limited and controlled, the limitations do not concern the company as a legal entity but concern the way of forming the decision. This differentiation is extremely important because, from a practical point of view, solutions may appear that lead to the annulment of some legal acts, or even make it difficult and stop the company's chances of recovery. The purpose of these restrictions is to protect the interests of creditors and to enable an efficient reorganization of the company, with the hope of avoiding bankruptcy and allowing the company to continue its business.

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