



Maqasid Al-Shari'ah in Ijarah (Leasing) Contract of Islamic Banking System

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Abstract

The operating *ijarah* and *ijarah* financing are currently generating interest among the Islamic banks, investors, customers and even policy makers due to their less risk overloads and better profits to the public. This paper attempts to highlight the benefits of applying the Islamic legal objectives (*Maqasid Al-Shari'ah*) in *ijarah* contract, and how a strict compliance to the latter can help manage *Shari'ah*, business and distribution of wealth in the society. The paper discusses the impact of Muslim scholars in applying *ijtihad* and analogical deduction to fashion out the appropriate ruling in respect of the issues, by putting into consideration what would be the best interest of Islam and Muslim community as a whole. It also discusses the consent of the contracting parties as one of the conditions validating the *ijarah* contract, and as a supplement to the objective of avoiding injustice and embezzlement of another person's wealth. The paper explains how the profit made and the risks incurred, if any, are shared between the parties involved in *ijarah* transaction which are proportionally shared according to what has been earlier agreed upon.

Keywords: 'Ijarah, Maqasid al-Shari'ah, Islamic banking, *ijtihad*, distribution of wealth.

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1. Introduction

Islamic banking system is based on Islamic law. Thus, its operation is in line with the principles of *Shari'ah* (Nasiru & Mansur, 2015). This banking system makes economic activities simple and reduces costs of transactions (Obaidullah, 2005). It also facilitates diversification for the investors and manages a number of risks arising from investor activities and the risks associated with the banking operation. Therefore, it contributes meaningfully to the development of the society (Dogarawa, 2014). Islamic banking prohibits activities that involve interest (*riba*), uncertainty (*gharar*), trading gambling (*maysir*) and sanctity of contracts. It only deals with (*halal*) legally permissible activities and avoids (*haram*) unlawful activities (Ayub, 2007).

Islamic banks mobilize deposits through the provisions of the normal current, saving and investment accounts. The structures and management of the deposit in Islamic banks are guided by the Islamic law principles on trust (*amanah*) loan (*Qard hassan*) and safe-keeping (*Wadi'ah*). The funds in these accounts are then employed by the Islamic banks to finance their investment activities. Islamic banking system adopts the modes of investment under Islamic commercial jurisprudence in structuring their products. Such modes include partnerships (*Musharakah* and *Mudarabah*), mark-up sale (*Murabah*), forward sale (*Salam*), leasing (*ijarah*) (Nasiru & Mansur, 2015). *Ijarah* (leasing) product is referred to as the lease of an asset or service for a stipulated period in exchange for a payment of rental instalments, which may, at the end of the leasing period, lead to a transfer of ownership of the leased asset (BNM, 2016). Technically, *ijarah* transaction is a contractual agreement whereby the owner of an asset sells the usufruct or the benefit or use of the asset to another person for the period covered by the contract while retaining the ownership of the property (Ayub, 2007). *Ijarah* contract, as it relates to the Islamic banking system, is a means through which the Islamic bank funds the purchase of a productive asset, so that the latter would facilitate the settlement of the bank as the lessor. Islamic bank leases the productive assets to the lessee who is the customer of the bank; the lessee pays

for the use of the usufruct derived from the assets; and at the end of the leasing period, the property reverts to the bank. (Rizwanullah et al., 2012). On the other hand, in the concept of *ijarah-wa-iqtina'*, which is sometimes called *ijarah thumma al-bay* or *ijarah muntahiyat bi mamluk*, the lessee becomes the owner of the leased asset after the payment of some amount or in some cases without the payment of amount (Nasiru & Mansur, 2015).

Islamic banks have been established and are operating in many countries of the world. Most Islamic banks in the countries have *ijarah* based banking products. However, there is need to look into the Islamic legal objectives (*Maqasid Al-Shari'ah*) regarding the banking system, in order to know the extent of their relevance to the financial institutions. Meanwhile, the establishment of Islamic legal objectives is primarily meant to serve dual purpose. First is to foster mercy and maintain justice. And second is to eradicate hardships and all forms of injustice in all human affairs, including business transactions, especially *ijarah* (leasing) contractual enterprises. Hence, it is justifiable that *Maqasid Al-Shari'ah* would be relevant in this situation in order to protect the right of the parties involved in *ijarah* (leasing) contract. *Ijarah* (leasing) products and contracts will be examined in this regard in the light of the fundamental classifications of *Maqasid Al-Shari'ah*, which include *daruriyyat* (essentials), *hajiyyat* (complementary) and *tahsiniyyat* (embellishments).

In Islam, all the affairs of human beings are supposed to be regulated by *Shari'ah*. These affairs include the religious, economic, social and political phenomena. This shows that the *Shari'ah* does not leave anything unaddressed as far as all day-to-day activities of human beings are concerned. In the same vein, *Shari'ah* attaches much importance to the status of any party involved in any business transaction who has a legal entity. Therefore, his rights and obligations should be protected by ensuring that he is properly enjoying an adequate legal backing in his business transaction, having free entry to conduct trading with any business partners in any goods and services that are not forbidden by Allah (Kabir & Mahlknecht, 2011).

Similarly, the *ijarah* (leasing) contract too should be in line with *Maqasid Al-Shari'ah*. It is tantamount to a misnomer to be qualifying the *ijarah* (leasing) contract as *Shari'ah*-compliant, when it is not structurally based on the principles of Islamic legal objectives (*Maqasid Al-Shari'ah*) (Buba 2014).

2. *Maqasid Al-Shari'ah*

2.1 Meaning and the Concept of *Maqasid Al-Shari'ah*

Maqasid Al-Shari'ah means the goals, purposes and objectives upon which the *Shari'ah* is established and to which all the actions of mankind are directed (Laldin & Furqani, 2013). In another definition, *Maqasid Al-Shari'ah* is viewed as the meanings and wise goals derived by Allah in His commandments in general which are specifically meant to serve the interest of mankind (Al-Ayubi, M. S, 2008). According to Dusuki, et al (2011), it is defined as a divine secret of Allah behind most of the laws laid down by Allah, either specific or general, which guide towards the objectives and rationale behind the *Shari'ah*. Going by the various definitions of the concept in question, it goes without saying that *Maqasid Al-Shari'ah* is the sole objective behind the application of *Shari'ah* in the generality of real human life. The objective of *Shari'ah* is meant, among other things, to protect the affairs of mankind, without any discrimination in terms of gender, religion, tribe, colour and sex (Buba, 2014).

Maqasid Al-Shari'ah has been used substitutively with *maslahah* (public interest), especially in the earliest works of Islamic jurists which had contributed to the field of *Maqasid Al-Shari'ah* such as Imam al-Haramayn al-Juwaini (d. 478H), Abu Hamid al- Ghazali (d.505H), Fakhr al-Din al-Razi (d.606 H), Saif al-Din al-Amidi (d.631 H), Najm al-Din al-Tufi (d.716 H) and others. However, Najim al- al-Tufi said that the purpose of *Maqasid Al-Shari'ah* is to bring benefit (*maslahah*) for human being and take away the hardship (*mafsadah*) (Jasser, 2008).

2.2 Classifications of *Maqasid Al-Shari'ah*

The concept of *Maqasid Al-Shari'ah* is basically classified into three: *daruriyyat* (essential), *hajiyyat* (complementary) and *tahsiniyyat* (embellishments) (Laldin & Furqani, 2013). The first classification, which is *daruriyyat* (essentials), stands for the basic rights of human being. The second classification is *hajiyyat* (complementary). It refers to some acts that when they are not done, they create hardship to an individual or

community, but they do not lead to disruption of normal life (Laldin, 2006). The third division under *Maqasid Al-Shari'ah* is *tahsiniyyat* (embellishments). This classification has to do with the benefits derived from the desirable improvement. For example, the observation of cleanliness in personal appearance and *ibadat*, and avoiding extravagances; all these fall under *tahsiniyyat*. Meanwhile their absence may not affect the normal life but can only create some uncomfortableness in life (Laldin, 2006).

In order to make the classifications abundantly clear, there is need for exemplification. In this regard, it could be realized that every man is in dire need of a house where he would be lodging for self-protection. The house is therefore considered as a matter of necessity falling under *daruriyyat*. Meanwhile, at the same time, the man would want the house to have a number of rooms in order not to create inconvenience or problems for him and his family. The rooms are thus regarded as complementary requirements for a convenient stay in the house. If there are no rooms, they can all live in the house. This means the rooms are *hajiyyat*. If the man wants to have a complete house, he would like to get the whole house furnished and decorate it with many materials. Therefore, the furniture and other materials meant for decorating the house are *tahsiniyyat*.

According to Imam Al-Ghazali, the five objectives serving as the nucleus of *daruriyyat* (essentials), under *Maqasid Al-Shari'ah*, are manifested in the protection of the religion/faith (*deen*), life (*nafs*), intellect (*aql*), lineage (*nasl*) and property (*mal*) (Kabir & Mahlkecht, 2011). The principles attached to this first classification are regarded to as essentials (*daruriyyat*). These essentials are the basic rights of human being in this world. The first value is the right of the people to practice their religion without inflicting harm on them. Any Muslim, as a human being, should not entertain any fear while praying in the mosque. In other words, there is freedom of religion (LFRN, 1999). The religious practice allows mankind to live within a code of law which guides him to behave as human. A party to *ijarah* contract should apply the teachings of Islamic religion while engaging in the *ijarah* (leasing) transaction. It is said in the *Al-Qur'an*, in respect of the virtues of observing prayer regularly thus: "...and be steadfast in prayer (with constancy). Verily, prayer fends away indecency and evil..." (*Al-Qur'an. Al-Ankabut. 29:45*).

The second essential objective is to protect human life. This idea of protecting life or right to life raises some critical issues (LFRN, 1999). The issues include the problems relating to the capital punishment, killing in self-defense and killing in armed conflict (Laldin & Furqani, 2013). The purpose is to protect the life of mankind in general. Preservation of life entails, among other things, the prohibition of manslaughter, because of which the penalty of *qisas* and payment of *diyyah*, in retaliation of blood money, are prescribed in the Holy *Al-Qur'an*. Islamic banks should not structure any of their products, which allows a customer to enjoy any benefit at the expense of the other participating customers. Likewise, Islamic banks are banned from financing weapon and armed activity. It is unlawful in *Shari'ah* to terminate the life of an innocent human being. "And do not kill anyone whose killing Allah has forbidden, except for a just cause..." (*Al-Qur'an, Al-Isra' 17:33*).

The third objectives of *Shari'ah* is the protection of the intellectual faculty of mankind. Human being uses his intellect to think; while Allah asks the latter to always muse and ponder over His creations (*Al-Qur'an, Ar-Rum 30:21-24*). It could be realized that the primary reason why *Shari'ah* forbids intoxicants is that it harms human intellectual ability and functionality. Therefore, the forbiddance of narcotic and psychotropic drugs by the Pharmacists Council of Nigeria Act 2004 (LFN, 2004) is in line with the directives of *Shari'ah* aimed to protect the mental health of human being. Other things being equal, the Islamic banks too are banned from financing narcotic drugs such as cocaine, heroin, marijuana, cannabis and psychotropic drugs.

The fourth objective value of *Shari'ah* is to safeguard the posterity. This implies safeguarding one's lineage from illegitimacy (Arafat, 2012). The protection of the posterity and lineage against illegitimacy, which is synonymous with indignity, is enhanced through the prohibition of adultery. This is the reason why *Shari'ah* recognizes and licenses the solemnization of marriage (*An-Nikah*) and condemns adultery and fornication in the strongest term, in order to disambiguate some likely mysterious issues associated with paternity. Therefore, the legal marriage serves as a borderline and makes the clarification between the legitimate and illegitimate children. The protection of the posterity is of paramount importance, because it determines the continuity of the family's pedigree in the human society. Meanwhile, the air of belonging and utmost pride that the posterity is naturally characterized and distinguished with is owed to the nobility of his birth and his parents (Buba, 2014). The fifth objective value is the protection of wealth and property, which will be discussed under the application of *Maqasid Al-Shari'ah* on *ijarah* (leasing) Contract.

2.2 Application of *Maqasid Al-Shari'ah* on *Ijarah* (leasing) Contract

It is indisputable that *Maqasid Al-Shari'ah* encompasses all laws relating to disciplines, regulations, policies, instructions, principles, beliefs, obligations, devotions and actions designed to protect the interest of mankind in all fragments and aspects of life. As the aggregate objective of *Maqasid Al-Shari'ah* lies in the safeguarding and protection of human being's faith (*deen*), lives (*nafs*), intellect ('*aql*), posterity (*nasl*), and wealth (*mal*), the basic theme is the understanding of the benefit of the public interest (*maslahah*) (Ahmad, 1992). Thus, where there is no direct rule governing a legislation from the *Al-Qur'an* and Sunnah (the traditions of the prophet), the Islamic scholars are required to apply Ijtihad (analogical deduction). They will fashion out the appropriate ruling in respect of the issue by putting into consideration what would be the best interest of Islam and Muslim community as a whole (Aznan, 2011). Basically, the underlying objective of *Maqasid Al-Shari'ah* is compassion. The demonstration of this behavioural phenomenon applies to and must reflect in the day-to-day activities of the people (Kamali, 1998). Analogously, Allah said to Prophet: "We have not sent you but as a mercy to the worlds" (*Al-Qur'an*, Yūnus 10:57). This principle has been supported by one the Islamic legal maxims (*al-qawaidul al-fiqhiyyah*) that says: "hardship must be eradicated" (*ad-dararu yu'zal*) (Buba, 2014). Thus, the essential objective of *Maqasid Al-Shari'ah* is to establish mercy and justice; while removing hardship and injustice in the society (Sulyman, 2014).

According to Rosly (2010), *Maqasid Al-Shari'ah* is mainly meant to execute two primary things: securing benefits and repelling harms- as directed by Allah, the Lawgiver. Therefore, this justifies the need for innovation in Islamic finance (*mu'amalat*) and all the new products must be *Shari'ah*-compliant. Therefore, based on the above argument, it could be seen that the purpose of *Maqasid Al-Shari'ah* is the preservation and protection of the basic necessities (*darruriyat*) of mankind. Such as (i) faith (*deen*), (ii) lives (*nafs*), (iii) intellect ('*aql*), (iv) posterity (*nasl*) and (v) property (*mal*) (Kabir & Mahlkecht, 2011).

The preservation and protection of wealth is classified under the necessity (*daruriyyat*). It is the fifth objective of *Maqasid Al-Shari'ah* which is directly relevant to the application of *Maqasid Al-Shari'ah* on *ijarah* (leasing) Contract. In order to protect *ijarah* (leasing) property (*mal*) contract, it should be fashioned according to the principles of *Maqasid Al-Shari'ah* in order to enjoy the utmost benefit and drive away gambling and all forms of dubious dealings and uncertainties (Buba, 2012).

Contract ('*aqd*) approaches alone should not be the only yardstick in determining and confirming the status of *Shari'ah*-compliance on *ijarah* (leasing) products; *Maqasid Al-Shari'ah* should be added to '*aqd* approaches in order to ensure total *Shari'ah*-compliance in the acquisition of *ijarah* (leasing) property (Buba, 2012). The yardstick used in measuring *Shari'ah* compliance in the acquisition of *ijarah* (leasing) property in contract ('*aqd*) approaches rests on the fulfillment of the following four principles of contract: lessor and lessee, valid price, valid subject matter and valid offer and acceptance. The lessor must have absolute ownership of *ijarah* (leasing) object (*mal-mutaqawwim*). The principle of *Shari'ah* is that you cannot give out what you do not possess (Rosly, 2010). Both the lessor and the lessee must be matured ('*aqil baliqh*) enough or possessing legal capacity in case of juristic person (company) to conduct the leased contract, in order to understand the obligations stated in the letter of offer and leased agreement (Buba, 2012). Valid price means that the lessor and the lessee must agree on a price on the spot with the method of payment to be written in the *ijarah* (leasing) agreement. The elements of fraud, cheating, uncertainty and deception of any kind must be avoided in *ijarah* contract and also in all other contracts. This is because the presence of any of the aforementioned vices will cause some defects to the effectiveness of the contract; whenever any of the vices is found in *ijarah* leasing contract, the latter ceases to be considered valid and consequently receives no legal protection (*Al-Qur'an*, *An-Nisa'* 4:29).

The primary objective of *Maqasid Al-Shari'ah* is to establish justice and go away with injustice in the society (Kabir & Mahlkecht, 2011). Thus, *riba* is prohibited and considered as a sin. The structure of *ijarah*, as an Islamic economic system, should be devoid of all forms of injustice or exploitation as Allah says: "O you who believe! Eat not *riba* (interest) doubled and multiplied, but fear Allah that you may be successful" (*Al-Qur'an*, *Al-Imran* 3:130). It is obviously true to state that one of the primary objectives of *Maqasid Al-Shari'ah* is protection. The idea of protecting the rights of the parties involved in business transactions raises some fundamental issues. Such issues relate to the problems of *riba*, Islamic banks must completely keep away from all dealings and financial transactions characterized by any element of *riba* (interest). The Islamic banks must not allow *riba* to appear in the course of providing services through some products to their

customers in general and *ijarah* products in particular (Chapra, 2007). The purpose of the objective is to protect the contracting parties. Injustice in business transaction, that is involving ribā, leads to the exploitation and acquisition of properties of others. In other words, this is technically termed as *'aklu amwalin-nas bil batil* (*Al-Qur'an, An-Nisa' 4:29*). *Shari'ah* permits equity participation. This is because the parties to *ijarah* transaction share the risks of business and share the profit on proportions earlier agreed upon, if any. The customer that acts as the investor (*'amil*) should not be subjected to all such investment risks and hazards alone (Ahmed, 2014).

2.4 The Objectives of *Ijarah* Contracts under *Maqasid Al-Shari'ah*

The objectives of financial transactions of *ijarah* contracts fall under *Maqasid Al-Shari'ah* of *mu'amalat*. Considering the five essential objectives earlier identified by Imām al-Ghazālī, Ibn 'Ashur also identified five objectives purposely dedicated to financial transactions which include the contract of *ijarah*; they are: circulation of wealth (*rawaj* or *tadawul*), transparency (*wuduh*), preservation (*hifz*), durability (*thubut*) and equity (*'adl*) (Buba, 2012). Hence, both the views of Imam al-Ghazali and Ibn 'Ashur serve the purpose of preserving wealth/property (*hifz al-mal*) together; then, the objectives which are upholding *ijarah* contracts will be identified.

In the concept of *Maqasid Al-Shari'ah*, it is categorically established that the rules and regulations guiding each contract under transactions should not contradict *Shari'ah*. If any contradiction is identified and established, the transaction is said to be null and void. Therefore, in the contract of *ijarah*, the lessee, as one of the contracting parties, needs to specify the kind of usufruct he wants to derive from *ijarah* contract. The specification should be made before he approaches the lessor and prior to the commencement time, while the expiration period must also be defined.

Impliedly, as usufruct (*manfa'ah*) is one of the primary objectives of *ijarah* contract, it serves as the only benefit for the lessee in the transaction. The asset is leased to the lessee for a given time and for a specified period to return it. He uses the asset and pays rent as a consideration to the lessor. In this respect, the *ijarah* (leasing) is fulfilling the objective of wealth circulation in the market economy as pointed out in the holy *Qur'an* (*Al-Qur'an, Al-Hashr 59:7*). The application of this can be illustrated through the *ijarah* on the large scale of irrigated landed property. The latter is used to produce fruits through the serious engagement of the farmers, expert agricultural workers, tractor operators, expert refiners (refining the fruits to juice products) and distributors whose duty is to sell the juice products in the market or export them. Thus, such *ijarah* has provided works or businesses for the lessee and generated employment opportunities to many people in the community.

Moreover, in respect of *ijarah muntahiyat bi tamlik* (lease of releasing the ownership to lessee), the lessee will be entitled to own the asset at the end of *ijarah* contract as a term in the leased agreement. This serves the purpose of transferring the ownership of the asset to the lessee. As such, it is in line with the provision of holy *Qur'an* (*Al-Qur'an, Al-Hashr 59:7*). The reason behind the mode of *ijarah muntahiyat bi tamlik* is easy transfer of ownership of the property to the one who cannot afford the payment of the purchase price at once. With this mode, the wealth is not concentrated on the hand of the rich alone. It could be observed that, in *ijarah muntahiyat bi tamlik*, the objective of promoting the circulation of wealth (*rawaj*) is being achieved. In a nutshell, the objectives of *ijarah*, include forestalling properties from being kept idle or stockpiled (*Al-Qur'an, Al-Imrān 3:180*). It can be discovered, from the illustration above, that *ijarah* facilitates employment and proper use of services and this leads to the growth of market economy and also the human capital flows into the market.

Having made retrospective look into the episode of Prophet Shu'ayb and his two daughters, where one of the daughters advised their father to hire Musa for wages, it goes without saying that the *Qur'an* verse (*Al-Qur'an, Al-Qasas 28:26-27*), impliedly creates employment opportunities. It also recognizes talents, qualities of a good worker, skilfulness of an employee and the latter's winning performance. All the features and qualities are being harnessed, in order to achieve the purpose of production. The *Qur'an* passage also exposes the good relationship that is supposed to be established between the employer and the worker. In other words, the development seeks to open up economic opportunity and enhancement, which is one of the objectives of Islamic finance. More so, human development is also realized in *ijarah* contract.

The subject matter of *ijarah* must exist at the time of *ijarah* contract, so that the lessee enjoys the usufruct, except on *ijarah mawsufah fi al-dhimmah* contract- where the lessor enters *istisna'* contract to produce the

asset in future. Because the primary objective of *ijarah* is usufruct, goods without usufruct cannot therefore be the subject matter of *ijarah* contract. Besides, perishable goods are not made as subject matter of *ijarah* contract. The consent of the contracting parties is one of the conditions validating the *ijarah* contract. This is a supplement to the objective of avoiding injustice, cheating and embezzlement of another person's wealth ('*aklu amwalin-nas bil batil*) (*Al-Qur'an, An-Nisa'* 4:29). Equally, the objective of constancy and stability in wealth is fulfilled, when the ownership of *ijarah* transfers to the lessee at the expiration of *ijarah muntahiyat bi tamlik*.

One of the terms of valid *ijarah* contract is that rental amount and period of lease are clearly known to the contracting parties. The specification's aim is to fulfill the objective of clarity by avoiding *gharar* (uncertainty), *jahalah* (ignorance), untrustworthiness and violence in the course of making the contract, in order to prevent dissension and dispute between the parties (AAOIFI, 2010). The objective of *Sukuk al-ijarah* is for the capital to have potential to mitigate the risk; and on the other hand, to maintain an economy that will be devoid of debt based instruments. The promotion of equitable distribution of wealth in the society is also guaranteed through *Sukuk al-ijarah* (AAOIFI, 2010). Hence, *ijarah* based Islamic bond *Sukuk* offers interesting potential security and development in Islamic capital markets for *ijarah* assets and financiers. It is asset-backed; therefore, the assets are safer, less prone to default and with less risk. It is also considered as a tool for monetization of untapped assets (Kabir & Mahlknecht, 2011:177).

3. Conclusion and Recommendation

The products and services of Islamic banking should be made on the basis of *Maqasid Al-Shari'ah* (Kabir & Mahlknecht, 2011), so that the contracting parties will enjoy the maximum benefits. *Maqasid Al-Shari'ah* has sought to drive away interest (*riba*), uncertainties (*gharar*) and gambling (*maysir*) and forbidden all sorts of unlawful (*haram*) acts. Hence, both *Maqasid Al-Shari'ah* and '*aqd* contract should be used as yardsticks in determining and confirming the status of *Shari'ah* -compliance regarding all the products of Islamic banking and *ijarah* products in particular.

Pertinently, *Maqasid Al-Shari'ah* has shown the degree of *Shari'ah* -compliance on the application of *ijarah* products and contracts. For this reason, the principles of *Maqasid Al-Shari'ah* and '*Aqd* contract play an important role in eradicating hardship in the society. *Maqasid Al-Shari'ah* has done justice to the redistribution of the wealth and social welfare in the society. It has also done justice to equity participation on *ijarah* products. It has created an opportunity, in respect of the products, which is being explored by the contracting parties. In conclusion, as *ijarah* is regarded as one of the products of Islamic banking finance, it has therefore, to the large extent, satisfied the objective of *Maqasid Al-Shari'ah*.

To this end, it should be recommended that all the transactions that are being made in Islamic banking industry and financial institutions should give priority to *Maqasid Al-Shari'ah* which emerges as a yardstick for examining and determining the levels and the degrees of harms and benefits. If this recommendation is translated into action, the transactions and all the products of Islamic banks could then be qualified as *Shari'ah* -compliant.

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