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Mount Eastern Holdings Resources Co., Limited
v
H&C S Holdings Pte Ltd and another matter

[2016] SGHC 01

High Court — Originating Summons No 740 of 2015 (Summons No 4242 of 2015 — Registrar's Appeal No 279 of 2015) and Originating Summons No 870 of 2015
Quentin Loh J
29 October 2015

Arbitration — Award — Recourse against award — Setting aside

12 January 2016

Quentin Loh J

Introduction

1 This case concerned two applications in relation to an arbitration award ("the Award"). First, the plaintiff in Originating Summons No 740 of 2015 ("OS 740/2015"), Mount Eastern Holdings Resources Co Limited ("Mount Eastern"), who prevailed in the arbitration, sought and obtained leave to enforce the Award as a judgment under s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) against the defendant, H&C S Holdings Pte Ltd ("H&C"). H&C applied for an extension of time to set aside the *ex parte* order granting leave to enforce the Award as a judgment. The Assistant Registrar ("AR Tan") refused

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to grant the extension of time. Registrar's Appeal No 279 of 2015 ("RA 279/2015") was an appeal against AR Tan's decision. Second, Originating Summons No 870 of 2015 ("OS 870/2015") was an application by H&C to set aside the Award.

2 Having heard the parties, I dismissed OS 870/2015 as there were no valid grounds for setting aside the Award. Consequently, I dismissed RA 279/2015 on the basis that no valid grounds had been put forward for an extension of time. Costs was awarded against H&C in the fixed sum of $18,000 all in for both RA 279/2015 and OS 870/2015. Additionally, I ordered that the monies paid into court by H&C be paid out in favour of Mount Eastern's solicitors. H&C also made an oral application for a stay of enforcement pending a potential appeal against my decision and I refused the stay. H&C has since filed a notice of appeal against my decisions and I now set out my detailed grounds.

Background

3 Mount Eastern and H&C entered into two agreements. The first was for the former to supply iron ore to the latter, which was to be performed in July 2013 ("the July Contract"). The second was for the latter to supply iron ore to the former, which was to be performed in August 2013 ("the August Contract").[1] The focus of the present dispute was on the August Contract although I note that there are also disputes under the July Contract which are presently the subject of ongoing arbitral proceedings.

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[1] The Award, Respondent's bundle of documents Tab 2, XHL-1, at paras 5–6.

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4 Under the August Contract, H&C was obliged to deliver 90,000 wet metric tonnes of iron ore to Mount Eastern. It is undisputed that such delivery was never made. As a result, Mount Eastern commenced arbitral proceedings against H&C for a claim for contractual damages pursuant to cl 13.1.1 of the August Contract. Clause 13.1.1 provided as follows:

> 13.1.1 Unless excused by Buyer's failure to perform, if Seller fails to deliver all or part of the Quantity pursuant to a Transaction in accordance with this Agreement (a "**Seller's Deficiency"**), Seller shall pay Buyer, an amount for each tonne of the Seller's Deficiency equal to the positive difference, if any, obtained by subtracting the Base Price from the Replacement Price. **"Replacement Price"** means the price at which Buyer, in view of its obligation to take any and all reasonable steps to mitigate its losses and always acting in a commercially reasonable manner, purchases substitute Iron Ore in an amount and quality and on the same Delivery Basis equivalent to the Seller's Deficiency (plus incremental costs, including without limitation additional transport charges, if any, incurred by Buyer, or incurred by Buyer as a result of taking delivery of substitute Iron Ore) or, absent a purchase, the market price for such quantity and quality of Iron Ore, on the same Delivery Basis at such Load Port or Discharge Port (as applicable), as determined by Buyer in a commercially reasonable manner.
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> [emphasis in original]

5 Before the arbitral tribunal, H&C relied on several defences. For present purposes, the material line of defence was that Mount Eastern was required to establish an anticipatory breach of the contract before it could claim for damages and that anticipatory breach had not been pleaded by Mount Eastern. This argument was premised on cl 14.2 of the August Contract which stipulated:

> 14.2 If an Event of Default occurs with respect to a Party, or, where applicable any Credit Support Provider of such Party (the **"Defaulting Party"**), at any time during the term of this Agreement, then so long as the Event of Default is subsisting, uncured and unwaived at the time of giving notice, the other Party (**"Non-Defaulting Party"**) may, in its sole discretion, terminate at its option either (a) any Transaction(s) the Defaulting Party's breach of which has given rise to an Event of Default or (b) all Transactions hereunder by giving Notice in Writing to the Defaulting Party and specifying a date (which

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> date shall be no earlier than the date that such notice is given to the Defaulting Party and no later than twenty (20) Working Days thereafter) (**"Early Termination Date"**) after which no further payments or deliveries shall be required to be made in respect of the terminated Transactions, and instead one Party shall pay an amount calculated in accordance with this clause 14 (**"Termination Amount"**) to the other Party within seven (7) Working Days of its notification by Notice in Writing to the Defaulting Party. On or as soon as is reasonably practicable after the Early Termination Date the Non-Defaulting Party shall calculate the Termination Amount in accordance with the following provisions of clause 14, and shall provide the Defaulting Party with a statement showing the quantum of Termination Amount, its method of calculation and including all relevant quotations used therein.
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> [emphasis in original]

6 On 18 June 2015, the tribunal rendered the Award in which it rejected the various defences mounted by H&C and ordered H&C to pay Mount Eastern contractual damages of US$1,527,660, costs of US$188,417.40 (*ie*, legal fees, expert fees and disbursements) and the administrative costs of the SIAC and the tribunal's fees which amounted to $145,593.04.

7 Thereafter, Mount Eastern commenced OS 740/2015 for leave to enforce the Award. Leave was granted by the High Court but no payment was forthcoming from H&C. Instead, just before the 14-day time period to file an application to set aside the order expired, H&C filed Summons No 4242 of 2015 ("SUM 4242/2015") seeking an extension of time for the filing and service for an application to set aside the Award.[2]

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[2] Respondent's written submissions, at paras 13–14.

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8 As noted above, SUM 4242/2015 was heard by AR Tan on 16 September 2015 who dismissed H&C's application for an extension of time.[3] This resulted in the commencement of RA 279/2015.

9 The very next day, H&C filed OS 870/2015 on an *ex parte* basis to set aside the Award. Following from this, Mount Eastern commenced enforcement proceedings on 28 September 2015 by way of filing Summonses for Garnishee Orders to Show Cause against banks with which H&C had accounts with. Provisional garnishee orders against 11 banks were awarded by the High Court.[4]

10 H&C then filed Summons No 4956 of 2015 to set aside the garnishee orders and Summons No 4969 of 2015 to seek a stay of enforcement.[5] On 16 October 2015, another Assistant Registrar ("AR Ho") dismissed both of H&C's applications but directed that if it was willing to pay the sums of US$1,716,077.40 and $145,593.04 into Court, the garnishee orders would be discharged.[6] H&C duly complied and the garnishee orders were discharged as a result. AR Ho gave further directions for Mount Eastern to apply for any order of payment out of these sums held in court after the determination of OS 870/2015.

11 At the hearing before me, the parties agreed that OS 870/2015 should be heard before RA 279/2015 as the strength of H&C's case in the former may have a bearing on the latter. I agreed with that sequence and heard OS 870/2015 first.

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3 Respondent's written submissions, at para 16.

4 Respondent's written submissions, at para 20.

5 Respondent's written submissions, at para 23.

6 HC/ORC 6800/2015.

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OS 870/2015

The parties' arguments

H&C

12 In OS 870/2015, H&C set out three grounds for setting aside the Award pursuant to s 24(*b*) of the International Arbitration Act: first, that the tribunal had granted Mount Eastern an award that was not specifically pleaded ("the Pleadings Issue"); secondly, that the tribunal had failed to give H&C a fair hearing ("the Fair Hearing Issue"); and thirdly, that there was a breach of natural justice. From their submissions, it was clear to me that H&C was proceeding on the basis that success on either or both of the Pleadings Issue and Fair Hearing Issue would establish a breach of natural justice, which would render the Award liable to be set aside.

13 With respect to the Pleadings Issue, H&C argued that through the Statement of Case ("the SOC") in the arbitral proceedings, Mount Eastern had claimed that the August Contract had been terminated pursuant to cl 13.1.1 of the Contract.[7] However, the only avenue for termination was that of the procedure found in cl 14.2 of the August Contract whereby Mount Eastern would have to convert a breach by H&C into a defaulting event.[8] Mount Eastern's failure to rely on the procedure encapsulated in cl 14.2 and its failure to even plead cl 14.2 meant that its claim for damages had to fail. Additionally, according to H&C, the date of performance of the August Contract was 31 August 2013. By relying on events which pre-dated 31 August 2013 to establish

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7 Timothy Ethan Chan Huang Chiang's affidavit dated 17 September 2015 ("Chan's Affidavit"), at para 5.

8 Chan's Affidavit, at para 6.

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termination, Mount Eastern was required to plead anticipatory breach, which it failed to do. The Tribunal, in deciding in favour of Mount Eastern, had therefore determined matters which fell outside of Mount Eastern's pleaded case.

14 As for the Fair Hearing Issue, H&C contended that because the tribunal had concluded that "the establishment of the termination of the August Contract as pleaded in [18] of the [SOC] is not crucial to the Claimant's claim for damages", it raised the question as to whether the issue had even been considered by the tribunal. According to H&C's counsel, Mr Manoj Nandwani, the tribunal's conclusion in this regard did not sit well with the opportunity to be heard.

Mount Eastern

15 With respect to the Pleadings Issue, Mount Eastern's position was that the damages in the Award had been awarded on a claim that was fully pleaded in the SOC. Mount Eastern had pleaded and had always based its claim for damages on cl 13.1 of the August Contract. H&C was fully cognisant of the existence of this claim and had specifically responded to this point of pleading in its Statement of Defence ("the Defence").[9] Further, although Mount Eastern did state in its SOC that it had terminated the August Contract, its claim did not depend on such termination. Therefore, even if the proper procedure for termination was that which was stipulated in cl 14.2, Mount Eastern did not have to rely on it nor did it have to plead it to successfully establish its claim for damages.

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9 Respondent's written submissions, at [43]–[46].

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16 As for the Fair Hearing Issue, counsel for Mount Eastern, Mr Daniel Chia, went into some detail as to how the arguments were presented to the tribunal (see below at [21]) and submitted that H&C had been given a fair opportunity to be heard. The tribunal had duly considered H&C's arguments before concluding that the question of termination was not crucial to Mount Eastern's claim for damages.

17 Accordingly, there had been no breach of natural justice.

My Decision

18 The law with respect to the setting aside of an international arbitral award on the ground of breach of natural justice is well-established and settled. In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, the Court of Appeal affirmed (at [29]) that a party challenging an arbitration award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

19 The Court of Appeal further endorsed the view (at [43]) that the essence of the two pillars of natural justice is first, the principle of *nemo judex in causa sua* (*ie*, an adjudicator must be disinterested and biased), and secondly, the principle of *audi alteram partem* (*ie*, parties must be given adequate notice and an opportunity to be heard). H&C's challenge is mounted on the second principle. Having specified the rule of natural justice which was alleged to have been breached, I considered whether there had in fact been such a breach. In my view, there was none and this was ultimately fatal to H&C's application.

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The Pleadings Issue

20 With respect to the Pleadings Issue, I found that the tribunal did not decide on issues which had not been pleaded. H&C's argument that Mount Eastern should have pleaded anticipatory breach and a reliance on cl 14.2 to justify its claim for damages was, in my view, without merit.

21 In the course of his submissions, Mr Chia helpfully detailed the sequence of events and the relevant arguments which had been raised throughout the course of the arbitral proceedings. I summarise them as follows:

(a) The gist of Mount Eastern's claim for damages was encapsulated at paragraph 22 of the SOC which placed reliance only on cl 13.1 of the August Contract.[10]

(b) There was a reference to Mount Eastern having terminated the August Contract at paragraph 18 of the SOC.

(c) In the Defence, H&C replied directly to paragraph 22 of the SOC, acknowledging that paragraph 22 "merely summarises Clause 13.1 of the 2nd Contract" and stating that "[s]ave as expressly pleaded herein, [H&C] does not admit paragraph 22 of the [SOC] and [H&C] puts [Mount Eastern] to strict proof". Clause 14.2 did not feature at all in the Defence.

(d) Clause 14.2 was first alluded to in the opening statement of Mr Peter Gabriel, counsel for H&C in the arbitral proceedings. Mr Gabriel

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[10] Statement of Case of Claimant, Respondent's bundle of documents Tab 9, TEC-2 at p 10.

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submitted that even "if there was [a] breach, they did not call it a breach in accordance with the contract. They did not call it an event of default. They did not give notice of the termination."[11]

(e) Following from this, during the closing submissions, counsel for Mount Eastern emphasised that Mount Eastern's claim was premised on cl 13.1.1 of the August Contract (he had also stated the same in his opening statement).[12]

(f) In Mr Gabriel's closing submissions, he detailed the argument that because Mount Eastern had failed to give notice of an Event of Default to H&C, cl 14.2 had not been triggered and accordingly, no cause of action had crystallised in favour of Mount Eastern against H&C.[13]

22 It was against this aforementioned backdrop that the tribunal concluded as follows:

> 55. On this issue, the Respondent submits that the Claimant's claim should be dismissed as there is no plea of anticipatory breach by the Claimant. The Respondent's arguments appear to proceed on the basis that the Claimant has pleaded at [18] of its Statement of Case that … the Claimant accepted that the August Contract was terminated and demanded compensation by way of Mr Shen's email of 30 August 2013. As the last date for performance of the August Contract was 31 August 2013 and not 30 August 2013, the Claimant's termination of the August Contract could only succeed on the basis of an anticipatory breach before the last

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11 Christine Ong's affidavit, 28 October 2015 ("Christine Ong's Affidavit"), at p 51.

12 Claimant's reply closing submissions, Respondent's bundle of documents Tab 21, at pp 128–129.

13 Respondent's closing submissions, Respondent's bundle of documents Tab 21, at pp 90–93.

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> day of performance on 31 August 2013. … Since the Claimant has failed to plea anticipatory breach, its claim must fail.
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> 56. The Claimant's primary response is that its claim is a straightforward claim for breach of the August Contract, to be assessed in accordance with Clause 13.1.1 …
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> 57 As the Respondent as Seller had failed to load the contractual cargo … and deliver or enable delivery to occur, the Respondent's failure amounted to a Seller Deficiency … and the Claimant is entitled to damages. *As such the establishment of the termination of the August Contract as pleaded in [18] of the Statement of Case is not crucial to the Claimant's claim for damages.*
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> 58. *The Tribunal has carefully considered the submissions made by both Parties and has reviewed the pleadings in relation to this issue.* Although the Claimant did plead the termination of the August Contract in [18] of the Statement of Case … the Tribunal finds that the crux of the Claimant's claim for damages is contained in [22] of the Statement of Case …
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> 59. *As such, the plea of termination and whether the Claimant relied on an anticipatory breach of the August Contract are not crucial ingredients for the Claimant's claim for damages.* In this regard, the Tribunal disagrees with the Respondent's submission on this issue and finds that there is no basis to dismiss the Claimant's claim on the ground that there is no plea of anticipatory breach in either the Statement of Case or Statement of Reply.
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> [emphasis added]

23 From the above, it is clear that the tribunal did not reach its determination on the basis of unpleaded issues. Rather, the tribunal had concluded that while Mount Eastern's purported termination of the August Contract did form part of the factual matrix surrounding its claim for damages, the crux of its pleaded case was that H&C had failed to fulfil its contractual obligations and this entitled Mount Eastern to damages pursuant to cl 13.1.1 of the August Contract. Simply put, Mount Eastern pleaded its case on the basis of cl 13.1.1 and the tribunal applied this exact clause to reach its decision, and held that there was no need for Mount Eastern to plead or rely on anticipatory breach or cl 14.2 of the August Contract to support its claim. Even if the tribunal was

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wrong on its construction of or conclusions in relation to cl 13.1.1 and cl 14.2 (a view with which I cannot in any case agree), that is clearly not a ground on which a court is entitled to set aside the Award. Further, Mr Chia's submission – that in any case, if H&C was seeking to invoke reliance on cl 14.2 to defeat Mount Eastern's claim, this is a point which was not pleaded in their Defence, is one that is not without insignificant weight. However as noted above, the tribunal in any event did deal with H&C's submissions on this point.

24 In my judgment, there was therefore no basis for H&C to allege a breach of natural justice on the ground that the tribunal had considered an issue outside the pleadings.

The Fair Hearing Issue

25 With respect to the Fair Hearing Issue, I similarly found that H&C's allegations were wholly unmeritorious. It was evident from paragraphs 58 to 59 of the Award (see [22] above) that the tribunal had given due consideration to the objections raised by H&C. In fact, as was brought to my attention by Mr Chia, towards the end of the hearing, the tribunal gave an opportunity for counsel to make oral submissions on the appropriate date for assessing damages. Mr Simon Milnes, counsel for Mount Eastern in the arbitral proceedings, emphasised at that point that Mount Eastern's case centred on cl 13.1.1 of the August Contract.[14] When the tribunal gave Mr Gabriel an opportunity to respond, he indicated that he would reply in his written submissions.[15] True to his indication, in his closing written submissions, Mr Gabriel went into some detail as to how Mount Eastern's failure to plead anticipatory breach and its

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14 Christine Ong's Affidavit, at p 343.

15 Christine Ong's Affidavit, at p 354.

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failure to rely on cl 14.2 of the August Contract to establish termination were fatal to its claim for damages. The tribunal dealt squarely with this issue in its Award, and as reproduced above, concluded that "the plea of termination and whether the Claimant relied on an anticipatory breach of the August Contract are not crucial ingredients for the Claimant's claim for damages".

26 The crux of H&C's objection was that by concluding that the question of termination was not crucial to Mount Eastern's claim for damages, the tribunal failed to properly consider this issue.[16] With respect, I found this to be a baffling proposition. It was clear that the tribunal had given consideration to H&C's objections and simply reached a different view from what was advocated by H&C. It seemed to me that the real reason behind H&C's dissatisfaction was its view that the tribunal had erred in reaching its conclusion. Even if H&C was right that the Tribunal had erred in its interpretation of the August Contract, that is a question on the merits and was not something which I was entitled to scrutinise.

27 Accordingly, I found that there had been no breach of natural justice and I dismissed H&C's application in OS 870/2015.

RA 279/2015

28 Having dismissed OS 870/2015, I similarly dismissed H&C's appeal in RA 279/2015. Quite apart from the fact that the setting aside application was wholly unmeritorious, H&C was unable to provide a satisfactory reason as to why an extension of time should be granted.

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[16] Minute Sheet of Quentin Loh J, 29 October 2015, at p 6.

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29 In the hearing before me, Mr Nandwani argued that it was necessary to seek an extension of time because H&C's representative was overseas and there was difficulty in getting instructions. In my view, this did not amount to a satisfactory reason for the delay. If the representative was able to give instructions to counsel to seek an extension of time, the representative could surely have given instructions for counsel to apply for the setting aside of the registration of the Award as well. To Mr Nandwani's credit, he appeared to recognise the difficulty of this argument and did not belabour the point.

Conclusion

30 Having dismissed both OS 870/2015 and RA 279/2015, I awarded costs to Mount Eastern at the fixed sum of $18,000 all in for both OS 870/2015 and RA 279/2015 and ordered that the monies paid into court by H&C be paid out to Mount Eastern's solicitors. I also dismissed H&C's oral application to stay enforcement pending an appeal as again it provided no good reason for me to do so.[17] H&C sought to argue that because Mount Eastern is a BVI company, it had no other assets and that because its owner, Mr Ma Xia Jun had previously been arrested in China for fraud, there was a risk that it would not be able to recover the monies paid out should it succeed on appeal. Additionally, H&C alleged that Mount Eastern had an outstanding debt of more than USD$3 million.[18] I noted, however, that Mr Kevin Xu, who is the Vice-General Manager of Mount Eastern, had affirmed an affidavit stating that there were no major debts or claims against Mount Eastern. While Mount Eastern sought to take issue with the fact that it was Mr Xu, and not Mr Ma, who had produced an affidavit, I was of the view that this was not a relevant objection. The present

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17 Minute Sheet of Quentin Loh J, 29 October 2015, at p 10.

18 Minute Sheet of Quentin Loh J, 29 October 2015, at pp 11–12.

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dispute concerned Mount Eastern as a separate legal entity, and not Mr Ma. It was therefore sufficient that the Vice-General Manager (*ie*, Mr Xu) had affirmed that Mount Eastern was not labouring under any major debts.

31 Additionally, Mr Chia informed me that Mount Eastern had still been trading with counterparties as late as September 2015 and that he had shown email exchanges to AR Ho in SUM 4969/2015 to support this position. These emails, however, were not put in an affidavit as they pertained to confidential information.[19]

32 In the circumstances, I found that there was no good reason to allow a stay of enforcement pending an appeal and I accordingly dismissed H&C's oral application.

Quentin Loh
Judge

Daniel Chia and Ker Yanguang (Morgan Lewis Stamford LLC) for the plaintiff in OS 740/2015 and the defendant in 0S 870/2015; Manoj Nandwani and Christine Ong (Gabriel Law Corporation) for the defendant in OS 740/2015 and the plaintiff in OS 870/2015.

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[19] Minute Sheet of Quentin Loh J, 29 October 2015, at p 11.

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