

MUSHARAKAH AL-MUTANAQISAH ISLAMIC HOME FINANCE IN DEALING WITH ABANDONED HOUSING PROJECTS IN MALAYSIA: FEATURES, ISSUES, AND PROSPECTS

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Abstract: Islamic Banking has been established since 1980s in Malaysia. It was initially commenced with the incorporation of Bank Islam Malaysia Berhad (BIMB) in 1983. Until today, Islamic Banking has robustly developed in Malaysia providing various kinds of Islamic transaction products including Islamic home finance. Various Islamic Home Finance products have been introduced and practised in Malaysia. Among the products are: *Bay' Bithaman al-Ajil* ('BBA'), *Musharakah al-Mutanaqisah* ('MM'), Commodity *Murabahah* ('CM') and *Ijarah Mausufah Fi Zimmah*. Nonetheless, there are many issues in these products when faced with the problems of abandoned housing projects in Malaysia. One of the issues is the inadequacy of the Islamic Home Finance products to deal with the issues of abandoned housing and give equitable and fair terms to the aggrieved purchaser consumers. This paper aims to highlight and study the terms in MM and how this Islamic Home Finance product deals with the problems of abandoned housing projects. The focus of this paper is the MM as applied by Affin Islamic Bank Berhad in Malaysia. This paper used *shariah* (Islamic Law) and legal doctrinal and qualitative textual analysis methodologies. This paper finds that the current applicable terms in MM as practised by Affin Islamic Banks in Malaysia are inadequate and warranted them to be replaced with terms that can provide equitable protection to the aggrieved purchaser consumers in abandoned housing projects thus can fully comply with the requirements of the *shariah* (Islamic Law). The outcome of this paper will help the Islamic banking industry in dealing with issues of in abandoned housing projects in Malaysia and provide protection to the aggrieved purchaser consumers.

Keywords: *Musharakah al-Mutanaqisah* ('MM'); abandoned housing projects; terms and conditions; grievances and losses of purchaser consumers; justice

1 Introduction

It is a trite practice in Malaysia that those who wish to purchase houses through Islamic Home Finance, particularly involving transaction that fall under the purview of Housing Development (Control & Licensing) Act 1966 and its regulations (Act 118), to apply for home financing from Islamic banks. Normally the purchasers will enter into housing contracts with the housing developers purchasing the pending completion houses. Once the relevant documents are signed, the purchasers will then apply to Islamic bank to finance the balance purchase price via any Islamic home financing products. One of these

Islamic home financing products is *Musharakah Mutanaqisah* ('MM') (Md Dahlan, Mohd Nor & Shuib, 2017).

In MM the purchaser customer and the Islamic bank will jointly buy a property. As a result, the ownership of the property will be shared between the purchaser customer and the Islamic bank. Later, the purchaser customer shall buy the share of the Islamic bank in the property until exhaustive and the full ownership of the property will belong to the purchaser customer. The Islamic bank will prescribe the price for the purchaser of their share in the property. From this price the Islamic bank will get profits (Md Dahlan, Mohd Nor & Shuib, 2017).

2 Problem Statement

Abandoned housing projects is one of the hot topics and unending difficult issues for the Malaysian government to tackle and settle. As a result many purchaser consumers have suffered irreparable damage and losses without getting equitable and appropriate remedies.

Previously, just after Independence in 1957, the main provider for public housing was the government itself. However, as the government faced upsurges in demand for housing accommodations and suffered shortage of funds to finance the construction of public housing for public purchase, the government had opened this programme to the private sector housing developers as well to participate. The government only controls the conducts of these private sector housing developers through the Housing Developer's (Control & Licensing) Act 1966 (Act 118) and its regulations (Md Dahlan, 2009).

Despite there are federal and states' laws governing housing development through the above statute, the National Land Code 1965 (Act No. 56), Town and Country Planning Act 1976 (Act 172) and Street, Drainage and Building Act 1974 (Act 133) and Uniform Building By-laws 1984, abandoned housing projects is still cannot be totally curbed to the detriment and chagrin of the aggrieved purchasers (Md Dahlan, 2009).

In the observation of the author, the major reasons leading to the abandonment of housing projects are these: There is no mandatory system of "full build then sell" of housing delivery implemented by the developers imposed by the government; there is no mandatory requirement that the developer must possess housing development insurance serves as a support in the event the developer is unable to complete the project; and, there is no specific regulation governing rehabilitation of abandoned housing projects and protect the rights and interests of the purchasers. Apart from these, it is found that the loan agreements between the bank financiers and the purchaser consumers including the Islamic Home Finance products also do not have terms and conditions that can equitably and fairly protect the rights and interests of the purchasers if the housing projects are terminated mid-stream and abandoned by the developers (Md Dahlan, Mohd Noor & Shuib, 2017).

Among the losses that the purchaser consumers have to bear are as follows (Md. Dahlan, 2009):

- 1) They cannot obtain the duly completed houses as promised by the housing developer and as prescribed under the sale and purchase agreement on time;
- 2) They have to incur additional costs in the event new rehabilitating parties agree to undertake rehabilitation, as the end-finance funds are not adequate to cover the costs of rehabilitation;

- 3) They have to incur additional costs for renting houses pending the completion of the rehabilitation of the abandoned housing projects complete; and,
- 4) They may have to suffer irreparable damage and losses as the abandoned housing projects cannot be rehabilitated as there is no party interested to revive the project or the projects are not feasible for rehabilitation.

It is evident that the terms in Islamic Home Finance products for examples *Bay' Bithaman al-Ajil* (BBA), Commodity *Murabahah* and *Ijarah Mausufah Fi Zimmah* are inadequate to protect the rights and interests of the aggrieved purchasers in abandoned housing projects. This tantamount to injustice and a breach of the Islamic concept of *al-Ghunmu bi al-Ghurmi* (profit must commensurate with risk) and prohibition against *gharar* (uncertainty leading to losses) in that, there is no corresponding and reciprocal responsibility on part of Islamic bank to protect the interests of purchaser customers (Md Dahlan, Mohd Noor & Shuib, 2017).

Thus, this writing intends to highlight and analyze the terms and conditions in the Islamic Home Finance MM as practised by Affin Islamic Bank Berhad in dealing with abandoned housing projects. Islamic law emphasizes that contracts must comply with the requirements of Islamic law for example the requirement that the contract must not contain any *gharar* elements and that the terms and conditions must be fair, equitable and just to the parties. These commands are enshrined in the Quran and al-Hadith (Traditions of the Prophet Muhammad (PBUH)).

3 Research Questions

- a) Whether MM as applicable in Malaysia is sufficient to provide protection to purchaser customers against problems, *gharar* and losses arising from abandoned housing projects?
- b) If insufficient, why?
- c) If the terms are insufficient, how to improve the products?
- d) What are new suggestions to improve MM?

4 Objectives

- a) To study the terms in MM.
- b) To study the issues in MM in face of the problems of abandoned housing projects and its consequences for example *gharar* and losses suffered by purchaser consumers; and,
- c) To propose improvement in the terms of MM in face of the problems of abandoned housing projects.

5 Research Methodology

The author used *shariah* (Islamic Law) and legal research methodology to explain and analyze the Islamic Home Finance product MM contractual terms, issues, problems and proposal in this academic paper. The legal research is in a form of hybrid in nature. It consists of applied research, academic research, analytical/critical research, descriptive research, library-type and experimental study. The research activities

under this heading include the discovery of the principles, rules and case law in order to explain and resolve the identified problems guided by the set objectives (Zahraa, 1998).

The second methodology is the social research methodology using textual analysis and interviews with relevant persons. The author chose a qualitative research methodology as the authors wish to examine in detail issues and discussion in MM that involve abandoned housing projects. Qualitative methodology is concerned with exploring people's life, histories or everyday behaviour that quantitative research is unable to grasp. By using the qualitative method, information gathered will be more and enriching as it involves an in-depth and deeper understanding and study of a particular matter. The sources of data are from the accessible files of KNM Consulting Services, Jalan Medan Tuanku, Kuala Lumpur ('KNM') and a law firm known as Khamdan & Co, Advocates & Solicitors in Shah Alam, Selangor. KNM is a private agency set up with a purpose to resolve issues arising from abandoned housing projects and to help aggrieved purchaser consumers. The subject of this paper is the sample contract of *Musharakah Mutanaqisah* as used by Affin Islamic Bank Berhad (AIBB). Through this sample contract, the author scrutinized the terms and conditions that are applicable in the event the housing project is subject to abandonment. The purpose of the scrutiny, through textual analysis, is to find out whether there are protective terms given to the aggrieved purchasers in face of abandoned housing projects. In addition, the author also interviewed the purchasers involved, shariah advisors of Islamic banks, lawyers and bank officers as a way to achieve triangulation and multiple evidences and thus can ensure reliability and validity of the research undertaken (Silverman, 2000; Yin, 1994; Yin, 2000).

5 Findings

5.1 *Gharar*

There are many verses from the Quran, calling for the doing of justice and abstaining from committing any cruelty, fraud and injustice, especially in business and transactions. '*Gharar*' means 'detrimental act', causing harm or damage. *Gharar* transaction means undertaking buying and selling activities based on unknown or unspecified terms, conditions and subject matters or inability for the surrender of the subject-matter of the contract (Majma' al-Lughah al-Arabiah al-Idarah al-'Ammah Lil Mu'jamat Wa Ahya' al-Turath, 2005). The following are examples of the relevant verses of the Quran relating to injustice in transactions:

'Do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property'. (al-Baqarah (2): verse 188).

O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily Allah hath been to you Most Merciful! (al-Nisa' (4): verse 29).

Examples of practices involving fraud and injustice are the practice of *riba*' (interest/usury) in lending transactions and the '*gharar*' sale and purchase. The practice that involves '*riba*' and '*gharar*' may be necessary and appropriate for investors and businessmen as being creative and innovative but devious

capitalist business devices to maximize profits with no or less risk. They are considered unlawful and injustice under Islamic law. Islam prohibits the practice of *riba* (interest/usury) and *'gharar'* transactions. The prohibition of *riba* is explained in the following Quranic verse:

'Those who devour usury will not stand except as stand one whom the Evil one by his touch Hath driven to madness. That is because they say: "Trade is like usury," but Allah hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for Allah (to judge); but those who repeat (The offence) are companions of the Fire: They will abide therein (forever). Allah will deprive usury of all blessing, but will give increase for deeds of charity: For He loveth not creatures ungrateful and wicked'. (al-Baqarah (2): verses 275 and 276).

Similarly, the hadith of the Prophet Muhammad (Peace Be Upon Him - PBUH) also, call for similar practice in carrying out any transaction:

From Uqbah bin Amir he said: "I heard the Messenger of Allah (saw) say: 'The Muslim is the brother of another Muslim, and it is not permissible for a Muslim to sell his brother goods in which there is a defect, without pointing that out to him'" (al-Shawkani, 2002).

From Abu Hurairah RA. It was reported that the Prophet Muhammad (PBUH) while he was passing a vendor selling foods, and became attracted to the bunch of foods before him. He put his hand into the bunch and found the part below the foods were wet. He asked the seller: What is this? The seller replied: the foods were wet because they were poured with rain water and to prevent public from knowing this fact, he put the wet foods at the bottom part of the bunch. On hearing of this, the Prophet (PBUH) said: 'He who cheats us, is not from us'. (al-Shawkani, 2002).

5.2 Contract of Sale Involving a Non-Existent Subject Matter

The position of Islamic law is clear on contracts involving a non-existent subject-matter. Islamic law lays down a condition that the subject-matter must actually exist at the conclusion of the contract. Hence, if the subject matter does not exist, generally, the contract is void even though it could probably exist thereafter, or even if it is established then that it would exist in the future but the existence is still to the detriment of any party to the contract. A contract which involves a non-existent subject-matter is prohibited pursuant to a hadith, whereby the Prophet Muhammad (PBUH) prohibited a person from selling an animal foetus yet to be born while it is still in the mother's womb, when the mother is not part of the sale. Similarly, is the selling of milk whilst it is still within the udder of the animal. This sale is void as there is a possibility of the udder being perhaps void of milk, and instead, only containing air (al-Shana'i, 1991).

In one hadith, the Prophet (PBUH) prohibited the act of stopping the milk of udder of the female goat for certain duration for the purpose of enticing the public to purchase the female goat on the pretext of

it containing a lot of milk. The Prophet (PBUH) too prohibited the sale of things which one does not own (al-Zuhayli, 1988).

However, Muslim jurists allow the contract of a non-existent subject matter, as one of the exceptions to the above, relating to the sale of agricultural products before they become ripe. However, this is subject to the knowledge that the products have already appeared even before the signs of ripeness are shown. Further, this type of contract is allowed if the purchaser immediately harvests them. The position is the same in respect of the sale of fruits and agricultural products, which yield successively one after another during one harvest as in the case of water melons and egg-plants. In this particular case, Muslim jurists in general have agreed to allow the sale of the fruits which have already appeared but disallow the sale of fruits which have yet appeared. School of Maliki, school of Shiah Imamah, Ibnu Taimiyah, and Ibnu Qayyim from Hanbali school, allow the selling of fruits which are seen physically ripen or otherwise as a facility for sale and to hinder hardship in business dealing. However, for Hanafi, Hanbali, Zaidiah, Zahiri and Ibadiah schools, selling of the mixtaure between ripen and not ripen fruits, is prohibited (al-Zuhayli, 1988). This contract falls under the category – ‘the subject matter exists in essence, then comes into existence thereafter’ Nawawi, 1999).

As regards the subject-matter which does not exist at the time of contract and it is established that it also could not exist in the future, Muslim jurists do not accept this kind of contract as this contract contains the element of *gharar*. Transactions containing *gharar* element is prohibited based on the verses of the Quran above and the Hadith of the Prophet (PBUH). Majority of the jurists are also unanimously of the opinion, that the contract which its subject-matter generally could not be surrendered to the parties at the conclusion of the contract or at the promised date, is a *gharar* contract and thus it is void, not binding and having no legal effect. *Gharar* is forbidden in Islam as its existence would harm the well-being, rights and interests of contractual parties and cannot ensure satisfactory outcomes, justice and fairness in their contractual dealings. It is also forbidden by the Shariah because this element typically causes enmity, dispute, hardship, injustice and losses to the parties (al-Zuhayli, 1988).

It is further opined that, in abandoned housing projects, the inability of the purchaser consumers/consumers to obtain duly completed houses together with the Certificate of Fitness for Occupation (CF) or Certificate of Completion and Compliance (CCC), failure of the vendor housing developer to register their names into the issue documents of title to the said houses due to the abandonment and that they can suffer grievances and losses are situations that fall under the heading of *gharar al-fahish* (exorbitant *gharar*).

On the other hand, if a *gharar* is minor/trivial, the said *gharar*, for it being only minor/trivial, will not void the contract (al-Zuhaili, 1988). According to Shatibi:

"...the law in many cases does not provide what is to be considered as a grave *gharar* and what is a trivial *gharar*. What has been done by the jurists is to compare between what was prohibited by direct provisions of the texts and what was not...**trivial *gharar* is the one which the people feel at ease with, no dispute will arise from it and people are very much in need of such a contract'** (Buang 2000).

In the opinion of the author, possible losses, injuries and grievances can be suffered by the purchaser customers in abandoned housing projects are the results of the *gharar al-fahish* features in the Islamic Home Finance transaction due to the absence of terms in the transaction that can protect the rights and interests of the purchaser customers in face of abandoned housing projects.

As the focus in this writing is on MM, the author would like to inquire whether MM contains any term and condition that can prevent the occurrence of *gharar* i.e abandoned housing projects and losses to the purchaser customers?

5.3 *Musharakah Mutanaqisah* (MM)

Musharakah originates from the word '*shaaraka*', '*Yushariku*', '*Musharakatan*'. It means sharing. '*Fulan Yushariku Fi Ilma Kaza*', which means 'He has a share in it'. While the word *mutanaqisah* originates from the word *naqasa*. It means, to decrease. The word '*munaqasah*' means progressively decreasing (*al-Mu'jam al-Wasit*, 2005).

In the practical sense, *musharakah Mutanaqisah* means, a transaction between the Islamic banks and the purchaser customer where the ownership of the Islamic bank over the joint property of the Islamic bank and the purchaser customer will be decreased over time through the progressive settlement made by the purchaser customer to own the degree of ownership of the Islamic bank over the property until the ownership of the property is fully owned by the purchaser customer.

According to Rahman and Naim (2015), *Musharakah Mutanaqisah* is as follows:

“...that *Musharakah Mutanaqisah* is an agreement between two or more people on participation in ownership of an asset or services/work on its existence or one of them pay the other kinds for work on it with intention of investment and sharing of the returns between them then one of them sells his share to his partner from the returns of the project or from the money from outside payment at once or periodical payments based on the conditions pre-agreed on until the ownership of the project turns to him at the end of the contract or rent/lease the property to a third party and they share the rental/lease payment between the partners according to their shares.”

5.4 *Musharakah Mutanaqisah* (MM) of Affin Islamic Bank Berhad ('AIBB')

The description and analysis of the above Islamic housing finance products are based on the *Musharakah Mutanaqisah Master Agreement* ('A'), *Ijarah Contract – Leasing Contract* ('B'), *Musharakah Contract* ('C'), *Ijarah Contract – Leasing Contract* ('D'), *Declaration of Trust* ('E') dan *Service Agency Contract* ('F'). These MM sample documentations are used by Affin Islamic Bank Berhad, (No. 709506-V) ('AIBB'). The author was able to get an access this MM sample documentations from Messrs. Khamdan & Co, Advocates & Solicitor in Shah Alam.

In summary the framework and methods of Islamic housing financing according to the above product (MM) are as follows (clause A-3 (a) - (f); C-1, C-2; C-3; C-6; D-1, D- 2, D-3, D-4, E-1, E-2; F-1, F-2, F-9):

- a) Customers and AIBB will jointly purchase a property where the customer will contribute a sum of money as an initial payment on part of the property purchase and AIBB will contribute part of the total amount as a balance of the initial payment on the purchase of the property. In this case the customer and AIBB are considered as co-owners of the property.
- b) AIBB will then lease its share of the property to the customer on *ijarah* (lease).
- c) The Customer shall pay to AIBB by installment payment amount which includes payment of the amount to acquire AIBB's ownership in the property and payment of the total *ijarah* (lease) on the property.
- d) As a result of this installment payment, the customer ownership share on the property is increasing and AIBB's ownership share on the property is decreasing, so that the ownership of the property will be fully owned by the customer.
- e) The lease payment shall cease when the customer has fully paid the share of AIBB in the property and thus can acquire the full ownership of the property from AIBB.
- f) AIBB will appoint customers as its agent for the property subject to the terms set out in the Agent Services Contract. In this case, the customer as the AIBB's service agent shall be responsible, among others, to perform maintenance and repair work on the property, the customer is responsible for paying monthly bills, quit rents, assessment bills, bills from the relevant authorities, customers shall take insurance to protect the property from fire and so on and the customer shall take mortgage insurance.
- g) In order to secure the financing of the property, the customer as a chargor shall charge the property to AIBB to secure the MM financing facility (Annexure).
- h) Among the customer's obligations is to ensure that the installment payments are made and ensure compensation is made payable to AIBB in the event of any liability, claim, damages, loss, proceeds, costs and expenses which cause AIBB to be incurred as a result of the approval of this Islamic housing financing facility to the customer (clause B-5; B-9.1 (n); B-15.1; F-7).
- i) The customer's responsibility and financial liability as the agent of AIBB to repair the property if there is any damage, pay all bills and pay insurance bill (clause F-2 (a) (b) (c)) will be shared with AIBB in accordance with their proportionate degree of share in the ownership of the property, insofar as this is fair and equitable to both parties (F-3.2 clause).

There is a clause where in the event of an illegality of this MM Islamic home finance product agreement due to any law, government official direction, directive of the Bank Negara (Central Bank) or any authority, then the MM is to be determined, and the customer is required to pay the amount to the extent that as appropriate by AIBB (clause B-10.1). However, is it arguable that whether this term would apply when the housing project has been abandoned? In the opinion of author, this MM facility is subject to this term and will be determined.

On the duly execution of the above MM documentations, AIBB and customers are entitled to the following rights:

Among the customer rights are as follows

- a) The exclusive right to occupy, use and enjoy the property; and,
- b) The right to purchase AIBB's ownership share in the property at any time is subject to the facility agreement (clause C-4.1).

While the AIBB's rights, inter alia, are as follows:

- 1) The right to enter the property for examination purposes; and
- 2) The right to repair any damage to the property (clause C-4.2).

However, in clause D-3(c) of the *Ijarah* Contract states:

"If the Property cannot be occupied due to the construction of the Property is abandoned which cannot be revived, the advance lease rental ... as duly paid by the Customer, will be refunded to the Customer in the manner as determined by the Bank"

Based on these terms, AIBB will refund all the moneys received from the customer if the property under construction becomes abandoned. However, it is argued that there is no such term in the MM prescribing responsibility of AIBB and its customers to jointly rehabilitate the abandoned properties and payment of compensation by AIBB to the aggrieved customers. There is also no requirement that the developer/seller of the property is responsible for restoring abandoned properties or/and paying damages to AIBB and customers and / or refunding all monies he received from AIBB. Nonetheless, it is submitted by having the above clause D-3(c) in the *Ijarah* Contract, the aggrieved purchasers' losses and damage can be mitigated as compared to the other types of Islamic Home Finance Products such as *Bay' Bithaman al-Ajil* and *Commodity Murabahah*. The latter two products, it is opined do not have adequate terms that can deal with abandoned housing projects and their problems (Md Dahlan, Mohd Noor & Shuib, 2017). Nonetheless, according to Shuib, Daud and Sulaiman@Mohamad, in the event of abandonment, some Islamic bank may discuss with the aggrieved purchaser, either to refund all moneys paid by the purchaser or the Islamic bank will get consent from the aggrieved purchaser to rehabilitate the abandoned housing unit until duly completion. Some Islamic bank for example the Citibank (Malaysia) Berhad, through their MM product known as Citibank Home Partner-i' requires the purchaser customer who applies for the product (Citibank Home Partner-i) to ensure that the purported housing unit has been duly completed by the housing developers (Shuib, Borhan & Abu Bakar, 2011). Thus, abandonment will be the issue and the purchaser customer will be free from any grievances of housing abandonment.

7. CONCLUSION AND RECOMMENDATIONS

It is submitted that the terms and conditions of MM as prescribed in the above AIBB's sample DO have some terms that can protect and preserve the interests and rights of the stakeholders for instance the aggrieved purchasers in abandoned housing projects. However, to improve the application of MM and improvise it, certain approaches should be adopted by AIBB and other Islamic banks. These include additional terms providing liability and responsibility of the housing developer vendor to rehabilitate or compensate the aggrieved parties in the event of abandonment. In addition, there should have a special mechanism that can ensure all relevant stakeholders are shielded from any losses and grievances

consequential to housing abandonment, for instance the housing developer should possess housing insurance to cover the situation where housing project is abandoned. This is the practice in the United Kingdom, where the house financiers require the developer who uses the concept of "sell then build" to possess a housing development insurance. This insurance serves as a support if the developer later fails to complete the construction of the promised house (Md Dahlan, 2014). This is a good approach that can be followed by Islamic Banks in Malaysia. The Islamic banks can require the housing developer who applies "sell and build" system of housing delivery to obtain housing development insurance before their purchasers can obtain Islamic home finance facilities to finance the purchase of the houses pending completion. It is the opinion of the author that the system of "build and sell" housing delivery system should be practised in Malaysia to avoid the problems of abandoned housing projects and their consequential losses altogether.

The author also proposes that the membership of the Shariah Advisory Council (SAC) of Malaysian Central Bank and Shariah Advisory Board (SAB) of the respective Islamic banks in Malaysia should also comprise of representatives from the consumer associations (for example, Persatuan Pengguna Islam (PPIM) (Muslim Consumers' Association of Malaysia), National House Buyers Association (NHBA), Federation of Malaysian Consumers Association (FOMCA) and Consumers Association of Penang (CAP)) in order to ensure that the decision making process in these bodies is sound and inclusive, thus can ensure that the products approved are truly 'consumer friendly', practical, equitable and fair to consumer public, not just being one sided and being banker-centric. This includes calling these parties to advocate the insertion of more equitable terms in the MM for example terms that can provide better protection to customer purchasers in the event of the housing units they purchased are abandoned.

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