CONCEPTUALIZING THE RIGHT TO WITHDRAW IN DISTANCE CONTRACTS IN VIETNAM: A DISCOURSE OF PACTA SUNT SERVANDA AND EASTERN CHARACTERISTICS

ABSTRACT

The increasing commonality of distance selling has raised concerns about the protection of the interests of consumers. Since 1997, the European Union has taken a bold step in consumer protection by introducing Directive 97/7/EC. The Directive consists of numerous measures aiming at tackling different issues, including the introduction of the right to withdraw from distance contracts. This raised concerns and controversies about whether the deep-seated principle of contract law - 'Pacta sunt servanda' - has to be redefined, whether this may result in the reconstruction, or at least, reconciliation of contract law; whether these changes are advantageous rather than absurd, and counterintuitive; whether the compulsory requirement to incorporate the right to withdraw in contracts restrict the freedom of private entities. To answer such questions, addressing the right's substance is required but insufficient; in equal need is to address these in a societal context. This paper proposes to address the demand for conceptualizing and incorporating the right to withdraw into the Vietnamese legal system by examining its foundational rationale and nature and surrounded debates, and approaching this right from a Vietnamese perspective, e.g., Confucianism accounts, the Vietnamese psychological mindset, the contemporary Vietnamese societal reality. This paper suggests (i) the imperatives such as benevolence (ren/nhân) and fiduciary (xin/tín) rooted in Asian traditions find equivalent to the concept of good-faith and the principle pacta sunt servanda; (ii) the inherently suspicious and non-litigious psychology of Vietnamese should motivate the introduction of the right in Vietnamese law; (iii) nevertheless, this intervention should be at the minimum and accessory as it would be more advantageous if the parties voluntarily practice fiduciary and strive to maintain the relationship - guanxi. Doing such would conciliate deep-seated values and principles with the need to protect consumers.

Keywords: Pacta sunt servanda, the withdrawal right, fiduciary- Tín - Xin (信); good-faith (bona fide); Relationship - Quan hệ - Guanxi (关系)

I. WITHDRAWAL RIGHT IN DISTANCE CONTRACTS IN EU LAW AND PACTA SUNT SERVANDA

The withdrawal right was first officially adopted in 1997 under the Directive 97/7/EC on distance selling and is inherited by Directive 2011/82/EU on consumer rights. Directive 2011/82/EU on consumer rights shows an attempt to harmonise EU consumer protection law by requiring the mandatory adoption of member states (Article 4 and 23 of Directive 2011/82/EU).

The conceptualization of this right raises concerns primarily about the overarching principle of freedom of contract (Hartlief 2004). Nevertheless, this paper argues that the adoption of the withdrawal right does not change the status quo of freedom of contract but pacta sunt servanda; therefore, analysis of this right should primarily depart from pacta sunt servanda and attempt to adopt this right should answer the trade-off between the concreteness of pacta sunt servanda and policy choice. The reasons are as follow:

First. while both are relative rather than absolute, e.g., concerning, pacta sunt servanda, it is the fact that not all contracts are enforceable and exemptions to pacta sunt servanda are not singular, e.g., rescinding of contract due to uninformed, 'freedom' seems to be more *relative*. Both model contracts and shared general clauses, which are not reached by mutual negotiation but the unilateral imposition of one party – the one that has more market power and deal with monstrous numbers of contracts, e.g., banks, internet provider or water supplier, and the imposition of mandatory rules by states as an intervention to balance interests between parties are common and do not evidence 'unfreedom of contract'.

Second, despited being denied by scholars, the withdrawal right touches the heart of and threatens the fundamental principle of pacta sunt servanda. To defend or defeat the withdrawal right by poisoning its rationale, scholars often borrow the account of liberalism about market failure and asymmetry of information. They argue that because of such, that there is a potential defectiveness in the process of forming consumers' will to be bound, or/and consumers do no freely entering the contracts (Borges and Irlenbusch 2007; Canaris 2000; Eidenmueller 2012; Luzak 2014; Yuthayotin 2015), Nevertheless, this rationale is not coherent and justifiable in line with provisions on this right prescribed by EU law.

In defending its stance that a rationale and defend based on liberal accounts of market failure and asymmetry of information are a pretext, this paper points out five notable inconsistencies between this right and the principle of pacta sunt servanda as follow

(i) According to Article 9.(1) of the Directive 2011/82/EU, this right can be invoked after both parties have received performance from the other within the period of 14 days to withdraw from a distance contract. This allows one party – the consumer to not keep his or her promise.

(ii) Also according to Article 9.(1) of the Directive 2011/82/EU, this right can be invoked discretionally without giving any reason.

If the issue at stake is the will and rationality in concluding a contract, then, an appropriate response should be about addressing it, viz, it should be confined to cases of irrationality. Eidenmuller rightly argues

"Something might have been wrong with this will formation process, *but we do not know for sure*. However, the consumer can exercise the withdrawal right under any circumstance, *regardless of whether he or she originally intended to be bound by the contract and fully understood the terms of the agreement.* In other words, withdrawal rights allow a consumer to avoid contractual obligations simply *because he or she changed their mind*, or, for example, because more attractive offers became available" (Eidenmueller 2012).

Therefore, it is not an exemption to the principle of pacta sunt servanda akin to other exemptions such as invalidation of contract because it is concluded by a minor, or termination because of force majeure, or hardship (change in circumstance).

(iii) There is an abundance of evidence put forward by researchers that this right has a negligence role in addressing the issue at stake. Both the possibility of exercise it or not can lead consumers to fall into various psychological traps (Luzak 2014).

(iv) Possibilities of abuse of right have been taken for granted. Article 16 of Directive 2011/83/EC is not about preventing all abusive acts: it lists only some overly extreme cases where the exercise of the right, reading in conjunction with transactions and surrounding context, makes goods to be unmerchantable, or the buyers may have fully enjoyed the benefit of goods and services before the execution of the right.

(v) If it is about addressing irrationality, in the state of rationality and conscouis, consumers should have the right to opt out this right, which is not the case: any otherwise contractual

provisions aim at invalidating this right are deemed abusive and are rescindable (Eidenmueller 2012; Mekki 2010).

Therefore, policy choice is the primary justification of the withdrawal right (Howells, Ramsay, and Wilhelmsson 2018; Loos 2009). But rather than based on the liberal rationale concerning the formation of will in entering into and being bound by a contract as pretends, the policy to adopt of the withdrawal right is in line with social welfare and social justice goals of the EU (Atiyah 1979; Howells and Wilhelmsson 1997). It is the intervention of a state or states into private relationships. The withdrawal right does not make an exemption to the principle pacta sunt servanda but make the principle pacta sunt servanda an exemption, considering the huge number of distance transactions of consumers.

II. CONCEPTUALIZE THE RIGHT TO WITHDRAW IN VIETNAM AND ASIAN COUNTRIES – AN EASTERN CHARACTERISTICS PERSPECTIVE

Following the previous subsection, I presuppose that the question that whether Vietnam or other Asian states should and/or is willing to adopt the withdrawal right should have an answer depended on the internal or external factors of the nuance of the meaning of pacta sunt servanda from the perspective of that state, particularly, whether the understanding of pacta sunt servanda in that state is in favour of permising one party to exit the bound of the contract.

(i) The internal factor is the moral idea underlined an Asian pacta sunt servanda that encourage one partner – the creditor to discharge the other – the debtor from obligations arising out of the contract. I address this account by presupposing that Confucianism is the possible moral ground to build a de factor Asian pacta sunt servanda.

(ii) The external factor is the policy choice and social goals of such a state that the state intervenes to release one party – the consumer from the contract. This factor is related to the reality of that states, including its institutions and reality in distance transactions and the 'image of consumers' in that state(Howells et al. 2018).

2.1.Confucianism, fidelity, and guanxi, and pacta sunt servanda

Within the subject of this paper that is pacta sunt servanda, this subsection shall first primarily focus on the philosophical ground of xin (tín) (though it is related to the overarching virtue ren

(nhân)). Xin (Tín) in Asian states comprises of two layers (i) trust and trustworthiness and (ii) a fiduciary society.

In the first layer, it comprises of two components

(i) faithfulness or keeping promise (as stated under Analects 1.13): This requires one to do *'of what that one says with earnestness'* (Hall and Ames 1987; Lu 2001) This is akin to pacta sunt servanda or good-faith in performance.

(ii) truthfulness (Analects 17.6): this is about saying honesty or honesty (good-faith) in fact.

The two components of the first layer of xin (tín) are very much akin to the two components of good-faith in the US law and from the liberal perspective that are, according to Charles Fried, honesty in fact and good fact in performance (Fried 2015). Contrary to the normal belief that a liberal account concerning good-faith and pacta sunt servanda is a-moral and harsh that is typically observed from the normally Victorian-era gentlemen who are hard-bargainer, it also comprises a level of compassion to as to respect the integrity of individuals and their mind at a specific temporal (Fried 2015).

What is different between a liberal and a Confucianism account is that the combination of truthfulness and faithfulness and the ultimate goal of xin (tín), according to Confucianism, is to yield *trustworthiness* – the core moral personality of a person (xin shi) (Analects 17.6). Confucian claims that a person without xin cannot understand others/ humanity/ the way to be a human and bring into completion (Analects 15.8, 20.5).

In the second layer, xin (tín) is the ground for forming a fiduciary society – a harmonious society based on mutual trust and shared values (Chen 2003; Lu 2001; Wei-ming 1984). This layer yields aims at and yields an effect of valuating and maintaining relationships and contributes to the altruism characteristic of Confucianism. In this layer, one party is encouraged to and may, at their willingness, pardon the wrongfulness of the other but not at their own expense (Chan 1999). This is a kind of sympathy and compassion but not an obligation. The fiduciary relationship can only be maintained by compassion in attitude and balance in interests of both parties.

It can be drawn from this subsection that, although whether or not there were or are Asian legal principles (rules), under Confucianism, xin (tín) is a moral ground to establish a unique version of pacta sunt servanda and good-faith in Asia. It comprises two layers

(i) trustworthiness: comprises of truthfulness (honesty fact) and faithfulness (good faith in performance).

(ii) a fiduciary society: express a level of altruism. This softens a harsh version of pacta sunt servanda and is in favour of discharging one party from their obligation based on compassion, generosity, and mutual understanding. This layer also in favour of an adoption of withdrawal right as according to it, pacta sunt servanda is not absolute; nevertheless, it is more favourable if withdrawal right can be reached by mutual agreement rather than by imposition from the state.

2.2.Conceptualize the withdrawal right in Vietnam

Another factor that should be considered in confirming the desirability and necessity is the societal reality, particularly concerning distance transactions, in Vietnam. Based on this, I argue the need to conceptualize the right to withdraw in Vietnam concerning distance contracts.

According to the Whitebook on Vietnamese Ecommerce 2020 (the Whitebook), the top drawback for B2C transactions is mistrust, particularly, the concern for the low quality of goods in comparison with one being advertised (Department of E-Commerce and Digital Economy - Ministry of Industry and Trade 2020). This is the reason explaining why some people have not conducted any distance transactions (Department of E-Commerce and Digital Economy - Ministry of Industry and Trade 2020).

The demand for enhancing the trust resulted in the adoption of some kinds of warranty and return policy of traders. Indeed, around 80% of traders self-claim that they offer returns policy, and the same number is concerning warranty (Department of E-Commerce and Digital Economy - Ministry of Industry and Trade 2020).

As Vietnam does not have a lemon law and Vietnamese citizenry holds a non-litigious attitude, influenced partly by Confucianism and partly by the arbitrary and monopoly of power of officials for a long time in the feudal age, a peaceful withdraw can be more beneficial than rules empowering consumers to sue. The right to return signals traders' commitment that consumers

can have a chance to experience goods and services, thereby, clearing the psychological obstacle in purchasing luxurious goods or service online.

Nevertheless, such adoption is rather formalistic and realistic, and psychological mandatory rather than voluntary: traders deploy numerous tactics to limit the possibility that consumers can invoke this right.

First, very often, platform providers do not allow consumers to return goods or services at will (Anon 2020; Shopee 2021). They sometimes require consumers to demonstrate very technical issues that impact the goods and even the seriousness of the defectiveness to return products, e.g., previously, Lazada only allows consumers to return goods if they can prove at least three major technical defectiveness, which can be beyond the reasonable knowledge of a citizen. An exemption to this is in the case when a consumer can reach an agreement to return good with a specific trader, but not the platform provider. Traders do not have an obligation to grant consumers such a right. Considering the right to silence of traders, consumers may in many instances, never get a satisfactory response. Even if it is somehow better, *a delay of justice is injustice. I*t is unfair for consumers to wait a lengthy period of waiting time just to have their right to be 'granted'. During this lengthy period, many events can occur that can be either the goods are lost or consumers give up their attempt to claim for their legitimate interest.

Second, besides substance matters, platform providers set procedural obstacles as well. Shopee and Lazada do not allow consumers to check the delivery box right after receiving it so that if consumers are unsatisfied or there are any mistakes, return the delivery to the shipper outright. To return the goods, consumers must receive the delivery box and then record the process of opening the box and any defectiveness at that first time opening the box. Consumers then must send the recording clip to either the platform provider or the trader to claim the return policy. This is clearly an obstacle for consumers to return goods even if there is any defectiveness and a threaten to consumers' rights.

Third, even if platforms providers offer a policy to return goods or services at will, they control this policy stringently. They offer this policy only in a few instances: the product must first belong to categories of product that can be returned and then must not belong to the specific list of restriction in return (Tiki 2021b, 2021a).

Fourth, information about the right to withdraw provided by traders is scattered and even not well disclosed. While information web pages of some platforms are down (the site of Tiki is currently down); therefore, consumers cannot access and understand the term and procedural process to return goods and services, some platforms do not allow consumers to read the return policy before shopping.

Fifth, given the above-mentioned facts, consumers cannot spot out differences in various policies. Some many consumers are indifferent about the variety of return policy of various platforms and traders because they do not expect to exert this right.

These facts call for the adoption of the withdrawal right:

First, contrary to arguments of some scholars that it is important to no longer consider the consumer as a pathetic figure who cannot take care of himself (Hartlief 2004), the image of Vietnamese consumers are about a group of vulnerable people who lack knowledge, means, and power to protect themselves. This insufficiency makes consumers different about information as it is irrelevant for them; the more or the less they know, the same outcome is yielded. This, read in conjunction with the societal reality in Vietnam and other developing nations as well, viz., the fact that while consumer protection associations are weak, corporates are both abundances of money and political power that can threaten consumers effortlessly, calls for paternalism protection from the state.

Second, the adoption of the right to withdraw as a paternalism protection from the state signals the state's effort to (i) allow consumers to have more right to try products, thereby promoting distance transactions, (ii) remove the drawback of consumers as those lacking means to prove for themselves, which exists in many current return policies.

Third, it would follow that the adoption of the right to withdraw has the effect to uniform these disparate treatments and ensure certainty among customers, at least concerning products that consumers are exposed to high risk of information asymmetric.

Fourth, the adoption of the withdrawal right can be observed as a measure of states to ensure and call on traders and platforms to supply information duly and sufficiently. With the status as a

statutory right, the right to withdraw can be more visible to customers, which facilitates the utility of this right.

Fifth, a [compulsory] withdrawal right can bridge the gap between traders striving to protect consumers with those aiming only at winning money. The purpose of this right is to ensure that while the field is levelled, consumers may get the minimum protection that they deserve to have. As such, in no way, it means that we should burden traders by imposing on them any unbearable obligations.

I have mentioned some benefits in adopting the withdrawal right but, does it come at no price? Of course not (Hartlief 2004)! Nevertheless, is the price of protection overburden resulting in the paradox elimination of the protection and business motivation? Maybe not, too! As nearly all traders have built their return policy, the subtle change moving the current status quo may cause some expenses, but it is not as huge as some scholars have thought (Borges and Irlenbusch 2007; Eidenmueller 2012).

Regardless of the gravity of the loss, for some libertarian, the adoption of the withdrawal right is unfair; for them, *"withdrawal rights are paid for by all consumers, regardless of whether they wish to have and/or to exercise such rights"* (Borges and Irlenbusch 2007; Eidenmueller 2012). This objection moves issue to the distribution of costs. The ideal channel for cost distribution, as argued by some libertarians, is the market where *"consumers can opt between a contract with and without a statutory right to withdraw"* (Eidenmueller 2012). To implement this strategy, they frame their proposed regime in the way mimicking the *insurance* regime: "additional price for having the withdrawal option is the *'insurance premium'*; only those consumers who benefit from such rights would contract and pay for the option to withdraw" (Eidenmueller 2012). The market is believed to bring about the equilibrium for two separate types of contracts at two equilibrium points (Eidenmueller 2012). The one having withdrawal rights is at a slightly higher price than the other: (Eidenmueller 2012)"competitive forces will drive the price of the *'insurance premium'* down to the marginal costs of the vendors" (Eidenmueller 2012). This prevents abuse of vendors, and the insignificant price differential also prevents consumers from acting opportunistically *"by buying goods with a withdrawal right, returning them after having exercised the right, and then buy them again much cheaper without a withdrawal right"* (Eidenmueller 2012).

Though this paper reaches the same conclusion as Eidenmueller's that the rationale for the adoption of the withdrawal right is quite akin to the rationale of insurance (Eidenmueller 2012), it contends that the model on which the withdrawal right reflect is not a kind of commercial insurance depicted by Eidenmueller but a kind of social security. It also contends that in depicting a commercial insurance model for adoption of a voluntary withdrawal right, Eidenmueller misunderstands the characteristic of it but a kind of social security.

The withdrawal right can be observed to mimic social security because the way it attributes cost is over the society rather than on need. It can be contended, especially from libertarians who are doubtful that the social security itself, that this method of allocating cost is inefficient. Yet, the cultural and psychological aspect may in favour of this analogy. An on-need commercial can result in the over abuse of right – the right received through payment should be utilized as much as it could be. On the contrary, social security is the joint force of society, as a whole, to channel resources and allocate them to the ones that need them. On this basis, ordinarily, a reasonable person should well recognize that he or she shall not overuse it. However, opportunistic consumers are hard to get rid of or prevented, yet, it should be better if we find a way to restrain a handful of opportunistic consumers who conduct malpractice rather than from an ordinary person trying to utilize that right that he earns. The former task seems to be easier than the latter. A provision akin to Article 16, as argued, seems to have some effects as it prevents opportunistic consumers to fully enjoy the benefit that he or she does not pay money for (in fact, he or she withdraws the money paid). Another mechanism to prevent opportunistic consumers is from platforms and traders themselves. They have all the right not to conclude a contract with an opportunistic consumer. Transaction history can be a good indicator of opportunistic consumers, and based on this, traders or platform providers can make a decision. Yet, this put a huge power in the hand of traders and platform providers that they can preclude consumers from acting against their will. However, it is not impossible to prevent this scenario. A careful and regular monitoring, overseeing, and administering from state agencies can prevent this and struck a fair balance.

The question then is what is the shape of the withdrawal right in Vietnam? Scholars are in many instances argue that a mandatory withdrawal right can be counter-intuitive, and even measures such as requiring consumers to bear the expense in returning goods – shipping the goods back do

not reduce the possibility that this right can be abuse by opportunistic consumers (Borges and Irlenbusch 2007; Eidenmueller 2012; Luzak 2014). A mandatory right is now a positive norm in the EU and there are normative arguments for and against this right and the call for making this right to be voluntary. The real goal for this debate, however, should be about balancing the interests of consumers and traders, not in the sense of static but dynamic equilibrium, regardless of the territory at stake is the EU or states extending the border of the EU. This mission cannot be read apart from the relationship of traders and consumers but should be built upon it. A state and its measures, e.g., the law, in many instances do not comprehend the features of different sectors and goods and service, therefore, should not be over paternalism in regulating. A policy should ensure the protection of consumers on one hand, and respect the business relationship on the other hand. Therefore, though consumer protection can be a mix of private and public law, the balance should be lean towards the former in the sense that the state should foster negotiation and mutual agreement between consumers and traders.

This need is derived only from the survey experiments (Borges and Irlenbusch 2007) but from the tradition of Asians. For Asians, as mention in the previous subsection, a far-reaching layer of xin (tín) is to build a fiduciary society – a society of love, compassion, and shared values. This object is far-reaching and even, if not to say, impossible to achieve in the short-run, or even impossible, considering the inherent selfish and various sources of conflict of interest. Yet, we should strive towards it. The trust and fiduciary between human and human is valuable resources. Trust and fiduciary is especially needed in the age of turbulence and in the societal context where law and formal rules and regulations are ranged from inactive, inefficiency to unpredictable, arbitrary, and suppressive. In ancient time, to counter the oppression and arbitrary from rulers, corruption from official, and uncertain rules and legal proceedings, citizen prevented being involved in a formal adjudication by relying on informal institutions. Though the important of contract or khế ước is undeniable, especially in a newly-formed relationship, in the long run, when trust is fostered and growth, contracts became redundant. The sole dependence on relationships created a mutual interdependence relationship or famously named guanxi (quan hệ) (Language Research Institute of China Social Science Academy 1981; Phê 2013). Though more than often, guanxi (quan hệ) is cast dark light and is stigmatized for corrupted and malpractice acts, even for the collapse of the Eastern system in the modern age, guanxi (quan hệ) has a complex cultural nuance and can only be understood if it is read together with the whole societal

context and human needs. As rightly pointed out by the renowed philosopher Onora O'Neill who argues for the recognization and appreciation of fiduciary in society, balancing and ensuring a healthy relationship between trust and accountability with respect to the trust vested in is a daunting task (Jones 2013; O'neill 2002). Guanxi, as cultivated from the trust and fiduciary, has both good and bad. Nevertheless, we still need to lean towards goodness. In the age of revolution 4.0, gaining trust, fiduciary, trustworthiness, and having a mutual and even bilateral trust can be more challenging than before. In the digital platform and B2C transactions, often, transactions are concluded anonymously. Platforms do not provide much detail about traders, and in the same vein, traders, after uploading information of their goods on online kiosks, do not know quite well about their consumers. Fostering healthy B2C transactions require a higher level of engagement between traders and consumers.

Therefore, an adoption of the withdrawal right should not be overactive. It should exist as an attempt to uniform standard treatments and inform consumers about their right. It, however, should not eradicate or replace the capacity to bargain and facilitate mutual trust. A statutory withdrawal right is demanded, but it should be at the minimum, only for consumer to return goods and services at will. It shall require all traders to offer the withdrawal right to consumers and provide a recommended set of rules thereof, e.g., the withdrawal period is seven (7) days. Traders, however, can alter this set of rules and establish their own policy. Traders then shall offer both the statutory withdrawal right and their policies and let the consumers choose for their own, e.g., traders can provide consumers with two alternations: (i) the right to withdraw within seven days without charge, and (ii) the right to return goods at a longer period, e.g., 12 months, but with a charge, e.g., 10-20% of the price of the product – I may call it is premium insurance. Nevertheless, traders are not allowed to eliminate the possibility that consumers may be benefited from the withdrawal right. Such a policy on withdrawal right shall, *first,* motivate traders to be more transparent on their policy. *Second,* it shall not be at odds with the principle of freedom of contract, pacta sunt servanda, and good faith because if the final shape of the 'withdrawal/return' right is reached by efforts of negotiation, it is a part of a pactum (contract) and the exercise of this right looks no different than a termination of a contract pursuant to a mutually agreed clause. *Third,* such an adapted policy that allows parties to curtail it to fit their purpose can also facilitate long-trusted relationships.

III. CONCLUSION

The increasing commonality of distance selling has raised concerns about the protection of the interests of consumers. This results in the introduction and adoption of the right to withdraw. This right is at odds with the deep-seated principle of contract law - 'Pacta sunt servanda'; its adoption is the matter of policy fitting the goal of social and welfare justice of the EU.

On examing Confucianism, this paper finds a possible moral ground of pacta sunt servanda in Asia – xin/tín. Xin/tin comprises of two layers: (i) trustworthiness that aims at building a human and guiding him to practice humanity by fostering faithfulness – keeping promises or good-faith in performance, and truthfulness – honesty in facts; (ii) a fiduciary society that promotes altruism, shared values, and compassionate. The second layer of xin (tín) softens pacta sunt servanda as it stimulates one party to discharge the other from obligation and wrongfulness if he or she is willing. It is, therefore, is more suitable with and not an obstacle for adoption of the withdrawal right.

The reality regarding distance contracts and B2C transactions, the inherent suspiciousness, and the non-litigious psychology of Vietnamese should motivate the introduction of the right in Vietnamese law. Nevertheless, this intervention should be at the minimum and accessory as it would be more advantageous if the parties voluntarily practice humanity, fiduciary and strive to maintain the relationship. There should be a statutory withdrawal right, but traders should offer choices for consumers and facilitate conditions for consumers to choose for their own, including being transparent. Doing such would conciliate deep-seated values and principles with the need to protect consumers.

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