



AMERICAN
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2018 International Insolvency & Restructuring Symposium

Asset-Tracing in International Insolvencies

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ABI 14TH INTERNATIONAL INSOLVENCY & RESTRUCTURING SYMPOSIUM

ASSET TRACING IN INTERNATIONAL INSOLVENCIES

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Milan

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Case Study: Viação Aérea São Paulo S.A. (“VASP”)

*In re: Chapter 15 VIAÇÃO ÁREA SÃO PAULO S.A., Case No.: 15-22091
(Bankr. S.D. Fla. 2015)*

- 2008: Brazil’s largest liquidation of government owned airline VASP.
- 2013: liquidation extended to Wagner & Ulisses (son) & Brazilian injunction.
- Oct 2013: U.S. entities formed in the name of Ulisses’ 2 daughters and wife (“Canhedo Entities”).
- 2015: Ch. 15 petition granted, Brazilian proceeding recognized.



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Case Study: VASP Discovery

- Foreign Representative:
 - Examined witnesses, took evidence, obtained information on Debtor.
 - Issued subpoenas for Rule 2004 Examination against banks and Canhedo Entities.
 - Obtained wide-ranging discovery on VASP Accounts, Wagner, Ulisses & Canhedo Entities to locate assets.
- To establish links between Canhedo Entities controlled by Wagner:
 - i.e. the suspicious timing of creation of the Canhedo Entities shortly before the Brazilian court's injunction on Wagner/Ulisses' assets in the Brazilian liquidation.

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Case Study: Diplomata

In re: Diplomata S/A Industrial E Comercial, et al., Case No.: 16-bk-15327
(Bankr. S.D. Fla. 2016)

- Poultry producer & 4 related companies in Capanema, Brazil controlled by Kaefer.
- Restructured ownership of companies pre-bankruptcy.
- Fraudulent acts of Kaefer to hide & shield assets from bankruptcy estate.
- 2016: Brazilian proceeding recognized under Chapter 15. Discovery campaign commenced to locate assets.



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Expanded Reach

- When foreign jurisdiction laws are more restrictive than the U.S.
e.g. Brazil banking & tax secrecy
- Advantage of Chapter 15 for asset tracing
 - 11 USC §1507(a)
 - Rule 2004
- *In re Foreign Economic Industrial Bank Ltd.* 2017 WL 5070117 (Bankr. S.D.N.Y.): (2017)
 - Cooperation in bankruptcy between two different legal systems
 - Leading to recovery of assets in New York

Case Study: Mappin

In re: Massa Falida de Mappin Lojas de Departamento S.A., et al.
16-ad-01626 (Bankr. S.D. Fla. 2016)

- Mappin Lojas became insolvent after only 3 years under Mansur’s control.
- Mansur lived a lavish lifestyle in Brazil, London & Miami.
- Used ‘straw men’ or ‘laranges’ (oranges) to hide assets.
- U.S. recognizes Brazilian veil piercing order.
- Temporary Restraining Order (“TRO”).



Case Study: Mappin

- Assets subject to TRO:
 - Temporarily restrained and enjoined Mansur, his relatives and Canhedo Entities “*from transferring, encumbering or otherwise disposing of any assets in their possession, custody or control that are owned (nominally, beneficially, equitably, or otherwise) by Mansur*”.
- Evidentiary Hearing on TRO and recognition, where judge queried why the LLCs :
 - were paying memberships for a country club;
 - were paying rent at \$24,000/ month for a house if it is an online auction company business;
 - held 15 luxury cars.



Piercing the Corporate Veil

- Extends corporate liability to third parties when the estate can demonstrate an intent to defraud creditors.
- In some cases, U.S. Bankruptcy Court have recognized foreign veil piercing orders:
 - *In re: Massa Falida de Mappin Lojas de Departamento S.A., et al.* 16-ad-01626 (Bankr. S.D. Fla. 2016)
 - *In re Petroforte Brasileiro de Petroleo Ltda.* 542 B.R. 899 (Bankr. S.D. Fla. 2015)

In Re Mappin

Excerpts from the Brazilian veil piercing order:

“... is a petition of the illustrious Bankruptcy Trustee of the Estate of Mappin Lojas de Departamento S.A. alleging that he reiterates his previous request and states that the assets of all Mappin conglomerate companies have been dilapidated and that ruinous actions have been taken, as well as the existence of certain straw men listed on p.; then, after a lengthy discussion, he requests the piercing of the corporate veil of several companies, as well as reverse veil-piercing, to extend the Bankruptcy to the companies and individuals listed, ...”

“I grant the piercing of the corporate veil of Mappin Lojas de Departamento S.A., Casa Anglo, Mappin Empreendimentos Imobiliários, and Mappin Telecomunicações, as well as any equity interest therein, for all legal purposes and effects, whereby such companies shall henceforth bear the liabilities of the main Bankruptcy.”.

Case Study: Mappin

- Veil piercing order: *identified the alter ego behind the LLCs*
 - pierced the corporate veil of the Debtors;
 - extended the bankruptcy to Mansur;
 - made Mansur and his assets personally liable for the debts of the Debtors.
- Foreign Representative could:
 - seize all assets that are owned (nominally, beneficially, equitably, or otherwise) by Mansur;
 - take action abroad to identify and retrieve assets of Debtor’s estate.
- Reverse veil piercing order: *identified transfer of assets into LLCs*
 - extended the bankruptcy to various, non-debtor entities owned and controlled by Mansur.

Additional Discovery Tools: 28 USC § 1782

- 28 USC § 1782: Additional discovery powers in aid of foreign proceedings.
- Can obtain correspondent wire records in *ex parte* proceedings without tipping off the defendant.
- Can obtain:
 - relevant, non-privileged documents, including emails, bank records, corporate documents;
 - sworn testimony;
 - Shareholder lists, organizational documents, other materials generally available only to shareholders – an alternative to an action for access to books and records, under state law (e.g. Delaware § 220).

Case Study: Gisela Peters

In re: Application of Gisela Peters for an order to take discovery pursuant to 28 U.S.C. §1782, Case No.: 17-cv-00230 (D. Del. 2017)

- Two marriages and marital estate / sets of claims.
- Biological daughter from 1st marriage commenced Brazilian probate action to recover property from 2nd wife after his death.
- Assets owned by Delaware LLCs related to Brazilian entities and real estate.
- Discovery sought against Delaware LLCs which uncovered title to substantial property and assets including resort in Praia do Forte.



Case Study: Gisela Peters

In re: Application of Gisela Peters for an order to take discovery pursuant to 28 U.S.C. §1782, Case No.: 17-cv-00230 (D. Del. 2017)

Client Goals	How Achieved
<ul style="list-style-type: none"> • Identify / inventory of Father's assets including: <ul style="list-style-type: none"> – Assets controlled by Father (through 2nd wife) via Delaware holding companies; – Brazilian holding entities; – Transfers of Father's real estate in Brazil including resort (Praia do Forte). 	<ul style="list-style-type: none"> • Discovery and testimony against discovery targets: <ul style="list-style-type: none"> – They turned over records which showed 2nd wife used trusts to hold assets in Brazil. • Subpoenaed correspondent banks for wire transfer records. • Could piece together information about Brazilian assets including Father's property in Praia do Forte.

Case Study: Yeo and Rambaldi

In the matter of the ex parte application of Andrew Reginald Yeo and Gess Michael Rambaldi for an order to take discovery pursuant to 28 U.S.C. §1782, Case No. 17-mc-00484 (S.D.N.Y. 2017)

Client Goals	How Achieved
<ul style="list-style-type: none"> • Obtain information from US correspondent banks and wire-transfer clearing houses for Australian proceedings. 	<ul style="list-style-type: none"> • Obtained express permission from Australian court judges to file 1782 application in accordance with local laws.

Case Study: Sylvia Hernandez

In the matter of ex parte application of Silvia Fernandes for an order to take discovery pursuant to 28 U.S.C §1782, Case No. 18-mc-20111 (S.D. Fla. 2018)

Client Goals	How Achieved
<ul style="list-style-type: none"> Resolve distribution of matrimonial property outside of Brazil including one luxury condo in Miami. Prove the husband owned the condo and force settlement. 	<ul style="list-style-type: none"> 1782 subpoena: obtained information from the registered agent. Information used to fight the Brazilian matrimonial action.

Panelist: John Couriel of Kobre & Kim

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I. Tactical Advantages of Using Chapter 15

Chapter 15 proceedings assist a Foreign Representative to secure recoveries or pursue foreign claw-back targets in instances where corporate fraud has led to insolvency by providing the tools and reach to do so.

- a. **Discovery Powers.** Foreign Representatives have access to expansive discovery powers to obtain crucial evidence in the U.S. regarding a foreign debtor, assets, claims and potential recoveries related to foreign proceedings.
 - *In re: Chapter 15 VIAÇÃO ÁREA SÃO PAULO S.A.*, Case No.: 15- 22091 (Bankr. S.D. Fla. 2015) in the U.S. Bankruptcy Court for the Southern District of Florida (“*In re: VASP*”). The Foreign Representative sought broad discovery from U.S. banks and third party non-debtors in Brazil’s largest liquidation of a Brazilian airline.
 - *In re: Diplomata S/A Industrial E Comercial, et al.*, Case No.: 16-bk-15327 (Bankr. S.D. Fla. 2016), extensive discovery was sought from numerous banks and clearing house payment companies for use in Brazilian proceedings.
- b. **Expanded Reach.** These powers are beneficial in cases where the laws of the home jurisdiction of the foreign proceeding are more restrictive than in the U.S.
 - *In re: Massa Falida De Mappin Lojas De Departamento S.A., et al.*, Case No.: 16-25541 (Bankr. S.D. Fla. 2016) in the U.S. Bankruptcy Court for the Southern District of Florida (“*In re: Mappin*”). The Foreign Representative used U.S. discovery procedures to obtain information about the debtor, in a large-scale insolvency proceeding of an iconic Brazilian department store. Under Brazilian law, it was more difficult to obtain information from banks due to restrictive Brazilian tax and banking secrecy laws.
- c. **Tracing Assets.** Expanded discovery provide the Foreign Representative with tools to seek, identify and trace hidden U.S. assets.
 - *In re: Mappin*, the debtor tried to conceal assets by using straw men (individuals who nominally own assets on the debtor’s behalf). Foreign Representatives issued subpoenas for discovery against U.S. banks to locate further assets for the Brazilian liquidation.
 - *In re: VASP*, the Foreign Representative issued subpoenas to U.S. banks seeking broad-ranging confidential financial records from third party non-debtors.

Panelist: John Couriel of Kobre & Kim

- d. **Piercing the Corporate Veil.** In some cases, U.S. Bankruptcy Court judges have recognized foreign veil piercing orders.
- This can extend corporate liability to third parties when the estate can demonstrate an intent to defraud creditors.
 - *In re: Mappin*, the U.S. court recognized Brazilian bankruptcy and veil piercing orders where the debtor had significant assets. The debtor was enjoined from further transfers of assets within the U.S.
 - *In re: Petroforte Brasileiro de Petroleo Ltda.*, 530 BR 503 (Bankr. S.D. Fla. 2015), the Southern District of Florida recognized the insolvency proceeding and also extended recognition to related debtor entities, who the Brazilian court determined were liable as debtors.
- e. **Asset Recovery.** Chapter 15 proceedings allow the Foreign Representative to pursue claw-back and other asset recovery actions. Those assets are then liquidated, monetized and repatriated to the foreign proceeding.
- *In re: Mappin*, the Foreign Representative obtained a temporary restraining order granting emergency relief against the Debtor's U.S. assets and was authorised to issue subpoenas to examine witnesses and request the production of documents.

II. Additional Discovery Tools

28 U.S.C. § 1782 allows parties in a foreign proceeding to take discovery in the U.S. for use in the foreign proceeding.

- *In re: Application of Gisela Peters, in her capacity as the court-appointed administrator of the Probate Estate of Wilhelm Peters*, 17-cv-00230 (D. Del. 2017) in the U.S. District Court for the District of Delaware, the administrator of a probate estate obtained discovery to locate substantial real estate assets for use in Brazil.
- *In the matter of the ex parte application of Andrew Reginald Yeo and Gess Michael Rambaldi for an order to take discovery pursuant to 28 U.S.C. §1782*, Case No. 17-mc-00484, (S.D.N.Y. 2017) in the U.S. District Court of New York, discovery was ordered from correspondent banks and wire-transfer clearing houses for use in Australian proceedings.
- *In the matter of ex parte application of Silvia Fernandes for an order to take discovery pursuant to 28 U.S.C §1782*, Case No. 18-mc-20111 (S.D. Fla. 2018), in the U.S. District Court of Florida, discovery led to obtaining information from the registered agent which revealed a luxury condo in Miami used to fight the Brazilian matrimonial action.

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Presented by:

James H.M. Sprayregen

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KIRKLAND & ELLIS LLP**When does asset tracing become relevant?**

- On appointment of insolvency professionals
 - Gather in / freeze assets
 - Maintain status quo while investigations take place
- During the course of legal proceedings
 - Prevent dissipation of assets available to satisfy any judgment
- Post-judgment enforcement

Asset tracing tools: Hong Kong and the Caribbean

- Investigative powers of insolvency professionals
 - Cross border recognition (common law / Model Law)
- *Mareva* injunctions / freezing orders
 - Disclosure orders
 - Undertaking in damages
 - Ancillary injunctions in other jurisdictions
- Bank production orders / *Norwich Pharmacal* orders

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Effective international asset tracing

- Have a clear strategy from the outset
 - Where are the assets and key individuals?
 - Where do you need orders?
 - What do you want to achieve in each jurisdiction?
- Coordinate your approach
 - Cross border recognition of insolvency professionals
 - Parallel ancillary injunctive relief
 - Standalone applications in multiple jurisdictions

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Insolvencies and red chip structures

- What is a red chip structure?
- Asset tracing and preservation in the PRC
 - Taking control of PRC subsidiaries and assets
 - Orders in the PRC vs Hong Kong vs Caribbean
- Using Chapter 15 tools in the USA

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Asset Searching in Europe: Tips & Pitfalls

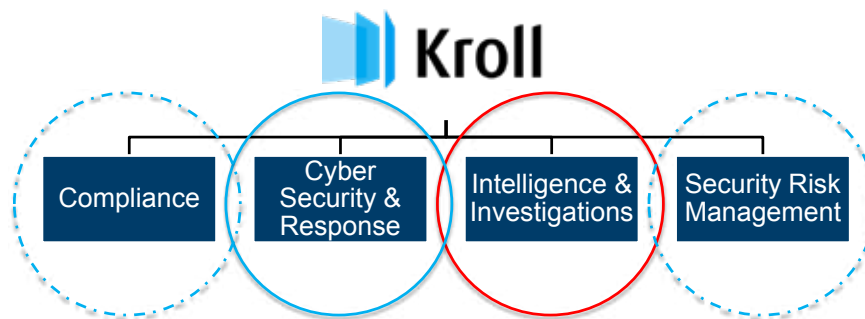
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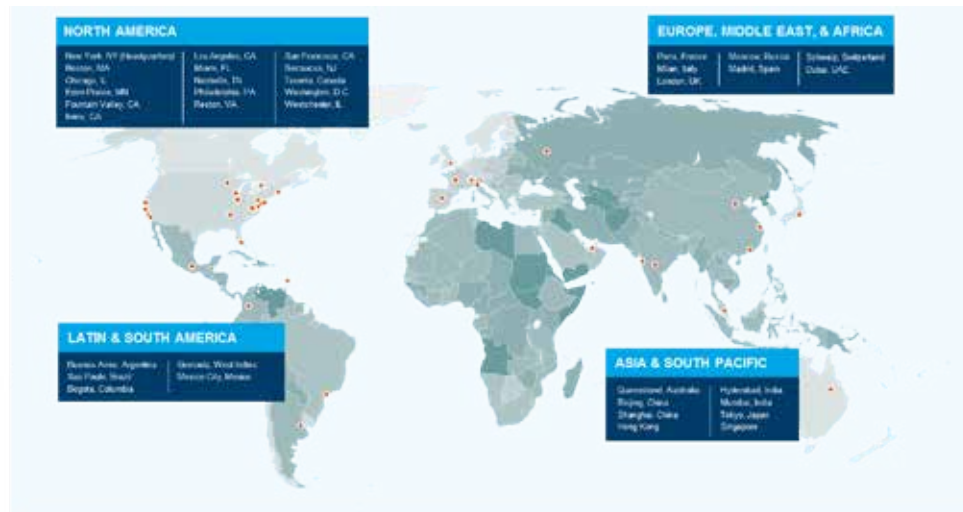
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Our Approach to Asset Searches



Global Coverage



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Kroll's Experience

Who do we do this for? Some examples

- Liquidators in liquidation or bankruptcy proceedings
- Corporates
 - Before a commercial dispute, to determine whether the counterparty holds assets
 - To identify indications of "ill-gotten gains" by employees suspected of malpractice
- Banks
 - To recover non-performing loans
 - To recover ill-gotten funds following fraud
- Lawyers
 - To enforce awards granted by courts or in international arbitration;
- Governments
 - Foreign asset recovery
- High-net worth Individuals
 - Divorce cases

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Asset Identification

Asset Search v. Asset Trace v. Asset Recovery

- Depends on our starting point and the information available to us
- Asset Trace
 - Access to internal records (e.g. company books, computers, bank statements)
 - **Following the cash**, obtaining disclosure orders on bank statements
 - Usually forms part of larger fraud investigations
- Asset Search
 - Starting from the “outside”/ “cold”
 - No access to internal records
 - Some degree of circumstantial evidence/ intelligence acceptable, especially if client may consider negotiating a settlement
- Asset Recovery
 - Working with legal counsel to identify, attach and seize assets
 - Evidence is key – must strongly link subject to asset through paper trail

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Sources of Information

Investigative Research

- Global reach but local knowledge
 - Subjects often have assets in multiple jurisdictions; research needs to be coordinated simultaneously across the world
 - Local people means local knowledge: what to look for, where to find it and what it means
- Access to information and the ability to interpret and analyse that information
 - Huge variety of international data sources
 - Attention to the important detail in a vast quantity of information
- Cyber
 - Social media interrogation and geo-location of assets
 - Finding information in the deep web
- Bigger picture
 - Look for patterns and relationship between subjects
- Focus and strategy
 - Targeted searches for “low hanging fruit” first in the best jurisdictions for recovery
 - Experienced staff who are used to working with legal counsel to formulate best in class strategy

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Effective Public Record Research

Google is not enough

- Public record analysis comes from searching press archives, the internet, proprietary databases, manual retrieval of other records from relevant industry, government and regulatory bodies
- Deep web must be professionally mined
- Europe has 50 countries and even more languages
- In Europe public record does not mean universal access and it is often not anonymous
- In Europe most archives are still not (entirely) digitised
- Many checks available in the US are “readily available” but in fact entirely illegal (e.g. litigation and criminal checks)
- No discovery!

Examples of public records sources that can be reviewed:

Corporate records
Family tree searches
Criminal records (selected jurisdictions)
Property and other asset searches (optional)
Local and international regulatory checks
English and local language media and internet checks
Professional bodies
Trade and industry specific data

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Public Record Strategy

Factors to consider

- Nationality vs centre of economic interests
- Availability of records and ease of search
 - French real estate
 - Greek real estate
 - Italian real estate
 - Scottish vs Italian corporate record
- Access issues – who has legitimate access?
 - Italy – preparing for litigation or recovery gives a legitimate right
 - Greece - the above does not always apply
- Transcription errors and gaps
- The problem with record suppression
- The right to be forgotten
- The new register of beneficial owners
- Dealing with organised crime

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Sources of Information

Beyond the desktop

- Conducting source enquiries
 - Individuals with knowledge of the subject's industry
 - Individuals identified by us during the course of the investigation – e.g. former employees, former spouses, etc.
 - Consider confidentiality risk v benefits gain
- Conducting interviews
 - Identify key individuals with required knowledge and obtain witness statements
 - E.g. "front men," former business partners, former employees, former spouses, etc.
- Conducting surveillance
 - Must be appropriate to the investigation
 - To show where individual currently resides or does business, or his current business partners

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Fieldwork

Factors to consider

- Licensing
- Legal limitations by jurisdiction –surveillance
 - Italy: regulated
 - Greece: banned (but counter surveillance allowed)
 - Portugal: unregulated
 - Holland: regulated (and you have to inform the subject!)
- Legal limitations by jurisdiction – recordings
 - UK: need to inform subjects
 - Italy: always legal if part of a conversation you are in
- Acceptable evidence – breaking corporate veils
- Presenting illegally obtained information in court

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Word of Caution

Know when to stop and when to carry on

- Consider phases of work to assess likelihood of success
 - “Asset Profile”
 - Investigative Research to locate assets held by the subject ONLY and initial source work
 - Global focus if appropriate but at a more superficial level (databases and public record)
 - Provides a general overview of the subject's potential assets
 - Generally considered “phase one” of most investigations
 - “Deep Asset Dive”
 - Asset Profile with a review of a subject's close associates and others who may hold assets on the subject's behalf
 - Focus on obtaining evidence from the public record showing asset ownership
 - Source enquiries – with individuals in the industry, former employees
 - Onsite visits – to office premises, residential addresses, etc.
 - Generally considered “phase two” of most investigations
 - “Full Recovery”
 - Both of the above plus other strategies for locating assets, including interviews with key individuals and obtaining witness statements, working to obtain disclosure orders, etc.
 - Moves offering from asset search to asset trace & recovery exercise

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Marianna Vintiadis is a Managing Director in Kroll's Investigations & Disputes practice and Head of operations in Southern Europe, based in the Milan office. In this role she is responsible for Kroll's operations in Greece and expanding the company's network in Austria, the Balkans, Spain, and Portugal. As a practitioner, Marianna has been involved in some of Kroll's most high-profile and sensitive business intelligence engagements in the region, spanning many jurisdictions and areas of corporate activity.

Marianna and her team have worked with clients in the private and government sectors, helping them assess risks involved in mergers and acquisitions and corporate finance transactions; exposing mafia infiltration and sanction breaches; supporting in disputes, asset recoveries, and NPL management; helping limit counterparty exposure and reputational liabilities; and gathering evidence in leak of information, corruption, and internal fraud investigations. Marianna has also been on the leading edge of supporting clients in southern Europe with the challenges of preventing and resolving data breaches. Her particular areas of expertise include the shipping and gaming industries as well as energy, banking, and telecommunications.

Prior to joining Kroll, Marianna worked for Navale Assicurazioni in its marine hull division. Previously, Marianna had spent eight years at Cambridge University doing research, teaching, consulting in economics, and working on technology transfer.

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