

GCE

Law

Unit **G156**: Law of Contract Special Study

Advanced GCE

Mark Scheme for June 2016

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by examiners. It does not indicate the details of the discussions which took place at an examiners' meeting before marking commenced.

All examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the report on the examination.

OCR will not enter into any discussion or correspondence in connection with this mark scheme.

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These are the annotations, (including abbreviations), including those used in scoris, which are used when marking

Annotation	Meaning of annotation
C	Critical Point (Q1/Q3), Developed Case (Q2)
L1 etc	Analytical/Applied Point 1 etc (Q1/Q3), L5 = Synopticism in Q2
LNK	Linked Case (Q1), Link to Source (Q2)
K	Bald Case (Q1), Conclusion (Q3)
A2	AO2 point (Q2)
✓	AO1 point not linked to an authority
CON	Conclusion (Q2&3)
!	Irrelevant
R	Repetition
x	Incorrect

Q	Answer/Indicative content	Mark	Guidance												
1*	<p>Potential answers MAY:</p> <p>Assessment Objective 2 (12 marks available) Analysis, Evaluation and Application</p> <p>Explain the critical point (C) of the case: this was a case about the alleged frustration of a building contract. Counter-arguments included the fact that the labour shortages were foreseeable and that the courts should not allow a party to escape a contract simply because it had become more onerous or less profitable</p> <p>Link this case with another relevant case (LNK) for development such as: <i>Taylor v Caldwell</i>, <i>Tsakiroglou v Noble Thorl</i>, <i>Amalgamated Investment Properties v John Walker</i>, <i>Gold Group Properties v BDW Trading Ltd</i>, <i>The Sea Angel (Edwinton Commercial Corporation v Tsavlis Russ)</i></p> <p>Discuss the case analytically (A), for example making points such as:</p> <p>A1. This is one of the most recent House of Lords cases on frustration and is thus an important authority on the doctrine</p> <p>A2. This case demonstrates a significant narrowing of the doctrine of frustration since the days of <i>Krell</i> and <i>Union Marine</i></p> <p>A3. The case shows strong support for the idea that any foreseeable event should not be held capable of frustrating a contract</p> <p>A4. The case shows that the courts expect parties to take advantage of contractual terms to protect themselves and incorporate in their price any risk of delay. This appears to be a sensible and efficient approach (credit any economic analysis of risk allocation)</p>	16	<table border="1" data-bbox="1283 248 1552 459"> <thead> <tr> <th>Level</th> <th>AO2</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>11-12</td> </tr> <tr> <td>4</td> <td>9-10</td> </tr> <tr> <td>3</td> <td>7-8</td> </tr> <tr> <td>2</td> <td>4-6</td> </tr> <tr> <td>1</td> <td>1-3</td> </tr> </tbody> </table> <p>Refer to matrix for descriptors.</p> <p>Stretch and Challenge and synoptic consideration can be demonstrated by candidates who appreciate the overarching theme in developing the particular area of law being studied. This includes the role of the judges, the role of Parliament, the Law Commission, potential avenues for reform or the influence of policy in decision-making where relevant.</p> <p>Marks should be awarded as follows:</p> <ul style="list-style-type: none"> • Max 3 marks for the Critical Point (C) • Max 6 points for Analytical Points (A) • Max 3 points for a relevant Linked Case (LNK) <p>Level 5 Candidates are unlikely to achieve L5 without discussing the CP, without using a linked case for the purpose of showing development and without making two analytical points.</p> <p>Level 3 Candidates are unlikely to achieve L3 without discussing the CP.</p>	Level	AO2	5	11-12	4	9-10	3	7-8	2	4-6	1	1-3
Level	AO2														
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	<p>A5. The central aspect of this case has become particularly important during recent years of economic hardship and has remained a cornerstone of the doctrine of frustration</p> <p>A6. This case includes extended discussion of the justifications for the rules of frustration including an attack on the 'implied term' approach originally seen in <i>Taylor v Caldwell</i> as being illogical as it centres on parties foreseeing the necessarily unforeseeable. Lord Radcliffe suggests a test based on radical difference of circumstance (<i>non haec in foedera veni</i>)</p> <p>A7. Any other analytical point</p>													
	<p>Assessment Objective 3 (4 marks available) Communication and Presentation</p> <p>Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.</p>		<table border="1"> <thead> <tr> <th data-bbox="1279 619 1480 655">AO2 marks</th> <th data-bbox="1480 619 1671 655">AO3 mark</th> </tr> </thead> <tbody> <tr> <td data-bbox="1279 655 1480 692">10-12</td> <td data-bbox="1480 655 1671 692">4</td> </tr> <tr> <td data-bbox="1279 692 1480 729">7-8</td> <td data-bbox="1480 692 1671 729">3</td> </tr> <tr> <td data-bbox="1279 729 1480 766">4-6</td> <td data-bbox="1480 729 1671 766">2</td> </tr> <tr> <td data-bbox="1279 766 1480 802">1-3</td> <td data-bbox="1480 766 1671 802">1</td> </tr> </tbody> </table>		AO2 marks	AO3 mark	10-12	4	7-8	3	4-6	2	1-3	1
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2*	<p>Potential answers MAY:</p> <p>Assessment Objective 1 (16 marks available) Knowledge and Understanding</p> <p>Explain that Frustration was developed to mitigate the harshness of the ‘absolute contract’ doctrine, <i>Paradine v Jane</i></p> <p>Explain that the frustrating event must occur after the formation of the contract (<i>Amalgamated Investment v John Walker</i>) and that the existence of an applicable <i>force majeure</i> clause precludes the application of Frustration (<i>Jackson v Union Marine Insurance Co</i>)</p> <p>Explain the ways in which a contract may be frustrated:</p> <ul style="list-style-type: none"> • Impossibility of performance: <ul style="list-style-type: none"> ○ Due to destruction of subject matter, <i>Taylor v Caldwell</i>, <i>Appleby v Myers</i> ○ Due to death or illness of a party essential to performance, <i>Robinson v Davison</i> ○ Due to unavailability of something essential to performance, <i>The Wenjiang (International Sea Tankers of Liberia Inc v Hemisphere Shipping Co of Hong Kong)</i>, <i>Jackson v Union Marine Insurance Co</i>, <i>The Nema (Pioneer Shipping v BTP Tioxide)</i> • Radical change of circumstances, <i>Krell v Henry</i> • Illegality of performance, <i>Fibrosa v Fairbairn Lawson, Denny, Mott and Dickinson v James Fraser & Co</i>, <p>Explain the circumstances where the courts will decide that frustration will not apply:</p> <ul style="list-style-type: none"> • Where performance would be possible but more difficult/expensive or less profitable, <i>Tsakiroglou v Noblee</i> 	34	<table border="1" data-bbox="1283 260 1823 472"> <thead> <tr> <th>Level</th> <th>AO1</th> <th>AO2</th> <th>AO3</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>14-16</td> <td>13-14</td> <td></td> </tr> <tr> <td>4</td> <td>11-13</td> <td>10-12</td> <td>4</td> </tr> <tr> <td>3</td> <td>8-10</td> <td>7-9</td> <td>3</td> </tr> <tr> <td>2</td> <td>5-7</td> <td>4-6</td> <td>2</td> </tr> <tr> <td>1</td> <td>1-4</td> <td>1-3</td> <td>1</td> </tr> </tbody> </table> <p>Refer to matrix for descriptors.</p> <p>AO1</p> <table border="1" data-bbox="1283 679 1552 892"> <thead> <tr> <th>Level</th> <th>AO1</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>14-16</td> </tr> <tr> <td>4</td> <td>11-13</td> </tr> <tr> <td>3</td> <td>8-10</td> </tr> <tr> <td>2</td> <td>5-7</td> </tr> <tr> <td>1</td> <td>1-4</td> </tr> </tbody> </table> <p>Level 5</p> <p>Responses are unlikely to achieve level 5 without including 8 relevant cases/statutory provisions of which 6 are developed. Responses are likely to use material from both within (LTS) and beyond the resource materials including a specific link to the resource materials. Developed discussion of cases/statutes should include a direct link to cited cases/statutory provision and include sufficient factual material to ensure accuracy of citation and to support a discussion. Responses are likely to include well developed explanations and definitions.</p>	Level	AO1	AO2	AO3	5	14-16	13-14		4	11-13	10-12	4	3	8-10	7-9	3	2	5-7	4-6	2	1	1-4	1-3	1	Level	AO1	5	14-16	4	11-13	3	8-10	2	5-7	1	1-4
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	<p><i>Thorn, Amalgamated Investment v John Walker, Davis Contractors v Fareham, Gold Group Properties v BDW Trading Ltd</i></p> <ul style="list-style-type: none"> • Where the change of circumstances is insufficiently radical, <i>Herne Bay v Hutton, Davis Contractors v Fareham</i> • Where the potentially frustrating event was foreseeable, <i>Amalgamated Investment v John Walker, Davis Contractors v Fareham, The Sea Angel (Edwinton Commercial Corporation v Tsavlis Russ)</i> • Where the impossibility of performance was due to the fault or choice of one of the parties, <i>The Eugenia (Ocean Tramp Tankers Corp v V/O Sofracht), Maritime National Fish Ltd v Ocean Trawlers, The Super Servant 2 (J Lauritzen A/S v Wijsmuller BV)</i> • Where the legal changes are peripheral, <i>Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd</i> <p>Explain that the effect of Frustration is to discharge the contract at that point <i>Hirji Mulji v Cheong Yue Steamship Co</i></p> <p>Explain the common law rules on loss:</p> <ul style="list-style-type: none"> • The old 'loss lies where it falls' rule (<i>Chandler v Webster</i>) was replaced by the 'total failure of consideration' rule in <i>Fibrosa</i> <p>Explain the provisions of the Law Reform (Frustrated Contracts) Act 1943:</p> <ul style="list-style-type: none"> • Section 1(2) where money paid/payable in advance of the frustrating event may be reclaimed/need not be paid, possibly minus just expenses (<i>Gamerco SA v ICM/Fair Warning Agency</i>) 		<p>Level 4 Responses are unlikely to achieve L4 without including 6 relevant cases/statutory provisions, 4 of which will be developed. Responses are likely to include good explanations and definitions.</p> <p>Level 3 Candidates are unlikely to achieve L3 without including 4 relevant cases/statutory provisions, 2 of which will be developed. Responses are likely to include adequate explanations and definitions.</p> <p>Level 2 Responses are unlikely to achieve Level 2 without including 2 linked cases. Responses are likely to include limited explanations and definitions.</p> <p>Level 1 Responses are not required to discuss any cases. Responses are likely to include very limited explanations and definitions.</p>

Q	Answer/Indicative content	Mark	Guidance												
	<ul style="list-style-type: none"> Section 1(3) where a party has to account for any unjust enrichment gained <p>Credit reference to the fact that Frustration does apply to leases, <i>National Carriers Ltd v Panalpina (Northern) Ltd</i> though this is not required for full marks</p> <p>Credit reference to the s7 of the Sale of Goods Act with regard to sale of specific goods though this is not required for full marks</p> <p>Credit any other relevant point(s).</p>														
	<p>Assessment Objective 2 (14 marks available) Analysis, Evaluation and Application</p> <p>Points may include:</p> <p>Discussion of the different possible concepts of ‘justice’ in this area – creating fairness between the two parties when something has gone wrong, or simply enforcing an agreement freely made (the deeper ‘justice’ of the sanctity of contract)</p> <p>Discussion of the fact that for frustration to be successfully argued performance must be impossible with neither party at fault – ‘justice’ therefore must necessarily involve some sort of balancing out of losses</p> <p>Discussion of the ‘injustice’ of allowing people to ‘weasel’ out of contracts simply because they have become bad bargains, hence the courts’ narrowing of the application of the doctrine can be seen as just in this respect</p> <p>Discussion of the fact that it would be most unjust to allow frustration to be pleaded when an event is self-inflicted or foreseen, hence the law in this regard appears just</p>		<p>AO2</p> <table border="1" data-bbox="1283 660 1552 874"> <thead> <tr> <th>Level</th> <th>AO2</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>13-14</td> </tr> <tr> <td>4</td> <td>10-12</td> </tr> <tr> <td>3</td> <td>7-9</td> </tr> <tr> <td>2</td> <td>4-6</td> </tr> <tr> <td>1</td> <td>1-3</td> </tr> </tbody> </table> <p>Stretch and Challenge and synoptic consideration can be demonstrated by candidates who appreciate the overarching theme in developing the particular area of law being studied. This includes the role of the judges, the role of Parliament, the Law Commission, potential avenues for reform or the influence of policy in decision-making where relevant.</p> <p>Level 5 Responses are unlikely to achieve Level 5 without sophisticated analytical evaluation of the relevant areas of law, being very focused on the quote and providing a logical conclusion with some synoptic content.</p>	Level	AO2	5	13-14	4	10-12	3	7-9	2	4-6	1	1-3
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	<p>Discussion of the fact that the courts would much prefer parties to freely negotiate their own 'just' settlement in advance through <i>force majeure</i> or hardship clauses (credit ref to <i>laissez faire</i> here)</p> <p>Discussion of the fact that the LR(FC)A achieves much more just results than the old common law rules ever did. Note the use of discretion within the sections as a vehicle of justice</p> <p>Discussion of the potential lacuna in the Act (no expenses protection is provided where no monies are paid/payable before frustration) noting that this still may be seen as just as it reflects the freely arrived at terms of the contract and most would see it as very unwise to agree to be paid in full on completion</p> <p>Any other relevant point</p>		<p>Level 4 Responses are unlikely to achieve Level 4 without good analytical evaluation of the relevant areas of law and good focus on the quote.</p> <p>Level 3 Responses are unlikely to achieve Level 3 without adequate analytical evaluation of the relevant areas of law and some focus on the quote.</p> <p>Level 2 Responses are unlikely to achieve Level 2 without at least some limited analytical evaluation of the relevant areas of law. Responses are unlikely to discuss the quote.</p> <p>Level 1 Responses are unlikely to achieve Level 1 without at least some very limited analytical evaluation of the relevant areas of law. Responses are unlikely to discuss the quote.</p>										
	<p>Assessment Objective 3 - Communication and presentation</p> <p>Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.</p>		<table border="1"> <thead> <tr> <th data-bbox="1279 959 1576 997">AO1 + AO2 marks</th> <th data-bbox="1576 959 1787 997">AO3 Mark</th> </tr> </thead> <tbody> <tr> <td data-bbox="1279 997 1576 1035">24-30</td> <td data-bbox="1576 997 1787 1035">4</td> </tr> <tr> <td data-bbox="1279 1035 1576 1074">17-23</td> <td data-bbox="1576 1035 1787 1074">3</td> </tr> <tr> <td data-bbox="1279 1074 1576 1112">9-16</td> <td data-bbox="1576 1074 1787 1112">2</td> </tr> <tr> <td data-bbox="1279 1112 1576 1150">1-8</td> <td data-bbox="1576 1112 1787 1150">1</td> </tr> </tbody> </table>	AO1 + AO2 marks	AO3 Mark	24-30	4	17-23	3	9-16	2	1-8	1
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3	<p>Potential answers MAY:</p> <p>Assessment Objective 1 (10 marks available) Knowledge and Understanding</p> <p>Define the relevant rules and use any relevant cases as authorities for those rules.</p> <p>Assessment Objective 2 (20 marks available) Analysis, Evaluation and Application</p> <p>In the case of a):</p> <p>C Identify whether this will result in a fundamental difference to that originally agreed, will it render the contract radically different from what was undertaken by the contract (<i>Davis Contractors v Fareham UDC</i>)</p> <p>L1 Identify that Bryony could argue that the contract is impossible due to the cancellation of the flight (<i>Jackson v Union Marine Insurance</i>)</p> <p>L2 Identify that the courts will not find a contract frustrated merely because it is more onerous so the extra time taken is irrelevant (<i>Amalgamated Investment v John Walker, Tsakiroglou Co Ltd v Noblee Thorl GmbH</i>)</p> <p>L3 Identify that Bryony could also argue that the contract is commercially pointless as she can no longer make any profit (<i>Krell v Henry</i>)</p> <p>L4 Identify that the courts will not find a contract frustrated merely because it has become a bad bargain so Bryony's £50 loss is irrelevant (<i>Gold Group Properties v BDW Trading Ltd</i>)</p> <p>CON Conclude that the contract has not been frustrated and Bryony will have to perform</p>	30	<table border="1" data-bbox="1283 248 1688 461"> <thead> <tr> <th>Level</th> <th>AO1</th> <th>AO2</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>9-10</td> <td>17-20</td> </tr> <tr> <td>4</td> <td>7-8</td> <td>13-16</td> </tr> <tr> <td>3</td> <td>5-6</td> <td>9-12</td> </tr> <tr> <td>2</td> <td>3-4</td> <td>5-8</td> </tr> <tr> <td>1</td> <td>1-2</td> <td>1-4</td> </tr> </tbody> </table> <p>Refer to matrix for descriptors.</p> <p>Marks should be awarded (per scenario) as follows:</p> <table border="1" data-bbox="1283 608 1693 820"> <thead> <tr> <th>Mark levels</th> <th>(a), (b) or (c)</th> </tr> </thead> <tbody> <tr> <td>5</td> <td>9-10</td> </tr> <tr> <td>4</td> <td>7-8</td> </tr> <tr> <td>3</td> <td>5-6</td> </tr> <tr> <td>2</td> <td>3-4</td> </tr> <tr> <td>1</td> <td>1-3</td> </tr> </tbody> </table> <p>A maximum of 3 marks can be allocated for AO1 for each part question.</p> <ul style="list-style-type: none"> • Max 3 marks for the critical point (C) • Max 6 marks for applied points (L) • Max 1 mark for a logical conclusion/assessment of the most likely outcome in terms of liability (CON) <p>In order to reach level 5, responses must include a discussion of the Critical Point, a relevant case and a conclusion.</p> <p>Responses are unlikely to achieve level 5 if the conclusion is incorrect <u>and</u> contradicted by the reason offered.</p>	Level	AO1	AO2	5	9-10	17-20	4	7-8	13-16	3	5-6	9-12	2	3-4	5-8	1	1-2	1-4	Mark levels	(a), (b) or (c)	5	9-10	4	7-8	3	5-6	2	3-4	1	1-3
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	<p>In the case of b):</p> <p>C Identify that the contract is frustrated due to destruction of something (Karim's factory) essential to the performance of the contract (<i>Taylor v Caldwell</i>)</p> <p>L1 Identify that Lauren should have paid £1,000 already but that under s1(2) of the LR(FC)A that money no longer has to be paid</p> <p>L2 Identify that s1(2) of the LR(FC)A states that set-off can be claimed if money was already paid or payable. Even though Lauren has not paid the £1,000 Karim will be able to claim for lawful expenditure</p> <p>L3 Identify that under s1(3) LR(FC)A, Lauren can be made to pay a just sum for the benefit that she has received</p> <p>L4 Identify that Lauren has received a benefit <i>BP Exploration v Hunt, Gamarco SA v ICM/Fair Warning (Agency) Ltd</i></p> <p>CON Conclude Lauren will probably have to pay £1,500 for the footballs received plus a possible sum for expenses</p> <p>In the case of c):</p> <p>C Identify that the contract has been frustrated due to the change in the law on pink diamond trading, subsequent illegality (<i>Fibrosa</i>)</p> <p>L1 Identify that the courts will not find a contract frustrated where the frustrating event was foreseeable and not being able to get hold of enough diamonds was foreseeable and hence this will not frustrate the contract (<i>Davis Contractors v Fareham UDC</i>)</p>		

Q	Answer/Indicative content	Mark	Guidance
	<p>L2 Identify that the courts will not find a contract frustrated where the impossibility of performance was due to the fault or choice of one of the parties (self-induced) (<i>Maritime National Fish Ltd v Ocean Trawlers, The Super Servant 2 (J Lauritzen A/S v Wijsmuller BV)</i>)</p> <p>L3 Identify that s1(2) of the LR(FC)A can only help Vlad with his expenses if money was already paid or payable</p> <p>L4 Identify that s1(3) of the LR(FC)A is not applicable as Seetha has not received any benefit</p> <p>CON Conclude that Vlad will not receive any money for his expenses and Seetha will not be liable for the balance of £30,000.</p>		

APPENDIX 1: Advanced GCE Law Levels of Assessment

There are **five** levels of assessment of AOs 1 and 2 in the A2 units. The first four levels are very similar to the four levels for AS units. The addition of a fifth level reflects the expectation of higher achievement by candidates at the end of a two-year course of study. There are **four** levels of assessment of AO3 in the A2 units. The requirements and number of levels differ between AS and A2 units to reflect the expectation of higher achievement by candidates at the end of a two-year course of study.

Level	Assessment Objective 1	Assessment Objective 2	Assessment Objective 3 (includes QWC)
5	Wide ranging, accurate, detailed knowledge with a clear and confident understanding of relevant concepts and principles. Where appropriate candidates will be able to elaborate with wide citation of relevant statutes and case-law.	Ability to identify correctly the relevant and important points of criticism showing good understanding of current debate and proposals for reform or identify all of the relevant points of law in issue. A high level of ability to develop arguments or apply points of law accurately and pertinently to a given factual situation, and reach a cogent, logical and well-informed conclusion.	
4	Good, well-developed knowledge with a clear understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate by good citation to relevant statutes and case-law.	Ability to identify and analyse issues central to the question showing some understanding of current debate and proposals for reform or identify most of the relevant points of law in issue. Ability to develop clear arguments or apply points of law clearly to a given factual situation, and reach a sensible and informed conclusion.	An accomplished presentation of logical and coherent arguments and communicates relevant material in a very clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
3	Adequate knowledge showing reasonable understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate with some citation of relevant statutes and case-law.	Ability to analyse most of the more obvious points central to the question or identify the main points of law in issue. Ability to develop arguments or apply points of law mechanically to a given factual situation, and reach a conclusion.	A good ability to present logical and coherent arguments and communicates relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
2	Limited knowledge showing general understanding of the relevant concepts and principles. There will be some elaboration of the principles, and where appropriate with limited reference to relevant statutes and case-law.	Ability to explain some of the more obvious points central to the question or identify some of the points of law in issue. A limited ability to produce arguments based on their material or limited ability to apply points of law to a given factual situation but without a clear focus or conclusion.	An adequate ability to present logical and coherent arguments and communicates relevant material in a reasonably clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
1	Very limited knowledge of the basic concepts and principles. There will be limited points of detail, but accurate citation of relevant statutes and case-law will not be expected.	Ability to explain at least one of the simpler points central to the question or identify at least one of the points of law in issue. The approach may be uncritical and/or unselective.	A limited attempt to present logical and coherent arguments and communicates relevant material in a limited manner using some appropriate legal terminology. Reward grammar, spelling and punctuation.

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