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Abstract

This article discusses the development of principles and characteristics of the principle of al musawah akad mu'adhat in infrastructure construction contracts based on a system of Build Operate and Transfer (BOT). This is very urgent, because of the existence of Law of Local Government, the local level authorities have been given the power to establish the development of the local through the utilization of all natural potentials from each region, such as land. However, in reality, as the APBD (Anggaran Pendapatan dan Belanja Daerah) is limited, private sector need to be involved. One of the method that can be implemented, is through the collaboration that exist in the form of agreement, by using the system Build Operate And Transfer (BOT). The implementation of Build Operate And (BOT) in a form of agreement, must contain the basis of al-musawah akad mu'awadhat as the basis of an unfulfilled agreement. The best way to find the answer regarding the basis of al-musawah akad mu'awadhat that is associated with this Build Operate and Transfer (BOT) system is by using library research method. If this basis is not fulfilled, the collaboration efficiency between two parties will be affected.

Keyword: Build Operate and Transfer; Al Musawah; Akad Mu'awadhat

1. Introduction

The availability of adequate infrastructure is one of the determinants of success in efforts to accelerate the development of a country, both concerning economic and social development for the welfare of society, including in the region [1]. Private participation is very much needed on projects that require large funds or that do not really need large funds in public services, such as the construction of toll roads, oil and gas, dams, the construction of malls, airport expansion, and power plant renovation of markets, terminals, base trucks, rest areas, resorts and others [2].

At present, there are developments in new patterns as an alternative funding in government projects that often involve the private sector, either in the form of national-foreign cooperation or government with domestic private parties in financing development infrastructure development including in the regions. The manifestation of the form of cooperation between the government and the private sector includes cooperation with the Build Operate and Transfer (BOT) system or Bangun Serah Guna. This is done because several factors include:

1. Demand is faster than the Government's ability to provide infrastructure services;
2. The huge investment needs cannot be fulfilled by the Government alone, only around 50% of the estimated infrastructure investment can be fulfilled

- by the State Budget, BUMN benefits, and development assistance from abroad;
3. Private sector cooperation provides additional funding for infrastructure and good managerial capabilities;
 4. In the context of global competition, the partnership between the Government and the private sector can accelerate the provision of infrastructure while increasing the efficiency of service quality;
 5. Infrastructure development must be treated as a business activity;
 6. Creating a new paradigm in the provision of infrastructure services from monopoly to a competitive model;
 7. Protect the public interest [3].

15 Taking into account the considerations of these reasons, the concept of collaboration with Build Operate and Transfer (BOT) or Bangun Guna Serah will greatly help the government and will be more often implemented in building infrastructure. With the existence of this Build Operate and Transfer (BOT) system, the government no longer has difficulties in providing funds to realize infrastructure development including in the regions.

Therefore, the implementation of the Build Operate and Transfer (BOT) system cooperation contract includes referring to Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure. This can happen if the agreement can give birth to state-owned buildings that can realize the prosperity goals for the people.

However, in the course of the government's efforts to have state-owned buildings by involving the private sector, it does not always run well, but it also causes conflict because there are parties who feel rights and equality are not fulfilled. There are a number of Build Operate and Transfer (BOT) system agreements that have led to conflicts including revitalizing Palembang 16 Ilir Market by collaborating with PT. Prabu Makmur [4]. There is also a Build Operate and Transfer (BOT) agreement conflict related to the method of dispute resolution not through the Settlement of Rights Disputes between Regional Governments [5] In addition, the implementation of this Build Operate and Transfer (BOT) is not in accordance with the prevailing laws and regulations [6], or other matters that do not achieve the objectives of the agreement with the Build Operate and Transfer (BOT) system.

In implementing this collaboration with the Build Operate and Transfer (BOT) system, the parties involved consist of the government and investors as a private party from a business entity. The government acts as a provider of land in the form of land, while investors as owners of capital will act to realize infrastructure development on land that has been provided by the government. After the construction is complete, the infrastructure will be managed by the investor within a certain period of time. During the infrastructure management by the investor, the profits obtained were entirely an advantage for the investors [7]. However, it does not cause the ownership of the owner to be transferred to investors.

The steps taken by the government involving the private sector to create an investment climate in promoting the acceleration of infrastructure based on business principles in a healthy manner requires a comprehensive study. Cooperation with the Build Operate and Transfer (BOT) system is determined based on an agreement between the government and the private sector insofar as it does not conflict with the applicable laws and regulations. In addition, cooperation with the Build Operate and Transfer (BOT) system is still categorized as an agreement not a regulation, namely this agreement is related to the management of state property [8], which is regulated in the Republic of Indonesia Government Regulation Number 27 of 2014 concerning Management of State / Regional Property.

Therefore, in implementing this Build Operate and Transfer (BOT) agreement, the parties involved must pay attention to legal principles that will support the creation of equitable Build Operate and Transfer (BOT) agreement. According to Article 4 of the Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure which forms the basis of government and private cooperation in the procurement of infrastructure, it is partnerships, benefits, competitiveness, control and risk management, effective and efficient.

For this reason, it is very interesting to explore more deeply the principles of comparable partnerships that become the first principle of the agreement with this Build Operate and Transfer (BOT) system. In Islamic Law itself, it is known as al musawah, namely the principle of equality and equality in the mind of muamalah which does not cause the transfer of property which aims to gain profit (tijari / business) from the type of akad mu'awadhat. This is very important as it is aligned with the objectives of the agreement with the Build Operate and Transfer (BOT) system which aims to prosper the people, so that it needs characteristics to see the musawah principle akad mu'awadhat from this Build Operate and Transfer (BOT) to achieve a partnership contract by fulfilling equal rights and equality.

The method used in writing this law is normative juridical. This approach was used to analyze qualitatively the application of the principle of the concept of akad mu'awadhat in the Build Operate Transfer (BOT) system of infrastructure development and management carried out by the government in partnership with the private sector. The normative juridical approach method uses an approach to a legal rule by looking at the norms that should apply or to the determination of the positive law.

Furthermore, legal research is compiled based on secondary data covering all library materials that support the writing of this study. The research specifications that will be used in writing this law are descriptive analytical. Descriptive means that this study aims to provide a detailed, systematic and comprehensive description of everything related to the implementation of a cooperation contract with the Bangun Guna Serah (BGS) in Build Operate Transfer (BOT) system in the construction of infrastructure in accordance with the principle of al musawah from a partnership akad mu'awadhat.

Understanding and Development of Al Musawah Principles, Mu'awadhat Agreement and Build Operate and Transfer (BOT) System

Capital planning from the regions to build infrastructure, especially for the development of public facilities in supporting the development of economy, is through cooperation contracts between regional government and investors (private parties). The Law of the Republic of Indonesia Number 23 of 2014 concerning the Government is the legal basis of each region to be able to take advantage of all the potential of each region [4], despite lack of capital, but one alternative that can be taken is by entering into a Build Operate and Transfer (BOT) system cooperation contract.

A contract is a legal instrument that facilitates rights and obligations in accordance with the agreement of the parties that bind themselves in an agreement. The definition of the contract contained in Article 1313 (the Civil Code (for the shortest in the Civil Code) is "an action by which someone or more expresses himself against someone or more". While the understanding of Build Operate and Transfer (BOT) itself is contained in Article 1 Number 14 of the Republic of Indonesia Government Regulation Number 27 of 2014 concerning Management of State / Regional Property, stating:

"Build Operate Transfer is the use of state / regional property in the form of land by other parties by constructing buildings and / or facilities and facilities, then utilized by other parties within the agreed period of time, to return land and buildings and / or facilities and facilities after the expiration of the period".

Based on the understanding of Build Operate and Transfer (BOT) above, the elements of the agreement with the Build Operate and Transfer (BOT) system are:

- 1) Investor (funder);
- 2) Soil;
- 3) Commercial buildings;
- 4) Operational period;
- 5) Submission (transfer) [4].

Cooperation with the Build Operate and Transfer (BOT) system has two mechanisms, namely:

1. BGS (*Bangun Guna Serah*) is the use of central government land by other parties by building buildings and / or facilities and facilities, then being utilized by other parties within the agreed period and then returned to the Property Manager after the expiration date. At BGS the audit is done at the end. The BGS system has weaknesses related to willingness in building maintenance;
2. BSG (*Bangun Serah Guna*) is the utilization of land owned by the central government by other parties by constructing buildings and / or facilities and

facilities, then handed over to the Property Manager and then utilized by the other party within the agreed period. The basic difference between *BGS* and *BSG* is related to the audit system. At the *BSG* the audit is carried out at the beginning before being operated. The benefits of the Government of Blood can know the value of buildings so that they have high legal legitimacy. *BSG* partners are obliged to submit building *BSG* results when the contract ends with the value of the building in accordance with the initial audit [9].

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Furthermore, this collaboration with the Build Operate and Transfer (BOT) system is actually also a form of development of the type of contract or contract. A contract or known by the term contract is also one way to obtain in obtaining assets in Islamic law which is widely used in daily life. The word contract comes from the Arabic "al-aqdu" in the plural form called "al-uquud" which means a rope tie or knot [10]. According to ulama fiqh, a contract is a relationship between *ijab* and *qabul* according to the will of Shari'a Islam which stipulates the existence of legal influence in the object of engagement [11].

Another opinion is that the contract (al-'aqd) which in a special sense is a link or link between the statement of the will of one party (*ijab*) and the statement of acceptance or approval from another party (*qabul*) which affects the object of the contract (*ma'aqud alaih*) [12]. The term contract (bond, decision or reinforcement) or agreement or transaction can also be interpreted as a partnership that is framed with shari'ah values [13].

The contract in principle can be grouped in two parts, namely:

1. Contracts that are included in the social domain (*tabarru'*), another term is the *ghair mu'awadhat* contract, which is a contract carried out by certain parties with the aim of helping / helping other parties and expecting rewards from Allah. A contract is like being social;
2. Contracts which are included in the contract of *mu'awadhat*, which are contracts carried out by certain parties with the aim of gaining profit (*tijari / business*). Each of the contracts seen in terms of the transfer of ownership of *ma'qud alaih* can be divided into two, namely:
 - a) The contract of ownership of *ma'qud* is achieved (*intiqlal al-milkiyyah*), such as the contract of agreement and the sale and purchase agreement;
 - b) The contract whose ownership is *ma'qud alaihnya* does not move (*ghair intiqlal al-milkiyyah*), such as *al-qardh* and *akad al'ariyah* [14].

Thus, the contract is commensurate with the agreement in Indonesian positive law, namely the event that one party promises to the other to do something. Contract or contract, then according to the nature of the contract is inseparable from the principles rather than the philosophical contract law itself. Paras are notions and values that become a benchmark for thinking about something [15]. The legal principle is the basis or reason for the formation of a legal or ratiological regulation of a legal regulation [16].

To understand the meaning of the principle of law is inseparable from being returned to what is meant by the principle.[17] The legal principle is abstract, which is basically contained in concrete rules or articles, although not all of them are.[18]

The existence of this legal principle, according to Satjipto Rahardjo, is not a legal regulation. However, there is no law that can be understood without knowing the legal principles in it. Through legal principles, it will provide ethical meaning in legal regulations and legal procedures. The legal principle is the "heart" of legal regulations on the basis of two reasons, namely:

1. The legal principle is the broadest foundation for the birth of a legal regulation. This means that the application of legal regulations can be returned to the principle of law;
2. The legal principle contains ethical demands, so the legal principle is likened to a "bridge" between legal regulations and social ideals and the ethical view of the society.[19]

By paying attention to the broad meaning of the legal principle, the implementation of a legal norm can be returned to the legal principle. The legal principle becomes a test tool for existing legal norms, meaning that legal norms can eventually be returned to the legal principle that animates them.[20] Legal principles are the basic principles to find rationalism or the basis of birth, so that it is the background of thinking that becomes the motivation and the purpose of the birth of legal regulations.

There are a number of contractual principles produced at the 1981 contract law reformation seminar held by the National Legal Development Agency (*BPHN*), namely:

1. The principle of freedom of contract;
2. The principle guarantees protection for weak economic groups;
3. Principles of good faith;
4. Principle of harmony;
5. Principle of decency;
6. The principle of public interest;
7. The principle of legal certainty;
8. Principle of double check.[21]

With the existence of the legal principles of this contract will be able to realize justice, guarantee legal certainty and provide economic benefits as the parties who make contracts. This is in line with the function of the contract, namely:

1. Contract legal principles that establish the construction of contract law, namely the principle of contract law, whose function is to build a solid foundation for construction, which places the legal position of the parties making contracts in equal, clear and concrete contractual legal relationships;
2. The principles of contract law that direct the substance of contract law, namely the principles of contract law, whose function is to direct the parties that make

contracts to determine the substance of the contract, which includes their rights and obligations in contractual legal relationships that are not contradictory by law, public order and morality.[22]

Understanding the principles in contract law is very important, in addition to the legal provisions of business activities that must be clear in making contracts that contain the rights and obligations as guidelines for the work of the related parties. For this reason, in the preparation of contracts, it cannot be done arbitrarily and needs to pay attention to legislation, public order, customs and morality that apply.[23]

Then, in Islam there are several principles of mind, namely:

1. Divine principles or monotheistic principles, are starting points from Allah, where *muamalah* activities are never separated from divine values. Humans have responsibility to the community, to the second party, responsibility to themselves and responsibility to Allah SWT, because all their actions will get a reply from Allah SWT including in business through contract;
2. The principle of freedom (*Al-hurriyah*), the parties that carry out the contract have the freedom to make an agreement (freedom of making contract) both in terms of the object of the agreement and in determining other requirements and the method of dispute resolution. In the field of fiqh rules about muamalah it is stated that, "as long as something is permissible, until there is a proposition that shows there is a prohibition"
3. The principle of equality or equality (*Al-musawah*), that in fulfilling human life should complement each other and have the same opportunity to carry out an agreement in which the parties in the engagement have the right to determine rights and equality and there must be no tyranny in the engagement ;
4. The principle of justice (*Al-'is*), the parties that make an engagement are required to act properly in expressing their will and circumstances;
5. The principle of willingness (*Al-redho*), that all transactions carried out must be on the basis of likes or willingness between each party, there can be no pressure, coercion, fraud or mis-statement;
6. The principle of honesty and truth (*Ash-shidq*), if honesty is not done in the engagement, it will damage the legality itself. Muamalat acts can be claimed correctly if they have benefits for the community and the environment;
7. Written principle (*Al-kitabah*), that an agreement should be made in writing, attended by witnesses and given individual responsibility for those who make the engagement and who become witnesses.[13]

According to Article 21 of the ³ **Compilation of Sharia Economic Law**, the contract is based on:

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1. Practical/voluntary, each contract is carried out at the will of the parties, avoiding compulsion due to pressure from one party or another party;
2. Trust/keep promises, each contract must be carried out by the parties in accordance with the agreement stipulated by the concerned and at the same time avoid injury to the promise;
3. Carefulness/caution, each will be done with careful consideration and done correctly and carefully;
4. *Luzum*/does not change, each contract is carried out with clear goals and careful calculations, so as to avoid aspects of speculation or *maisir*;
5. Mutual benefit, each contract is carried out to fulfill the interests of the parties so that it is prevented from the practice of manipulation and loss of one party;
6. *Taswiyah*/equality, the parties in each contract have an equal position and have balanced rights and obligations;
7. Transparency, each contract is carried out with the accountability of the parties openly;
8. Ability, each contract is carried out in accordance with the capabilities of the parties, so that it does not become an excessive burden for those concerned;
9. *Taisir*/ease, each contract is carried out by giving each party convenience to each other in order to carry out it in accordance with the agreement;
10. Good faith, contract is carried out in the framework of enforcing benefit, does not contain elements of traps and other bad deeds;
11. For lawful things, not against the law, are not prohibited by law and are not illegal.[24]

The principle of understanding in Islam is in line with the principles contained in Article 4 of the Republic of Indonesia Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure, namely:

- a. Partnership, namely cooperation between the government and the Business Entity is carried out based on the provisions of legislation and requirements that consider the needs of both parties;
- b. Benefits, namely the provision of infrastructure carried out by the government and business entities to provide social and economic benefits to the community;
- c. Competing, namely the procurement of Business Entity cooperation partners carried out through stages of elections that are fair, open and transparent, and pay attention to the principles of fair business competition;
- d. Risk control and management, namely cooperation in Provision of Infrastructure is carried out with risk assessment, development of management strategies, and risk mitigation;

- e. Effective, namely the cooperation of Infrastructure Provisioning can accelerate development while improving the quality of infrastructure management and maintenance services; and
- f. Efficient, ie Infrastructure Provisioning cooperation is sufficient to **meet the funding needs in the Provision of Infrastructure through the** support of private funds.

Characteristics of Al Musawah the Mechanism Bangun Serah Guna in Build Operate and Transfer System

By paying attention to the meaning of contract or contract which is an agreement to a statement **that contains the rights and obligations of the parties** that are stated in the agreement. Where it is associated with an agreement with the Build Operate and Transfer (BOT) system, which includes **an agreement between the government** and business entities (private parties) as investors in fulfilling public service infrastructure, then the partnership between the government and investors in the agreement to fulfill an infrastructure contained the rights and obligations of the parties is a very important problem to fulfill the principle of equality / equality so that no party feels disadvantaged or wrongful.

In collaboration with this Build Operate and Transfer (BOT) system, the government provides land for the construction of public service infrastructure while the private sector carries out infrastructure development with **a certain period of** agreement. The private sector gets a return on capital from the development from commercial use of infrastructure built within a specified **period of time that has been agreed** upon. Then, it will be handed back to the government which is the holder of ownership rights, because the private parties are not permanent owners.

In implementing collaboration with the Build Operate and Transfer (BOT) system, to avoid arbitrariness, including the law limiting the activities of the central government through regional autonomy to manage regional property. However, in carrying out the authority to manage regional property through Build Operate and Transfer (BOT) cooperation with private parties which are highly vulnerable to abuse or violations and negligence, such as asset abandonment, revocation of rights that have been granted by the local government and the private sector for personal gain.

To lead to optimal management **12** regional property, in accordance with the provisions of Article 3 paragraph (1), and (2) **Government Regulation Number 27 of 2014 concerning Management of State / Regional Property** as one form of service to the community is through supervision. The purpose of supervision of government actions is intended so that the government in carrying out its activities in accordance with legal norms, and also intended to restore the situation before the violation of legal norms. In addition to prevent **5** efforts and repressive efforts from the existence of supervision, the most important thing is **as an effort to provide legal** protection for the people.[25]

Then, the form of supervision and control of management of regional property is carried out based on Article 480 of the Minister of Home Affairs Regulation Number 19 of 2016

concerning Guidelines for the Management of Regional Property, are (1) Goods Users through monitoring and control; (2) and / or goods manager through monitoring and investigation. Forms of supervision and control in the form of monitoring and control of the use, utilization, transfer, administration, maintenance, and security of property belonging to the region under its control.[25]

Through cooperation in the development of public service infrastructure through the Build Operate and Transfer (BOT) system, the community can still enjoy land use through the agreement system. The object of the agreement is the land, which is not registered in the land registration system. The object of land registration, which does not register land as an object rather than Build Operate and Transfer (BOT), has the effect of weak legal certainty and legal protection for right-holders on an object of land.

Therefore, the existence of land objects in the Build Operate and Transfer (BOT) agreement system is placed on Building Use Rights, namely the proceeds of the land through a business partnership with the owners of capital. This is in line with the Remembrance of Build Operate and Transfer (BOT) is a system that is not simple, because in addition to being carried out in 3 (three) stages, namely the development stage, operation phase, and delivery phase, also the risks borne by the parties are not a little like political, economic, default, overmacht, and the period of implementation which takes around 30 (thirty) years.[26]

For this reason, in providing legal certainty and protection of the position of the parties in the Build Operate and Transfer (BOT) agreement, namely the owners of land rights namely the government and the private sector as investors, also other parties involved such as the contractor, the tenant, the bank, and the insurance company as carefully and thoroughly as possible in including and understanding the Build Operate and Transfer (BOT) agreement clauses. This is done as an effort to uphold and protect the rights and obligations of the protected parties. It is suggested that they have a good understanding regarding the contents of the Build Operate and Transfer (BOT) agreement, so that they can protect the rights and obligations of the parties.[27]

Provision of public service infrastructure carried out through government cooperation agreements with the private sector is a form of engagement that has the characteristics of an agreement that is not named or in other words is a form of agreement that arrangements outside the Civil Code. The next characteristic of this form of collaboration with the Build Operate and Transfer (BOT) system is that there is no time limit and there is no transfer of ownership and to gain profit, the characteristics of the mu'awadhat contract. Thus, the arrangement of cooperation with the Build Operate and Transfer (BOT) system is to refer to laws and regulations that contain arrangements regarding Build Operate and Transfer (BOT) system agreements.

The statutory regulations of the Build Operate and Transfer (BOT) system agreement are the Business partnership system with capital owners which is the main principle in the implementation of the provision of public service infrastructure. One of the legislation concerning the cooperation of the Build Operate and Transfer (BOT) system, namely the President of the Republic of Indonesia Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Infrastructure, one of the principles of the collaboration between government and business entities in providing infrastructure for public

services is the partnership principle. The principle of partnership in this Presidential Regulation contains the meaning that cooperation between the government and business entities is carried out based on the provisions of legislation and requirements that consider the needs of both parties.

Furthermore, the principle of partnership from government cooperation with the private sector in providing infrastructure for public services as stipulated in the laws and regulations is also in line with the principles of understanding in Islamic Law, namely what is called the al-musawah principle which means equality or equality. The principle of al-musawad of each contract has the meaning that each party has the same opportunity to carry out an agreement in which the parties in the engagement have the right to determine rights and equality and there must be no tyranny in the engagement.

⁶ Based on the principle of partnership in the Republic of Indonesia ⁴ Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in the Provision of Islamic Infrastructure and Law, there are several elements that must be fulfilled in the cooperation agreement with the Build Operate and Transfer (BOT) system, namely:

1. There are laws and regulations that regulate;
2. Terms of agreement ³ based on agreement of the parties;
3. Having the same rights in determining the rights and obligations of each party;
4. No party has been harmed.

⁷ Cooperation with the Build Operate and Transfer (BOT) system specifically does not yet exist, although there are a number of laws and regulations that can be used as the legal basis for implementing Build Operate and Transfer (BOT) system agreements. The cooperation agreement with the Build Operate and Transfer (BOT) system is also carried out by looking at the legal bases contained in the Civil Code, State Administrative Law, and even settlement can also be carried out in civil, criminal or administrative sanctions. A ⁸ Build Operate and Transfer agreement must also be measured by statutory provisions related to and not contrary to morality and public order, so that the parties cannot fully apply the principle of freedom of contract.

Thus, through the principle of al-musawah akad mu'awadhat and the principle of partnership of the laws and regulations ¹¹ concerning cooperation between the government and business entities in the provision of infrastructure, hence cooperation with the Build Operate and Transfer (BOT) system through the Bangun Serah Guna mechanism (BSG) through the principle of partnership based on equality and equality, will be fulfilled, if:

1. Implementation based on applicable laws and regulations;
2. Agreement clauses are determined based on the agreement of the parties involved;

3. The parties have the same position to fulfill the rights and obligations of each party;
4. There are sanctions for parties that harm the other party.

Conclusion

Legislation concerning cooperation agreements with the Build Operate and Transfer (BOT) system through both the Bangun Guna Serah (BGS) and Bangun Serah Guna (BSG) mechanisms is the ultimate goal for the welfare of society. Limited funds from the regional government are not a barrier to providing public services for the community. The alternative is to collaborate between the government and investors with returns according to a certain period.

In ensuring legal certainty from the implementation of cooperation with the Bangun Guna Serah (BGS) in Build Operate and Transfer (BOT) system, caution is needed, so that it must be understood what is the principle of implementing the Build Operate and Transfer (BOT) system cooperation, so that the realization of cooperation based on equal and equal partnerships, namely 1. Implementation based on applicable laws and regulations; 2. Agreement clauses are determined based on the agreement of the parties involved; 3. The parties have the same position to fulfill the rights and obligations of each party; 4. There are sanctions for parties that harm the other party.

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