SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

MITA (P) 203/07/95

FEBRUARY 1996 ISSUE NO. 10

PUBLISHER

SINGAPORE INSTITUTE OF ARBITRATORS

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Printed by
Ngai Heng Book-Binder Pte Ltd.

PRESIDENT'S COLUMN by Raymond Kuah Leong Heng

Arbitration Proceedings – a question of Confidentiality Much has been stated that confidentiality is one of the advantages associated with the use of arbitration proceedings. Parties who stipulate in their contract that any dispute arising out of the terms of the contract, or concerning the performance of the contract is to be resolved through the use of arbitration do so with a view to taking advantage of the benefits said to accrue from the use of arbitration procedure.

The private nature of arbitration proceedings is, without doubt, an important and distinguishing feature of arbitration. Such inherent privacy can be discerned from the fact that interlocutory matters in respect of pleadings, witness statements and other documents exchanged between the parties, unlike litigation, do not require to be filed at a public registry. Therefore, it may be said that this essential feature, in actual practice, sets arbitration apart from litigation and its administrative procedures.

There can be no question that the agreement to submit the dispute to arbitration is singularly the most important aspect of arbitration. Without the agreement in writing, there is no arbitration; for example, an arbitration clause in a building contract may form part of the original agreement between the parties. Such arbitration clause, in addition to stipulating that the parties will submit disputes arising under the agreement to arbitration, may also advert to how the appointment of the arbitrator is to be made; and in certain cases, may include the rules which will apply to the conduct of the arbitration. It would however be unusual for a standard arbitration clause to condescend to details about arbitral procedure.

It is the thrust of this column that the parties may well need to turn their attention to refer to issues of privacy and confidentiality and to make provisions for them in the agreement relating to the arbitration.

Arbitration agreements are enforceable under Singapore legal system. The courts would support the parties' intention that the agreement to arbitrate is observed by the parties, and that any award resulting from the arbitration can be enforced. Domestic arbitrations in Singapore are subject to the ***Arbitration Act (Cap. 10);*** with international arbitrations subject to the ***International Arbitration Act 1994 (No. 23 of 1994).*** However, the legislation of the domestic Arbitration Act (Cap. 10) had been brought in line with the development of English Arbitration Act 1979 which favoured more party autonomy and supports the concept of private arbitration by agreement between the parties by keeping judicial interference to a minimum.

Whenever arbitration as a means of dispute resolution is offered as an alternative to litigation in court, it is invariably asserted that one of the advantages of arbitration is that the proceeding are held in private. Where the

Arbitration Proceedings – a question of Confidentiality

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subject matter of the dispute, or the fact of the dispute itself, is regarded as being sensitive by any one or more of the parties to the dispute, then confidentiality associated with the use of arbitration would become advantageous to the party or parties involved. In ***Gunter Hench v. Andre et Cie SA (1970),*** Mr Justice Mocatta stated that "one of the major attractions indubitably is the lack of publicity in relation to arbitration proceedings". But, could it be considered probable that confidentiality may be attached to the proceedings along with a variety of matters that are also associated with such proceedings?

It has been said that one very significant factor in favour of arbitration is that it enables the dispute to be resolved within the confine of a private arrangement; and a great deal of publicity is thus avoided. Accordingly, it is submitted that if confidentiality of information disclosed in or arising out of an arbitration is of importance to the parties, it is a matter which the parties might pay particular attention and consider ways of protecting their own interests.

It is also submitted that the arbitrator is a third party to the arbitration agreement upon his appointment, and the arbitrator enters into a tri-lateral contract to which he undertakes his quasi-judicial functions. The issue as to who may be present and who may be excluded from the arbitration proceedings has been the subject of recent litigation both in the United Kingdom and Australia. The parties to an English arbitration are entitled to assume that the Hearing will be conducted in private. Shortly before the ***Esso*** case, Justice Colman held to this similar effect in ***Hassneh Insurance Co. of Israel v. Stewrd J. Mew [1993] 2 Llyods R243, Q.B.D.,*** on the basis of universal practice over hundred of years.

In Victoria State (Australia), it was raised for consideration in case of ***Esso Australia Resources Ltd. and Others v. Plowman, Minister for Energy and Minerals, [(Supreme Courts of Victoria, Appeal Division, Brooking J, with Tadgell and Smith JJs) (1994) VR1],*** in which the Court held that there was an implied term in arbitration proceedings that they should be heard in private. There has been many judicial observations suggesting that arbitrations are fundamentally private in that sense. ***[Re: Oxford Shipping Co. v. Nippon Yusen Kaisha – The Eastern Saga (1984) 3 All ER 835.]***

The fact that arbitration proceedings are held in private would lend weight to the necessity that it must , by implication, be the parties' mutual obligation to accord to documents disclosed for the purposes of the arbitration the same confidentiality which would attach to those documents if they were litigating their disputes as distinct from arbitrating it. In the ***Esso*** case, it also argued that the principle of confidentiality in arbitration proceedings was likewise reinforced by an analogous principle to that which obtains in the course of discovery in civil litigation. In this regard, information so obtained in discovery in litigation is not to be used by the party obtaining discovery for any collateral or ulterior purpose other than disclosure with the consent of the party or there exists a duty to disclose. This obligation is called the implied undertaking, which is regarded as one of the fundamental rules of discovery.

On the other hand, there may be a great deal of information which would not have the necessary quality of confidence. However, in ***Dolling-Baker v. Merritt [1990] 1 WLR 1205 atp. 1213, Parker LJ*** observed that the basis of the claim to protection against disclosure of the documents was not based on a claim to the "confidentiality" of the documents themselves, but rather, it was because of the private nature of the arbitration procedure.

There is no doubt that it will be useful for the parties to deal with the rules which govern their international commercial arbitration. It would appear to be unwise simply to assume that by the adoption of UNCITRAL arbitration rules, or any other rules, that issues of privacy and confidentiality will somehow be properly addressed. ▲

FEATURE

This article, *"The Asian Concept of Conciliator/Arbitrator: is it Translatable to the Western Wrold?"*, was first published in ICSID Review – Foreign Investment Law Journal, whose kind permission SIArb herein acknowledge for its republication.

THE ASIAN CONCEPT OF CONCILIATOR/ARBITRATOR: IS IT TRANSLATABLE TO THE WESTERN WROLD?

By M. Scott Donahey, B.A. Stanford University; M.A. Johns Hopkins University; J.D. Santa Clara University; Partner, Holtzmann, Wise & Shepard. This paper was presented at the eleventh joint ICSID/ICC/ AAA Colloquium on International Arbitration in San Francisco, California on October 17, 1994 and is also published in the April 1995 issue of the Asian Law Journal.

INTRODUCTION

IN VARIOUS ASIAN COUNTRIES, there is a profound societal and philosophical preference for agreed solutions. Rather than a cultural bias toward "equality" in relationships, there exists an intellectual and social predispositions towards a natural hierarchy that governs conduct in interpersonal relations. Asian cultures frequently seek a "harmonious" solution, one which tends to preserve the relationship, rather than one which, while arguably factually and legally "correct," may severely damage the relationship of the parties involved.

Where the westerner will segregate the function of the facilitator from that of the decision-maker, the Asian will make no clear distinction. The westerner seeks an arbiter that is unconnected to the parties to the dispute, one whose mind has not been predisposed by previous knowledge of the dispute or the facts that underlie it, a judge who is prepared to "let the chips fall where they may." On the other hand, many Asians seek a moderator who is familiar with the parties and their dispute, who will not only end their state of disputation, but assist the parties in reaching an agreed solution, or, failing that, will allow both parties to view the resolution as one to which each has freely agreed, or, failing that, will find a position which will not only be one that terminates their dispute, but one that will allow the parties to resume their relationship with as little loss of "face" as possible. Thus, the distinction between the function of the arbitrator and that of the conciliator is blurred.

Clearly, as there is increased interaction in the forms of tourism and trade between the western world and Asia, differences between the two cultures have diminished and will continue to diminish. We in the West tend to view this process as one in which the Asian countries are influenced by our economic and political systems and become more "westernized." Our western pride and predispositions often do not permit us to recognize the degree to which we have been influenced and changed by the Asian cultures with which we have come in closer contact. The eastern outposts of western culture are those that have the closest and most immediate relationships and therefore the earliest opportunities to assimilate useful concepts. Thus, it should not be surprising that the concept of the arbitrator/conciliator has been accepted most completely by western dispute resolution centers on the Pacific Rim.

PHILOSOPHY AND RATIONALE BEHIND THE ARBITRATOR/CONCILIATOR

Within the Confucian tradition, there is a concept known as *"li,"* which concerns the social norms of behavior within the five natural status relationships: emperor and subject, father and son, husband and wife, brother and brother, or friend and friend. *Li* is intended to be persuasive, not compulsive and legalistic, a concept that governs good conduct and is above legal concepts in societal importance. The governing legal concept *"fa"*, is compulsive and punitive. While having the advantage of legal enforceability, *fa* is traditionally below *li* in importance. The Chinese have always considered the resort to litigation as the last step, signifying that the relationship between the disputing parties can no longer be harmonized. Resort to litigation results in loss of face, and discussion and compromise are always to be preferred. Over time the concepts of *fa* and *li* have become fused, and the concept of maintaining the relationship, and, therefore, face, has become part of the Chinese legal system.

The same can be said for other Asian legal systems. A noted commentator has described the Korean method of dispute resolution as follows:

> Dispute settlement, after all, does not occur in a social vacuum. The settlement defines, or redefines, status, rights and obligations, both for the disputants themselves and for some other people. Status expectations may be reaffirmed, weakened, strengthened, or altered, and all this has some effect on subsequent relationships and social action.
>
> In Korea as in other Eastern societies, close personal relations have a pervasive influence in almost all kinds of human transactions. An individual is viewed in total context, that is, as a son, as a nephew, or the like. This is in contrast to the detached

and impersonal relations that characterize Western industrialized societies where functional relationships usually prevail.

Adjudication is an act-oriented process. Consequently, it is adversary in nature and involves a highly structured, impersonal trial procedure with strict rules of procedure to assure the accuracy of the fact-finding process so essential to adjudication. In contrast, since conciliation/ mediation is a "person-oriented" one, it is non-adversary, and set in a warm and friendly air of informality unbound by technical rules of procedure. Furthermore, while the nature of the adjudicative process requires that evidence and arguments presented by one party be made in the presence of the adverse litigant, separate conferences with the parties have been found to be an effective tool of conciliation. It is less important, in conciliation proceedings, to be accurate in finding the truth of the issues than to know what values are held by the parties so that a "trade-off" may be effected that will restore the disrupted harmonious relationship.

In Japan, as well, permitting a relationship to fall into a state of disharmony, is culturally unacceptable:

In Japan... the existence of a dispute may itself cause a loss of "face," and submission of a dispute to a third party may carry with it some sense of failure.

Thus, if there is one principle which can be said to lead to the combining of the role of arbitrator with that of conciliator it is that of preserving the harmonious relationship between the parties to the dispute. This principle is one that is frequently cited by western arbitral institutions in promoting the use of commercial arbitration over litigation.

VARIOUS ASIAN APPROACHES TO THE ARBITRATOR/CONCILIATOR

Clearly, not all Asian countries take the same approach to the combined role of the arbitrator and conciliator. Perhaps the foremost proponent of the practice is the People's Republic of China. While no written rules have ever sanctioned or even described the practice, Chinese arbitrators and practitioners both practice and espouse the combination of mediation and conciliation:

Arbitration and conciliation are interrelated and complementary with one another. They are not antagonistic and do not exclude each other...

CIETAC (The China International Economic and Trade Association) may try to conciliate cases in the course of arbitration on the complete willingness of the parties and on the basis of ascertaining the facts and distinguishing the right from the wrong and identifying the liabilities, so as to promote the parties to reach a settlement agreement in the spirit of mutual understanding, and mutual concession and friendly cooperation. In case a settlement agreement is reached through conciliation, an arbitral award based on the contents of the settlement agreement will be rendered. If no settlement agreement can be reached, an arbitral award decided by the majority of the arbitrators of the tribunal shall be rendered as soon as possible. Practice proves that combination of arbitration with conciliation is a good method for settling disputes in a prompt and effective way.

CIETAC's Arbitration Tribunal may conciliate cases in the process of arbitration. This is a unique arbitration practice in China, known as the Combination of Arbitration with Conciliation.

It is important to understand that the Chinese combination of arbitration and conciliation occurs during the ongoing process of arbitration. The arbitrators, after the taking of some evidence and hearing of some witnesses, might attempt to conciliate the differences, and, if efforts at conciliation fail, return to the receipt of evidence and the hearing of witnesses, ready to attempt conciliation again at an opportune time during the course of the proceedings.

This is different from the way that other Asian nations combine the functions of arbitrator and conciliator. Generally, an arbitrator attempts to conciliate the parties' dispute at the outset, prior to the commencement of the arbitration, or, if the parties agree to conciliation during the course of arbitration proceedings, and arbitrator will suspend the arbitration during the period that conciliation is attempted. Such is the case, for example, in Indonesia and Korea.

In Japan, the Civil Conciliation Act provides that, with the advance written agreement of the parties, the conciliators can, where efforts at conciliation fail, issue a binding decision that is then converted to a judgement by the court. Thus, the conciliation process can ultimately become an arbitration process, so that the conciliators can take evidence, hear witnesses, and conduct their own investigation of the facts. Moreover, the conciliation commission that hears the dispute has the authority to reject the settlement of the parties if it deems it to be inappropriate.

DEGREES OF INTEGRATION OF AND PREFERENCE FOR COMBINING THE ROLES OF THE ARBITRATORS AND CONCILIATOR

Obviously, the most complete integration of the role of the arbitrator and conciliator is in the Chinese model, where the arbitrator may become a conciliator, then become an arbitrator again at any stage of the proceedings. Less integration occurs where the arbitrator may act as the conciliator only at the outset of the proceedings or where the arbitration proceedings are suspended to permit conciliation to be attempted. No integration of the roles occurs at all where a conciliator is barred from acting as an arbitrator in the resolution of the same dispute, or where an arbitrator is prohibited from acting as a conciliator.

Moreover, rules can express a preference for the combining of the roles, or a disposition against such combination. In CIETAC arbitrations, no express agreement of the parties is required to enable the arbitrators to act as conciliators of the dispute. Rules can also state that the arbitrator/conciliator roles may be reposed in the same individuals whenever the parties so agree, or only where the parties so agree in advance of the commencement of the arbitration.

Rules can also provide a disposition against such combined roles, where they provide that no conciliator may act as an arbitrator (or arbitrator as conciliator) absent an agreement of the parties. Maximum disposition against the combination is, of course, its outright prohibition.

WESTERN VIEWS OF THE COMBINED OF ARBITRATOR AND CONCILIATOR

The traditional western view is that the conciliation process should be separate from the arbitration process, and that the same persons who act as conciliators should not act as arbitrators in the same dispute. It is thought that offers to compromise and disclosures of confidential information made during and essential to the conciliation process might affect the ability of the conciliators to act as an arbitrator in the same dispute. The western view of the role of the arbiter is that of an unbiased "truth" seeker, who then strictly applies the law to the truth that has been discovered and renders a decision based solely on such application, without regard to the effect on the parties' relationship. An example of the prohibition of combined roles is the United Nations Commission on International Trade Law (UNCITRAL) Rules of Conciliation, which do not permit a conciliator to act as an arbitrator in the same dispute. Often western statutes and rules merely express a disposition against such a combined role by precluding a conciliator from acting as an arbitrator absent an agreement of the parties to the contrary.

However, the traditional western view is changing, largely due to the influence of Asian cultures. In Hong Kong, the outpost of western civilization on the doorstep of Asia, by agreement of the parties a conciliator may act as an arbitrator and an arbitrator as conciliator. One limitation on this power is that, once conciliation efforts have terminated, the arbitrator/conciliator must disclose to all parties any confidential information that he or she has received and that he or she considers to be material.

In Canada, the British Columbia International Commercial Arbitration Act expressly provides that, with the parties' agreement, an arbitrator may act as a conciliator at any stage of the proceedings. The capital of British Columbia, Vancouver, is a busy Pacific port with one of the largest Asian population in North America. Clearly, the draftspersons of the British Columbia statute were influenced by the experience of their Asian trading partners and their citizens of Asian backgrounds.

In a soon-to-be-published paper entitled "Recent Legislation that Combines Conciliation and Arbitration," Howard M. Holtzmann and Donald Francis Donovan identify ten key elements of the conciliation process, at least three of which are clearly implicated by any combination of the conciliation and arbitration processes into one concurrent process. These three are:

a) Whether all information given by a party to the conciliator will be disclosed to the other side, or whether there are arrangements for keeping such information confidential;

b) whether a party can resort to arbitration or judicial proceedings while the conciliation is going on; and

c) whether if the conciliation fails:
   - the conciliator can act as an arbitrator, or as a counsel for a party, in any arbitral or judicial proceeding concerning the same dispute;
   - a party can introduce into evidence in an arbitral or judicial proceeding certain types if information related to the conciliation.

In a combined arbitration/conciliation under Chinese practice, it is understood that parties can and do arbitrate and conciliate at the same time in a combined process in which the same persons act as both arbitrators and conciliators. However, it is unclear whether parties convey information to the arbitrators/conciliators in confidence during the conciliation phase, and, if so, how it is maintained. Once the arbitrators/conciliators determine that their efforts at conciliation have failed, if they have received evidence in confidence, it is uncertain how such evidence is treated and whether it influences any award that may be issued. In order to satisfy the uneasiness of westerners with such a combined procedure, it will be necessary to address the subject of confidential information and its treatment.

The Hong Kong Ordinance is most explicit in this regard. It provides that information received in confidence by persons who act as both arbitrators and conciliators during the conciliation embedded in the combined conciliation and arbitration process must be disclosed upon termination of attempts at conciliation, to the extent that the arbitrators/conciliators deem such information to be material. While this may tend to inhibit completely candid exchanges during the conciliation procedure, such disclosure prior to embarking on a final arbitration phase is necessary in order not to offend western notions of "natural justice" and "due process." This is so because the ultimate decision-makers might be in possession of material information of which one side is unaware and to which that side has had no opportunity to respond.

CONCLUSION

A combined conciliation and arbitration process offers significant advantages in reaching an agreed settlement and in preserving existing commercial relations between the parties. It is a system that apparently has worked well in Asia, and we in the West should not shrink from its use. However, to be successful in the West, any such combined process should *a) be by agreement of the parties, either to the process itself or to rules that clearly provide for the process, and b) explicitly provide for confidential information, both its maintenance and also the disclosure of any material information following the cessation of all efforts at conciliation. This translation of an historically Asian process should satisfy the primary concerns of all to whom the process seems foreign.* ▲

BOOK REVIEW

Selected Works of
China International Economic & Trade Commission Awards
by English Edition Editorial Board
Sweet & Maxwell (ISBN 0421554002)

Review by: Raymond Kuah, MSIA, ARIBA ARIAS, FSIArb, FCIARB, FBIMGT.

There has been a great deal of interest and attention worldwide generated by the principle and method in the characteristic combination of arbitration and conciliation by which ***CIETAC*** deals with commercial disputes.

This first authorised English translation of arbitration Awards made by *CHINA INTERNATIONAL ECONOMIC & TRADE ARBITRATION COMMISSION* ***(CIETAC)*** has clearly added to yet another useful reference work for which the practitioners, the educator, and those involved in research alike should greatly appreciate its publication.

The intention to publish this Authorised English version is also a clear indication that the English Edition Editorial Board do recognise the need to overcome the language barrier which hinders access by readers outside China to the arbitration awards made by ***CIETAC*** during the period between 1963 to 1968, with update to 1993; and which are intended to be published as a series of annual volumes.

The book follows a logical sequence commencing with the first part containing, inter alia, useful texts of Arbitration Law of the People's Republic of China, ***CIETAC*** Arbitration Rules; and ***CIETAC*** Fee Schedule, etc. The second part of the book is devoted to useful inclusion of the awards on cases decided; the written conciliation statements; and the withdrawal decisions which are set in chronological order.

Written in clear accessible language, this is a simple but well-presented book which brings together much useful material and information in the form of ready reference.

It is essential for users of arbitration, including lay advocates, practising arbitrators and businessman doing business in China should find it a valuable reference book. ▲

LEGAL DEVELOPMENT AFFECTING ARBITRATORS

Waverley SF Ltd v Carnaud Metalbox Engineering plc (1995) 71 BLR 113

Arbitration – Scope of Court's Jurisdiction under Arbitration Act 1979, s 5 – Discovery of Documents

The plaintiffs (Waverley SF Ltd) were sub-contractors to the defendants (Carnaud Metalbox Engineering plc) for the installation of the ducting for an oxydiser installed by the defendants. The plaintiffs were claimants and the defendants were respondents in an arbitration.

In the arbitration, the plaintiffs' claim was for sums allegedly due under the sub-contract for variations and in respect of delays and the defendants alleged by way of set-off and counterclaim a number of breaches of the sub-contract by the plaintiffs.

After 8 days of hearing, the arbitration was adjourned so that the plaintiffs could commence this action in court for an order under section 5 of the Arbitration Act 1979. Section 5 provides:

"(1) If any party to a reference under an arbitration agreement fails within the time specified in the order or, if no time is specified, within a reasonable time to comply with an order made by the arbitrator or umpire in the course of the reference, then, on the application of the arbitrator or umpire or of any other party to the reference, the High Court may make an order extending the powers of the arbitrator or umpire as mentioned in subsection (2) below.

(2) If an order is made by the High Court under this section, the arbitrator or umpire shall have power, to the extent and subject to any conditions specified in that order, to continue with the reference in default of appearance or of any other act by one of the parties in like manner as a judge of the High Court might continue with proceedings in that court where a party fails to comply with an order of that court or a requirement of rules of court."

The plaintiffs alleged that the defendants had failed to comply with 2 aspects of the arbitrator's directions, one of which was in relation to the discovery of documents. In the application before the court, the plaintiffs requested an extension of the arbitrator's power under section 5 to deal with, inter alia, the discovery of documents and also requested that the court should give guidance on the nature of the powers which were being conferred.

The defendants disputed the scope of the jurisdiction of the High Court conferred by section 5 at three separate points:-

1. That it was limited to cases where there was an existing failure to comply with an order of the arbitrator at the time of the applications under section 5;

2. That it was limited to cases where the party in default was ready to concede that it was still in default;

3. That it was limited to cases where the arbitrator's existing powers were not adequate to deal with the default in question.

The defendants argued, inter alia, that:-

1. In cases where there had, in the past, been a failure to comply with an order of the arbitrator but such failure had, at the time of the application under section 5, been remedied (ie as in the present case), the High Court had no jurisdiction to make an order under that section;

2. In cases where there was conflicting evidence as to whether the failure to comply with the arbitrator's order was in existence at the time of the application under section 5, the High Court should act on the basis of the defendants' evidence;

3. In cases where the arbitrator already had powers which were adequate to deal with any problems caused by the defendants' default, the High Court had no jurisdiction under section 5 to extend the arbitrator's powers.

Judge Kershaw QC held, inter alia, that:-

1) The High Court had the jurisdiction to made an order under section 5 once there had, in the past, been a failure to comply with an arbitrator's order and it did not matter whether or not that failure still persists at the date of the hearing of the application under section 5.

2) In considering any dispute of fact as to the existence or continued existence of a failure to comply, the High Court had to consider the question on the available evidence, and if there were conflicting evidence, it must resolve the conflict.

3) The High Court had jurisdiction to extend the arbitrator's powers even if he already had powers which appear adequate to deal with the problems which had so far arisen. The arbitrator's existing powers were, however, relevant to how the High Court exercises its discretion to extend the arbitrator's powers.

4) The High Court should decide on the order to be made and explain the reasoning behind the decision, it should avoid giving any explanation of the powers being conferred, since that might influence or appear to influence the arbitrator.

It was ordered, inter alia, that the arbitrator should have power to continue the reference in like manner as a judge of the High Court might continue with proceedings in the High Court when making any order for discovery against the defendants. The High Court did not give any guidance to the arbitrator on the nature of the powers which were being conferred. ▲

Monica Neo, LLB, Barrister-at-law, MSIArb

NEWSFOCUS

The followings were admitted to membership of the Institute during fourth quarter of 1995

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CONGRATULATIONS to The Rt. Hon. The Lord Mustill on being appointed as President of the Chartered Institute of Arbitrators UK.

CONGRATULATIONS to Brian Green on being elected as Chairman of the Chartered Institute of Arbitrators UK.

NEWSFRONT

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