

# Taking the Working Rules for Expert Members of CICC to a New Level: A Future Vision of Code of Conduct

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The Supreme People's Court of China (SPC) established the China International Commercial Court (CICC) in 2018. To support the “one-stop” platform for the diversified dispute resolution mechanism integrating litigation, mediation, and arbitration for the settlement of international commercial disputes, the SPC set up the International Commercial Expert Committee (ICEC) to facilitate and promote the trial work of CICC. In order to regulate the work of ICEC, the SPC implemented “Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation)” (Working Rules) in November 2018. The Working Rules has formulated the fundamental qualifications, duties, and rules to be followed for the Expert Members. However, the present Working Rules lacks detailed circumstance for conflicts of interest disclosure and requirements of other important ethics. It is necessary to draft a Code of Conduct for Expert Members of ICEC, which can guide them to perform their duties under a more precise and clearer rules and ensure the support for CICC diversified dispute resolution mechanism. This article proposes the main contents of the Code of Conduct which mainly focuses on the independence and impartiality, disclosure of conflict of interest, and other relevant obligations. A whole proposed version of Code of Conduct for Expert Members can be accomplished and found at last.

*Keywords:* CICC, Code of Conduct, ICEC

## Introduction

In 2018, the Supreme People's Court of China (SPC) established the China International Commercial Court (CICC), in order to build up an “one-stop” diversified international commercial dispute resolution platform, providing high-quality international commercial dispute resolution in the Belt and Road Initiative (BRI) (Sun, 2023).<sup>1</sup> Subsequently, the SPC set up the system of International Commercial Expert Committee (ICEC), an institution aiming to facilitate and promote the trial work of CICC.<sup>2</sup> This committee composed of leading experts from China and other countries, who are from diverse backgrounds and specialized in international trade law, investment law, commercial law, and other areas. They can serve as mediator, provide advisory opinions on specialized legal issues in international commercial dispute cases, provide advice and suggestions on the

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<sup>1</sup> The General Office of the Communist Party Central Committee and the General Office of the State Council of PRC, Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions, *Zhong Ban Fa* [2018] No. 19.

<sup>2</sup> SPC, The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court (August 24, 2018), *Fa* [2018] No. 224.

development of CICC, and provide advice and suggestions on the formulation of judicial interpretations and judicial policies of the Supreme People's Court and other matters entrusted by CICC.<sup>3</sup> From the starting of the ICEC system in August 2018, the SPC appointed 31 experts from various countries and regions to enhance the international credibility of CICC.<sup>4</sup> Later in December 2020 and March 2023, the SPC appointed the second and third group of experts as members of ICEC.<sup>5</sup> After some resignations and removals, the total number of ICEC members has reached 61 (CICC, n.d.), which has shown CICC's great determination of improving professional level of international commercial trials, strengthening international exchanges and cooperation, facilitating and promoting the trial work of CICC, the internationalization and professionalization of CICC.<sup>6</sup>

The CICC has adopted a series of innovative measures including the creation of "one-stop" platform for the diversified dispute resolution mechanism integrating litigation, mediation, and arbitration for the settlement of international commercial disputes (one-stop platform) (Sun, 2020, p. 48). To play as significant supporting role for building this one-stop platform, ICEC's performance of duties needs regulations and guidance. Therefore, the SPC implemented "Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation)" (Working Rules) in November 2018.<sup>7</sup> The Working Rules has formulated the fundamental qualifications<sup>8</sup>, duties<sup>9</sup>, and rules<sup>10</sup> to be followed for the Expert Members.

Under this background, this article firstly explores the provisions of Working Rules concerning the qualifications, duties, and rules set out for Expert Members. After evaluating the advancement and limitation of the existing rules, this article brings out the necessity and importance of drafting a code of conduct for the Experts Members. On this basis, with reference to the codes of conduct of other international commercial courts and international arbitration institutions, this article proposes the main contents of code of conduct for Expert Members as arbitrators and mediators, which mainly focuses on the independence and impartiality, disclosure of conflict of interest, and other relevant obligations. On the whole, this article proposes a draft Code of Conduct for the Expert Members based on the discussion above.

## **The Evaluation of Existing Working Rules**

### **What the Present Working Rules Already Has**

As mentioned above, the Working Rules has formulated the fundamental qualifications<sup>11</sup>, duties<sup>12</sup>, and rules<sup>13</sup> that the Expert Members should observe during performing their duties. In Article 2 of the Working Rules,

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<sup>3</sup> SPC, Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trial Implementation) ("Working Rules") (November 21, 2018), Article 3, Fa Ban Fa [2018] No. 14.

<sup>4</sup> SPC, The Decision on Appointment of the First Group of Members of the International Commercial Expert Committee (August 24, 2018), Fa [2018] No. 225.

<sup>5</sup> SPC, The Decision of the Supreme People's Court on Appointing the Second Batch of Expert Members of the International Commercial Expert Committee (December 8, 2020), Fa [2020] No. 312; SPC, The Decision of the Supreme People's Court on Appointing the Third Batch of Expert Members of the International Commercial Expert Committee (March 2, 2023), Fa [2023] No. 49.

<sup>6</sup> SPC, The Decision on Appointment of the First Group of Members of the International Commercial Expert Committee (August 24, 2018), Fa [2018] No. 225.

<sup>7</sup> Working Rules.

<sup>8</sup> Working Rules, Article 2.

<sup>9</sup> Working Rules, Article 3.

<sup>10</sup> Working Rules, Article 4 and other provisions.

<sup>11</sup> Working Rules, Article 2.

<sup>12</sup> Working Rules, Article 3.

<sup>13</sup> Working Rules, Article 4 and other provisions.

qualifications required for the Expert Members have been illustrated, including recognized expertise, integrity and fairness, and ability to perform duties. Also known as the duty of competence, this type of ethic requires the arbitrators or mediators must acquire specialties and skills in certain areas, high moral characters, and necessary language ability, which enable them competent to perform their duties and fulfill the expectation of the parties (Shapira, 2016, pp. 164-165).

Article 3 delineates the sphere of Expert Members' duties entrusted by the CICC in a more precise description than before.<sup>14</sup> The Expert Members' duties can be classified into two main categories: (a) presiding over in mediations, (b) providing opinions on legal issues in CICC and SPC cases, and providing advice and suggestions on CICC development and SPC judicial issues.<sup>15</sup> Based on aforementioned categories, Article 4 sets forth similar but distinguished requirements for Expert Members to observe.<sup>16</sup> When providing opinions, advice, and suggestions, the Expert Members should conduct independently, objectively, and impartially, and in an individual capacity based on professional expertise; whereas, the Expert Members should mediate in international commercial cases in a neutral and impartial manner, and treat the parties equally.<sup>17</sup>

Besides stipulating work routine for the ICEC, the Working Rules has set forth the appointment procedure for Expert Member to preside in mediation,<sup>18</sup> and the work done by Expert Members when termination or outcome of mediation.<sup>19</sup> Notably, Article 10 requires that as agreed to preside in mediation, the Expert Member should disclose on conflicts of interest issues;<sup>20</sup> and Article 11 provides that the mediation should proceed according to the principles of fairness, equability, and confidentiality.<sup>21</sup>

### **The Necessity for a Code of Conduct**

The Opinion and the Decision have mentioned the ICEC's function of supporting diversified dispute resolutions as mediation, arbitration, and litigation to resolve international commercial disputes,<sup>22</sup> which shows the possibility for Expert Members to be nominated as an arbitrator to resolve dispute. However, the Working Rules provides no regulations or guidelines for Expert Members performing as arbitrators. Even if there are a few ethical requirements guiding the Expert Members to perform their mediation duties, the present Working Rules lacks detailed circumstance for conflicts of interest disclosure and requirements of other ethics. The working guidance and discipline for Expert Members as arbitrator or mediator needs further refining and detailing.

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<sup>14</sup> Working Rules, Article 3. Compared to the present Working Rules, the "Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions", "Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court", and "The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court" only mentioned the duties of Experts Members generally as supporting arbitration, mediation, and such diversified dispute resolutions under CICC, providing legal opinions and advice in international case or judicial policies of SPC.

<sup>15</sup> Working Rules, Article 3.

<sup>16</sup> Working Rules, Article 4.

<sup>17</sup> Ibid.

<sup>18</sup> Working Rules, Article 9.

<sup>19</sup> Working Rules, Articles 12, 13.

<sup>20</sup> Working Rules, Article 10.

<sup>21</sup> Working Rules, Article 11.

<sup>22</sup> See the "Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions" and "The Decision on the Establishment of International Commercial Expert Committee of the Supreme People's Court".

Therefore, it is necessary to consider including ethical values and requirements in the future in the form of Code of Conduct for Expert Members.

Singapore International Commercial Court (SICC) developed the Judicial Code of Conduct, containing six core values: independence, impartiality, integrity and propriety, dignity, diligence, and confidentiality. This Judicial Code of Conduct sets out standards of professional ethical conduct that International Judges of the Supreme Court of Singapore must respect and honour in their duty to maintain and enhance public confidence in the legal system, having utmost regard to the oath of office that they have taken.<sup>23</sup>

The code of conduct or ethics sets forth generally accepted standards of ethical conduct for the guidance of arbitrators, mediators, and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.<sup>24</sup> Both international arbitration and mediation need articulated ethical norms to guide and regulate participants especially arbitrators and mediators (Rogers, 2002, p. 350). Furthermore, the Code of Conduct is not only guidance for Expert Members to act complied with, but also a manifestation showing the public that they will perform impartially and independently, and thereby secure the belief and respect to the CCIC, SPC, and the whole Chinese legal system. It is necessary to draft a Code of Conduct for Expert Members, which can guide them to perform their duties under a more precise and clearer rules and ensure the support for CICC diversified dispute resolution mechanism.

### **Impartiality and Independence**

After discussing the competence already contained in the Working Rules, there are other core values needing to be covered. Independence and impartiality are the most significant ethical requirements in a code of conduct.

#### **General Standard of Independence and Impartiality**

Basically, independence generally means that the arbitrator has no financial interest in the case or its outcome. And impartiality means that the arbitrator is not biased because of any preconceived notions about the issues and has no reason to favor one party over another (Moses, 2017, p. 141). These are two core ethics found in almost every code of conduct for arbitrators and mediators among different institutions or international commercial courts.

International Judges are all distinguished lawyers in foreign jurisdictions who are appointed to sit in the SICC. They may accept appointments as arbitrators or mediators (or as experts in arbitrations and mediations), in case of conflicts and doubt; the SICC Judicial Code of Conduct sets out General Statement, Guiding Principles, and Commentary separately for the values of independence and impartiality.<sup>25</sup> The General Statement on Independence states that International Judges must always demonstrate independence in their individual decision-making and safeguard the institutional independence of the Judiciary as a whole, as well as preserve the public perception of independence.<sup>26</sup> And Guiding Principles emphasizes that International Judges must reject any outside influence that affects their decision-making and conduct in a way avoiding of doubt.<sup>27</sup> As for impartiality,

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<sup>23</sup> Judicial Code of Conduct for the International Judges of the Supreme Court of Singapore (SICC Judicial Code of Conduct), Introduction.

<sup>24</sup> The AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Preamble.

<sup>25</sup> SICC Judicial Code of Conduct, pp. 5-10.

<sup>26</sup> SICC Judicial Code of Conduct, Independence, General Statement, p. 5.

<sup>27</sup> SICC Judicial Code of Conduct, Independence, Guiding Principles, p. 5.

General Statement stipulates that International Judges must be and must be seen to be impartial in their judicial decision-making.<sup>28</sup> Then Guiding Principles prescribes in two levels explaining how International Judges shall and should do to observe impartiality.<sup>29</sup>

Considering the future possibility that CICC dealing with investment-related disputes, it is valuable to refer to well-drafted code of conduct in investment arbitration area. The United Nations Commission on International Trade Law (UNCITRAL) Working Group III has devoted attention to the code of conduct for arbitrator or judges within the scope of its mandate addressing Investor-State Dispute Settlement (ISDS) Reform (Dimsey & Pramod, 2021, p. 1175). Article 3 of UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution provided that the arbitrator shall be independent and impartial by obliging himself/herself not to:<sup>30</sup>

- (a) Be influenced by loyalty to any disputing party or any other person or entity;
- (b) Take instruction from any organization, government, or individual regarding any matter addressed in the International Investment Dispute (IID) proceeding;
- (c) Be influenced by any past, present, or prospective financial, business, professional, or personal relationship;
- (d) Use his or her position to advance any financial or personal interest he or she has in any disputing party or in the outcome of the IID proceeding;
- (e) Assume any function or accept any benefit that would interfere with the performance of his or her duties; or
- (f) Take any action that creates the appearance of a lack of independence or impartiality.

The China International Economic and Trade Arbitration Commission (CIETAC) released code of conduct for arbitrators in 2021, which also generally states that arbitrators shall hear cases independently, impartially, diligently, and prudently.<sup>31</sup> Beijing International Arbitration Center (BIAC) Code of Conduct for Arbitrators in International Investment Disputes points out that arbitrators shall at all-time remain independent and impartial.<sup>32</sup> It is also common that code of conduct requires mediators to observe the values of impartiality and independence. As stated in Model Standards of Conduct for Mediators, a mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner; and impartiality means freedom from favoritism, bias, or prejudice.<sup>33</sup>

### **Proposed Impartiality, Independence Provision**

Independence and impartiality:

The Expert Members shall at all-times remain independent and impartial, and shall not be influenced by self-interest or external pressure.

The Expert Members shall provide advice and suggestions independently, objectively, and impartially in their personal capacity.

<sup>28</sup> SICC Judicial Code of Conduct, Impartiality, General Statement, p. 8.

<sup>29</sup> SICC Judicial Code of Conduct, Impartiality, Guiding Principles, p. 8.

<sup>30</sup> UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, Article 3. This advance copy of the code and the commentary was prepared by the Secretariat based on the decisions taken by the Commission at its fifty-sixth session (A/78/17).

<sup>31</sup> CIETAC Code of Conduct for Arbitrators, Article II.

<sup>32</sup> BIAC Code of Conduct for Arbitrators in International Investment Disputes, Article 3.

<sup>33</sup> The Model Standards of Conduct for Mediators (2005), Standard II, Impartiality.

The Expert Members shall preside over the mediation in international commercial cases fairly, treat the parties neutrally and equally, and not undermine the public perception of their independence.

### **Conflicts of Interest and Obligation of Disclosure**

#### **IBA Guidelines on Conflicts of Interest in International Arbitration as a Model**

Under the UNCITRAL Model Law and a number of arbitration rules, an arbitrator is required to disclose without delay any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.<sup>34</sup> Article 10 Working Rules has broadly stipulated the duty of disclosure by the Expert Members concerning conflict of interest existing.<sup>35</sup> When and what the Expert Members should disclose need more specific details and further clarification on the circumstances and content. The outcome of the International Bar Association (IBA), “Guidelines on Conflicts of Interest in International Arbitration” (The Guidelines) that issued in 2014, can serve as a vital role model in practice while dealing with issues on conflicts of interest. The Guidelines contains useful standards and concrete examples of standards application.

The Part I of the Guidelines sets forth the of general standards regarding impartiality, independence, and disclosure; and Part II is about the Practical Application of the general rules. General Standard 2, “Conflicts of Interests”, sets forth the standards for determining whether a particular conflict would require the arbitrator to decline appointment. The first standard listed under General Standard 2 is subjective: An arbitrator must decline appointment if he has doubts as to his impartiality or independence. The second listed standard is objective: An arbitrator must decline appointment if a reasonable person would have justifiable doubts about the arbitrator’s impartiality and independence. The “justifiable doubts” are those that would persuade a reasonable third party that the arbitrator might make a decision based on factors other than the merits of the case.<sup>36</sup> Then General Standard 3 articulates that “in the eyes of the parties”, what create doubts as to the arbitrators’ impartiality and independence must be disclosed.<sup>37</sup>

In Part II of the Guidelines, it provides examples of how the General Standards of Part I should be applied. Lists of specific situations are divided into three different groups: red, orange, and green. The Red List contains examples of serious conflicts of interests. The Orange List contains situations that the arbitrator must disclose. The Green List contains examples of situations that the Working Group believes would not raise questions of impartiality or independence, and would therefore require no disclosure. Naming after the colors of the traffic light, in a specific and detailed manner, the three different lists contain different levels of situations influencing the arbitrators’ impartiality and independence, and require different levels of disclosure of these requirements.<sup>38</sup> The Guidelines has shown a well-articulated set of rules regarding the circumstances that the arbitrators must decline appointment, and the facts that an arbitrator should disclose according to Red, Orange, and Green Lists.

#### **Proposed Conflicts of Interest and Obligation of Disclosure Provision**

Conflicts of interest and obligation of disclosure:

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<sup>34</sup> UNCITRAL Model Law, Art. 12(1); CIETAC Rules, Art. 31(1); LCIA Rules, Art. 5.5; ICDR Rules, Art. 13(3).

<sup>35</sup> Working Rules, Article 10.

<sup>36</sup> See 2014 IBA “Guidelines on Conflicts of Interest” (The Guidelines), Part I: General Standards Regarding Impartiality, Independence and Disclosure, General Standard 2.

<sup>37</sup> Ibid., General Standard 3.

<sup>38</sup> The Guidelines, Part II: Practical Application of the General Standards.

If the Expert Members agree to preside over a mediation, they shall sign a written declaration of no conflict of interest, unequivocally announcing that there is no circumstance that may affect the independence and impartiality of the mediation.

Upon acceptance to preside over a mediation and during the mediation, the Expert Members shall disclose in writing any facts that may give rise to justifiable doubts of the parties as to their independence or impartiality. The lists include but not limit as followed:

- (a) Have an interest involved in mediation case;
- (b) Meet with the parties or agents privately, or accepting treats, gifts, or other benefits offered by the parties;
- (c) Have other relationships with the parties or its representatives of the case, that may affect independence and impartiality;
- (d) Other circumstances that may give rise to justifiable doubts about the independence or impartiality.

An Expert Member must decline appointment from a mediation case if the following circumstances are met:

- (a) The parties have obtained unlawful benefits through mediation;
- (b) The disclosure by the Expert Member causes the parties to have justifiable doubts as to their independence or impartiality;
- (c) The mediation violates the public interest;
- (d) The Expert Member is unable to perform his/her duty for personal health reasons;
- (e) Other circumstances that influence the fairness of the mediation proceedings.

### **Other Obligations of the Expert Members**

The Expert Members bear other obligations coming from ethical concepts of usual practices in international arbitration (Rogers, 2014).

#### **Integrity and Diligence**

An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding.<sup>39</sup> In SICC Judicial Code of Conduct, International Judges should strive, at all times, to conduct themselves in a manner that is consistent with high judicial office and avoids any ground for criticism.<sup>40</sup>

Regarding to the duty of diligence means that arbitrators or mediators shall perform their duties diligently, devote sufficient time to the proceeding, and render all decisions in a timely manner.<sup>41</sup> The “one-stop” platform under SPC was launched on the website of the CICC in July 2021. With the development of online arbitration and mediation,<sup>42</sup> the content of diligence needs to extend to cover the online arbitration and mediation. In *Song Lihua v. Lee Chee Hon*, one of the arbitrators, Q was not properly focused on the online hearing, as he was moving from one place to another and even off-line for a periods of time.<sup>43</sup> Considering Q’s failure to act with

<sup>39</sup> AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, CANON I.

<sup>40</sup> SICC Judicial Code of Conduct, Integrity and Propriety, Guiding Principles, p. 11.

<sup>41</sup> UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, Article 5 Duty of Diligence.

<sup>42</sup> Working Rules, Article 11 provides that “Mediation can be conducted by way of video conference or in-person”.

<sup>43</sup> *Song Lihua v. Lee Chee Hon (Former Name Que Wenbin)*, [2023] HKCFI 2540 at Paras. 38, 40, 42.

due care and focus on the proceeding, which raised the issues touching on fundamental principles of impartiality and the right to be heard, the Hong Kong Court of First Instance found as a matter of public policy that enforcement of the award would “violate the most basic notions of justice”.<sup>44</sup> This recent case has shown that the concepts of diligence, even fairness and impartiality, need update with trend of the digitization and modernization in the field of dispute settlement.

### **Confidentiality**

In SICC Judicial Code of Conduct, International Judges must, at all times, keep strictly confidential all non-public information which is internal to the Judiciary and their judicial office.<sup>45</sup> Arbitrators and mediators shall not disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding or save that the disclosure or use is required by legal duty or to protect a legal right.<sup>46</sup>

### **Proposed Integrity and Diligence, and Confidentiality Provisions**

**Performance of duties.** Expert Members shall perform their duties fairly, diligently, honestly, and efficiently.

By appointed by ICEC, the Expert Members shall ensure that they possess specialized legal knowledge in international trade, investment, and other areas of international commercial law, and ensure that they are able to devote sufficient time and energy to their duties.

The Expert Members shall be of high moral character, and ensure that they are able to perform their duties with integrity and propriety.

**Confidentiality.** Upon acceptance of appointment as a mediator, the Expert Members shall keep confidential the information obtained in the course of the mediation process, except where the law provides that such information shall be disclosed or where the parties agree to such disclosure.

If the Expert Members perform other duties, they shall fulfill the obligation of confidentiality in accordance with the requirements underlying the work entrusted to them.

### **Completion of Proposed Code of Conduct**

The proposed Code of Conduct can be complete once adding the following provisions.

### **Purpose and Objective**

In order to regulate the behavior of the Expert Members of International Commercial Expert Committee, this Code of Conduct is hereby formulated in accordance with the “Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court” and “Working Rules of the International Commercial Expert Committee of the Supreme People’s Court (For Trial Implementation)”.

### **Scope of Application**

This Code applies to Expert Members who have been appointed by the Supreme People’s Court to perform their duties under the mandate of the International Commercial Court of the Supreme People’s Court.

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<sup>44</sup> *Song Lihua v. Lee Chee Hon (Former Name Que Wenbin)*, [2023] HKCFI 2540 at Paras. 52, 56.

<sup>45</sup> SICC Judicial Code of Conduct, Confidentiality, General Statement, p. 17.

<sup>46</sup> BIAC, Code of Conduct for Arbitrators in International Investment Disputes, Article 7; The Model Standards of Conduct for Mediators (2005), Standard V, Confidentiality.



### Consequences of Violating This Code

If an Expert Member violates this code, the Supreme People's Court will decide not to renew or dismiss the appointment depending on the seriousness of violation.

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