THE INTERNATIONAL ARBITRATION REVIEW

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Editor
James H Carter

THE LAWREVIEWS

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Chapter 41

TURKEY

H Ercüment Erdem[1]

I INTRODUCTION

In Turkey, the use of arbitration as an alternative dispute resolution mechanism has gained great momentum in recent years. The statistics of the International Chamber of Commerce (ICC) indicate record figures for parties from Turkey for 2016.[2] This record shows not only that Turkish parties have been involved in many disputes, but also that they are more and more inclined towards the resolution of their disputes through arbitration. In practice, with regard to multinational transactions, arbitration is very popular as a means of dispute resolution. Parties especially rely heavily on alternative dispute resolution in certain sectors such as the construction, energy and maritime sectors.

The most recent example of this momentum is the establishment of the Istanbul Arbitration Centre (ISTAC), which is the newest local arbitration institution in Turkey. The ISTAC was established within the scope of the Istanbul International Financial Center to be an independent arbitration institution able to compete with other similar arbitration institutions in the international arena. The ISTAC Arbitration and Mediation Rules came into force in October 2015. In its first year, it was reported that the ISTAC resolved six of its seven cases,[3] which may, beyond doubt, be considered as a success.

The ISTAC and the other local arbitration institutions aim to promote arbitration as a dispute resolution mechanism in Turkey through increasing the number of parties electing arbitration as the means to settle any disputes over the agreements that they conclude. These institutions also promote the selection of Istanbul or any other city in Turkey by both Turkish and foreign parties as their arbitral seat.

This momentum will, hopefully, have a positive impact on the arbitration culture in Turkey, and assist Turkey to become viewed as an arbitration-friendly jurisdiction.

i Legal framework

The structure of arbitration-related laws in Turkey is based on the distinction between domestic and international arbitration.

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2 See iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016.

3 A statement made by the President of the Board of Arbitration of ISTAC, Professor Dr Ziya Akıncı, in 'Istanbul arbitration up and running for the first year': aa.com.tr/en/todays-headlines/istanbul-arbitration-up-and-running-in-first-year/751259.

The main legislation regulating international arbitration is the International Arbitration Act No. 4686 (IAA). The IAA applies to arbitrations in which there is a foreign element and that are seated in Turkey. Additionally, the IAA also applies if the parties or the arbitrators select it as the applicable law (Article 1/1).

On the other hand, the provisions pertaining to domestic arbitration are set forth under the Code of Civil Procedure No. 6100 (CCP). These provisions shall apply for arbitrations having no foreign element that are seated in Turkey.

An important part of this legal framework is formed by international conventions, such as the New York Convention, which serves as the legal basis for most of the recognition and enforcement proceedings in Turkey. Turkey has ratified the Convention with two reservations: it will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state; and the Convention will only be applied to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law. Considering that 157 states are parties to the New York Convention,[4] it may be concluded that most of the enforcement proceedings would be conducted pursuant to the Convention.

Distinctions between international and domestic arbitration law

The distinction between international and domestic arbitration law in Turkey is based on the issue of a foreign element.

On the issue of a foreign element, the IAA was the first legislation to clarify the concept of 'international arbitration' under Turkish law.[5] The issue of the foreign element has been clarified under Article 2 of the IAA. Accordingly, the presence of one of the circumstances below shows that the dispute has a foreign element, and the arbitration shall be qualified as international:

a the legal domicile or habitual residence, or the workplace of the parties, is in different countries;

b the legal domicile or habitual residence, or the workplace of the parties, is:
- in a state different to that determined in the arbitration agreement, or different to the seat of the arbitration if this is determined in accordance with the arbitration agreement; or
- in a state different to the place where an important part of the obligations arising out of the main agreement will be performed, or to which the matter in dispute has the most close connection;

c at least one of the shareholders of the companies that is party to the main agreement upon which the arbitration agreement relies has brought foreign capital to Turkey pursuant to legislation on incentives on foreign capital, or has entered into credit or guarantee agreements, or both, to provide capital from a foreign country for the performance of the agreement; or

d the main agreement or legal relationship upon which the arbitration agreement relies serves to transfer goods or capital from one country to another.

4 www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

5 Ziya Akıncı, *Milletlerarası Tahkim*, Istanbul, 2016, p. 55.

Accordingly, if the dispute falls within either one of the categories listed above, the dispute will be considered as having a foreign element, and the IAA shall be applied.

Arbitration agreements under Turkish law

The arbitration agreement is the essential element of arbitration, as it contains the parties' intention to arbitrate. The arbitration agreement under Turkish law is further analysed below.

Written form and intention to arbitrate

Under Turkish law, the arbitration agreement must be in writing, as set forth both under Article 4/2 of the IAA and Article 412/3 of the CCP. Pursuant to both of these provisions, the written form requirement is fulfilled if the arbitration agreement exists in a written document signed by both parties, or in a means of communication or electronic format such as a letter, telegraph, telex or fax exchanged between the parties. The written form is also deemed fulfilled if the respondent does not object in its statement of defence to the existence of an arbitration agreement raised by the claimant in its statement of claim.

An important element thoroughly analysed by the Turkish courts is whether the arbitration institution has been clearly distinguished in the arbitration agreement. If not, there have been cases where Turkish courts have refused the enforcement of an arbitral award. On this issue, the Court of Cassation decided that the enforcement request should be rejected since the arbitration had not been conducted before the institution agreed upon by the parties.[6]

With regard to the intention to arbitrate, clauses stipulating that the courts would also have competence, in addition to arbitrators, also render the arbitration agreement invalid. In practice, this issue manifests itself usually in clauses stipulating that the disputes shall be resolved by courts if the arbitrators fail to do so. The Court of Cassation regularly considers such clauses to be invalid arbitration clauses.[7]

Special authority for entering into arbitration agreements under Turkish law

Another issue to keep in mind when entering into arbitration agreements with Turkish parties is that under Turkish law, an attorney needs to have special authority with regard to the conclusion of arbitration agreements on behalf on the principal, and the general authorisation that may be found in powers of attorney, such as the general ones granted to attorneys-at-law for representation before courts, is not sufficient.

Pursuant to Article 74 of the CCP, to conclude a valid arbitration agreement on behalf of the principal a representative should have special authority on that matter. The same rule also exists under the Turkish Code of Obligations No. 6098, and is found under Article 504/3. Both of these articles lead to the conclusion that if an arbitration agreement is concluded by an attorney, the latter should have a specific power in its power of attorney entitling him or her to enter into an arbitration agreement on behalf of the principal. If this condition is not fulfilled, there will without doubt be objections to the fact that the arbitration agreement has not been concluded by a duly authorised attorney.

6 Decision of the 19th Civil Chamber of the Court of Cassation dated 7 June 2011 No. 2011/4149 E, 2011/7619 K. All of the decisions of the Court of Cassation referred to in this chapter may be accessed at www.kazanci.com.

7 For the decisions of the Court of Cassation for 2016 on this matter, see footnote 13.

Some decisions of the Turkish Court of Cassation set forth that arbitration agreements concluded by a representative who does not have special authority are invalid.[8]

Challenging arbitral awards

Under Turkish law, an appeal against an arbitral award may not be filed, and the awards are considered final and binding on the parties. Pursuant to Article 15 of the IAA, an arbitral award may be set aside if any of the following circumstances exists:

a invalidity of the arbitration agreement or the incompetence of one of the parties;
b non-compliance with the procedures set out in the arbitration agreement or in the law as to the appointment of arbitrators;
c failure to issue an award within the agreed period of time;
d unlawful decision of the tribunal as to its competence;
e decision of arbitrators on a matter exceeding the scope of the arbitration agreement or exceeding the scope of their authority;
f violation of procedural rules that has an effect on the substance of the award; and
g violation of the principle of equality of the parties.

Additionally, there are two grounds that the court may take into consideration *ex officio*, namely non-arbitrability and public policy.

Recognition and enforcement of international arbitral awards

As previously mentioned, the recognition and enforcement of international arbitral awards is conducted mostly pursuant to the New York Convention.

Some of the issues that may cause problems before Turkish courts in recognition and enforcement proceedings are further analysed below.

The first issue to be addressed with respect to enforcement proceedings to be conducted in Turkey is public policy. Public policy manifests itself as a very important ground for refusal of the recognition and enforcement of foreign arbitral awards in Turkey. Turkish courts tend to have a rather vague interpretation of this notion, which sometimes leads to a review of the merits of the case.

Another important issue in enforcement proceedings is arbitrability. Under Turkish law, disputes pertaining to rights *in rem* on immoveable property located in Turkey, or disputes arising out of issues that do not depend on the will of the parties, are not arbitrable. Accordingly, the precedents of the Court of Cassation set forth that disputes pertaining to determination of the amount of lease payments, vacation of property, tax disputes and labour law disputes are among non-arbitrable disputes. On the other hand, in some of the precedents of the Court of Cassation, a review on public policy is conducted when the Court of Cassation decides on the arbitrability of a subject matter.[9]

Concerning recognition and enforcement cases filed by foreign parties in Turkey, the issue of *cautio judicatum solvi* should be kept in mind. Pursuant to Article 48/1 of the International Private and Procedural Law No. 5718, foreign parties filing a lawsuit in Turkey

8 Decision of the General Assembly of Civil Chambers of the Court of Cassation, dated 22 February 2012 No. 2011/11-742 E, 2012/82 K.

9 Decision of the 3rd Civil Chamber of the Court of Cassation dated 2 December2004 No. 2004/13018 E, 2004/13409 K.

should provide security to be decided upon by the court to compensate for any damages that may be suffered by the counterparty. Accordingly, the requirement to provide security exists if the claimant is a foreign real or legal person, there is a lawsuit filed before the Turkish courts and the provisions concerning exemption from providing security are not applicable.

The court may declare a foreign party exempt from providing a security. If the foreign party comes from a state that is party to the Hague Convention on Civil Procedure of 1 March 1954, or if there is a bilateral agreement on this issue, the courts declare the foreign party to be exempt from providing security.

Local arbitration institutions

The local arbitration institutions in Turkey, including the Istanbul Chamber of Commerce Arbitration Center (ITOTAM), the Union of Chambers and Commodity Exchanges of Turkey and the Izmir Chamber of Commerce, have been active for many years and have contributed to the arbitration culture.

A recent development regarding local arbitration institutions was introduced with the establishment of the ISTAC.

A quick review of the ISTAC Arbitration Rules reveals some important advantages for its users. To begin with, the ISTAC aims to provide more effective secretarial services, with less bureaucratic formalities. The ISTAC Arbitration Rules provide that the time limit for rendering an arbitral award is six months from the notification of approval of the terms of reference to the arbitral tribunal by the Secretariat, which may be extended by the court (Article 33 of the Rules). This time limit is also a great advantage in comparison with dispute resolution before the Turkish courts, since it is quite impossible to obtain a court decision within such a short time period. The ISTAC Rules also provide for emergency arbitrator proceedings that provide the possibility to obtain a decision from the arbitrators instead of state courts if there are issues that need to be decided rather urgently. The ISTAC Rules also provide for expedited proceedings that would be automatically applicable for disputes not to exceeding 300,000 Turkish liras.

Another point where the ISTAC has an advantage over national courts is the fee structure. The ISTAC prides itself for having more reasonable fees than the national courts, especially for disputes with a higher value. The court fee structure followed by the Turkish courts is based on a court fee tariff that is updated each year, and proportional court fees, which are calculated based on the amount in dispute, and may reach quite outrageous amounts concerning high-value transactions. As this percentage remains the same and does not decrease even when the disputed amount is rising, fees will reach quite high levels in proportion to higher amounts in dispute. Within this framework, the ISTAC fee structure is more advantageous in disputes with higher values.

Recently, the Prime Ministry issued Directive No. 2016/25, which aims to encourage governmental authorities to stipulate in their contracts ISTAC arbitration as the dispute resolution mechanism. Accordingly, the ISTAC seems to have the support of the government as well.

II THE YEAR IN REVIEW

i Legislative developments

Regarding the general legal framework in Turkey, 2016 has been a significant year in terms of political developments. Following the attempted coup on 15 July 2016, a three-month

state of emergency was declared on 20 July 2016. The state of emergency was extended on 19 October 2016. Pursuant to Article 121 of the Turkish Constitution, this allows the Council of Ministers to issue decrees having the force of law on matters necessitated by the state of emergency.

These political developments aside, another important development for 2016 was the regional courts of justice, which started to operate on 20 July 2016. These courts were established through Law No. 5235 on the Establishment, Jurisdiction and Competence of the Civil Courts of First Instance and the Regional Courts of Justice (Law No. 5235), which dates back to 2004; however, the introduction of the regional courts of justice was delayed until 2016. The regional courts of justice are structured within seven of the larger cities in Turkey, and will be responsible for each of their respective geographical areas.

The operation of the regional courts of justice introduced an important amendment to the two-tier appellate review system, which has evolved into a three-tier appellate system. While decisions that were given prior to 20 July 2016 will be subject to the previous system, decisions given subsequent to this date will be subject to the three-tier system.

As a change of legislation directly affecting arbitration-related proceedings, the issue of court fees to be charged in arbitration-related court proceedings has been clarified. The issue of court fees has been a matter of debate for many years, and different approaches were adopted on this matter by the different chambers of the Court of Cassation. The problem was whether enforcement lawsuits would be subject to proportional court fees or fixed court fees. All of these controversies have been resolved through an amendment of Tariff No. 1 related to the Court Fee Act No. 492, which regulates court fees through Law No. 6728. Accordingly, it has been clarified that the provision on proportional court fees shall not be applicable in arbitration proceedings. This development is quite positive, since the court fees in enforcement proceedings have reached very high amounts when calculated based on proportional fees.

ii Arbitration developments in local courts

In Turkey, the Court of Cassation is structured through chambers that have certain areas of specialisation. However, there is no specialised chamber for arbitration-related matters, which causes some discrepancies between the decisions of the Court of Cassation. While the non-existence of a specialised chamber is highly criticised in the doctrine and by practitioners, no initiative was taken in this regard in 2016.

Important decisions of the Court of Cassation for this year are summarised below.

Decisions pertaining to the competent court for arbitration-related matters

In the IAA, the competent court to hear disputes related to arbitration proceedings has been determined as the civil court of first instance, which covers objections to arbitration clauses, appointments and dismissals of arbitrators and the setting aside of arbitral awards, as well as the recognition and enforcement of arbitral awards. With Article 5 of Law No. 5235, it has been regulated that such lawsuits shall be brought before the commercial courts.

Even though this amendment was introduced in 2014, decisions have been granted on arbitration matters by the civil courts of first instance. Pursuant to the amendment introduced in 2014 with regard to the competent court, the Court of Cassation has granted

many decisions emphasising the competent court in arbitration-related matters, and has reversed decisions of the civil courts of first instance that were not given in accordance with the amendments introduced by Law No. 5235.[10]

Decisions on the prohibition of revision au fond

In one decision of the 11th Chamber of the Court of Cassation,[11] the respondent objected to the enforcement of the arbitral award based on a claim that the arbitral tribunal rejected a request for the appointment of a technical expert, and that this constituted infringement of public policy. It was also alleged that the mandatory provisions of the competition legislation were not taken into consideration by the arbitral tribunal. In this case, the Court of Cassation decided that the arbitral award did not infringe upon public policy, and that the issues brought forward by the respondent during the enforcement proceedings could not be analysed by the enforcement court at this point.

In parallel with this decision, in a lawsuit pertaining to the setting aside of an arbitral award based on an allegation that the arbitral tribunal failed to appoint an expert and conduct an expert review, the Court of Cassation decided that an arbitral tribunal has the discretion to conduct an expert review. In addition, the arbitral tribunal is to determine the applicable law, and the courts may not rule on these matters in an action to set aside an arbitral award.[12]

Arbitration clauses authorising state courts in addition to arbitration institutions

Again in 2016, the Court of Cassation granted decisions pertaining to arbitration clauses authorising state courts in addition to arbitration institutions.[13] In these cases, the Court of Cassation clarified once again that authorising state courts, in addition to arbitrators, does not indicate a clear intention to arbitrate, and these arbitration clauses were deemed invalid by the Court of Cassation.

Court fees

As stated above, the provision on court fees in arbitration-related proceedings has been a matter of debate for many years. This issue has been clarified by Law No. 6728, which entered into force on 9 August 2016, clarifies that arbitration-related court proceedings would not be subject to a proportional fee. Prior to the entry into force of this provision, the 15th Civil Chamber of the Court of Cassation granted decisions setting forth that a

10 Decisions of the 11th Chamber of the Court of Cassation dated 1 December 2016 No. 2016/7420 E, 2016/8731 K; and dated 7 March 2016 No. 2016/1593 E, 2016/2463 K.

11 Decision of the 11th Chamber of the Court of Cassation dated 6 October 2016 No. 2016/725 E, 2016/7777 K.

12 Decision of the 11th Chamber of the Court of Cassation dated 22 June 2016 No. 2016/4931 E, 2016/6886 K.

13 Decision of the 19th Civil Chamber of the Court of Cassation dated 8 June 2016 No. 2016/1164 E, 2016/10350 K; Decision of the 15th Civil Chamber of the Court of Cassation dated 8 March 2016 No. 2016/1133 E, 2016/1495 K; Decision of the 11th Chamber of the Court of Cassation dated 7 March 2016 No. 2015/14286 E, 2016/2435 K.

proportional fee should be paid with regard to enforcement proceedings, in line with its previous jurisprudence.[14] It is expected that this issue will no longer create any controversy, taking into consideration the new provision on the matter.

iii Investor–state disputes

Turkey is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). It is reported that subsequent to the entry into force of this Convention, arbitration through the ICSID has been included in all of the agreements on reciprocal promotion and protection of investments concluded by Turkey.[15]

The only ICSID case currently pending against Turkey is *Baymina Enerji Anonim Sirketi v. Boru Hatları ile Petrol Tasıma Anonim Sirketi*.[16] In this case, which was registered on 30 December 2014, two hearings on the merits have been held, from 20 to 23 February 2017, respectively, in Washington, DC, and on 4 April 2017 in Toronto.[17] The case was filed against a state-owned pipeline company, BOTAS, and concerns a natural gas power plant in Ankara, which is operated by Baymina and supplied by BOTAS under a gas purchase agreement.

A Stockholm Chamber of Commerce (SCC) case involving Turkey was decided in 2016, namely, *Cem Cengiz Uzan v. Republic of Turkey*.[18] This case was based on the Energy Charter Treaty. The arbitral tribunal decided on 20 April 2016 that the claimant had not established jurisdiction *ratione personae* in his claims against the respondent; therefore, the claims of the claimant have been dismissed.[19]

Apart from *Cem Uzan*, one of the most recent cases concluded was *Nabucco Gas Pipeline International GmbH in Liqu v. Republic of Turkey*.[20] This case was concluded on 5 November 2015 by an order noting the discontinuance of the proceedings pursuant to Rule 44 of the ICSID Convention Arbitration Rules pertaining to discontinuance at the request of a party. Another case was the annulment of an award rendered on 10 March 2014 in the proceedings with regard to *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey*.[21] The application for annulment by the claimant was dismissed in its entirety on 30 December 2015 through a decision issued by the *ad hoc* committee.[22]

Apart from these cases, two cases were filed by Turkish investors against other states in 2016: *Attila Dogan Construction & Installation Co Inc v. Sultanate of Oman*[23] and *Görkem Insaat Sanayi ve Ticaret Limited Sirketi v. Turkmenistan*.[24] These cases are currently pending.

14 Decisions of the 15th Chamber of the Court of Cassation dated 31 March 2016 No. 2016/895 E, 2016/2050 K; and dated 1 March 2016 No. 2016/935 E, 2016/1312 K.

15 Information provided on the official website of the Ministry of Economy: www.ekonomi.gov.tr.

16 ICSID Case No. ARB/14/35.

17 The procedural details about this case may be accessed at icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/35.

18 SCC Case No. V 2014/023. Information on this case may be accessed at www.italaw.com/cases/5586.

19 For the Award on Respondent's Bifurcated Preliminary Objection, see www.italaw.com/sites/default/files/case-documents/italaw8642.pdf.

20 ICSID Case No. ARB/15/26.

21 ICSID Case No. ARB/11/28.

22 The decision on the dismissal of annulment may be accessed at www.italaw.com/sites/default/files/case-documents/italaw7037.pdf.

23 ICSID Case No. ARB/16/7.

24 ICSID Case No. ARB/16/30.

Cases decided locally involving investors and other states

A very interesting decision was granted by the 13th Civil Chamber of the Court of Cassation[25] in a case requesting the setting aside of an ICC arbitral award in an arbitral case between a Turkish global system for mobile communications (GSM) operator company as claimant, and the Undersecretariat of Treasury and the Ministry of Transport as respondents. As far as can be ascertained from the decision of the Court of Cassation, the dispute was based on a concession agreement pertaining to the operation of the GSM operator that stipulated that 15 per cent of the revenue of the operator shall be paid to the Treasury.

As the arbitral award arose from the fact that the income of the state had decreased (it is understood that some excerpts of the arbitral award were detrimental to the state entities, and therefore gave rise to the state's revenue being decreased), this was considered to be contradictory to the state's aim of generating revenue consistently, to contradict the mandatory legal provisions and, consequently, to be in contradiction of Turkish public policy. The Court of Cassation concluded that the enforcement of the arbitral award would be contrary to public policy, and that the relevant excerpts of the arbitral award should be set aside accordingly.

III OUTLOOK AND CONCLUSIONS

Arbitration as an alternative dispute resolution mechanism is gaining popularity in Turkey. The establishment of the ISTAC, and the events organised to promote arbitration, have been quite successful. This may help eliminate the apparent lack of interest for arbitration among middle-sized Turkish enterprises that have traditionally not elected arbitration as a dispute resolution mechanism.

Another positive development is the operation of the regional courts of justice, which introduced a three-tier appellate system in Turkey. These courts will, beyond doubt, help with the workload of the Court of Cassation. On the other hand, an important problem remains unresolved in 2016: the lack of a specialised chamber in the Court of Cassation concerning arbitration matters.

The approach of local courts on arbitration matters is also very important for the improvement of arbitration in Turkey. Even though the courts in some cities may not be familiar with arbitration, in large cities such as Istanbul, Ankara and Izmir the courts are granting many qualified decisions. All of these issues are also crucial for the promotion of Turkey as an arbitral seat, since the courts located in Turkey must be considered arbitration-friendly for parties to select it as an arbitral venue. We hope that these objectives will be achieved in the near future.

25 Decision of the 13th Civil Chamber of the Court of Cassation, dated 23 February 2016 No. 2013/16287 E, 2016/5292 K.

Appendix 1

ABOUT THE AUTHORS

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Professor H Ercüment Erdem is the founder of and senior partner at Erdem & Erdem. He has more than 30 years' experience in arbitration, international commercial law, competition and antitrust law, mergers and acquisitions, privatisations and corporate finance. He serves international and national clients in a variety of industries including energy, construction, finance, retail, real estate, aerospace, healthcare and insurance.

He has acted as chair and sole or party-appointed arbitrator in many international and national arbitrations under different rules, including International Chamber of Commerce (ICC) arbitration, Swiss arbitration, Moscow arbitration, United Nations Commission on International Trade Law arbitration, Tehran arbitration and *ad hoc* arbitrations and is, furthermore, distinguished in this field.

He has collaborated for many years with the ICC and has actively participated in several ICC task forces, drafting model contracts for international business (e.g., agency, distribution, confidentiality, mergers and acquisition, occasional intermediaries, Incoterms). He is the co-chair of the ICC Commission on Commercial Law and Practice, a member of the ICC International Court of Arbitration, the ICC Incoterms Experts Group, a council member of the ICC Institute of World Business Law, and a Member of the ICC Turkish National Committee Arbitration, the Istanbul Arbitration Centre (ISTAC) and the Association Suisse de l'Arbitrage (ASA).

He was selected as one of the leading individuals in dispute resolution by *The Legal 500*

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