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Exploring Med - Arb in Tanzanian Industrial Disputes Resolution: A Legal Perspective

Faraji M. Rushagama

LLB, PGDLMA, PGDLP, LL. M (DSM), PhD Candidate (UNZA)

Abstract: ***The paper examines the utilisation and challenges of combined Mediation and Arbitration 'Med - Arb' in resolving industrial disputes in Tanzania. It analyses the Legal Framework and the Practice of Med - Arb under the Commission for Mediation and Arbitration 'CMA' highlighting the absence of the specific procedural rules and the CMAs discretionary power in disputes resolution. The Paper underscores the need for clear guidelines and legal recognition to enhance the efficiency of Med - Arb in Tanzania labour disputes resolution.***

Keywords: Mediation, Arbitration, industrial disputes, med - arb, labour disputes

1. Introduction

Med - arb mechanism is the hybrid of mediation and arbitration whose application in Tanzania depends on an area and objectives. It is here from, one may conceptualise of an example of the private and court annexed mediation under the Civil Procedure Code, 1966[1] and Arbitration under the Arbitration Act[2] which apply differently and in different circumstance outside the industrial disputes scope in Tanzania, as the Industrial Disputeshave their own specific procedures through which they are dealt. It is thus important to in nutshell analyse the concepts of mediation, Arbitration and Med - Arb so as to make a clear way to the study.

Mediation and arbitration mechanisms are considered to be part of Alternative Dispute Resolution ('the ADR') among many others. ADR has been defined to mean the range of procedures which save as alternatives to the adjudicatory procedures of litigation and arbitration for the resolution of disputes generally but not necessarily involving the intersession and assistance of the neutral party who helps to facilitate that resolution (Bernstein, 1998). According to Pitt (2007), applicability of the mechanisms may depict, arbitration remain intending to make decision between partieswhile mediation standing as a process by parties to dispute use to satisfy their needs when someone else controls the negotiation occurring when one has something that the other one wants; and is willing to bargain to get it as Maddoc (1988) reiterates and thus Med - Arb grasping both intentions.

2. Meaning of Mediation

Apart from statutory definitions, different elites have defined the concept a bit differently. Black (2009) defines mediation as a method of non - binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

Further, mediation is defined by Boulle and Rycoft (1997) as a dispute resolution making processes in which parties are assisted by the third party whoattempts to progress the decision making headway for accomplishment of an outcome with which each party can agree. It is assisted by the mediator via a dynamic structured but interactive and neutrally handled process with the aim of resolving dispute (Trenczek, 2013).

Moreover, Mediation in relation to the labour and employment relations is as well defined as a peaceful way that allows employees and employers or their unities to reach an agreement in relation to disputes between the parties arising from their labour relations (Mugyabuso, 2012).

Besides, It is defined as a form of non - adversarial alternative dispute resolution and sometimes used interchangeably with conciliation according to Woodley (2005), whereas conciliation simply means bringing disputing parties together with view to facilitating their reaching agreement by themselves without further legal processes (Pitt, 2007). A nearby definition to the lesson can be taken from Lukumay (2016); who lays down the definition to mean a decision making process in which a mediator assist the parties by facilitating discussion between them so as to communicate to each other regarding the matter in dispute hence fair and satisfactory solution and reach agreement on the matter in dispute.

A statutory definition applicable in labour disputes in Tanzanian institutions does not much differ from the above. Rule 3 (1) [3] of the Labour Institutions (Mediation and Arbitration Guidelines) Rules provides for the meaning of mediation and I quote:

Mediation is the process in which a person independent of the parties is appointed as a mediator and attempt to assist them to resolve a dispute and may meet with the parties jointly or separately, and through discussion and facilitation, attempt to help the parties settle their dispute.

The mediator in this respect must be appointed by the CMA in the meaning of rule 2 (1) [4] and appointment done pursuant to Section 86 (3) (a) of the Employment and Labour

[1] Chapter 33 Revised Edition of 2002
[2] Chapter 15 Revised Edition of 2002 and Rules there to, GN 427 of 1957
[3] Labour Institutions(Mediation and Arbitration Guidelines) Government Notice number 67 of 2007, ('GN')
[4] Ibid GN 67/2007

Relations Act (the 'ELRA') [5] unlike in private mediation in which parties to disputes choose their own mediator and incur all mediation payments in accordance with their own agreement (Boulle and Rycoft, 1997).

3. Meaning of Arbitration

Save for industrial based statutory position, Arbitration is another ADRinvolving the third neutral part in deciding the dispute (Sullivan and Sheffrin, 2003). According to Lewick, Hiam and O'lander (1996), arbitration is a private dispute resolution process where parties in conflict hire an impartial third party to listen to their stories, look at their facts, evidence and make a decision for them on how the dispute will be determined. In Arbitration, a dispute is resolved by one or more persons resulting into an arbitral award with legal binding and enforceable powers (Sullivan and Sheffrin, 2003).

In addition to that, Black (2009) defines arbitration as a method of dispute resolution involving one or more neutral third Party agreed to by the disputing parties and whose decision is binding.

While Absorn (2005) defines arbitration as an effective adjudication of dispute otherwise than by the ordinary procedure of the court, Mugyabuso (2012), typically defines not arbitration but labour dispute arbitration as aquasi - judicial process done by the dully appointed arbitrator under the labour laws authority to conduct formal off court proceedings in disputes and determine the merits of the matter in an enforceable manner and in the parameters of the statutory requirements and discipline.

The statutory definition of Arbitration in relation to labour disputes is provided for under Rule 18 (1). [6] Arbitration is a process in which a person appointed as an arbitrator for resolving a dispute determines the disputes for the parties. The provision uses the word appointed arbitrator simply because, an arbitrator must be appointed by the CMA to arbitrate the matter in accordance with the requirements of Section 88 (2) (a). [7]

It should be noted that, mediation and Arbitration are mandatory stages in resolving labour disputes in Tanzania; however, little exceptions apply, for example; a person bound by collective agreement is not bound to refer the dispute arising there from to the commission. [8] Another example is when the commissioner is of the opinion that mediation may delay, prioritise the general public interests, contemplation of prospect settlement, effective utility of commission's resources and so on, the mediation stage may be skipped and start with arbitration[9]. Another example is based on the subject matter of the dispute, for example labour torts cannot be referred to CMA for Mediation and Arbitration as we are going to see on the current position of the labour court on that issue.

[5] Act number 6 of 2004
[6] Ibid GN 67/2007
[7] Ibid ELRA
[8] ELRA, Section 95 (3)
[9] Ibid GN 67/2007

4. Combined Mediation and Arbitration

Combined Mediation and Arbitration is established by rule 18 (1) [10] of the Labour Institutions (Mediation and Arbitration) rules. The rule empowers the CMA to resolve a dispute through Med - Arb contemporaneously processed and conducted by the same mediator or arbitrator.

Deason (2013) refers to combined mediation and arbitration as med - arb, a jargon in which parties attempt to resolve their disputes using mediation and proceed to arbitration if the forma is not successful in reaching settlement.

Besides, Panchu (2011) refers to a Combined Mediation and Arbitration as Med - Arb or Arb - Med; which are the hybrid of mediation and arbitration whereas Med - Arb is the Mediation process followed by Arbitration in which case, the dispute is mediated by mediation techniques and after the mediator has got issues and facts he focuses parties on interests and legal realism and hence work with them to find a solution; and at any stage where mediation fails in the process, arbitration proceeds.

To Pappas (2015), Med - Arb is a substantiation of arbitration to determination of dispute resulting into litigation similarity promoted as a practice to fix the mediator's is short of formal authority to create a final binding settlement.

It is alerted that Med - Arb is not Arb - Med regardless of their enjoyment of the same source. In the latter, a dispute begins with adversarial action and if it appears that settlement is likely possible, mediation techniques are used. From the above proposition, a good example may be fetched from rule 30 of the Labour institutions (Mediation and Arbitration Guidelines) Rules[11]in which it is stated categorically that the neutral during arbitration may by consent of the disputants suspend arbitration and resort into mediation and so resolve a dispute. During the Med - Arb process, Mediation and Arbitration processes and skills apply. [12]

Generally while, Mediation in Tanzanian ordinary disputes under the Civil Procedure Code, is a compulsory court annexed process that a dispute must pass before trial as reiterated by Lukumay (2016) and arbitration being a private arrangement, litigated out of the court and once the award enforcement arise, the court processes are involved as seen by Mugyabuso (2012) Mediation and Arbitration are compulsory stages and administered by the CMA in resolving trade confrontations in Tanzania.

Generally, a good number of literatures have to large extent focused on general ADR, some have tackled mediation, arbitration and Med - Arb or Arb - Med and their applicability in resolving Disputes outside the court on traditional and general bases. Due to the nature and source of dispute and relations involved, Industrial dispute is declared by other jurisdictions to be a typical and a

[10] GN 64/2007
[11] Supra GN 67/2007
[12] Ibid

traditional mediated field (Panchu, 2011). Some jurisdictions unlike Tanzania have no special forums and procedures in treating labour disputes as a special case and some have unique processes during or before trial and in or outside the court (PapaConstantinou and Zacharakis (2013). It is revealed that other jurisdictions allow settlements any time during court proceedings (Moorhouse, 2013).

Generally to say, in some countries, ADR in labour disputes is not a compulsory procedure in resolving industrial disputes, while in some countries conducted by special organs at the parties willingness and volition and in other countries ADR is considered once the dispute is in tribunal for decision and at any stage of proceedings. Being the situation, some entities have no connection with the tribunal upon failure of the said mechanisms as it is in Tanzania (Field and Moorhouse, 2013). In Tanzanian jurisdiction, the industrial dispute has special handling in the meaning of procedures, forums and the stages are interconnected and determine one step after another depending on successful or failure of the mechanism.

5. The Law and Practice

Subject to statutory jurisdiction, Labour Disputes resolving mechanism in Tanzania begins with the CMA for being mediated and if circumstances force, to be arbitrated as a mandatory procedures under Section 86 (3) of ELRA. Non - compliance to the said provision, proceedings become void as it was concluded in **Cable Television Network (CTV) Ltd v Athumani Kuwinga and 3 others.** [13] The remedy to the aggrieved party in arbitration is to move the High Court (Labour Division) for revision. However, it should clearly be noted that although rules of the procedures requires that disputes be referred to the CMA should be within its pecuniary jurisdiction which is that of the Resident Magistrate Court; [14] which is two hundred million Tanzanian shillings as for now, [15] the ELRA through paragraph 13 of the 3rd schedule to ELRA amended by the by Section 42[16] establishes unlimited pecuniary jurisdiction for CMA as per current court position although unpleasant to a good number of legal practitioner minded that the CMA is over empowered jurisdiction as the court position stands fairly.

The decision in the case of **Francisca K. Muindi v The Tanzania Ports Authority (TPA) and 2 others**[17] is the decision to the proposition that following cited above provision, the CMA enjoys unlimited jurisdiction however, and its jurisdiction is based on the subject matter and not the pecuniary value of the dispute. The position stands so reflected in the case of **George Lugembe Malyeta v National Bank of Commerce (NBC) Ltd.** [18] Following decisions of the High Court in the above cases, the position stands that labour disputes must be referred to CMA for Mediation and Arbitration if so liable to be mediated and arbitrated.

Essential as the issue of jurisdiction stands in CMA's during mediation, where it appears that there is an issue of jurisdiction to be determined, the preferring party has a burden to prove it[19]; example may be taken from Sections 88 (i) (b) (ii) and 94 (1) [20] as amended by the Written Laws[21] establishing the issue of labour tort in the cause of employment in Tanzania, still the nature of the tort referred to, would remain demanding the jurisdiction issue as the labour court has remained with two position as to the issue of jurisdiction of the CMA in labour tortuous matter as can be revealed in the cases of **Dar Es Salaam City Council v Rafael Ruvakubusa.** [22] In that case, *inter alia***,** the High Court is of the position that the CMA has jurisdiction on labour tort matters so long as they should not be label based; unlike in **General Manager Tanica Ltd v Robert Rugumbirwa**[23] where decision stood that the CMA has no jurisdiction in any tortuous labour dispute. It is a known circumstance that whenever the court of records has more than one decisions on a single point, the confusion rises as the court is not bound by its own decision but the decision of the superior court to it save for little exceptions according to Semu (2005), despite the fact that the later has been taken to save the purpose to subordinate court or tribunals as in our case subordinate forums that is the CMA may stagger on what decision to rely on as reference.

The position by this jurisprudence can be learnt in common law persuasive cases whereby in **Young v Bristol Aeroplane Co. Ltd**[24] the rule stands that the court is bound by its previous decision unless its forma decision conflict the position of the court of appeal and house of lords or if satisfied that the previous decision was decided per in curium. It may as well not be bound by its decision if satisfies itself that the decision would produce serious inconveniences in administration of justice as it is justified in the case of **Secretary of the State for Trade and Industry v Desai.** [25] Despite such all possibility, the superior court of record remain respected and binding the lower courts to it as was confirmed by Lord Denning in **Cassel v Broome.** [26] Following the likely confusion as stated in the issue of CMA and jurisdiction in some matters as per tort related issues in labour based approach despite the position of the law, the matter is still confusing and contradictory in court decisions (Marwa, 2011).

[13] Labour Revision No.94 of 2009,High Court of Tanzania, Labour Division-Dar Es Salaam(Un reported)
[14] Rule 20(3)(b)(ii),GN 67/2007
[15] Section 40 of the Magistrates Court Act of 1984 (Revised Edition 2002)as amended by Section 22(b) of the Written Laws (Miscellaneous Amendments)Act number 3 of 2016
[16] Written Laws (Miscellaneous Amendments)Act number 2 of 2010
[17] Miscellaneous Application number 95 of 2014,High Court of Tanzania, Labour Division-Dar Es Salaam(Un reported)
[18] High Court of Tanzania, Labour Division-Dar Es Salaam, Labour Dispute Number 29 of 2010.
[19] Rule 15 and 20 of GN 64/2007
[20] Ibid ELRA
[21] Miscellaneous Amendments number 8 of 2006
[22] Labour Revision number 149 of 2008, High Court of Tanzania, Labour Division-Dar Es Salaam.
[23] Labour Revision number 38 of 2007, High Court of Tanzania, Labour Division.
[24] [1944]KB 718
[25] [1992]B.B.C.110
[26] [1972]AC 1027

Generally the position that stands out now is that, a labour dispute referred to CMA must be mediated and arbitrated if mediation fails, [27] however, the CMA may refer the dispute to arbitration before mediation in consideration of possible consequences of delay in mediation, proceedings, prospect of settlement in mediation, use of resources effectively, interest of the parties and public interests generally and or to combined process as it is going to be seen. [28]

6. Statutory reflection of Med- Arb and Its Challenges/Weakness in Industrial Disputes Resolution:

a) A statutory Reflection:

Rule 18 (1) [29]empowers the CMA to conduct Med - Arb processes so as to resolve labour disputes. The Coramappointments are as per CMA's power to appoint a mediator and Arbitrator and assign them mediation and arbitration duties as per Sections 19 (7) and 88 (3). [30]

Rules applicable in Med - Arb Process are rule of mediation and arbitration set forth under Rules 22 to 28, [31] and rules 30 to 33[32]however they do not categorically state as to which rule applies to the foresaid hybrid as they are collectively referred to as rules applicable in mediation, arbitration and Med - Arb. Rule 30[33] entitles the parties to disputes to cause an arbitrator to suspend proceedings and resolve the dispute through mediation. In the words of rules 30 to 33, reference is made to arbitrator and the Coram upon change is not stated.

b) Challenges/weakness:

The labour laws of Tanzania save for mediation and arbitration rules governing mediation and Arbitration processes in CMA do not recognise the presence of Med - Arb and thus establishing inconveniences between the traditional legal mediation and arbitration intended by the laws. Section 86 (3) and (4) [34] makes it mandatory for a labour dispute to be referred to the CMA for mediation and if fails, it must be arbitrated. None mediating the dispute is an irregularity and may render the next procedures a nullity as the position stands in the case of **Cable Television Network Ltd v Athumani Kuwinga and 3 others**[35] a case in which the labour court insisted on mediating the labour dispute and if mediation fails, the same is to be arbitrated whereas at each stage a certificate must be produced showing on what capacity was the presiding person acting failure of all those procedures all what are done are illegal**.** The Coram must show the umpire presiding dispute as whom and ultimately produce a certificate of success or failure of mediation.

Further, neither statutes nor rules establish circumstances under which the CMA may opt for Med - Arb and why not separate Coram matters while the statutory requirements is arbitration to start after termination of mediation and production of mediation certificate; impliedly with different and separate neutrals. [36]Conduct and guidelines governing the CMA's mediation and arbitration processes allow the CMA to ignore mediation and conduct arbitration by considering general public interests[37]*inter alia* As to what amounts to public interests is not stated by the mother laws and regulations and thus creating another possible dangers to penetrate to the combined process.

In the event that there is CMA's option not to mediate the dispute but arbitrate it on the bases of the public interests *inter alia*, opting for Med - Arb or Arb - Med, as per rules and guidelines of the CMA in mediation and arbitration contrary to what the mother laws establish, then the likelihood processes challenges is intact due to:

1) The danger to apply regulations which are against the provisions of the mother law; the act of which may jeopardise the rights of the disputants and law. As seen above, the ELRA requires the labour dispute to start in CMA for mediation which if fails, resort to arbitration, next to which the aggrieved party may move the court via procedural requirements set forth in the ELRA, LIA and the Labour Court Rules[38]yet the CMA rules and guidelines governing the mediation and arbitration establish powers not to mediate but to arbitrate or apply Med - Arb and applying the later having no reliable procedures as insisted in the case of **Cable Television Network (CTV) Ltdv Athumani Kuwinga and 3 others**[39] that disputes resolution steps must be adhered and in the case of **Tanzania Breweries (TBL) Ltd v Charles Malabona**[40] stating categorically that Med - Arb has no procedures governing it. There is the need to harmonise the situation for not only in the interests of the forum but also disputants and abiding to legal principles that rules or by - laws or regulations whatever, once in conflict with principle legislations the forma becomes inoperative and the mother laws prevail (Majamba and Chuwa, 2018).
2) Impartiality, neutrality and practical influence issues are also likely shortcomings. The arbitrator and mediator must by their duties be partial, neutral and moral. In Med - Arb or Arb - Med, the issues above are likely to distort the process; as issues, facts and elements of disputes and disputants are already known to the neutral party during mediation, when the same neutral is to tackle the matter as an arbitrator, contemporaneously process and under time pressure; the proceed is notably likely to cause procedural and ethical dilemma. Jurisprudentially, (Lovász, 2012) it is suggested that mediation dilemmas as such likely to rise from impartiality point during the process, be cured by the matter to be determined by the other free neutral party knowledgeable with the process.

[27] Supra ELRA per sections 86 and 88
[28] Supra Rule 6;GN 67/2007
[29] Supra GN 64/2007
[30] Labour Institutions Act and ELRA consecutively
[31] Ibid GN 64/2007
[32]Op. Cit,GN 67/2007
[33] ibid
[34] Op. Cit. ELRA
[35] High Court of Tanzania ,Labour Division Dar es Salaam-Labour Revision number 94 of 2009
[36] See rule 18(4)
[37] See Ibid Rule 6(1)(e), GN 67/2007
[38] GN No 106 0f 2007
[39] Supra
[40] High Court of Tanzania Labour Division, Revision Number 24 of 2007

Following the Med - Arb process, it is revealed that when a neutral performs both mediation and arbitration, parties may not be cooperative in disclosing facts and issues thus prejudice arbitration processes (Panchu, 1998) and may succumb it distorting the spirit of good traditional ADR process.

In an Indian case, of **Alcove Industries V Oriental Structural Engineers,** [41] one of the noted likely difficulties in Med - Arb is absence of free and frank argument with an arbitrator looking for conciliating a dispute for it is obvious that in the event of such efforts failing arbitrator will obviously be influenced by the information received by him while delivering the conclusion or end remark. More often, as it is known that mediation is confidential, arbitration is of no such elements according to Thomas (1987) in information covered in the process hence a wide chance to misuse them and or probably used by circumstances to induce parties to disputes.

Skills paucity in addition to the above, like in compulsory Court Annexed mediation where mediator must be a judge or magistrate the common approach is said to be questions to the disputants during mediation such questions are like *why don't you settle this matter?, what does the defendant offer?What does the claimant want? And so on,* followed by order that you please go and try to solve your difference and shall meet on a certain date (See Lukumay, 2016) is also said to be witnessed in the labour dispute resolution. In addition, as a result of deficiency in ADR skills, guidelines and resources, parties to dispute at the very first day and minute of mediation may or be caused to state of their desire not ready to mediate and hence forth the mediation shall be marked to fail (Mashamba, 2018).

It is obvious and uncontroversial that in Med - Arb has no procedures and guides of its own, only that it applies procedures and guidelines governing mediation and arbitration as so given by rules generally. As no scope of control, improvising or forcing procedures is likely. Absence of the procedures was as well noted in the Case of **Tanzania Breweries Ltd (TBL) v Charles Malabona.** [42] It is suggested that, special procedural requirements to govern the matter be established so as to make Med - Arb and Arb - Med work within the parameters commonly set so as to make it possible to control the process against irregularity.

3) In consequentialism in opting for Med - Arb is not stated so as to build awareness of the disputants on the mechanism as there is no hard and fast rule specifically governing it. As seen earlier, Med - Arb is subject to wishes of the CMA as per Rule 18, [43] and handled under Rules 22 to 28 of the Labour institutions (Mediation and Arbitration) rules and Rules 30 to 33 of the Labour Institutions (Mediation and Arbitration Guidelines) Rule. [44] The process lacks application and procedural particularity hence possibility to allow improvising of the procedures and misuse of powers and decision as to its process, when med - arb is to apply and why; considering that the ELRA and LIA do not establish it. In the event that, Med - Arb is opted, should be evaluated by its circumstance and consequences since considered evaluation are likely to be satisfaction and ache to individuals in the essence of the jurisprudential meaning of in consequentialism (Bix, 2003). It is suggested that specific rules of Med - Arb be established to control the mechanism while letting it be established by the mother law as it is to mediation and arbitration for fair recognition and justification.

4) Arbitrariness likelihood in rules establishing powers with no scope or limit as to their application as the meaning of *'public interest generally'* used does not give the meaning of the public interests, scope or extent to which public interests is so public. It can be easily to focus on the jurisprudential position of the jurists that the standard norm is valid and legal because its validity comes from valid procedures through which it was created according to Albert (2014), it is true, but the law, rule or any subsidiary legislation whatever, that cannot limit powers and scope of conduct, is a bad tool (Majamba and Chuwa, 2018). It is thus suggested that clear scope and definition as to what amount to public interests should be clearly given along with rule 6 (1) (e). [45]

7. Vital for Mediation, Arbitration and Med - Arb as Mechanisms of Labour disputes resolution generally

Mediation saves to overcome the blocks and limitations of the direct negotiation process focussing on the interests of the disputants. In so doing it avoids likely disastrous outcome to parties due to the relationship existing between them, and that is why experts state categorically that the essence of mediation is negotiation (See Bernstein, 1998) and it occurs because one has something the other part wants and is willing to bargain to get it (Maddoc, 1988). On arbitration process, stands as the alternative to failure of the root of conciliation and negotiation and thus call for making decision between disputants (Pitt, 2009).

Both two mechanisms and Med - Arb insist on important elements to be observed for successful mediation and arbitration. To mention some, they include but not limited to (i) involvement of faster and more flexible procedures in handling the dispute, (ii) parties to resolve disputes by themselves for encouraging amicability (in mediation), (iii) causing better answer and which are not disastrous, (iv) does not apply legal technicalities as in court processes, (v) it is expected that resources in terms of time, material and human are minimised and lastly (vi) process flexibility, confidentiality and control of the process, and disputes are enjoyed. During conducting the process, the neutral is encouraged to be kin on likely obstacles to success which are secrecy, moral issues, fixed assumption of the dispute, adversarial assumptions and control parties against focus on 'I win you lose' (Panchu, 2011). Technical knowledge,

[41] (2000)(1)ARBLR 393-Delhi
[42] Loccit
[43] Op. Cit. GN 64/2007 and
[44] Supra GN 64 and 67 of 2007 Consecutively.
[45] GN 67/2007

procedures, skills impartiality and appointment should as well be taken carefully (Stephenson, 2001).

8. Conclusion

The paper concludes that while Med - Arb is a potentially effective mechanism for industrial disputes resolution in Tanzania, its effectiveness is hampered by the lack of specific procedural rules and the discretionary power of the CMA. The paper advocates for establishment of clear guidelines and statutory recognition of Med - Arb to ensure fair and efficient disputes resolution.

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