The International Arbitration Review

Seventh Edition

Editor
James H Carter

Law Business Research

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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2016

Chapter 43

TURKEY

Pelin Baysal[1]

I INTRODUCTION

The use of arbitration as an ADR method in Turkey is on the rise, especially for international disputes. There is also a growing demand for the use of domestic arbitration; however, domestic parties mostly prefer court litigation for cultural and financial reasons and because of the way the court and arbitration system is structured in Turkey.

The establishment of the Istanbul Arbitration Centre (ISTAC), which aims to attract not only disputes involving Turkish parties but also disputes from the region including the Middle East, Balkans and Caucasus, will encourage arbitration. The purpose is to attract more foreign investment and strengthen Istanbul's position as a regional and international finance centre supporting new and efficient ways to resolve commercial disputes.

Arbitrations worth billions of dollars to which Turkey or Turkish companies are party were much debated last year in legal circles worldwide, which shows the role arbitration plays for Turkey and Turkish companies and the higher level of attention that arbitration should receive in Turkey.

On the other hand, as Turkey is a party to some of the major international conventions on arbitration, and the enforcement of arbitration awards is governed in accordance with those internationally recognised rules, it remains true that local interpretation of restrictions to enforcement is still a big problem. Turkey ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) and the European Convention on International Commercial Arbitration in 1991, and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1987. These Conventions constitute a part of the Turkish arbitration legislation.

1 Pelin Baysal is a partner at Gün + Partners. The author would like to thank Orçun Çetinkaya, who wrote the first version of this chapter.

Even though arbitration legislation in Turkey is catching up with international standards and is almost identical to that in jurisdictions that are known to be arbitration friendly, a problem arises in Turkey when it comes to the execution of the arbitration awards, whether these are interim reliefs, injunctions or final awards.

In addition, the lack of uniformity in the way in which or the extent to which Turkish courts intervene in arbitral proceedings has always been a major issue. This is mostly due to the fact that there is still no specialised chamber at the Turkish Court of Appeals, which unfortunately results in different chambers taking different views about identical matters. Without precedents guiding the Turkish courts, it seems that arbitration awards that need to be enforced in Turkey will always suffer from unpredictable court reviews.

Initiatives regarding ISTAC could, however, be seen as a signal to policymakers, the business community and practitioners about the need for an arbitration centre in particular and for arbitration in general.

i Legal framework

The most general provision on arbitration can be found in Article 125 of the Constitution, where it is indicated that 'National or international arbitration may be suggested to settle the disputes which arise from conditions and contracts under which concessions are granted concerning public services. Only those disputes involving foreign elements can be solved by international arbitration.'

In principle, therefore, both domestic and international arbitration exists under Turkish law.

The main source of legislation on international arbitration in Turkey is the International Arbitration Law No. 4686 of 5 July 2001 (TIAL). The TIAL applies in cases where a foreign element exists and the seat of arbitration is in Turkey, or where the provisions of the TIAL are chosen by the parties or the arbitrators as the applicable law. Being mostly inspired by the UNCITRAL Model Law, the TIAL contains some differences that are based on Swiss international law. Accordingly, the general principals of the UNCITRAL Model Law are also the general principals of international arbitration under Turkish law, such as the equality of the parties, the autonomy of the parties, the very limited intervention of the courts, and the impartiality and independence of the arbitrator.[2]

The TIAL contains seven chapters, including chapters about arbitration agreements, the election, liability and authorities of arbitral tribunals and arbitral proceedings.

ii Domestic arbitration law

Domestic arbitration is mainly regulated in Article 407 of the CPL, which provides that when disputes do not contain any foreign element and where Turkey is selected as the place of arbitration, then the provisions of the CPL on arbitration will be applied. The articles of the CPL governing arbitration are based on the UNCITRAL Model Law.

However, domestic arbitration in Turkey is not well developed at all. In fact, fewer than 1 per cent of disputes are taken to arbitral venues. The reason for this may be that the amounts involved in the majority of commercial disputes in Turkey are relatively low, so parties hesitate to take their issues to arbitration due to cost concerns. In addition, Turkish

2 Articles 3 to 16 of IAL and Article 408 of the Civil Procedural Law (CPL).

parties culturally do not prefer ADR methods, even though they are not satisfied with the way in which Turkish courts handle such cases. This chapter is mostly concerned with international arbitration in Turkey.

Arbitration agreements under Turkish law

For an arbitration agreement to be regarded as valid, first, there should not be any question regarding the intentions of the parties to arbitrate. On many occasions, parties discuss the conditions of their intention to arbitrate when the dispute arises. As the intention is crucial, a simple, clear and straightforward clause in this respect is always preferable.

Secondly, it is important that the parties draft an arbitration agreement that complies with the chosen law. A problem arises, however, if the parties have not made a choice or if the choice of law is not clear enough.

In such case, the TIAL comes into play, as the arbitration clause should be in line with the TIAL. The TIAL makes it obligatory for the parties to express their decision to arbitrate in writing, which makes an arbitration clause in the contract or a separate written arbitration agreement inevitable.

For the form requirement to be deemed to have been met, there should be an arbitration agreement that is signed by the parties, and the arbitration agreement should exist, in the form of a letter, telegraph, telex, fax or electronic format, between the parties.

Even if there is no arbitration agreement in writing, if the defendant does not object in his or her response petition to the existence of an arbitration claim raised by the plaintiff, the arbitration agreement is accepted to have existed.

Thirdly, the arbitration agreement must be in relation to an arbitral matter (disputes relating to rights *in rem* over an immoveable property in Turkey and disputes arising from issues that cannot be made subject to the will of the parties are considered non-arbitral). Turkish courts generally take a prudent view as to what constitutes an 'arbitration agreement' under Law No. 4,686; they insist on a clear intention of the parties to refer a dispute to arbitration. For example, clauses predicting that the disputes that cannot be solved by arbitral resolution should be solved by national courts are interpreted by courts as contradictory, and therefore invalid.

According to the TIAL, as in many jurisdictions, parties are allowed to sign separate arbitration agreements even if their commercial contract is verbal. This occurs by and large at the time of dispute, as the parties agree that they have a dispute that needs a resolution but feel at the same time that court litigation may not be an effective way to resolve it.

With regards to the separability principle, under Turkish law, as in many other jurisdictions, an arbitration clause is considered to be separate and independent from the agreement even if it is inserted into the contract. The direct result of this principle is that the arbitration clause could be valid and parties can rely on it even if the agreement itself is decided to have been null and void.

The foreign element

Under Turkish law, the foreign element exists in cases where:

a the parties are domiciled or their habitual residence or their workplaces are in different countries;

b the parties' domiciles or their workplaces are in countries different to those determined in the arbitration agreement, different to the seat of arbitration when this is ascertained according to the agreement, or different to the country where an important part of the obligation will be fulfilled or with which the dispute is highly associated;

c any of the shareholders of the parties have brought foreign capital to Turkey in accordance with the regulations on incentives on foreign capital, or have made credit or guarantee contracts for the fulfilment of the agreement on which the arbitration agreement relies; and

d the agreement or the relationship to which the arbitration agreement is related is signed for the purposes of the transfer of goods or capital from one country to another.

Number of arbitrators and appointment method

Following Article 7 of the TIAL, parties are free to agree on the number of arbitrators and the method of their appointment; however, the number of arbitrators must be an odd number. In cases where parties have not determined the number of arbitrators, the number of arbitrators will be three.

Arbitrators can be selected only from among natural persons. In cases where the parties fail to agree on the sole arbitrator to be appointed, the competent commercial court of first instance can make the appointment upon the application of a party. The competent court is the commercial court of first instance where the defendant's domicile or habitual residence or workplace is. Otherwise, the Istanbul Commercial Court of First Instance will be the competent court.

If there are to be three arbitrators, each party appoints one arbitrator and those arbitrators appoint the third, who will be the chair. The appointment will once again be made by the commercial court of first instance, upon the request of a party if two arbitrators appointed by the parties cannot agree on the third or if a party fails to appoint its arbitrator within 30 days as of the receipt of request of the other party in that respect.

The decisions of the commercial court of first instance on the appointment of arbitrators are final and binding.

Procedure

The parties can freely choose the procedural rules, or can make reference to a specific law to the rules of international or institutional arbitration provided that they comply with the obligatory rules of the TIAL. If there is no agreement between the parties in this respect, the arbitrator or the tribunal shall run the proceedings in accordance with the rules of the TIAL.

Parties can be represented by foreign natural and legal persons at arbitral proceedings. However, foreign persons cannot represent parties at applications made to the court in relation to the arbitration proceedings.

The seat of arbitration will be determined by the parties or by the arbitration institution that the parties have chosen. In the case of no agreement in that respect, the arbitrator or the tribunal determines the seat depending on the particular nature of each case.

The parties are free to choose the language of the proceedings provided that the language they choose is recognised by the Turkish Republic. If the parties do not agree on the language, the arbitrators choose the language of the arbitral proceedings.

Unless agreed otherwise by the parties, the arbitral tribunal is under an obligation to hold a hearing upon the request of a party.

The arbitrator or arbitral tribunal will decide on the merits of the case according to the law chosen by the parties. When interpreting and completing the agreement, the commercial practices and customs recognised by the chosen law are taken into consideration by the arbitrators or the arbitral tribunal. The fact that parties have designated the law of a particular country does not mean that its conflict of law rules or procedural rules will be used; it only means that its substantive law will apply unless otherwise agreed on and expressed by the parties.

In cases where the parties have not agreed on the applicable law, the tribunal will apply the law of the country that has the closest connection to the disputes.

A sole arbitrator takes a decision on the substance of the dispute within one year of his or her appointment unless otherwise agreed by the parties. The tribunal gives a decision on the substance within one year as of the issuance of the minutes of the arbitral tribunal. Parties may extend the term of arbitral proceedings by mutual agreement. In cases where there is no agreement about the need to extend the proceeding, the competent civil court of first instance may extend the proceedings upon the application of a party. The tribunal grants its decision by majority unless otherwise agreed by the parties.

Appealing and challenging international arbitration awards

There is no appeal procedure for international arbitration awards on the merits of a dispute. The only possibility is to make an application for the purposes of setting aside an award. An application for setting aside an award is made before the competent commercial court of first instance. An award may be set aside only if any of the following grounds exist:

a a party to the arbitration agreement is incompetent;

b the arbitration agreement is invalid according to the law the parties designated, or is invalid according to Turkish law if the parties have not designated a law;

c the parties have not appointed the arbitrator or the tribunal in accordance with the procedure set out in an agreement or with the procedure set forth in the TIAL;

d if the award is not given within the term of arbitration;

e if the arbitrator or the tribunal takes a decision without complying with the law regarding their competence or incompetence;

f if the arbitrator or the tribunal give an award outside the scope of the arbitration agreement, or did not cover all the requests in the award, or exceeded their competence in the award;

g if the arbitral proceedings were run without allowing parties to settle or if the arbitral proceedings were run without complying with the procedural rules of the TIAL, which influenced the merits of the award;

h if the principle of party equality is not respected;

i if the dispute expected to be handled by the arbitrator or tribunal is not suitable for arbitration; or

j if the award is against public policy.

Applications for setting aside an award can be filed within 30 days before the competent commercial court of first instance as of the notification of an award or a decision of correction, interpretation or completion. Applications for setting aside an award automatically stay the enforcement. The parties to an international arbitration can partially or completely waive their rights to claim the cancellation of the arbitration award.

Recognition and enforcement of international arbitration awards

As mentioned above, Turkey ratified the New York Convention in 1991, so the national courts apply the provisions of the New York Convention for the recognition and enforcement of foreign awards granted in the territory of a foreign member country. Turkey is also party to a large number of international conventions and bilateral agreements that should be taken into consideration. While Turkish courts are not allowed to review the merits of arbitration, the courts can become an obstacle if they widely interpret the grounds for refusal of enforcement in the Turkish International Civil Procedure Law No. 5718 dated 12 December 2007 (TICPL) even though they are listed in the TICPL on a *numerus clausus* basis.

II THE YEAR IN REVIEW

As 18th largest economy in the world with a GDP of almost US$800 billion, Turkey has been making reforms to its judicial system for the past 10 years with an ambitious target of becoming one of the 10 largest economies in the world by 2023, which is the centenary of the foundation of the Turkish Republic.[3] In line with these reforms, crucial legislative amendments were made and new laws were adopted by the government during the course of 2015 . The Electronic Communications Law and the Law on Protection of Personal Data were passed as new laws, and the existing Law on Consumer Protection was renewed. Major amendments were made via omnibus bills on labour law, criminal law and the Law on the Formation, Authority and Competence of the Court of First Instance and the Regional Courts of Justice. More importantly, in addition to the commencement of the operation of ISTAC, which was established in early 2015, this year has been the year of arbitration in Turkey. Many endeavours were made during the past year to increase the number of parties resorting to domestic and international arbitration, as well as for making Istanbul a favoured and prestigious arbitration centre.

i Legislative developments

Law No. 6545 on the Amendment of the Turkish Criminal Code and Miscellaneous Laws (Law No. 6545), which came into force on 28 June 2014, caused a change in the competent court for arbitration-related disputes.

The TIAL provides that the civil courts of first instance are competent to hear lawsuits filed for objections to arbitration clauses, the appointment or dismissal of judges, and the setting aside of awards. Similarly, according to TICPL, the recognition and enforcement of arbitral awards can be brought before the civil courts of first instance. Although Law No. 6545 did not change the main legislation applying to arbitration or recognition and enforcement procedures, it amended the Law on the Formation, Authority and Competence of the Court of First Instance and the Regional Courts of Justice, which had an indirect effect on both.

The amendment made with regard to the Article 5 of the amended the Law on the Formation, Authority and Competence of the Court of First Instance and the Regional Courts of Justice provides that the following lawsuits shall be brought before the commercial courts of first instance:

a objections to arbitration clauses;

b applications for setting aside arbitral awards;

3 World Development Indicators, The World Bank.

c applications for the appointment or dismissal of arbitrators; and
d applications for the enforcement and recognition of foreign arbitral awards.

ii Developments affecting international arbitration

ISTAC becoming operational is the most significant development of the year in Turkish arbitration law. Its first general assembly was held on 30 April 2015, and ISTAC's chair was elected on 5 May 2015.

The ISTAC Arbitration and Mediation Rules were approved by members of the General Assembly on 26 October 2015, when the Rules came into force. Accordingly, ISTAC is now offering services such as fast-track arbitration, emergency arbitrator services and the appointment of arbitrators in *ad hoc* procedures that are available to all contracting parties, without any membership requirements.

ISTAC arbitration was recently selected for dispute resolution in the bilateral treaty between Turkey and Turkish Republic of Northern Cyprus concerning the supply of drinking and irrigation water to Turkish Republic of Northern Cyprus through the Northern Cyprus water supply project.

The Istanbul Arbitration Association, a civil initiative for arbitration in Istanbul, has also become active following the legalisation of ISTAC. The Istanbul Arbitration Association aims to:

a establish, support and promote arbitration centres based in Istanbul;
b increase the number of parties selecting arbitration as a dispute resolution mechanism;
c promote Istanbul-based arbitration and the selection of Turkish law as the applicable law in disputes; and
d incentivise and support domestic and international arbitration centres to operate in Istanbul via representative agencies, branch offices or similar establishments.

iii Arbitration developments in local courts

Discrepancies between the different chambers of the Court of Appeals also continued this year. Due to the fact that the Court of Appeals does not have a specific chamber dedicated to the review of local court decisions pertaining to arbitration proceedings and arbitral awards, all the chambers of the Court of Appeals can review referred decisions. Unfortunately, this creates inconsistency in the application and interpretation of legal concepts, and entails different outcomes based on the different approaches adopted by judges.

The highlight of 2015 in this respect regarded the issue of court fees. While the 11th chamber of the Court of Appeals insists in its practice as to ruling that court fees should be fixed for recognition and enforcement actions, the 19th and 15th chambers maintain their practice as to ruling that court fees should be proportional.

Another discrepancy continues to occur in relation to the interpretation of the amendment introduced by Law No. 6545. While some chambers continue ruling that competence is with a variety of special jurisdiction courts (intellectual property courts, consumer courts, etc.) even after the amendment, others rule that competence is with the commercial court of first instance in relation to actions of enforcement and recognition. Common practice is yet to be established on this matter.

Legal circles have become more keen about the idea of a chamber at the Court of Appeals being established as a specialised chamber for arbitration. Lobbying activities for related legislation are continuing to reach and maintain a standard of practice.

iv Investor–state disputes

Turkey signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 24 June 1987, and the Convention entered into force on 2 April 1989.

So far, a handful of disputes to which Turkey is a party went to trial before ICSID, and some legal actions were also brought before ICSID against contracting states by Turkish companies.

Among the cases brought against Turkey, *Alaplı Elektrik BV*,[4] *Tulip Real Estate* and *Development Netherlands BV*,[5] and *Nabucco Gas Pipeline International GmbH in Liqu*[6] were concluded during the course of 2015. Currently, the only case pending before ICSID against Turkey is *Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi*.[7]

Alaplı Elektrik BV

This case was between a Dutch company and Turkey under the Energy Charter Treaty and the Netherlands–Turkey bilateral investment treaty (BIT). The dispute concerned electricity concession agreements, and the value of the case was US$100 million. The arbitral tribunal rendered its award on 16 July 2012, and Alaplı Elektrik filed an application for the annulment of the award on 16 November 2012. The claims for annulment were dismissed with the decision, which was issued on 10 July 2014.

Tulip Real Estate and Development Netherlands BV

The dispute concerned allegations that actions taken by the respondent deprived the claimant of the entire value of its real estate development projects. The tribunal determined to hear as a preliminary question only the respondent's objection to jurisdiction, namely that the claimant has failed to respect the mandatory negotiation period set out in Article 8(2) of the BIT. The tribunal, however, rejected the respondent's claims on the basis that the claimant had sought to resolve the dispute to a sufficient extent through consultations and negotiations after giving notice of the dispute. The tribunal rendered its award on 10 March 2014 and dismissed the claimant's claims. The claimant applied for annulment of the decision, and the *ad hoc* committee refused the claimant's application on 30 December 2015.

Baymina Enerji Anonim Şirketi v. Boru Hatları ile Petrol Taşıma Anonim Şirketi

The request for the institution of arbitration proceedings was registered on 30 December 2014. The dispute concerns a natural gas power plant in Ankara, where the respondent is a state-owned pipeline company. The case is currently pending.

Recently brought actions

Some examples of recent actions brought against invested states by Turkish investors are:

a four claims by Turkish companies against Turkmenistan for unpaid bills for construction work:

4 ARB/08/13.

5 ARB/11/28.

6 ARB/15/26.

7 ARB/14/35.

- *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*:[8] the tribunal dismissed the claimant's claim in its entirety for lack of jurisdiction on the basis that the claimant had failed to submit its dispute to the local courts of Turkmenistan, which, as interpreted by the tribunal, was a precondition to the existence of the tribunal's jurisdiction under the BIT. The claimant applied for annulment of the decision, and the *ad hoc* committee refused claimant's application on 14 July 2015;
- *Içkale Insaat Limited Sirketi v. Turkmenistan*:[9] the tribunal dismissed the claimant's claims in their entirety for lack of merit;
- *Garanti Koza LLP v. Turkmenistan*:[10] pending (each party filed a statement of costs on 22 January 2016); and
- *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan*:[11] pending (the tribunal issued Procedural Order No. 6 concerning the respondent's request on 29 September 2015 and the claimants' request of 1 December 2015 on 9 February 2015);

b two claims by Turkish companies against Uzbekistan regarding wrongful criminal prosecution and seizure of the claimant's assets and investment by the Uzbek authorities on the basis of tax evasion:

- *Federal Elektrik Yatırım ve Ticaret AŞ and others v. Republic of Uzbekistan*:[12] pending (the tribunal was reconstituted on 3 March 2016); and
- *Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan*:[13] pending (the tribunal issued Procedural Order No. 2 concerning the production of documents on 12 February 2016);

c *Karkey Karadeniz Elektrik Uretim AS v. Islamic Republic of Pakistan*:[14] pending (the tribunal issued Procedural Order No. 14 concerning the procedural calendar on 17 March 2016);

d *Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan*:[15] pending (the tribunal issued Procedural Order No. 2 taking note of the discontinuance of the proceeding with respect to Som Petrol Ticaret AŞ on 18 February 2016); and

e *Attila Doğan Construction & Installation Co. Inc. v. Sultanate of Oman*:[16] pending (tribunal not yet constituted).

III OUTLOOK AND CONCLUSIONS

The amount of international arbitration practice taking place in Turkey and the number of arbitration cases involving Turkish parties gained momentum during the course of the

8 ARB 10/01.
9 ARB 10/24.
10 ARB 11/20.
11 ARB 12/6.
12 ARB/13/9/
13 ARB/13/19.
14 ARB/13/1.
15 ARB/15/8.
16 ARB/16/7.

year. With Turkey's dynamic efforts to promote Istanbul as a regional arbitration centre and encourage choosing arbitration as the first method for dispute resolution in the construction, energy and financial services sectors, arbitration has been gaining popularity over the past couple of years. Complex and high-value projects such as the third Bosphorus bridge, Izmir Bay Bridge project, the third airport at Istanbul and Akkuyu Nuclear Power Plant have increased the project financing practice and involvement of international companies in Turkey, and for the most part, international arbitration has extended safer and faster dispute resolution processes when compared with litigation in the national courts.

ISTAC becoming operational and the establishment of the Istanbul Arbitration Association contributed to the public's awareness of arbitration and confidence in international arbitration in Turkey. These developments have had significant impact on the Turkish parties to multinational deals, and have aided the development of an understanding that arbitration might be preferable to litigation.

Endeavours to draft and pass legislation to ensure the establishment of a specialised chamber of the Court of Appeals dedicated to arbitration matters are ongoing. A significant number of renowned scholars and lawyers are advocating this change in order to reach a level of consistency and predictability in appellate-level decisions concerning arbitration. It is also anticipated that the establishment of such a specialised chamber of the Court of Appeals will eventually lead to a more clear and objective interpretation of the public interest concept.

Appendix 1

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Pelin Baysal is a partner in the commercial and corporate department of Gün + Partners. She has an LLM from Ruprecht-Karls University and an LLB from Ankara University Faculty of Law.

She concentrates on commercial and corporate law with a special focus on dispute resolution and arbitration, in particular, in insurance and reinsurance. She has advised on large-scale arbitrations and represented many international and local clients in high-value commercial disputes before the Turkish courts, including shareholder and partnership disputes, contractual claims, insurance and reinsurance, unfair competition, professional negligence and regulatory affairs.

She is recommended for commercial litigation, insurance and reinsurance in Turkey by several global publications and directories, including *The Legal 500* 2015 and *Chambers and Partners* 2014.

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