

# The Rise of the Mediation Method in Wealth Management

**Nur Khalidah Dahlan<sup>a</sup>, Ruzian Markom<sup>b</sup>, Rozlinda Mohamed Fadzil<sup>c</sup>,**  
<sup>a,b,c</sup>Faculty of Law, The National University of Malaysia,

Alternative Dispute Resolution, or ADR, is a process for resolving conflicts - one that respects the dignity of individuals while creating mutually satisfying solutions. ADR uses communication skills, collaboration, negotiation, and mediation to produce an agreement that meets the interests of the parties involved. Alternative disputes resolution method has appeared to be more in line with Islamic precepts that consist of consultation (shura), mediation and conciliation (Sulh), as well as arbitration. When participating in Alternative Dispute Resolution, parties maintain the right to seek agreement and settlement. Mediation enjoys consistently high satisfaction rates by participants. In Malaysia, the organisation bodies for mediation are the Malaysian Mediation Centre, Securities Industry Dispute Resolution Centre (SIDREC) and the Ombudsman Financial Service (OFS). All these centres are focusing on banking and financial instruments. There is an indication that ADR options can lead to more efficient use of resources by the courts, saving time and money for litigants, and reducing levels of subsequent litigation. This paper will focus on some of the organisation bodies that practice mediation which and have been successfully undertaken in the past. These practices are examples of those that can also be similarly applied in the future.

**Key words:** *Mediation, banking, financial instrument issues, Alternative Dispute Resolution.*

## General Concept of Mediation

Mediation is a voluntary process involving a neutral third party, known as mediator, to facilitate communications and negotiations of disputed parties. A mediator aids the involved parties in reaching a harmonious settlement according to agreed upon terms. In mediation, although the mediator facilitates their communications and negotiations, the parties are still encouraged to take active participation in the process such as identifying the issues in the dispute, generate options as solutions to the dispute, and make a final decision for the settlement of the dispute. Generally, the mediator will be acting as an independent and neutral



third party to guide the parties to negotiate an agreement with reciprocal rights and benefits. Once the parties come to a consensus, their final settlement will be refined into a mediation agreement and it will be signed by the parties. However, if mediation is unsuccessful, the parties may proceed to opt for other methods to resolve their dispute, such as litigation or arbitration yet any communications or disclosure made during the mediation process will not be admitted as evidence in any court proceedings (Section 16 of Mediation Act 2012 (Act 749)).

## **Introduction**

The Malaysian Mediation Centre (MMC) is established under the auspices of the Bar Council of Malaysia and based in Kuala Lumpur. It was established in 1999 with the objective of promoting mediation as a means of Alternative Dispute Resolution (ADR) and to provide a proper venue for successful dispute resolution through mediation. Additionally, MMC is a founding member of the Asian Mediators Association (AMA) which was incorporated in August 2007. Its members include Hong Kong Mediation Centre, Thai Mediation Centre, etc.

MMC handles every type of dispute except constitutional disputes and criminal matters hence including mediation on banking/ financial instruments. Other than MMC, the Securities Industry Dispute Resolution Centre (SIDREC) or Ombudsman Financial Service (OFS) also provide ADR for disputes arising from banking/ financial instruments.

The functions and modus operandi of the three institutes (MMC, SIDREC and OFS) will be explained and compared in this paper for an overall insight into the dispute resolution processes concerning financial/ banking instruments.

## **Mediation Methods under MMC Mediation Rules**

The mediation process conducted by the Malaysian Mediation Centre (MMC) is to be governed by the *Mediators Rules* and *Code of Ethics* [rule 1]. There are two parts in such a code which are the *Mediation Rules* and the *Code of Conduct*. There is no specific guidance on how to initiate proceedings for corporate and company disputes.

However, under Rule 3 of the Mediators Rules and Code of Ethics by MMC, it lays down the steps for initiation of mediation. Any or all parties to a dispute may initiate mediation by filing jointly with the MMC submission to mediation pursuant to these rules with a non-refundable processing fee of RM106.00. However, the process is typically initiated through an exchange of written submissions between the disputing parties. Since the mediator does not consider and evaluate the dispute's substance, the written submissions are really brief and simple, unless the parties have a need to inform each other about their positions. According to



Rule 4, the *Joint Submission* or the *Request for Mediation* shall contain a brief statement on the nature of the dispute, and information for all parties on the dispute and those who will represent them. Individuals should attend the mediation in person. If it involves corporate entities, the parties shall appoint representatives to the mediation who have the necessary authority to settle the dispute. Then, the parties will furnish the MMC and the Mediator with the names of the representatives at the pre-mediation meeting as stated in rule 9 of MMC. Besides, based on sub rule 4.2, the initiating party shall simultaneously file two copies of the request with the MMC and one copy with every other party to the dispute.

The next step usually involves arranging a joint meeting between the parties for them to communicate openly (Sanchez 1996). However, before mediation is carried out, the parties will enter into an agreement for appointment of a mediator according to Rule 7 MMC. After that, the mediator will determine the steps to be taken during the mediation proceedings after consultation with the parties. The parties will be deemed, upon signing the agreement to mediate, to have accepted and will be bound by the Mediator's Rules and Code of Ethics. During the meeting, the mediator will give a brief introduction about the role he is playing and about what they are going to discuss in the meeting. After a brief opening, the mediator meets privately with each party to know deeply what they need from the mediation. These meetings may be conducted through a "shuttle diplomacy." Usually, the mediator will ask an open-ended question about disputant's needs and their interests.

Often, the mediator learns information which a party does not want the other party to know about it. It is because, the information often concerns priorities and preferences that could help forge a solution. A mediator who receives such information may slowly discover the contours of an optimal agreement that the parties would, otherwise, have failed to see in ordinary negotiations because of their unwillingness to share information in the fear of being exploited or losing to the other party. The mediator will normally gradually move from exploration to negotiations.

The negotiations may be conducted in the presence of both parties or initiated in private meetings. It is totally up to each party's preferences. During the negotiation, the mediator monitors the communication process and tries to eliminate practical and psychological obstacles to a settlement. It is very important for the mediator to always remain neutral and avoid being seen as favouring one party only. The MMC shall fix the date and the time of each mediation session. The mediation shall be held at the appropriate office of the MMC or at any other convenient location as may be determined by the MMC [Rule 10].

Corporate disputes are as unpleasant as those between shareholders of close corporations. The resentment is most intense when the shareholders are members of the same family or



related families. Involvement in disputes drain personal energy from business pursuits and may result in substantial expenditures of time and money (Lewis D. Solomon; Janett, 1987).

### **Mediation on Banking / Financial Institution and Shareholders Disputes**

In Malaysia, the law governing mediation is enacted under the Mediation Act 2012 (the 'Act') with 20 provisions and a Schedule altogether. The Act contains various matters in relation to mediation, which includes the process of mediation, appointment of mediator, post-mediation effect, confidentiality and privilege of parties involved in mediation, and other matters such as costs of mediation, regulations and liability of mediator. Subject to Section 2 of Mediation Act, Mediation can be applied to all cases except cases listed in the Schedule of the Act such as constitutional matters, applications for temporary or permanent injunction, election petitions, judicial reviews, appeals and any criminal matters. It is clear that under the Act, various disputes on corporate, company and shareholders can be mediated. In addition, the Act is also inapplicable in the mediation proceeding conducted by judge, magistrate or officer of the court or by the Legal Aid Department. The Act also governs mediation session conducted by MMC.

As quoted by Datuk Sundra Rajoo during the SSM National Conference 2014 in Kuala Lumpur, 'disputes over the governance of a corporation are inevitable'. In general, corporate governance disputes involve corporate authority and its exercise. Normally, the parties involved may include the company's board of directors, shareholders or investors. When there is a dispute arising in between the above-mentioned persons, it will surely affect the companies' reputation and the directors' reputation in the public eye. Thus, this matter could potentially cause the companies to collapse and deteriorate. However, this is unlikely to happen if the disputed parties decide to opt for mediation as a settlement for the dispute that arises. It does not jeopardise the reputation and good name of a company.

### **Security Industry Dispute Resolution Center ('SIDREC')**

In Malaysia, some references can be made to Security Industry Dispute Resolution Centre ('SIDREC'), which is an alternative dispute resolution body for the Malaysian Capital Market founded by the Securities Commission of Malaysia. SIDREC is an independent dispute resolution body established with the responsibility to manage any disputes that occur relating to capital market products and services, which could involve monetary claims up to RM 250,000. SIDREC works similarly to the MMC, except that SIDREC is a specialised independent body working to resolve matters involving capital market disputes, while MMC does not have any specialisation in Mediation proceedings and may conduct any matters that require mediation.



SIDREC adopts a mediative approach from the start to the closure of a case. The case management team seeks to understand the issues and engage with the parties to resolve cases before they progress to mediation or adjudication. We have found this approach to be an effective one, with 91.2% (52 out of 57 eligible disputes) of the eligible disputes that went through our process in 2017, resolved through case management and mediation. Of these, 71.9% (41 out of 57 eligible disputes) were resolved through case management and 19.3% (11 out of 57 eligible disputes) were resolved through mediation (SIDREC Annual Report 2017).

As mediation in the capital market corporate setting is relatively new in Malaysia, most claimants experience mediation for the first time during SIDREC's process. Sometimes, it is also the first time for SIDREC members and their representatives. Given the emotions involved and often the lack of trust between parties and communication issues, we find that a lot of the first timers are sceptical of the process. We do have the challenge of managing claimants' expectations and sometimes misplaced demands on what SIDREC ought to be doing for them. At times, claimants confuse our process and role with that of legal counsel or the courts and at times, even the regulator. However, in the main, claimants are reasonable and are able to appreciate that the help provided can only be for matters within our purview and mandate.

SIDREC covers disputes involving regulated activities dealing in securities, derivatives, Private Retirement Schemes (PRS), and fund management. In addition, SIDREC also covers a situation where a person wants to lodge a complaint against any SIDREC Member involving a capital market product or service they provided where the complaint can be made by either call, email, letter, submitted applications via website or by lodging a complaint at their office. However, the monetary claims is limited to RM 250,000 and the complaint can only be made against SIDREC's members by the investors.

### **Ombudsman for Financial Services (OFS)**

As for the financial and banking industry, the Ombudsman for Financial Services (OFS) is the operator for the Financial Ombudsman Scheme (FOS) appointed by the Bank Negara Malaysia (BNM). Its aim is to resolve complaints and disputes between licensed Financial Service Providers (FSPs) who are members of FOS and their customers. By referring to Paragraph 4 of the OFS's Terms of Reference (TOR), members of FOS include licensed bank, licensed Islamic bank, licensed insurer and many more related issues.

For example, a settlement of claims which will take longer for the tragedy of the MH370 and MH17 in 2014 may cause legal action to be imposed on a general insurance company.



Therefore, the victims' family members may seek assistance from OFS in terms of their insurance claim to be resolved (Mustazar Mansur, Alias Radam & Yuslindal Yaakub 2017). The legislative provisions that regulate the FOS include the Financial Services (Financial Ombudsman Scheme) Regulations 2015, Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015 and Development Financial Institutions (Financial Ombudsman Scheme) Regulations 2016. The TOR, which is consistent with these regulations, set out the scope of the FOS which include the terms of membership, types of disputes, the Award that may be granted by OFS, and the procedures and timeframe for a dispute to be referred to the FOS.

A simple explanation about the mediation process conducted by these three organisations (the Malaysian Mediation Centre (MMC), Security Industry Dispute Resolution Centre ('SIDREC') and Ombudsman for Financial Services (OFS)) is referred to in Table 1.

**Table 1: The services / products offered by MMC, SIDREC and OF**

Institution	Products/ services offered by the Institution
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<p><b>MMC</b></p>	<p>MMC offers a comprehensive range of services which include:</p> <ul style="list-style-type: none"> <li>a) Professional mediation services by trained mediators who have been accredited and appointed to the Panel of Mediators of the MMC;</li> <li>b) Assistance and advice on how clients may best look after their interests in using Alternative Dispute Resolution processes such as mediation;</li> <li>c) Provides training in mediation techniques, accredits and maintains a panel of mediators;</li> <li>d) Consultancy services in dispute management and conflict avoidance; and</li> <li>e) Administrative and secretarial support.</li> </ul> <p>MMC handles every type of disputes except constitutional disputes and criminal matters.</p>
<p><b>SIDREC</b></p>	<p>SIDREC deals disputes between investors and SIDREC members. Capital market products that come under SIDREC's purview include all securities (such as shares, unit trusts, warrants, bonds, structured products such as structured warrants etc.), derivatives (e.g. futures or options) and Private Retirement Schemes (PRS).</p> <p>It offers dispute resolution service that comprises of mediation and adjudication. The resolution will proceed with adjudication if the mediation fails to solve the problem.</p>
<p><b>OFS</b></p>	<p>OFS offering a free of charge services to financial customer. Financial customers may refer their disputes with the FSPs to the OFS for resolution provided the disputes fall within the scope of the FOS.</p> <p>Instances of the disputes between customers and FSPs include Life insurance claims, claims arising from ATM because of short of cash, claim arising from Hire-Purchase, etc.</p> <p>OFS may use negotiation, conciliation/ negotiation or adjudication in resolving the disputes</p>

**Source:** MMC, SIDREC and OFS

**Future Solution: Sulh (Islamic Mediation) in Wealth Management**



Salleh Buang (2002) explains that sulh in other terms is a mediation method. Mediation methods can be defined as "the process in which one party (third party or mediator) helps two parties to dispute with one another negotiating and reaching a peaceful settlement".

Sulh (mediation) method had been applied in the Shariah Court by the Malaysian Syariah Judiciary Department. As for the procedures, we will refer to The Sulh Manual that was published in 2002. The Sulh Manual contains procedures combination of the mediation method and conciliation method. It is also contained the code of conduct for judicial officers operating the sulh. Most of the Sulh method rules practiced in Malaysia only rely on disputes in family matters in the Shariah Court.

Mediation is also a traditional method of reconciliation in Islam and is mentioned in several verses of the Quran. Sulh is usually conducted in an informal manner, but can be facilitated by an institution. Unlike in international arbitration or litigation, mediation does not result in a binding award or judgment. At the conclusion of the mediation process if the mediation has been successful, the parties draft and sign a contract that reflects the settlement terms (Lawrence, Morton & Khan 2012).

According to Su'aida Safei (2009), the Sulh Council (Majlis Sulh) is part of the procedure in the Shariah Court in Selangor based on section 99 of the 2003 Enactment. The Sulh Council can be conducted at any stage of the proceedings either in the Shariah Subordinate Court or Shariah High Court in Selangor. However, the case must be filed in any court before going through the Sulh Council process. The implementation process of the Sulh Council is as provided in the Sulh Manual.

Consequently, to prove that Sulh's approach to resolving disputes related to Islamic finance can be implemented, research by Nur Khalidah Dahlan (2017) regarding this matter had been done. The research conducted a simulation of court cases adapted in resolving disputes using the sulh method. A proposed Sulh Manual for Islamic finance is also being suggested in this research in order to be applied to solving the problems or disputes faced by the parties without having to go through court proceedings in court or through other alternative dispute resolution methods (Nur Khalidah Dahlan 2017).

## **The Advantages of Mediation**

(a) Time and Cost Effectiveness

According to Newton (2012), mediation is well known as a cost-effective method in resolving a dispute that occurs between the parties where this method works to reduce the expenses incurred in resolving a dispute. As compared to litigation, where the parties brought the disputed matters before the court, mediation is a comparatively faster method where both of the parties negotiate with one another with the help of an independent third party, the mediator, to help the parties to reach a mutually acceptable agreement to settle the dispute arises. The main reason behind the cost and time effectiveness of mediation is due to the informal process adopted in resolving dispute and this method requires lesser time in solving the dispute (Chandran 1999). Due to the fact that a dispute is somehow inevitable in a contract or relationship, it should be resolved as soon as possible before it generates negative effect to the project success.

Hence, mediation helps the parties to solve the dispute in shorter time compared to the usual litigation proceeding for which a dispute or disagreement may take years to resolve. For example, in litigation, if one party disagrees with the judgement made by the court, he may opt to appeal the decision to higher courts, which may take a longer time to be resolved. Differing from the legal proceedings, both of the parties in a dispute will sit down together to solve the matter amicably by negotiation with the help of a mediator. The proceeding gives an advantage to the parties by solving the matter in a quicker way.

(b) Flexible Process

Next, one of the advantages of the mediation process is that it is very flexible, where the parties can control the proceeding and all of the procedures can be modified to meet the needs of a particular case (Chandran 1999). The flexibility of mediation also gives the parties involved some options as to when and where the negotiation should take place. Such flexibility is also applicable to the language used during the mediation proceedings, where in the absence of agreement of parties in dispute, the director may determine which language to be used to conduct the mediation or he may invite a mediator to do so after he is confirmed or appointed.

Apart from that, the flexibility can be seen in the appointment of the mediator. The parties have the total freedom to appoint their preferred mediator, who is willing to serve and who is not disqualified, where the parties will jointly nominate that person as the mediator for the Director's confirmation. The disputant parties can also decide the session to be conducted formally or informally, dependent on the type and nature of disputes (Boulle 1996). The parties can also withdraw from the process at any time if they wish. It is a process that allows you to have more control over the outcome of your dispute.

(c) Privacy and Confidentiality

Mediation proceedings ensure the privacy and confidentiality of both parties. The proceedings will be conducted in private where all parties in the proceeding are required to execute a written undertaking to give effect to this requirement. In maintaining the confidentiality of the proceeding, the parties also have the options to exclude any other person other than mediator and/or co-mediator to attend, hear or view any part of the mediation or any communication in relating to the mediation. In addition, all information given to a mediator by a party in a private session shall be kept confidential and will not be disclosed to the other party unless if the party who provides the information consents to its disclosure of the information to the other party. No information provided during the process can be used against the party providing it. All disclosures, communications and even admissions made under a mediation session are strictly “without prejudice” or privilege, it is not subject to discovery or to be admissible in evidence in any proceedings unless both parties consented to it.

### **The Disadvantages of Mediation**

(a) Both parties must agree to mediate

One of the disadvantages of mediation is both parties involved in the proceeding need to mutually agree with the decision made. However, the proceedings may be difficult if both parties have not reached a consensus, and this will indirectly extend the mediation period. The extension of the mediation period will also indirectly defeat the main objective for both parties to avoid the high cost of litigation. Where the mediator may suspend or terminate the mediation or resign as mediator without providing reasons for the resignation when he reasonably believes that the matter is unable to be resolved. For example, when the parties unable to participate meaningfully and reasonable in mediation or if the proceedings would cause significant harm to any of the party.

(b) Mediation lacks the procedural and constitutional protections guaranteed by the federal and state courts

One result of the confidential nature of mediation proceedings is that it has prevented the establishment of a useful body of case law on mediation decisions. Besides, since the mediation proceeding needs to be voluntary and it is a non-binding process with no force of law, the method may seem weaker (Velu 2011) as compared to the litigation proceeding, where the judgement derived from the court is binding to the parties and failure to abide with the judgement may result in contempt of court. As for mediation, the parties are not bound to

comply with the resolution made. Hence, if one of the parties changed their mind not to accept the resolution made during the mediation proceedings, the other party is unable to enforce the resolution made.

(c) The Irrevocability of the Mediation Could Be Questioned

Parties to a settlement agreement may attempt to dispute the settlement agreement and still end up filing suit in court regarding the legitimacy of the settlement agreement. By filing suit, the party has created a new dispute and denied the resolution of the underlying dispute that led the parties to a mediator. It is also possible to give a mediation agreement enforceability by contract. It can be done when a settlement has been reached by the disputants, heads of agreement are usually drawn up at the mediation by the mediator or the parties themselves; the disputants will usually then have the terms checked by their solicitors before signing. Once agreed in contractual form, an offending party can be sued for breach of contract.

In reference to *PM Securities Sdn Bhd v Securities Industry Dispute Resolution Centre (Securities Commission, intervener)* and another application (2016), the applicant applied an order for certiorari to be issued to quash the decisions of mediator and adjudicator of SIDREC.

The respective parties in this case were a stock broking company ('the Applicant') who is a participating organisation defined under the Rules of Bursa Malaysia Securities Berhad ("Bursa"), the Capital Markets and Services Act 2007 ("CMSA") and Securities Industry Act 1993 (prior to CMSA coming into force). SIDREC who is a dispute resolution centre resolves disputes between investors and capital market intermediaries who were registered as its members and the last party is the Securities Commission (SC).

The issues in this particular case were touched on judicial review application. The governing principle in judicial review is that the review is restricted to the decision-making process, and not the merits, substance or justification of the decision in question. Therefore, it is not the function of this Court at this stage to look at the correctness of the decision, action or omission but rather with the way the decision, action and omission was arrived at.

The findings of fact made by SIDREC in view of the fact that a judicial review is not an appeal from a decision but rather a review of the decision-making process. There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the decision maker. Appeals lie on fact and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process.

The court decided that the issues that were presented by SIDREC and SC, the decision of the 1st Respondent did not suffer from serious infirmities of illegality, irrationality and/or procedural impropriety to merit curial intervention. For the above-mentioned reasons, court allowed costs of RM15,000.00 to be awarded to SIDREC and SC in each case.

**Table 2: The advantages and disadvantages of Mediation method**

No.	Advantages of mediation method	Disadvantages of mediation method
1	<p><u>Cost-Effective</u> As opposed to due process, ADR options have no cost. Alternative Dispute Resolution does not involve the use of attorneys.</p>	<p><u>Must obtain approval by all the parties involve</u> Difficult if both parties do not have a consensus in making decision, and this will indirectly extend the mediation period. The extension of mediation period would also indirectly defeat the main objective of both parties to avoid the high cost of litigation.</p>
2	<p><u>Fast and Efficient</u> The ADR process is initiated after the administration process had been done.</p>	<p><u>Lacks the procedural and constitutional protections</u> The parties are not bound to comply with the resolution made. Hence, if one of the parties changed their mind not to accept the resolution made during the mediation proceedings, the other party is unable to enforce the resolution made.</p>
3	<p><u>Flexible Process</u> Satisfying Alternative Dispute Resolution uses neutral intervention and support to assist the two parties in reaching a mutually agreeable solution. A safe, collaborative working relationship is developed and supported, building trust between the parties.</p>	<p><u>The Irrevocability of the Mediation Could Be Questioned</u> If the parties or one of the party had breach the mediation agreement, a suit will be likely to be commence. By filing suit, the party has created a new dispute and denied the resolution of the underlying dispute that led the parties to a mediator.</p>
4	<p><u>Confidential</u> All information shared or collected through the ADR process is held confidential unless both parties agree to release it.</p>	

**Source:** Author

Mediation as an alternative does not lose sight of settlement; it does not, however, hold settlement as the core value. Settlement is only one possibility of many valuable outcomes.



Other positive outcomes include: the ability to speak, to be heard, and to talk about what may be irrelevant in the litigation process, but very important to parties; narrowing of important issues; clarity about what is most important to the participants; freer more unfettered conversation between the participants; better understanding of those involved and their situations; good faith restored; reputation and stature strengthened; and agreements based on genuine terms created by the participants, both pecuniary and non-monetary (as mentioned in Table 2).

## **Conclusion**

Mediation is usually carried out by the Malaysia Mediation Centre (MMC). However, parties who have disputes relating to banking and financial institution can bring their disputes to Ombudsman for Financial Services (OFS). In addition to that, SIDREC is also one of the mediation bodies that cover disputes involving regulated activities for dealing in securities, derivatives, Private Retirement Schemes (PRS), and fund management. Now, the way forward is also to venture in Sulh with regard to wealth management issues. All the steps taken in the sulh to solve the dispute in family matters have alleviated the burden of the parties becoming involved with the courts (in terms of time, cost and mutual agreement). Disputes that are often solved by the sulh method are disputes related to financial matters such as child custody, maintenance of families, and property of austerity. However, the sulh method does not restrict the types of disputes to be resolved. Any dispute encountered by the parties involved who intend to resolve them in a short time can be through this method. The sulh method can also be adapted to resolve all disputes related to Islamic finance in the future. In this regard, suggesting an appropriate alternative legal approach that is sulh in solving problems in line with the development of Islamic finance can be met.

## **Acknowledgement**

This paper is part of a project funded by Geran Galakan Penyelidik Muda (GGPM): GGPM-2017-027. The authors would like express gratitude for the comments and suggestions from their colleagues from Faculty of Law, UKM.

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