

Dispute Resolution

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South Africa

- When does an arbitration clause actually apply? Lessons from *DIRCO v Neo Thando/Elliot Mobility*
- Big brother in the boardroom: Is “bugging” the office lawful under RICA?



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When does an arbitration clause actually apply? Lessons from *DIRCO v Neo Thando/Elliot Mobility*

The Supreme Court of Appeal (SCA) case of *The Minister of International Relations and Cooperation NO and Another v Neo Thando/Elliot Mobility (Pty) Ltd and Another* (444/2023) [2024] ZASCA 134 (04 October 2024) provides a cautionary reminder that the existence of an arbitration clause in an agreement does not mean that every claim or issue in relation to that agreement can automatically be referred to arbitration.

The facts

In brief, the Department of International Relations and Co-operation (DIRCO) appointed Neo Thando/Elliot Mobility Proprietary Limited (Neo Thando) via a service-level agreement (SLA) to store and manage household goods of officials who are transferred abroad. Under the SLA, Neo Thando was required to take possession of goods that were with DIRCO's previous service provider, AGS Frasers/Gin Holdings (AGS Frasers). AGS Frasers refused to hand over the goods to Neo Thando.

Neo Thando issued a letter of demand to DIRCO claiming over R53 million in damages and stating that if DIRCO did not pay, Neo Thando would prefer to submit the matter to arbitration and asked DIRCO to confirm within 30 days whether it agreed to arbitrate, failing which, Neo Thando would issue summons out of the High Court.

DIRCO did not respond within the time period in the letter of demand and Neo Thando unilaterally referred the matter to arbitration.



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In its response to the letter of demand, sent 28 days after the time-period stipulated for a response in the letter of demand, DIRCO indicated that it did not believe there was any dispute to arbitrate and accordingly did not agree to arbitration, as required by the SLA. DIRCO further indicated it would appear before the appointed arbitrator only to challenge their jurisdiction to entertain the alleged dispute.

DIRCO challenged the arbitrator's jurisdiction on *inter alia* the following bases:

- The SLA outlined the circumstances under which a matter could be referred to arbitration, which required that both parties expressed a wish to refer the dispute to arbitration, but Neo Thando had done so unilaterally. Neo Thando also had not alleged the existence of a "*difference or dispute*" in its letter of demand that it wished to refer to arbitration.
- The SLA further provided that a party wishing to refer a dispute to arbitration must provide written notice to the other party identifying the dispute to be arbitrated. No such notice was given by Neo Thando. Its letter of demand merely sought payment of damages.

The arbitrator concluded that he had jurisdiction, confirmed in an interim award, and proceeded to make a final award against DIRCO.

The SCA's legal analysis

DIRCO unsuccessfully challenged the awards in the High Court, prompting DIRCO's appeal to the SCA.

The SCA held that the period of time that had elapsed (58 days between the letter of demand and the purported referral) was insufficient to infer on a balance of probabilities that DIRCO intended to reject the demand. Moreover, the SCA held that, due to the drafting of DIRCO's letter of demand, DIRCO's delay in response may have, if anything, warranted Neo Thando's institution of summons against DIRCO, not arbitration proceedings. Nevertheless, the SCA emphasised that DIRCO's delay in response could not be deemed to be an agreement to Neo Thando's preference that the matter be arbitrated.

The SCA overturned the High Court judgment and set aside the arbitration awards on the following bases:

1. A dispute must exist before arbitration can be triggered

The SCA emphasised that arbitration is a mechanism designed to resolve disputes, and arbitration agreements, including clauses in contracts, require an existing dispute before arbitration can occur. A demand for payment, by itself, does not constitute a dispute.



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Neo Thando's letter of demand did not expressly identify any "*difference or dispute*". It merely demanded payment and stated a preference to arbitrate in the event that DIRCO did not pay as demanded. When Neo Thando proceeded to arbitration a month later, no dispute had crystallised due to the failure of the parties to express differing views.

2. Neo Thando could not unilaterally refer the matter to arbitration

The SLA provided for arbitration "*if the parties wish to arbitrate*". The SCA held that this wording required mutual agreement between the parties to arbitrate a dispute, not unilateral referral by one party. Reading the clause as permitting one party to force the other into arbitration would be "*unbusinesslike*".

3. No "difference or dispute" was identified in Neo Thando's letter of demand

Even if a dispute had existed, Neo Thando failed to issue written notice identifying the "*difference or dispute*" to be arbitrated, which was an express contractual requirement under the arbitration clause.

Strategic lessons: Arbitration is not automatic

This case confirms the well-known principle that not every claim or issue arising from a contract containing an arbitration clause is automatically arbitrable. Parties often insist on arbitration clauses to secure advantages in dispute resolution, such as:

- confidentiality;
- expedited process (often with an agreed timetable);
- (normally) no right of appeal unless agreed; and
- possibility of a joint appointment of an arbitrator.

However, these benefits only materialise if the issue is one that can lawfully be arbitrated.

Crucially, if arbitration is pursued without proper jurisdiction, the process wastes time and costs and may, in a worst-case scenario, even result in the claim prescribing while the parties are engaged in what ultimately turns out to be an invalid arbitral process.



How to ensure you have an arbitrable dispute

If a party wishes to trigger arbitration, they must first ensure that a crystallised dispute exists and then they must follow the contractual procedure, including any pre-arbitration steps that are required (such as the parties first meeting to try and resolve matters) and ensure that there is a valid referral to arbitration. If there is doubt as to whether a dispute exists, a useful first step is to write to the counterparty demanding the performance or payment owed. If the counterparty disputes the demand in their response, a dispute arises, at which point arbitration can validly be pursued.

This approach ensures that the party seeking arbitration does not stumble into the jurisdictional trap highlighted by the SCA.

Key takeaways

- **An arbitration clause is not automatically applicable:** Not all claims or issues arising from a contract are automatically susceptible to arbitration.
- **Mutual consent may be required:** Where the contract requires agreement between the parties to arbitrate, a party's unilateral referral may undermine the jurisdiction of the arbitrator and render the process invalid.
- **Choosing the incorrect forum has real risks:** Proceeding to arbitration prematurely or without the requisite jurisdiction may lead to wasted costs, invalid awards and – in a worst-case scenario – potential prescription of the claim.
- **Be strategic when triggering arbitration:** It is sometimes necessary to first generate a clear dispute before initiating arbitration.
- **Act carefully at the outset:** Determining the correct forum (court vs arbitration) at the outset is critical to preserving rights, and avoiding delay and unnecessary costs.

**Timothy Baker, Lara Sneddon,
and Haydon Anderson**

Big brother in the boardroom: Is “bugging” the office lawful under RICA?

In today’s world, where business interactions are increasingly conducted over digital platforms and easily recorded devices, questions about the lawfulness of such recordings as well as their admissibility in court proceedings have become ever more pressing.

This alert examines the lawfulness of recording conversations/meetings in the workplace, the interplay of certain rights protected under the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA) and Protection of Personal Information Act 4 of 2013 (POPIA), the potential civil and criminal consequences of non-compliance with such legislation, and the evolving treatment of electronic recordings as evidence in litigation.

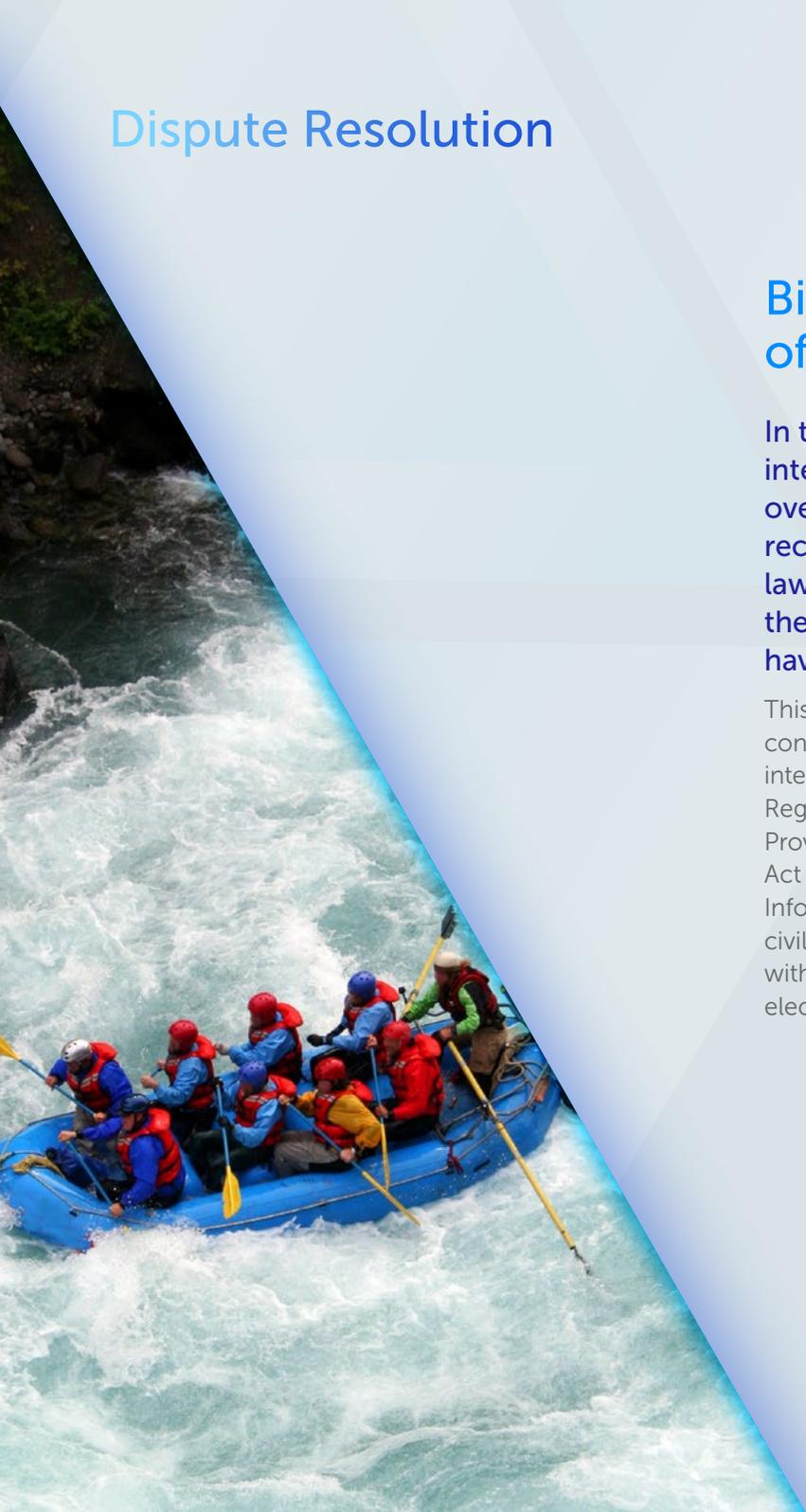
Must everyone in a meeting or conversation agree to have it recorded?

The recording of meetings and conversations is governed by RICA.

In terms of section 1, to “intercept” communication between parties means:

“[T]he aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication, and includes the – (a) monitoring of any such communication by means of a monitoring device; (b) viewing, examination or inspection of the contents of any indirect communication; and (c) diversion of any indirect communication from its intended destination to any other destination.”

“Interception device” is defined to mean any electronic, mechanical or other instrument, device, equipment or apparatus which is used or can be used, whether by itself or in combination with any other instrument, device, equipment or apparatus, to intercept any communication.



Sections 4 and 5 of RICA provide, respectively, that any person who is a “party to the communication” may intercept such communication, or if one of the parties to the communication has given prior consent in writing to such interception, unless it is being done for purposes of committing an offence.

A “party to the communication” includes a person who might be listening but not actively participating in the communication.

Therefore, any person who is a party to the communication can record a meeting or conversation without the consent of the other parties to the communication, unless it is being done for purposes of committing an offence. Therefore, not everyone in a meeting or part of a conversation needs to consent to the meeting or conversation being recorded, provided the requirements of section 4 of RICA have been met.

The right to privacy and POPIA

In an instance where a party to the communication records a conversation or meeting without the consent of the other parties (as they are allowed to do in terms of RICA), an issue that naturally arises is the non-consenting participants’ (whether they were given an opportunity to consent or not) right to privacy.

Section 14 of the Constitution entrenches the right to privacy, which includes to not have one’s communications infringed. POPIA creates civil liability for the infringement of the right to privacy.

In respect of the right to privacy, the Constitutional Court has held that:

“Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that, once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home.”

Therefore, in a business setting, it is arguable that, by being at a meeting, one accepts that their right to privacy may be compromised i.e. in terms of their images and words being recorded. Applying the same logic, such limitation of one’s right to privacy may similarly apply to conversations between colleagues, and between employer and employee, in the shared workspace.

Therefore, in a business meeting context, there might be scope to limit the right to privacy where a recording is made by a participant to the meeting.

Another factor to consider is whether confidentiality has a role to play in respect of recording meetings and distribution of such recordings to third parties. Certain information, such as a company’s proprietary information and trade secrets, are by their very nature confidential. If any confidential information is shared during a meeting which is recorded, and such recording is disclosed to third parties, such conduct may lead to civil liability on the part of the disclosing party, but may not constitute non-compliance with legislation, unless it also constitutes non-compliance with POPIA.

Consequences of non-compliance with RICA

Section 49(1) of RICA provides that any person who intentionally intercepts or attempts to intercept, or authorises or procures any other person to intercept or attempt to intercept any communication in the course of its occurrence or transmission, is guilty of an offence. Subsection (2), however, provides that subsection (1) does not apply to the interception of a communication as contemplated in, *inter alia*, sections 4 and 5.

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Section 51(1)(b)(i) provides, *inter alia*, that a person who is convicted of an offence referred to in section 49(1) is liable to a fine not exceeding R2 million or to imprisonment for a period not exceeding 10 years.

Therefore, if interception of communication falls outside the scope of sections 4 and 5 of RICA, such conduct is an offence under RICA and punishable by fine or imprisonment. Therefore, the "bugging" (i.e. recording of conversations by persons not a party to such communication, as defined) of offices or meeting rooms is likely to fall outside the ambit of section 4 (and of course section 5, if no written consent was provided prior to such interception), and accordingly is likely to be prohibited by RICA, be unlawful and constitute an offence in terms of RICA.

The admissibility of intercepted communications

In the current legal landscape, there is some uncertainty as to whether audio and video recordings constitute real or documentary evidence. Real evidence is defined as an object which is itself evidence (such as a weapon, or the appearance of a witness in the witness box). Real evidence usually owes its efficacy and relevance to a witness who explains it.

Documentary evidence, on the other hand, is information recorded in some form, traditionally on paper, but now also electronically. There is no single way to define a "document", although some case law has defined it as "any written thing capable of being evidence". The Electronic Communications and Transactions Act 25 of 2002 (ECTA) recognises that information is often created and stored digitally, and has accommodated such developments in technology by creating a new type of evidence, namely a "data message" to cover electronic records such as stored files and recordings.

Our courts have generally leaned toward treating such electronic material as documentary evidence, on the basis that digital information can be edited or manipulated. The basic rules governing the admissibility of a document generally are that the original document must be produced and the document must be authenticated. In other words, a witness must explain where the document came from, how it was created and that it has not been tampered with. The ECTA also makes it clear that electronic evidence cannot be excluded simply because it is digital or because the original device is not produced, provided it is the best evidence reasonably available.



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A further issue is whether electronic records constitute hearsay evidence. Hearsay evidence is evidence that relies on someone else's credibility rather than the person presenting it. On this issue, our courts have taken a practical approach: if the evidence depends on what a person said or recorded, then the normal hearsay rules will apply. If the evidence is generated by a computer system itself, it may be admissible (i.e. not hearsay evidence), and the court will attribute the relevance and weight to be placed on such evidence having due regard to other evidentiary rules.

Key takeaways

Lawfulness of recording conversations and meetings:

A person who is a "party to a communication" may lawfully record a meeting or conversation without the consent of the other participants, provided it is not done for an unlawful purpose (as permitted under sections 4 and 5 of RICA). A "party to the communication" is broadly defined and can include someone who is listening but not actively participating. Secretly recording a conversation to which you are not a party, and without prior written consent, generally constitutes unlawful interception and an offence under RICA.

The right to privacy is not absolute, but it is not irrelevant: Even where recording is lawful under RICA, privacy rights remain relevant. The constitutional right to privacy is not absolute and is attenuated in business and social contexts. In workplace and meeting settings, there may be a reduced expectation of privacy, potentially justifying participant-made recordings. POPIA can give rise to civil liability if a lawful recording nevertheless infringes privacy rights through improper processing or disclosure of personal information.

Confidentiality is distinct from legality: A participant may still lawfully record a meeting even if it is confidential. However, distributing recordings that contain confidential or proprietary information can lead to civil claims (interdict and damages).

Admissibility of recordings engage the ordinary hearsay rules: Meeting recordings are not automatically admissible but, if admissible, may have to withstand the scrutiny of being declared hearsay evidence by a court. Additionally, over and above relevance to the matter, the weight to be given to such evidence will also have to be assessed by the court considering the matter.

Lucinde Rhoodie, Muwanwa Ramanyimi and Lara Sneddon



OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa, Kenya and Namibia, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Patrick Kauta

Managing Partner | Namibia
T +264 833 730 100
M +264 811 447 777
E patrick.kauta@cdhlegal.com

Imraan Abdullah

Director:
Dispute Resolution
T +27 (0)11 562 1177
E imraan.abdullah@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Denise Durand

Director:
Dispute Resolution
T +27 (0)11 562 1835
E denise.durand@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Nastascha Harduth

Sector Head: Corporate Debt,
Turnaround & Restructuring
Director: Dispute Resolution
T +27 (0)11 562 1453
E n.harduth@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Annemari Krugel

Director:
Dispute Resolution
T +27 (0)11 562 1709
E annemari.krugel@cdhlegal.com

Mercy Kuzeeko

Director:
Dispute Resolution
T +26 (4)83 373 0100
E mercy.kuzeeko@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Nomlayo Mabhena-Mlilo

Director:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Sentebale Makara

Director:
Dispute Resolution
T +27 (0)11 562 1181
E sentebale.makara@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Khaya Mantengu

Director:
Dispute Resolution
T +27 (0)11 562 1312
E khaya.mantengu@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Lebogang Makwela

Director:
Dispute Resolution
T +27 (0)11 562 1057
E lebogang.makwela@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Sector Head:
Consumer Goods, Services & Retail
Director: Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Rimo Benjamin

Counsel:
Dispute Resolution
T +27 (0)11 562 1716
E rimo.benjamin@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

ONGWEDIVA

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.
T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

WINDHOEK

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

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