

HONG KONG / JUDGMENT

L. v. W

COURT

Family Court

DECIDED

31 May 2007

CASE / FILE NUMBER

FCMC9692/2006

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bjbj FCMC 9692 / 2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 9692 OF 2006

BETWEEN L Petitioner and W Respondent

Coram : Deputy District Judge T Chan in Chambers (Not Open to Public) Date of Hearing : 18 May
2007 Date of Reasons for Decision : 31 May 2007

REASONS FOR DECISION

Introduction

1. This is a Summons taken out by the respondent husband (hereinafter to be called) on 27th September 2006 (this Summons). By the Summons, H asks that the Petition for Divorce (the Petition) issued by the petitioner wife () on the 8th day of August 2006 be dismissed for lack of jurisdiction, or in the alternative, be stayed on forum non-conveniens, namely United State of America (the US) is a more appropriate forum for the hearing of all matters between the parties.
2. The application is opposed by W. History of Marriage and these Proceedings
3. I set out a brief account of the history of the marriage relevant to this application herein below on the basis of the undisputed facts as revealed from parties latest affirmations.
4. H was born and brought up in the US. W was born in Hong Kong and emigrated to the US in 1977 when she was 4. The parties met in Philadelphia when both were doing their Senior Year of High School in 1991. They were engaged in 2000 in Atlanta and were married in Philadelphia in September 2002. H is a neurologist who has completed his four years of

residency training in Atlanta in 2003 and got a job in Cleveland, Ohio since May 2004. W is a journalist having been working in New York, Tai Wan and Hong Kong between 1996 to 1999 (one year each in Hong Kong and Tai Wan in 1997-1998); and Atlanta since 1999 before getting married. The parties have stayed in Cleveland since 2004 basically, I do not think H would deny, because of H's job opportunity and his LRP grant commitment thereat. They had two twin boys (the Children) born in Cleveland in July 2004. W has stayed mainly in the US since her emigration in her childhood apart from her job opportunities in Asia as mentioned earlier. She had paid several other visits here on holiday as well.

5. W got a 2-year contract to work in Hong Kong between 8th August 2005 to 7th August 2007 and she came here in August 2005. H came also in November 2005 bringing along with him the Children and returned to the US by himself. The Children stayed with W here in Hong Kong pursuant to an express agreement between the parties for the Children to stay with W in Hong Kong for a period of two years up to August 2007. The marriage did not work out and eventually W issued the Petition in Hong Kong on 8th August 2006. H in his Form 4 filed on 15th September 2006 indicated that he would defend the case and would dispute the jurisdiction of the Hong Kong Court and / or the appropriate forum in these proceedings. At about the same time, H started proceedings for divorce in the Cuyahoga County Court of Common Pleas, Ohio, (the Cuyahoga County Court in Ohio) case no : DR
6. Since then the parties have been engaged in a series of litigations in Hong Kong. W commenced wardship proceedings in Hong Kong on 22nd September 2006. The order was not served and had then lapsed. H took out this Summons on 27th September 2006 whilst W took out a summons seeking non-removal of the Children and asking for interim maintenance for the Children on 9th October 2006. Both summonses were stayed pending hearing of H's application issued on 19th October 2006 under the Hague Convention proceedings seeking the removal of the Children from Hong Kong on the ground that the Children had been wrongfully retained here. H's application was dismissed by the Court of Appeal on 13th February 2007 as their Lordships found that the Children were not wrongfully retained in Hong Kong. They were here by parties' consent instead. It is also found that Hong Kong is the habitual residence for the Children. The said two summonses of the parties were then restored after the decision. This hearing is for the summons by H on Jurisdiction and forum. H's proceedings in the Cuyahoga County Court in Ohio have been put on hold pending the decision of this court on this Summons. The Legal Principles :
7. Parties have no argument on the legal principles determining issues on forum. It is not disputed that Rambas Marketing Co LLC v. Chow Kam Fai David [2001] 3 HKC 250 has succinctly summarised the legal principles on deciding whether the Hong Kong Court is a forum conveniens or otherwise. Recorder Geoffrey Ma SC, as he then was, stated at pp 253-254 that: Court's approach in stay applications ..The basic principles originate in recent times from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. I have already alluded above to the fact that the court will not even begin to exercise its discretion to stay until it is satisfied that there exists an available alternative forum. In *Spiliada*, at 474 C D and 476C,

Lord Goff of Chieveley (by reference to the judgment of Lord Kinnear in *Sim v Robinow* (1892) 19 R 665) the alternative forum as that in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. In *Hong Kong*, the court's approach is dealt with in the judgment of Lord Hale in *The Adhiguna Meranti* [1987] HKLR 904 at 907 F 908 B, setting out a 3-stage summarizing the effect of *Spiliada* (the page references are to the report of that case in [1986] 3 WLR) :

- (1) Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong (p. 986 H). The evidential burden is here upon the applicant. The emphasis is upon appropriate rather than convenient because this is not simply a matter of practical convenience. The purpose is to identify the forum with which the action has the most real and substantial connection per Lord Keith in the *Abidin Daver* [1984] AC 398. The principal factors are enumerated at p. 987 D. Failure by the applicant at this stage is normally fatal.
 - (2) If the answer to (1) is yes, will a trial at this other forum deprive the plaintiff of any legitimate personal or juridical advantages? (pp. 987F, 991 3). The evidential burden here lies upon the plaintiff (pp. 986 A and 987 G).
 - (3) If the answer to (2) is yes, a court has to balance the advantages of (1) against the disadvantages of (2), *Abidin Daver* per Lord Brandon at p. 419 Argument for H
8. At the hearing of this Summons, on behalf of H, Mr Clough submits, in gist, that H is not to dispute that at the time of the Petition being issued, the courts of Hong Kong did have the jurisdiction. He argues that Hong Kong is not the natural and appropriate forum and / or there is a more appropriate forum to which the Hong Kong courts should defer. In support of his argument, Mr Clough contends that W is an American citizen who came to Hong Kong on a temporary assignment, who is about to return in 3 months time to the US where she has been habitually and ordinarily resident since her childhood, H has no connection in Hong Kong, parties have no assets in Hong Kong, W has entered into a 3 year agreement with GM Management that fixes her career in the US for the next 3 years, H and W will earn their living in the US, the Children who were born in Ohio will cease to be habitual residents of Hong Kong the moment they leave in August 2007. Mr. Clough admits that W has been issued an Identification Card of Hong Kong in October 2006 after the filing of the Petition but says that it would not save W's connection with Hong Kong from getting weaker after her departure in this August.
9. Basically he submits that it would be absurd if the divorce and its ancillary matters of two Americans who are not present in Hong Kong is to be decided by the Hong Kong Court. He highlights the disadvantages of having the divorce proceedings to be determined here. They include that the Hong Kong Court would not be familiar with the costs of living in the US, the US taxation systems, the US education system and information of particular school the Children will be attending as they grow up, relevant documents are all in the US, parties will have to face the difficulties of giving instructions to their lawyers who are thousands of miles

away with time difference and that both parties might have to come back to Hong Kong to attend court hearings.

10. Mr Clough says that for the reasons aforesaid, not only the Hong Kong Court is not the natural and appropriate forum, the Cuyahoga County Court in Ohio is the available forum which is clearly and distinctly more appropriate than Hong Kong as it has the benefit of geographical proximity and familiarisation to local background and issues relevant for a decision. Argument for W
11. The argument put forward on behalf of W by Miss Yip is that H has failed to discharge the evidential proof that Hong Kong is not the natural or appropriate forum for the trial but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong as required by the law. She relies on the 3-stage approach set out in Rambas Marketing (Supra) as quoted in paragraph 7 above. Stage 1 Whether H has proved to the satisfaction of this court that the Cuyahoga County Court in Ohio is clearly and distinctly more appropriate than the Hong Kong courts
12. Miss Yip submits that paragraph 2 of this Summons lacks the particulars of the other court said to be clearly and distinctly more appropriate than the courts in Hong Kong, and on this ground solely H cannot surmount stage 1 and is therefore bound to fail. She refers me to Greenwood Limited v Pearl River Container Transportation Ltd & Another, unreported, Civ App No 27 of 1994. Alternatively, Miss Yip submits that, even it is accepted that H has been referring to the Cuyahoga County Court in Ohio as the clearly and distinctly more appropriate court to try the divorce, H has failed to prove on evidence before this court that it has jurisdiction so to do. She relies on a passage in the judgement of Deputy Judge Reyes as he then was in Hwoo v Fu Being San and Others HCA 4888 / 2001 where he stated that :
51. In S Megga Telecommunications Ltd. v. Etowaru Co. Ltd [1995] 2 HKC 761 (CA), at 765I Bokhary JA stated : - Guiding the courts in their approach to applications to stay proceedings on the ground of forum non conveniens is this basic principle laid down by Lord Goff in Spiliada Maritime Corp v. Cansulex Ltd. [1987] 1 AC 460 at p.467C : - The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice . That was not stated as merely a factor to be taken into account when deciding whether or not to exercise a discretion to stay proceedings on the ground of forum non conveniens. It goes to whether the discretion exists .
13. To support her alternative ground of argument that Cuyahoga County Court in Ohio does not have the jurisdiction over the parental rights, Miss Yip refers me to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the legal advice given by Ms Pamela J. MacAdams by way of her affirmation dated 11th May 2007. In her affirmation Ms MacAdams states that the Cuyahoga County Court in Ohio has no jurisdiction over the Children

according to 3127.15 of UCCJEA. The relevant passages of the UCCJEA is as follows : (A) Except as otherwise provided in section 3127.18 of the Revised Code, a court of this state has jurisdiction to make an initial determination in a child custody proceeding only if one of the following applies :

- (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.
 - (2) A court of another state does not have jurisdiction under division (A) (1) of this section or a court of the home state of the child has declined to exercise jurisdiction on the basis that this state is the more appropriate forum under section 3127.21 or 3127.22 of the Revised Code, or a similar statute of the other state, and both of the following are the case :
 - (a) The child and the child s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
 - (b) Substantial evidence is available in this state concerning the child s case, protection, training and personal relationships.
 - (3) All courts having jurisdiction under division (A) (1) or (2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under section 3127.21 or 3127.22 of the Revised Code or a similar statute enacted by another state.
 - (4) No court of any other state would have jurisdiction under the criteria specified in division (A) (1), (2) or (3) of this section. (B) Division (A) of this section is the exclusive jurisdictional basis for making a child custody determination by a court of this state. (C) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.
14. Ms MacAdams' advice is echoed by Miss Yip at the hering. It is said that H could not rely on Paragraph A (1) of 3127.15 of UCCJEA because according to the said paragraph, Ohio could not be the home sate of the Children. Home state is defined by Paragraph 7 of 3127.01 UCCJEA on definition : the state in which a child lived with a parent or a parent or a person acting as apparent for at least six consecutive months immediately preceding the commencement of a child custody proceeding and, if a child is less than six months old, the state in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period .
15. Miss Yip says that since the Children have not lived in Ohio for six months immediately prior to H s commencement of custody proceeding, Ohio could not be considered as the home state of the Children and therefore Paragraph A (1) of 3127.15 of UCCJEA could not assist H to make out his case.

16. Miss Yip further submits that she also sees difficulties of H meeting the requirement under Paragraph A (2) of 3127.15 of UCCJEA when he claims that Ohio has the jurisdiction. She points out that H himself does not have a significant connection with Ohio.
17. In support of her submission on H's lack of significant connection with Ohio, Miss Yip says that H himself has been unable to say how permanent he was in Ohio. His grant is movable. And that even if he has asset in Ohio, it is negligible. W does not have much asset in Ohio and if there is any, it is only cash not of a great amount. The Children will not be returning to Ohio in any event.
18. Further Miss Yip submits that there is no substantial evidence available in Ohio concerning the Children's care, protection, training, and personal relationship. She said that all the relevant evidence is here in Hong Kong. Discussion Stage 1
19. I have to be satisfied that Hong Kong is not the natural or appropriate forum and there is another available forum which is clearly or distinctly more appropriate than Hong Kong before I would exercise my discretion to stay the proceedings in Hong Kong. Whether Hong Kong not the natural or appropriate forum for the trial?
20. Miss Yip submits that Hong Kong is the natural and appropriate court for the trial because of the substantial connection W has in Hong Kong, she is a resident here, the Children have spent 18 months living here. I accept that the Children have lived here for 18 months out of their 34 months of life. That means the time they spent in Ohio, their place of birth, is not significantly less than the time they spent in Hong Kong especially given the fact that they should have been brought back to the US for holidays but that did not work out for one reason or the other. There were certain periods of time, even short, that they should have been in the US. This is however not important, but the fact is that the Children have spent more or less the same time in both places.
21. Miss Yip says W has worked two years here, I note that she also has stayed and worked on her book in Ohio since May 2004, more than one year before she came to Hong Kong for a job in August 2005. H has worked more than 3 years in Ohio and there is no concrete plan for him to leave at the moment or in the near future.
22. Reading from the authorities, including Rambas Marketing (Supra) and Louvet v. Louvet and Another, Civil Appeal No. 75 of 1989, factors such as, among others, residence of parties, availabilities of witnesses and documents are relevant in this particular case. W has no concrete plan to return to Hong Kong in the foreseeable future after her departure in August 2007. She is definitely minded to give herself a try to advance her career. Her intention has been and still is to work in New York, Washington D.C. or other big cities with metropolitan environment. The location for her to settle in after August 2007 would be much guided by her career especially now it seems the marriage could not be remedied. I accept that GM Management is a job-hunting agent for W and the contract between them would be 3 years. I also understand that the speciality and connection of GM Management is within the US. Although no one could rule out the possibility that W will come back to work in Hong Kong,

there is no such plan as at this stage even in the mind of W.

23. The situation is therefore, although W is a resident here and enjoys the right of abode in Hong Kong, she would be physically away from here at the time of the trial of the matter. Although she may not return to Ohio, it is more likely than not that she would stay within the US. Further if she is away from Hong Kong, there is no possibilities that the Children would be here by themselves.
24. Miss Yip argues that the witnesses concerning the Children would be here in Hong Kong. I find that there will also be witnesses residing in Ohio, like the nanny, the landlord and the grandparents. If social investigation report is to be called for in regard to the custodial plan for the Children, such investigating personnel would be likely to be in the US as well.
25. As to the documents, Miss Yip submitted that if the trial is not to be in Hong Kong, money spent on the discovery would be wasted. That may not be necessarily the case. Document discovered could be used in either courts. Further I am of the views that there are more documents in the US than Hong Kong as both parties spent most of their lives in the US but only W and the Children have spent 2 years here in Hong Kong.
26. I accept what has been said on behalf of H by Mr Cough that even W has the substantial connection with Hong Kong at the time the Petition was filed, such connection is getting weaker and weaker after she returns to the US. This although does not affect the jurisdiction of the court in Hong Kong, it is a factor to be considered on whether Hong Kong is not a proper and natural forum. Whether there is another forum clearly and distinctly more appropriate Defects in H's Summons?
27. I would deal with the defects in this Summons as submitted by Miss Yip first. It is true that no specific court as been mentioned in the Summons, but the Cuyahoga County Court in Ohio has been mentioned throughout in H's affirmations made at all stages. It is not a case where H has not decided which court in the US the parties should resort to for resolution of their disputes. From the very beginning, it has been the Cuyahoga County Court in Ohio (paragraph 17 of H's Affirmation dated 29th September 2006 refers). H has commenced action for divorce in the Cuyahoga County Court in Ohio, W's representation seeking to stay H's action had been filed with on 12th March 2007 to the Cuyahoga County Court in Ohio, case conference has been held at the Cuyahoga County Court in Ohio between parties' attorneys and Magistrate LoPresti. I find that it is not a case where H does not have an idea as to where the other appropriate court should be.
28. I also find the following passage helpful where Recorder Geoffrey Ma, S.C., as he then was, stated in *Rambas Marketing Co. LLC v. Chow Kam Fai David* [2001] 3 HKC 250, at 253B that : - Particularly in view of the remarks of the Court of Appeal in *Greenwood Ltd. v. Pearl River Container Transportation Ltd.* (CA27/1994), 25 May 1994, unreported), it would be advisable in future for the court or tribunal in favour of which the applicant seeks a stay of the Hong Kong proceedings, to be identified in the summons or motion. This is so because the availability of another forum having competent jurisdiction said to be the appropriate

forum, must be shown before the court even begins to exercise its discretion in this type of application: see the remarks of Bokhary JA in *S Megga Telecommunications Ltd. v. Etowaru Co. Ltd.* [1995] 2 HKC 761, at 765I .

29. Thus, according to the decision it would be advisable in future for the court or tribunal in favour of which the applicant seeks a stay of the Hong Kong proceedings, to be identified in the summons or motion. I am of the view that in this particular case although the Cuyahoga County Court in Ohio has not been identified on this Summons as an advisable practice, it has been clear always to W, and to this court, that the other court referred to by H is Cuyahoga County Court in Ohio. I see no prejudice caused to W by this defect . Whether the Cuyahoga County Court in Ohio has jurisdiction on the Children?
30. Miss Yip submits that the Cuyahoga County Court in Ohio has no jurisdiction on the Children. She relies on the UCCJEA. Paragraph(A)(1), 3127.15 of UCCJEA
31. I accept Miss Yip's submission that Ohio could not be considered as the home state of the Children according to the definition mentioned in paragraphs 14-15 above. I find that the Ohio is not the home state of the Children and therefore H could not rely on paragraph (A) (1), 3127.15 of UCCJEA. Paragraph (A) (2), 3127.15 of UCCJEA
32. I however could not agree with Miss Yip on her argument that H could not rely on Paragraph (A) (2) of UCCJEA because H and the Children does not have the significant connection with Ohio and there is no substantial evidence available concerning the Children's care, protection, training and personal relationships. Miss Yip relies heavily on the fact that W has no plan to return to Ohio with the Children. Yes, this might have been and still be her plan, but that is not a determining factor and could only be neutral when deciding whether the Children have significant connection in Ohio. One must not forget that in the Judgment on H's Hague Application, the Court of Appeal found that there was an agreement for the Children to be brought to Hong Kong because W has a contract for two years here. There was plan and agreement by parties that they would be returned to the US. The Children s presence in Hong Kong was for two years only and their absence from Ohio was not meant to be permanent at the time they were leaving Ohio. The finding of the Court of Appeal that Hong Kong is the habitual residence of the Children would not deny the Children s significant connection with Ohio when the agreed period of stay expires and upon their departure in August 2007.
33. The Children were born and brought up in Ohio. They had spent their first 14 months there with their parents and their grandparents were not far away. Their parents worked there at that time although mother worked at home or her book. Their father is still working and living there. But for W s plan not to return to Ohio, there is no reason why they should not carry on their lives there.

34. In regard to H, he is working there and is still living there. He has some assets there although not in the form of landed properties. The couple spent a good part of their married life in Ohio.
35. Further I could not agree with Ms Yip on her submission that the evidence required under Paragraph (A) (2) (b) is all in Hong Kong. Reading from the paragraph, future plan is also important although one could not ignore the history. Planning for the Children is of particular importance as such plan would have great impact on the growth of them until they become of age. On the one hand I do not agree that there is no evidence to be relied for the past history in Ohio because the family spent some time there, on the other hand I would not say at this stage that there would be no evidence on such plan when they are required.
36. I have read the email of Ms Helman of 26th March 2007 giving her advice and reporting on the case conference the Ohio attorneys of parties have had with Magistrate LoPresti. In the email, she quoted Magistrate LoPresti having expressed that she believed that Ohio is the more convenient forum to litigate the divorce case. She went further quoting Magistrate LoPresti having indicated that although she did not believe that she had the jurisdiction to make a parenting decision, since Ohio had not been the home state of the Children 6 months before this action was filed, but if the Hong Kong divorce court indicated that it was an inconvenient forum to hear the divorce and custody issues, she would promptly assume jurisdiction over and hear those custody issues.
37. I find that what has been said by Magistrate LoPresti is within Paragraph (A) (2), 3127.15 of UCCJEA.
38. Further, under 3127.04 Paragraph A, a court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying sections 3127.01 to 3127.24 . On this basis, this court can be treated as A court of another state provided in Paragraph (A) (2), 3127.15 of UCCJEA. Paragraph (A) (3), 3127.15 of UCCJEA
39. I find that Paragraph (A) (3) also applies to the present case. The Hong Kong Court is the only court named by W as having jurisdiction so far. So if this court decides to decline jurisdiction on the ground that the Cuyahoga County Court in Ohio is a more appropriate court, it will have the jurisdiction to make an initial determination in the Children s custody proceeding.
40. To summarise, I find, for reasons set out in above, the Cuyahoga County Court in Ohio does have the jurisdiction to try the matter of parties. Whether the Cuyahoga County Court in Ohio is a clearly and distinctly more appropriate than Hong Kong?
41. I accept Mr Clough's arguments for H that familiarity with the legal system and education system etc would be a factor to consider when deciding on the appropriateness of the Cuyahoga County Court in Ohio to try the matter. Both parties and the Children are American citizens, there is a firm plan for W to return to the country with the Children but

without a plan to depart therefrom for a meaning period, H has always been residing and working there in Ohio, witnesses and documents will be more available there than any other place including Hong Kong. Proximity to the Court is essential in this case because it is not uncommon that matrimonial disputes involve more than one court hearing for a once and for all decision. Parties may have to go to court for decisions from time to time and at times, applications may be urgent.

42. I note that it is not convenience but appropriateness that I should look into. For reasons set out above, in my judgment, the action has the most real and substantive connection with the Cuyahoga County Court in Ohio and it is a clearly and distinctly more appropriate than Hong Kong. I am satisfied that H has proved to this court that Hong Kong is not the natural and proper forum and that the Cuyahoga County Court in Ohio is clearly or distinctly more appropriate than Hong Kong. Stage 2 Will a trial at Ohio deprive W of any "legitimate personal or juridical advantages?
43. There is no submission made in this regard on behalf of W. I do not see any legitimate personal or juridical advantages that W would be deprived of if the matter is tried in by the Cuyahoga County Court in Ohio. There is no evidence before me to show that the legislation or the legal system in Ohio would put W in a less advantageous position than if the case is tried in Hong Kong. Stage 3 Whether a stay should be granted in the overall circumstances and justice of the case?
44. Stage 3 is a balancing exercise. The advantages in stage 1 include the shorter physical distance of parties from the Cuyahoga County Court in Ohio, the availability of witnesses and documents in Ohio, the familiarity of the Cuyahoga County Court in Ohio with the law and application of the same to the situations of the present case. The disadvantage in stage 2 is none. I am of the view that a stay should be granted in the overall circumstances and justice of the case.

Conclusion

45. Miss Yip asks me to decide whether Ohio has jurisdiction. In my judgment, it does. And for the reasons set out in the above I am satisfied that H has proved that in the circumstances, not only Hong Kong is not the natural or appropriate forum for the trial, there is a clearly or distinctly appropriate court than Hong Kong.
 46. I exercise my discretion to grant a stay of the proceedings in Hong Kong. Costs
 47. I make an order nisi that there be no order as to costs for this hearing. Such order is to become absolute if there is no application made by the parties within 14 days. (Tracy Chan) Deputy District Judge Miss Anita Yip instructed by Messrs Boase Cohen & Collins for the Petitioner Mr Neil Clough instructed by Messrs Stevenson, Wong & Co for the Respondent
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