Judicial Arbitration in California

The First Year

Executive Summary

Deborah R. Hensler, Albert J. Lipson, Elizabeth S. Rolph
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Foreword

Observers of our court system have frequently wondered whether a civil trial—often preceded by years of pretrial maneuvering and delay—is the best way that society can find to resolve a dispute involving only a few thousand dollars. Bar associations, legislatures, judges, attorneys for litigants, and citizen groups have deplored the delays and questioned the overhead costs incurred by using the courts for this purpose, and have long sought a better way. The search for alternatives has become more intense in recent years as civil filings have multiplied.

One of the more popular legislative responses to demands for reform has been to require that smaller cases be assigned to court-administered arbitration, or “judicial arbitration,” as it is called in California. The arbitration is not performed by a judge, but the court decides whether a case is to be arbitrated, appoints an arbitrator, and monitors the arbitration process. Unlike classic commercial arbitration, the outcome is not binding on the parties, who retain their rights to press the issue to trial. Penalties are often imposed, however, on a party who seeks a trial and then fails to receive a more favorable verdict than the arbitrator’s award.

Supporters of judicial arbitration believe that diversion of small cases into the streamlined arbitration process will reduce court congestion, cut costs to both litigants and the public, and speed the resolution of disputes without diminishing the quality of the justice meted out.

This report summarizes the results of the first year of operation of one of the largest experiments with judicial arbitration yet undertaken. Since July 1979, California law has required that civil damage suits filed in the larger counties in the state be reviewed by a judge and assigned to judicial arbitration if, in the judge’s opinion, the action involves $15,000 or less. The statute that installed judicial arbitration, which included a five-year “sunset” provision, was supported by the California State Bar Association and numerous other groups. It followed upon a more modest statewide experiment in which arbitration was ordered upon petition of the plaintiff if the case involved no more
than $7500; the mandatory format, extended to a flow of civil damage filings that was surpassing 100,000 per year at the time, was a far more ambitious application of the technique.

The end of the first year of the program presented an unusually promising analytic opportunity for The Institute for Civil Justice. Knowledgeable observers of the civil justice system urged us to examine various alternatives to judicial dispute resolution that were being proposed. Prominent among these was judicial arbitration, which was first adopted by the Philadelphia courts in the early 1950s and has now been adopted by all or parts of nine states. Here was a chance to catch a large-scale experiment at an early stage in its history. Not only could its progress be observed, but the data that the California Legislature will need for ultimately assessing its merits could be identified early. Perhaps most important, useful data and analyses could be made available to decisionmakers in other states that are considering adoption of some form of judicial arbitration. For all of these reasons, we embarked upon an examination of the experience under the new law.

This report is the product of that examination. It presents the first-year answers to the questions posed by the objectives of the enabling statute: Does judicial arbitration reduce court congestion or backlogs or both? Does it speed dispute resolution? Does it cut costs, and, if so, by how much and to whom? Do participants generally perceive the results as equitable, or do they see systematic biases in arbitrators’ decisions? Do they like arbitration, or would they prefer a return to more traditional procedures? These are the central issues that the authors address.

Many students of the civil justice system will be surprised by the report’s substantive conclusions; as the authors point out, however, some findings may well be artifacts of a difficult start-up period in which the courts were allowed to implement the program in a variety of ways. Particularly disquieting is the conclusion that the California Judicial Council, which is charged with the responsibility for evaluating the program, lacks the resources to do so. We have called this issue to the attention of the appropriate California authorities; we hope our research will assist them in developing a design for the long-term evaluation of the program.

Meanwhile, the findings that can be derived from the first year’s experience should be of urgent interest not only to California but to every citizen who shares a concern for improving the quality and cutting the cost of the civil justice system.

Gustave H. Shubert
Director
The Institute for Civil Justice
Executive Summary

BACKGROUND

During the last decade, the volume of civil litigation has increased sharply in many metropolitan trial courts. Between 1967 and 1979, in the California superior court system, the number of personal injury and property damage suits doubled and the number of other civil money suits multiplied by a factor of more than two and one-half. Many other state court systems experienced similar increases.

Across the nation, courts have struggled to combat the resulting congestion on the civil trial calendar with a variety of procedures for expediting cases. Among these, judicial arbitration (also known as court-annexed, mandatory, or compulsory arbitration) is widely viewed as one of the most promising. First introduced in Philadelphia in the early 1950s, it has since been adopted by nine states\(^1\) and has been the subject of experimentation in the federal district courts as well. Although these programs differ in many ways, their common intent is to divert smaller cases from the civil trial calendar by substituting adjudication by volunteer arbitrators for the traditional judge and jury trial. Unlike the classical form of arbitration, judicial arbitration is compulsory but its results are not binding.

In 1978 the California State Legislature adopted a judicial arbitration program that is one of the largest and most ambitious in the nation. Under the rules of the program, the court orders all civil damage suits\(^2\) valued at $15,000 or less to be heard by a single randomly selected attorney (or retired judge) who has volunteered to serve as an arbitrator. In addition, any plaintiff who agrees to a ceiling of $15,000 on the arbitration award may elect to submit his or her case to arbitration, without the consent of the defendant. Both parties may also

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\(^2\)Suits for monetary compensation for personal injury, property damage, or other loss incurred as a result of another's unlawful act, breach of contract, or negligence.
stipulate to arbitration of any case, regardless of its monetary value. The rules provide for completing the arbitration process within 3 months of a case's assignment to the program. The arbitrators are directed to conduct the hearing as informally as possible, with relaxed rules of evidence. The arbitrator's award has the same force and effect as a court judgment, but it may be appealed by either party. The case may then be tried "de novo," that is, as if arbitration had not occurred.\footnote{The rules provide that "no reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings." \textit{Cal. Rules of Ct.} 1616.} If the party that requested trial does not better his position, however, he may be penalized by having to pay the arbitrator's fee and specific court costs.

The judicial arbitration program was sponsored by the administration of Governor Edmund G. Brown, Jr., and supported by judges, attorneys, legislators, and representatives of interest groups who shared a concern about the burdens imposed on the courts and the public by the rapidly increasing rate of civil litigation. By adopting the program, the legislature hoped to reduce court congestion, stabilize rising court costs, reduce the elapsed time to disposition for smaller civil suits, and reduce other burdens on litigants. The legislature hoped to reduce the judicial workload by diverting smaller cases from trial, and substituting volunteer arbitrator time for the judicial time that would otherwise be necessary to dispose of these cases. They expected this to free judges to devote their time to the backlog of larger cases. Thus, arbitrators and judges would work together to reduce congestion. Over the long run, the legislators also hoped to stabilize court costs, because fewer new judgeships would have to be added to cope with the increasing rate of litigation. The legislators also hoped to benefit litigants in smaller civil suits by providing a "fast track" to judgment, and by establishing an informal hearing process that would be less costly, less time-consuming and, perhaps, more understandable to the average citizen, than the traditional trial process. Finally, the legislators believed that these procedural improvements could be made without jeopardizing either plaintiffs' or defendants' chances of receiving a fair hearing and just resolution of their cases. Although there was a consensus among the participants in the legislative process that the mandatory program was desirable, there was considerable dispute over its specific features, and the program that emerged was the result of a number of compromises among the parties.

The California program became effective July 1, 1979; consequently, it has not been functioning long enough to yield definitive
results about its effectiveness in meeting the legislators’ objectives. During its first year, many courts experienced start-up problems that were not resolved until well into the year. Procedures for implementing the program changed during the year as courts modified or adopted new policies. In addition, the response of attorneys and litigants to the program, expressed in their willingness to volunteer for arbitration and in their demand for de novo trials after arbitration, continues to evolve as they gain more experience with it.

Nevertheless, it is useful to examine the experience of the program to date. The likelihood of its meeting its goals can be tentatively assessed through a review of its record in diverting cases, reducing judicial workload, recruiting arbitrators, speeding case disposition, and cutting costs. In addition, examining program performance during its first year, when procedures for implementing it differed considerably across courts, offers an important opportunity for studying the relationship between the different ways in which courts have decided to implement arbitration, and its potential for success. Finally, California’s program has a sunset provision requiring that the legislature evaluate its costs and benefits in 1984, before deciding whether to continue it. An early assessment of the program may contribute to that evaluation by identifying the data it will require and problems that may impede data collection.

With these concerns in mind, The Institute for Civil Justice decided in early 1980 to undertake a study of the first year of the California judicial arbitration program. This report presents the results of our exploratory analysis of the program’s effects on the courts and on litigants. We began by identifying the objectives of the program’s supporters. We first studied the program’s legislative history and interviewed 20 of the principal participants in the legislative process, including state legislators and legislative, executive, and judicial agency staff. Then, using data collected by the Judicial Council of California, the local courts, and the State Controller’s office, we constructed various measures of program outcomes and compared them with those expected by the program’s designers. Finally, we examined the relationship between these outcomes and implementation decisions made by the local courts. We derived our information about these decisions from interviews with 34 court officials and practitioners in 6 of the 13 jurisdictions initially required to adopt the program. The jurisdictions

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*The Judicial Council of California reports regularly on the operations of courts, makes recommendations to the governor and the legislature, and adopts rules for court administration, practice, and procedure. It is headed by the Chief Justice.

The statute requires all superior courts with 10 or more judges to adopt the program. At the time of its passage, there were 12 such courts: Alameda, Contra Costa, Fresno, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco,
selected for more intensive study were the superior courts of Alameda, Los Angeles, Orange, San Bernardino, San Francisco, and Santa Clara Counties, which together account for more than half of the civil court workload of the state's superior court system.

OVERVIEW OF PROGRAM PERFORMANCE

During its first year of operations, about 24,000 smaller-value cases were diverted to the judicial arbitration program in the 13 courts that were required to adopt it. This is about twice the number of cases diverted to California's previous, entirely voluntary, program during its entire three-year history.

The new program seems to be acceptable to most attorneys. About half of the cases assigned to arbitration arrived there voluntarily, either by plaintiff's election or by stipulation of both parties. The courts have had almost no trouble recruiting an adequate supply of attorney-arbitrators to deal with the caseload. And although the rate of requests for de novo trial averaged about 40 percent over the year, few of these cases are likely to be pursued to trial.

The legislators thus appear to have scored a victory in extending the scope of the program. Our analysis suggests, however, that diverting 24,000 smaller-value cases from the civil trial calendar will relieve congestion in the large superior courts only mildly, because they are still far outnumbered by the rest of the cases in the civil workload. In addition, the potential effect of the program on court costs is highly uncertain.

The program appears to offer some important benefits for litigants with smaller civil suits. Those who volunteer for arbitration enter a faster track to adjudication than would otherwise be available to them. Under certain conditions, court-ordered arbitration can also speed resolution of smaller cases. Arbitration should save time and out-of-pocket expenses for some litigants. The available evidence suggests that attorneys and litigants believe that the arbitration process is fair and does not hurt their chances of obtaining equitable resolution of their cases.

Reducing Court Congestion

Many supporters of the program hoped that it would sharply reduce court congestion. It appears that they should temper these hopes somewhat.

San Mateo, and Santa Clara. A thirteenth court, Ventura, which has since moved into this category, also adopted mandatory arbitration in July 1979.
Under the current program rules, civil damage suits are the only type of cases that are eligible for arbitration. In the superior courts that were required to adopt mandatory arbitration, we estimate that about 58 percent of all civil damage suits that came up for court review during the program's first year were diverted to arbitration. That percentage sounds large but damage suits do not dominate the civil caseload, which also comprises large numbers of family law cases, civil petitions, and probate and guardianship cases. We estimate that the total arbitration caseload—comprising only smaller-value civil damage suits—was only about one-fifth the size of the total pending civil caseload in the 13 largest courts.

Only a small fraction of all suits require jury trial. Contrary to conventional wisdom, however, we found that smaller-value suits account for a significant proportion of all civil damage cases that do reach jury verdict. By diverting about 24,000 smaller-value suits to arbitration annually, we estimate the courts might save from 200 to 400 civil jury trials per year—a savings of about 10 to 20 percent in the 13 largest courts.

We do not expect that reduction to result in a proportionate reduction in the total judicial workload, however, because less than half of a judge's time is spent in jury trials, and because the arbitration program itself requires some judicial attention. The judicial time saved will depend on how much time smaller-value cases required in the past, the rate of trial de novo for cases arbitrated under the new program, and the length of these trials, all of which are currently unknown. Under our most optimistic set of assumptions, we estimate that the 13 courts could save as many as 26 judge-years annually, a reduction of 5 percent in the total number of judge-years they expended in the year before the program began. This estimate assumes that the de novo trial rate will be 1 percent (of all cases assigned to arbitration) and that the trials will last an average of 3 days. Under our most pessimistic assumptions, we estimate that the courts might experience a small increase in judicial time spent on smaller cases, equivalent to 3 judge-years. This estimate assumes a 3 percent de novo trial rate and a trial length of 5 days. It also assumes that, prior to arbitration, smaller-value cases required substantially less time for disposition than the average case.

The way in which local courts implement the program will also affect its ability to reduce judicial workload. For example, court policies regarding the imposition of monetary sanctions, authorized by the statute to discourage frivolous de novo trials, may affect the rate of such trials. We found little evidence that the courts regularly impose these sanctions. In addition, some courts assign all arbitration cases to settle-
ment conferences before permitting them to proceed to arbitration hearings. Unless these conferences are conducted by attorneys sitting as judges pro tem, they increase the judicial workload. During the program’s first year, this policy did not yield measurable increases in pre-arbitration settlement rates. Finally, the timing of assignment of cases to arbitration may affect the program’s potential for reducing workload. Proponents of early assignment believe it maximizes such potential by removing cases from the trial calendar before they can begin to consume court resources. Proponents of late assignment believe that it provides maximum opportunity for the parties to settle their cases out of court, reserving the expenditure of judicial time for those cases that actually require it. The available data do not permit an empirical assessment of the comparative validity of these assertions.

The program’s potential could be increased somewhat by raising the dollar limit for eligibility for its mandatory and elective components, thereby increasing the size of the arbitration caseload. But because there are no data on the composition of the civil caseload by dollar value, there is no way to predict how different monetary limits would affect the arbitration caseload. In addition, any consideration of increasing the scope of the program must not lose sight of fact that it depends on volunteers. Although the courts have had no trouble recruiting arbitrators to date, it is possible that larger caseloads would exhaust the supply.

Stabilizing Court Costs

During its first year, in the 11 large superior courts that reported detailed expense data, the arbitration program cost about $1.8 million to operate.\(^6\) Arbitrators’ fees accounted for about 60 percent of this total. Many cases that were assigned to the program in the first year, however, had not completed the process by the end of the year: Some were still awaiting selection of an arbitrator, and some were awaiting an arbitration hearing or award. We estimate that the total cost of program operations for all cases assigned to arbitration during the first year in the 13 large Superior courts will eventually reach about $3.4 million. We expect that the average cost per diverted case, including cases that are settled before arbitration, will be about $140.

Whether this represents a net savings or net cost to the taxpayers depends on the how much it costs to process the same kind of cases

\(^6\)Because Fresno’s program did not become operational until the latter part of the year, we did not include its expenses in our analysis. Ventura, whose claims for reimbursement had previously been rejected by the State Controller’s office, did not submit detailed expense data.
without arbitration, and that cost is unknown. To arrive at an approximation, we used statewide estimates of judicial costs and a complex set of assumptions about the time required to process smaller cases. We thereby estimated that, under various assumptions, the program could save as much as $4 million annually, could break even, or could result in a $4 million increase in court costs. Without additional data, it is impossible to say where within this range the final outcome will lie. Our most optimistic estimate of savings assumes a 1 percent trial de novo rate and 3 day trials. Our most pessimistic estimate assumes a 3 percent trial de novo rate and 5 day trials; it also assumes that, prior to arbitration, smaller-value cases required substantially less judicial time for disposition than the average case.

Even under the most optimistic assumptions, neither practitioners nor court analysts expect the arbitration program to reduce the cost of operating the courts in the short run, because the courts will expend any savings in judicial and other court time on reducing court backlogs and keeping up with continually rising caseloads. In the long run, however, if arbitration reduces the judicial workload somewhat, the rate of increase in the number of authorized judge- ship positions could slow, resulting in net savings for taxpayers.

The likelihood of future savings due to arbitration partly depends on how the program evolves over the next few years. Savings will be less likely if the proportion of cases diverted to arbitration decreases—as it could, in time, if the legislature does not increase the monetary limit of the program to keep up with inflation. Savings will also be less likely if the cost of processing arbitration cases increases at a faster rate than the cost of processing other cases. This could occur if arbitrator fees increased substantially, or if time-consuming pre-arbitration settlement conferences are instituted widely.

Whether or not the arbitration program reduces court costs over the long run, it may reallocate some of these costs from the local jurisdictions to the state. By law, the state must reimburse the counties for any "net costs" the program imposes on them. As a practical matter, the state currently reimburses the counties for all costs incurred by the arbitration program. Counties are therefore spared any additional expense to process cases diverted to arbitration. In addition to paying for judges' time, the state now pays for administrative time devoted to these cases; however, the state is currently attempting to develop a formula for calculating the net savings that the counties may be accruing due to arbitration, and hopes eventually to recoup any excessive payments it may have made to them.
Reducing Time to Disposition

Arbitration's effectiveness in reducing the time to disposition for small cases appears to depend on whether litigants volunteer or are ordered to arbitration, how the program is implemented locally, and the degree of congestion on the local trial calendar.

In all courts, arbitration offers a "fast track" to parties who volunteer for the program. In the six courts we studied closely, according to court administrators' estimates, it takes an average of only 7 months to reach an arbitration award when the litigant volunteers for it soon after the suit is joined.

Litigants whose cases are ordered to arbitration do not fare as well. Across the six courts, it takes an average of 22 months for these cases to reach arbitration award. In four of the six courts, it could even take slightly longer for a case to reach an arbitration award than to reach jury trial.

The elapsed time for a court-ordered case to reach an arbitration award depends primarily on when it is assigned to the program and how crowded the court calendar is. Congested courts that assign cases early in the pretrial process reap the greatest time savings. Congested courts that assign cases late in the pretrial process obviously cannot affect the time to disposition for arbitrated cases—except perhaps to extend it. In courts with uncongested calendars, statutory constraints on when a case is to be assigned to arbitration can worsen matters to the point that it takes longer to arbitrate a case than to try it.

Courts can speed disposition of both court-ordered and voluntary cases by expediting the selection of arbitrators, by monitoring the progress of cases, and by adopting strict limits on arbitration continuances. Such practices will increase the amount of time required to administer the program, however.

Reducing Other Burdens on Litigants

It is uncertain whether arbitration provides other benefits to litigants of smaller-value suits. We interviewed a small number of attorneys, who affirm that it costs less to adjudicate cases through arbitration than it does to try them. Arbitration eliminates expert and other witness fees and certain court costs, and reduces the amount of attorney time required to present the case. But what share of these savings is passed on to litigants, whether there are other reductions in litigants' transaction costs, and whether arbitration costs litigants more or less than settlement without arbitration, are unanswered questions. We found no evidence that arbitration is affecting the contingent fee structure.
The attorneys we interviewed generally believe the arbitration process is fair, but we do not know whether litigants share this view and whether they perceive other benefits from the program, nor do we know whether arbitration will maintain or improve the equity of case outcomes.

The rate of requests for de novo trials, while somewhat higher than anticipated, should not be interpreted as indicating concern about outcomes. Not many attorneys or litigants are determined to proceed to trial. Rather, attorneys appear to be filing such requests to keep their options open and to lay the foundation for post-arbitration settlement negotiations. Plaintiffs and defendants are equally likely to request trial de novo, suggesting that there is no general tendency for either side to believe that arbitration hurts its chances for obtaining a fair resolution of their cases.

Finally, some plaintiffs' attorneys told us that arbitration enables them to take on more smaller-value civil cases and obtain fairer (and larger) settlements for their clients than they could formerly. Conversely, some defense attorneys told us that arbitration improves the prospects for settling cases earlier and at a lower dollar value. Clearly, the effects of arbitration on the settlement process require further study.

THE FUTURE OF ARBITRATION

Unless the legislature decides to extend it, the mandatory judicial arbitration program will expire in 1985. The legislature's decision will depend largely on the satisfaction of the courts, attorneys, and litigants with the program, but the phenomenon of political inertia may prolong its existence. As long as a program does not cause problems for key constituencies, it may be extended indefinitely, even if it is only marginally successful in meeting its original objectives.

Most of the court officials we interviewed do not think arbitration will materially affect their workload. Faced with rising caseloads and legislative resistance to adding new judgeships, however, they seem willing to experiment with arbitration because it generally does not impose new costs or new administrative burdens on them, and because they are free to incorporate the program into their existing procedures pretty much in whatever way they choose. Some courts also see the program as an opportunity to bring about change. These courts view arbitration as an additional tool for managing the court process.

Attorneys' reactions to judicial arbitration are more complex than those of the courts. The program could affect the way attorneys handle
their cases, their financial rewards, and the outcomes of their cases. Moreover, it touches on two of the most sensitive issues regarding the American judicial system, due process and the citizen's right to a jury trial, about which many trial attorneys have strong philosophical convictions. Like court officials, attorneys will probably accept the program if it makes their job easier and if it does not harm them or their clients. But their reactions to arbitration will be colored by their beliefs about its larger effects on the system of justice.

All else being equal, plaintiffs' attorneys working on a contingent fee basis should prosper in a situation where such cases are processed expeditiously, with minimal expenses, because they will be able to handle more cases and earn greater financial rewards. Defense attorneys probably do not gain financially from such programs because they are paid on an hourly basis; but as long as they are involved in a substantial number of larger cases, they should not suffer from a program that expedites resolution of smaller-value cases.

Plaintiffs' attorneys are concerned, nevertheless, that arbitration may be construed as a first step in narrowing the purview of the jury trial process; and both the plaintiffs' and defense bars are concerned that substituting arbitration for jury trial may bias a preponderance of case outcomes toward one side or the other. To satisfy the bar, the program must prove that it can maintain the same pattern of outcomes as prevailed before arbitration.

Litigants have a clear interest in the expeditious and economical resolution of cases. If arbitration can reduce the time and cost of resolving small cases, it should make it easier for plaintiffs to find attorneys to take their cases, shorten their period of uncertainty about the case outcome, and alleviate financial hardship. Defendants may find it more difficult to settle claims without litigation, but they too should benefit by reducing their costs for cases that are litigated.

In sum, judicial arbitration may be a uniquely appealing program. Although it does not appear to have major promise as the solution to court congestion and rising court costs, it seems to have made friends for other reasons, and perhaps more important, it seems to have made no enemies.

**FUTURE RESEARCH**

In the course of our analysis we identified several areas where more data must be collected for a thorough assessment of the arbitration program. Some of these data relate to the program itself, some to the court process more generally, and some to attorneys and litigants.
Reports of program activities should indicate what proportion of the arbitration cases are personal injury suits and what proportion are other civil complaints. Arbitration administrators should report the average interval between the time a case is placed on the arbitration hearing list and the time it is removed from the list, either by administrative dismissal, by settlement, or by filing of the arbitration award. Courts should also record the number of arbitrated cases that are subsequently tried de novo, rather than simply reporting the rate of requests for such trials. Information should also be collected on the allocation of judicial time to different activities for different types of cases, the costs of judicial and nonjudicial personnel, the effects of arbitration on the settlement process, and its effects on litigants' costs and their satisfaction with the process. The additional court data might be obtained through review of local court records and interviews with judges and court managers in a small number of courts. Surveys of attorneys and litigants would probably be required to obtain additional information about the effect of the program on the settlement process, litigation costs, and satisfaction.

Collecting these data will be costly. Although the legislature has directed the Judicial Council (with the assistance of the Auditor General) to conduct an analysis of the costs and benefits of mandatory arbitration, to date it has not appropriated funds to conduct such an analysis. It is therefore not clear how much money the legislature is willing to invest in assessing the program.

Our exploratory analysis demonstrates the problems that evaluators will encounter if they attempt to assess the program's effects without additional research data collection. We believe that a thorough assessment will be well worth the time and money, in view of the generally positive response to the program and its clear potential for reducing time to disposition for those who volunteer to arbitrate. Clearing away the uncertainty surrounding the program's effects on court workload, costs, and the outcomes of cases, will benefit all parties concerned, from the legislature and courts down to the ordinary citizen.
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