



# ICLG

The International Comparative Legal Guide to:

## Gambling 2016

**2nd Edition**

A practical cross-border insight into gambling law

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# India

Gowree Gokhale



Ranjana Adhikari



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## 1 Relevant Authorities and Legislation

### 1.1 Which entities regulate what type of gambling activity in your jurisdiction?

The different States of India regulate gambling under their separate State laws with the *Public Gambling Act, 1867* being the only central legislation (albeit covering only a few States) (“**Gambling Enactments**”). This has been described in detail in the answer to question 1.2.

As is the norm in several countries, games of ‘*mere skill*’ are typically culled out as an exception to the prohibitions under the Gambling Enactments, though what amounts to ‘*mere skill*’ as opposed to games of chance has caused considerable debate. Therefore, games of skill as such are not regulated (except for some purposes such as taxation).

Casinos are also regulated under the Gambling Enactments which allow only Goa, Daman and Diu and Sikkim to allow gaming to a limited extent, under a licence, in five-star hotels. In Goa, the law also allows casinos on board of an offshore vessel. The State Government of Goa has the authority under the law to issue licences and rules to regulate casinos.

Lotteries have been expressly excluded from the purview of the Gambling Enactments and are governed under the central law – *Lotteries (Regulation) Act, 1998* and the *Lottery (Regulation) Rules, 2010* and State-specific rules (together the “**Lottery Laws**”). The Lottery Laws allow the State Governments to organise, conduct or promote a lottery, subject to the conditions specified in the central enactments.

Sikkim was the first (and till now the only) State to have enacted an online gaming statute *viz.* the *Sikkim Online Gaming (Regulation) Act, 2008* (“**The Sikkim Online Gaming Act**”). The Sikkim State Lotteries, under the Finance, Revenue and Expenditure Department, Government of Sikkim, is the authority that issues licences under the Sikkim Online Gaming Act.

The police departments under each State Government are primarily responsible for the enforcement of the Gaming Enactments and Lottery Laws. Lately, other criminal investigation agencies such as the Central Bureau of Investigation (“**CBI**”) have also been involved in the investigation of sports betting cases.

### 1.2 Specify all legislation which impacts upon any gambling activity (including skill and social games), and specify in broad terms whether it permits or prohibits gambling.

#### *Gambling Enactments*

The Constitution of India distributes law-making powers between India’s Central Government and the provincial or the State level Governments. It gives the States the exclusive power to legislate on matters relating to betting and gambling. Therefore, all Gaming Enactments are State level legislations. The *Public Gambling Act, 1867* (“**Public Gambling Act**”) is a central enactment; albeit one that dates back to India’s pre-independence era when States were not exclusively vested with the power to legislate on matters relating to gambling. The Public Gambling Act has been adopted by some States post-independence. Some other examples of State level Gaming Enactments include: the *Bombay Prevention of Gambling Act, 1887*; *The Andhra Pradesh Gaming Act, 1974*; *The Orissa Prevention of Gambling Act, 1955*; and *The West Bengal Gambling and Prize Competitions Act, 1957* (“**WB Gaming Law**”).

Most Gaming Enactments prohibit the act of: (i) owning, keeping, occupying or having care and management of a Common Gaming House; (ii) advancing or furnishing money for the purposes of gaming to persons frequenting any such gaming house; (iii) gaming in a Common Gaming House or being present for the purpose of gaming in a Common Gaming House; (iv) gaming or suspected of gaming in any public street, place or thoroughfare; (v) printing, publishing, selling, distributing or in any manner circulating anything with the intention of aiding or facilitating gaming; and (vi) gaming *per se* (not applicable to every State, only the Gaming Enactment of States like Orissa prohibit the act of gaming itself).

Sikkim enacted the first Indian legislation to regulate online gaming (*Sikkim Online Gaming (Regulation) Act, 2008* (“**Sikkim Online Gaming Law**”). Nagaland has recently proposed *Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Bill, 2015* (“**Nagaland Online Gaming Law**”). While the Nagaland Online Gaming Law only seeks to regulate skill-based games, the Sikkim Online Gaming Law regulates a wider variety of games to be offered within the State of Sikkim such as, *inter alia*, (i) Roulette, (ii) Blackjack, (iii) Pontoon, (iv) Punto Banco, (v) Bingo (vi) Casino Brag, (vii) Poker, (viii) Poker Dice (ix) Baccarat, (x) Chemin-de-for, (xi) Backgammon, (xii) Keno, (xiii) Super Pan, and (xiv) sports betting on games such as football, cricket, lawn tennis, chess, gold, horse-racing, etc.

Casinos

The States of Sikkim and Goa also have separate legislation regulating the operation of brick and mortar casinos, which have been explained in the answer to question 2.1. The *Maharashtra Casinos (Control and Tax) Act* was enacted in 1976 to regulate casinos within the jurisdiction of the State of Maharashtra (including the city of Mumbai), but was never notified and therefore is not in effect. In 2015, the Bombay High Court directed the State Government to take a decision on whether or not to allow casinos (in Maharashtra) within six months.

Lottery Laws

As mentioned above, Lotteries have been expressly excluded from the purview of the Gambling Enactments and are governed under the central law – *Lotteries (Regulation) Act, 1998* – under which the *Lottery (Regulation) Rules, 2010* (the “**Central Lottery Laws**”) have been framed. The Central Lottery Laws allow the State Governments to organise, conduct or promote a lottery, subject to the conditions specified in the Central Lottery Laws. Prior to the Central Lottery Laws, there were a few States which had enacted some specific State enactments to regulate (including Sikkim, Andhra Pradesh and Uttar Pradesh) and/or ban lotteries (such as Bihar and Madhya Pradesh). Further, pursuant to the Central Lottery Laws, certain States like Nagaland, Mizoram and Himachal Pradesh enacted rules to regulate/ban certain lotteries in their respective territories (collectively, and along with the Central Lottery Laws, referred to as “**Lottery Laws**” hereinafter).

Further, owning and maintaining “Common Gaming Houses” (defined hereinafter) or running lottery businesses other than as distributors licensed by the State Governments are punishable offences under *The Indian Penal Code, 1860* (“**IPC**”).

Prize Competition Law

The *Prize Competition Act, 1955* (“**Prize Competition Act**”), a central law, regulates prize competitions offering prizes for the solution of any puzzle based upon the building up, arrangement, combination or permutation of letters, words, or figures. Though the Prize Competition Act does not expressly cull out an exception for skill-based games, the Supreme Court of India (“**Supreme Court**”) has laid down the principle that skill-based, or preponderantly skill-based, competitions were not sought to be regulated under the Prize Competition Act. Whether a game is of chance or skill is a question of fact to be decided on the facts and circumstances of each case. The judicial view has been very strict in this regard.

Content related laws & Advertisements

Games, especially social and casual games, are also subject to content-specific laws, such as the *Indecent Representation of Women (Prohibition) Act, 1986* and *Information Technology Act, 2000* (“**IT Act**”), which penalise obscenity. Further, *Young Persons’ (Harmful Publications) Act, 1956* prohibits violence in such games which would corrupt the mind of young persons (under 20 years of age). Intellectual Property issues related to games, such as the use of trademarks, use of caricatures and copying of patented software, are dealt with in legislation such as *Copyright Act, 1957*, *Trade Marks Act, 1999* and *The Patents Act, 1970*.

Marketing and advertising of casinos and gambling through messages and calls are regulated by the *Telecom Commercial Communications Customer Preference Regulations, 2010* (“**SMS Regulations**”), which prohibit unsolicited commercial communications to people who have opted out from the same. The SMS Regulations also mandate that telemarketing can only be done by entities that obtain the requisite telemarketing licence from the Telecom Regulatory Authority of India.

Taxes, Foreign investment & exchange control

Under the *Foreign Direct Investment Policy of India 2015* (“**FDI Policy**”), FDI in ‘*lottery business including Government/private lottery, online lotteries; gambling and betting including casinos etc.*’ is prohibited. It also prohibits foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract for lottery business and gambling and betting activities. However, there are certain innovative structures that can be implemented. Further, India’s exchange control rules, which include the *Foreign Exchange Management (Current Account Transaction) Rules, 2000* (“**Current Account Rules**”), prohibit the remittance out of *lottery winnings, racing/riding or any other hobby*.

*The Income Tax Act, 1961* (“**Tax Act**”) taxes the income received by gamers in the form of winnings from lotteries, card games and other such games.

The anti-money laundering legislation impacting gaming activities in India has been discussed in the response to question 2.9.

## 2 Application for a Licence and Licence Restrictions

### 2.1 Who can apply for a licence to supply gambling facilities?

As discussed above, there are very few States of India which allow, through licences and permits, operators to organise gambling activities within the State.

In the States of Goa and Daman and Diu, under the *Goa, Daman and Diu Public Gambling Act, 1976*, (“**Goa Gambling Law**”) the Government, through subsequent notifications, has allowed ‘*games of electronic amusement/slot machines*’ and ‘*table games and gaming on board*’, to a limited extent, in offshore vessels and five-star hotels. Thus, casino licences have been issued by the Goa Government to operators in offshore vessels and five-star hotels. However, there is a restriction in terms of the number of slot machines which are allowed per licence. In the State of Sikkim, the Government, under the *Sikkim Casinos (Control and Tax) Act, 2002* read with *Sikkim Casino Games Commencement (Control and Tax) Rules, 2007*, (“**Sikkim Casino Law**”), regulates and licenses operators who wish to organise gambling activities in establishments. They only allow such operations in five-star establishments.

In Sikkim, any company, partnership firms or body corporate registered in India is eligible to apply for a licence to provide online gaming within the State of Sikkim. In West Bengal, under the WB Gambling Law, an operator needs to apply for a permit each time he wishes to organise skill-based games which shall be accessible to the public.

Lotteries in India are only allowed to be organised by the States of India. However, people, companies and firms, subject to the rules in each State, can apply to become authorised distributors or selling agents for paper and online lotteries of the State. The restrictions are outlined in the Central Rules and each State-specific set of rules. Foreign entities would not be able to apply for any of the above licences. Additionally, routing their investment through an Indian subsidiary is prohibited in India under the FDI Policy.

### 2.2 Who or what entity must apply for a licence and which entities or persons, apart from an operator, need to hold a licence? Are personal and premises licences needed? Do key suppliers need authorisation?

Typically, only Indian owned and controlled entities can apply for the

limited licences and permits issued to private bodies for the operation/organisation of various gambling activities. Under the licensing regime in gambling – being nascent in India – there are no separate personal and premises licences. When a licence is issued, it is given to a certain entity organising activity including its organisation, management or promotion, or negotiation or receipt of bets.

For lotteries, it has been provided that lottery tickets can only be printed at a Government press or a high security press included in the panel of the Reserve Bank of India (“RBI”) or Indian Banks’ Association, Mumbai.

### 2.3 What restrictions are placed upon any licensee?

Under the Sikkim Online Gaming Law, the regulations restrict the offering of only the specified games online under the licence to physical premises of gaming parlours, through intranet gaming terminals, within the Sikkim. Casino licences impose requirements as to the maintenance of five-star infrastructure along with reporting requirements related to transactions and maintenance of customer information, and may also include restrictions in terms of the number of slot machines allowed. Certain regimes also restrict the transferability of licences.

States organising lotteries are required to maintain records of tickets printed, sold and unsold. The States are restricted to organising lotteries within their territory, and must take permission and pay appropriate fees to the other State for distributing tickets in such State.

The Prize Competition Act prohibits prize competition(s) in which the total value of the prize or prizes (whether in cash or otherwise) offered in any month exceeds INR 1,000; and prize competition(s) where the number of entries exceed 2,000. Further, any person intending to conduct such prize competitions has to obtain a licence to engage in such activities and the details for obtaining such licences to be given in the rules made there under.

### 2.4 What is the process of applying for a gambling licence?

The Gaming Enactments, under which licences and permits can be procured, prescribe eligibility criteria and procedures for applying for the licences available in their regime.

To describe a few, under the Sikkim Online Gaming Law, an application may be made to the Government of Sikkim. After making an enquiry, the relevant department may grant a provisional licence so that the licensee can set up the necessary infrastructure and fulfill other criteria. There is a separate online gaming revenue payable by the licensee to the State Government.

Under the Goa Gambling Laws, the licence may be granted to the applicant on payment of an application fee which is currently INR 2,000,000 (approximately USD 31,746) for onshore or offshore casinos, irrespective of the number of tables and/or machines installed in the licensed premises or the size or capacity of the vessel.

Casinos in offshore vessels operating off the coast of Goa or Daman and Diu may require other relevant regulatory approvals, such as a No-Objection Certificate from the captain of ports to ply the vessels in inland waters. On satisfaction by the department, the applicant is required to pay a licence fee. The licence fee in Goa is INR 70,000,000 (approximately USD 1,111,111) *per annum* for a 100 passenger-capacity vessel offshore casino and INR 25,000,000 (approximately USD 396,825) *per annum* for a 100 square metre land-based casino in a five-star hotel, and such annual fees increase categorically thereafter.

Under the WB Gambling Law and subsequent rules, an application for a permit in West Bengal for hosting games of skill in a public place, along with a nominal fee of INR 10 (approximately USD 0.16), is required to be made to the Commissioner of Police in Kolkata (the capital of West Bengal) or the District Magistrate or the Sub-Divisional Magistrate elsewhere.

To become a distributor or selling agent for a State-organised lottery, the applicant must furnish a bank guarantee/security deposit along with their application, as may be specified by the organising State. When the applicant has fulfilled all of the requirements set out by the State, they are granted a licence to sell and distribute lottery tickets.

### 2.5 Please give a summary of applicable time limits and revocation.

The licence under the Sikkim Online Gaming Law is granted for a period of five years, with an option for subsequent renewal. In the case of permit under the WB Gambling Law, since the permit is event specific, the term of the permit may even be for one day.

Cancellation of licences and permits, as with all other contracts, is subject to a breach of licence conditions and/or other relevant laws. Such conditions (as discussed previously and subsequently), such as the payment of licence fees or any subsequent levy, when subject to breach, cause the revocation of the licence by the respective State department.

While no formal gaming commission has been formulated, processing for intra-department appeals and approaching the courts by way of writs are options available to a licensee in case of any grievance with regards to a revocation.

### 2.6 By product, what are the key limits on providing services to customers?

Under the different Gaming Enactments, the State Departments specify the products which are allowed to be provided under their respective licences. The example of the Sikkim Online Gaming Laws has already been discussed. Similarly, under the WB Gambling Law, a permit is available for public access to only games of skill such as *Bridge, Poker, Rummy* or *Nap*.

The Central Lottery Laws and subsequent State laws place restrictions on the conduct of lotteries. These restrictions: limit the number of lottery draws to 24 per day; fix the minimum price of a ticket and the minimum value of the first prize; place an obligation on the State to publish the result of the lottery in at least one national and two State-wide newspapers; and prohibit the determination of the lottery prize on the basis of single, double or triple digit in any form or combination; among other limitations.

The restrictions in terms of prize competitions have been discussed in the answer to question 2.3.

### 2.7 What are the tax and other compulsory levies?

Under the current applicable laws, entities responsible for distributing winnings from any lottery (any game involving a draw of lots), crossword puzzle, card game or other such games exceeding a threshold amount (presently INR 5,000 (approximately USD 79) in case of horse racing and INR 10,000 (approximately USD 159) in all other cases) are required to withhold income tax at the rate of 30% (slab rate) at the time of actual payment. It is to be noted that even if the prize awarded is in kind, deduction is required to be made under the Tax Act to the extent of the income from “winnings”.

For the withholding obligation with respect to horse racing, it was clarified that the term “winnings” for the purposes of horse racing should mean the amounts received by the punters in excess of the bets laid by them on the winning horses. Therefore, winnings should not include stake money, but be limited to the prize money received on a horse race by the owner thereof on account of such horse securing a position in the race.

Income by way of commissions paid to persons stocking, distributing, purchasing or selling lottery tickets is subject to a withholding tax at the rate of 10% under the Tax Act. Further, lottery distributors or selling agents in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, were brought within the purview of service tax, as well as a central levy, by way of a notification pursuant to the proposals made under the Union Budget, 2015. However, in October, 2015, the Sikkim High Court in *Future Gaming & Hotel Services (P.) Ltd. v. Union of India* [2015] 62 taxmann.com 238 (SIKKIM), held that a business procuring lottery tickets in bulk from the State Government and reselling the same to the public at large through various agents, stockists, resellers, etc., should not be subject to service tax because it was not a service.

Most indirect levies on gambling activities are imposed under the Gambling Enactments of different States. For instance, under the Sikkim Online Gaming Act, a company holding a licence (“**Licensee Company**”) and providing online games in Sikkim must pay to the Sikkim Government an Online Gaming Levy at the rate of 10% of the Gross Gaming Yield (“**GGY**”) or INR 50,000,000 (approximately USD 793,650), whichever is higher.

A State imposed entertainment tax may also be levied on casinos and casino games, whether attached to registered hotels or offshore vessels, and on horse racing either live or displayed for viewing through electronic media.

## 2.8 What are the broad social responsibility requirements?

Apart from restrictions on the territory and the nature of games that can be offered, under the Goa Gambling Law, Sikkim Casino Law, Sikkim Online Gaming Law and subsequent notifications and rules made thereunder, specific obligations are placed on the licensee to ensure that children below a certain age are not employed and are not granted access to these facilities. Additionally, such disclosures are required to be made on the website/in the brochures of the licensee. However, since the law regarding gambling is nascent in India, detailed social responsibility requirements have not been crafted for licensees.

## 2.9 How do any AML financial services regulations or payment restrictions restrict or impact on entities supplying gambling?

Under the *Prevention of Money Laundering Act, 2002* (“**PMLA**”), records of transactions for cash transactions above a certain value need to be maintained in respect of gaming activities, along with certain Know Your Customer (“**KYC**”) requirements. The recently legislated *Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015* (“**Black Money Act**”) requires that Indian residents should, in their annual income tax returns, declare all foreign assets, including foreign bank accounts and e-wallet/virtual accounts, even if they only hold signing authority in such accounts. Non-disclosure could result in a tax on the value of such undisclosed foreign assets, as well as the imposition of heavy penalties.

Further, remittance out of “*lottery winnings*”, “*racings/riding or any other hobby*” and “*football pools, sweepstakes, etc.*” is prohibited under the Current Account Rules. While the term “hobby” has not been defined, keeping in mind the letter and spirit of the prohibitions, remittances from games like poker, rummy, etc., may also be said to fall within the ambit of these prohibitions.

## 3 The Restrictions on Online Supply/Technology Support/Machines

### 3.1 Does the law restrict, permit or prohibit certain online activity and, if so, how?

Most offences and prohibitions under Gaming Enactments are linked to physical premises known as “Common Gaming Houses”. The law is not clear whether the Gaming Enactments are applicable to the online medium. A District Court in Delhi [*Gaussian Network Private Limited v. Monica Lakhanpal and Another* (Suit No 32/2012, Delhi District Court)] has opined that when skill-based games are played for money in virtual space, the same would be illegal; it also observed that the degree of skill in games played in a physical form cannot be equated with those played online. This matter is currently pending before the Delhi High Court and is not a binding decision as such. However, more recently, in a matter before the Supreme Court of India, the Counsel for the States mentioned that the State has not taken a decision on the applicability of the *Madras City Police Act, 1888* (under which the gambling law of Madras is covered) to the online medium.

As discussed above, online games are permitted and regulated by means of licences issued under specific Gaming Enactments in Sikkim, and Nagaland is expected to follow suit.

Online lotteries are legal in India. However, under the Central Lottery rules, they have also been limited to specific lottery terminals and licences.

### 3.2 What other restrictions have an impact on online supplies?

Apart from the restrictions on payments under the exchange control regulations and the anti-money laundering laws described before, the *Payment and Settlement Systems Act, 2007* (“**PSA**”) regulates payments through pre-paid instruments which include e-wallets. While setting up the payment system for the online gaming website, one would need to consider which category of prepaid instruments the wallet/account falls within. Certain payment systems can’t be operated without authorisation and procuring requisite licences from the Reserve Bank of India.

Further, according to the intermediary guidelines issued under the IT Act, ISPs, etc. are required to observe necessary due diligence and publish rules and regulations and user agreements for the access or usage of the bandwidth provided by the ISP. Such rules and regulations and user agreements need to include terms which, *inter alia*, inform the users of the bandwidth not to host any information that is relating or encouraging gambling, etc. It appears that the rule has been included to discourage any activity of gaming/gambling that may be unlawful under the Gambling Enactments in the country. Therefore, the ISP can *suo motu* also take down such gambling websites. The Registrar accredited with the ICANN has also been blocking the websites on its own accord.

### 3.3 What terminal/machine-based gaming is permitted and where?

The Goa Gambling Law allows for a specific number of slot machines under a licence.

Apart from this, Sikkim is the only State to expressly allow server-based gaming within the State of Sikkim.

Certain States, such as Maharashtra, impose certain conditions, for example, lottery tickets are only permitted to be sold by wholesale agents from one place, the address of which has been intimated and registered with the State Government.

## 4 Enforcement and Liability

### 4.1 Who is liable for breaches of the relevant gambling legislation?

The acts which are prohibited under the Gaming Enactments are listed in the answer to question 1.2 above.

The liability for offences under the Gambling Enactments usually vests upon:

- the owner of the gaming/common gaming house;
- the person keeping or having charge of the gaming/common gaming house; and
- the person gambling or possessing instruments or records of betting or suspected of gambling or possessing such instruments.

Additionally, as discussed earlier, a person involved in gambling-related activities (and in certain cases an abettor as well) shall be punished when in breach of any of the general legislation, such as IT Act, the IPC, etc.

*Note: Except in States like Delhi, Gaming Enactments across States require profits and gains to be derived from the gaming activities in order for the business to constitute a "Common Gaming House". Further, except in States like Andhra Pradesh, participants in the gaming activities need to put amounts at stake in order for the business to be attributed to a "Common Gaming House".*

### 4.2 What is the approach of authorities to unregulated supplies?

While prosecutions under the Gaming Enactments are fairly common (especially in certain States such as Karnataka), the authorities have taken an even stricter view towards sports betting. The Enforcement Directorate ('ED') and the CBI have been involved in extensive investigations involving sports betting in high profile sports tournaments, such as the cricketing tournament, Indian Premier League. The police have been conducting regular raids in brick and mortar clubs to ensure no illegal activities are being conducted.

Further, in case of violations of the FDI Policy and restrictions of Foreign Technology collaborations, typically, the authorities are amenable to compound offences of a mere technical nature. While compounding an offence is an effective way to mitigate risk arising out of a one-time offence, for offences of a continuing nature, the authorities are likely to require that the offender complies with FEMA going forward. If an investment is found to be in violation of the policy, the authorities are also likely to order that the structure be unwound or the payments be stopped immediately.

It also seems that the scrutiny of offshore bank accounts, including offshore e-wallets, if maintained will increase significantly due to the recently legislated Black Money Act, which has been discussed above. Offshore remittances as winnings for such activities are prohibited under India's exchange control regulations.

### 4.3 Do other non-national laws impact upon enforcement?

India has an extensive double taxation avoidance agreements ("DTAAs") network. Entities and persons availing of benefits under the DTAAs may be entitled to lower tax rates on royalties, etc. paid to non-residents.

### 4.4 Are gambling debts enforceable in your jurisdiction?

As per Section 30 of the *Indian Contract Act, 1872* ("Contract Act"), agreements by way of wager are void and hence non-enforceable. An exception has been made for certain prizes for horse racing. Subscriptions or contributions, or agreement to subscribe or contribute, for or toward any plate, prize or sum of money of the value or amount of INR 500 (approximately USD 8) or upwards, to be awarded to the winner or winners of any horse race, are permissible.

## 5 Anticipated Reforms

### 5.1 What (if any) intended changes to the gambling legislation/regulations are being discussed currently?

On 23 July 2015, the *Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Bill, 2015* was introduced. One of the objectives of this bill is to regulate and promote the conduct of online "Games of Skill" under issue of licence by the Government of Nagaland and thereby earn revenue for the State Government. This has been referred to a standing committee to consider and provide its report within three months.

The State Government of Goa has proposed amendments to the Goa Gambling Laws which are yet to be enforced. Such amendments prohibit persons other than tourists from entering casinos in the State.

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