

**ARCHITECT'S LIABILITY IN MAKING DECISION DURING CONSTRUCTION  
STAGE**

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**UNIVERSITI TEKNOLOGI MALAYSIA**

ARCHITECT'S LIABILITY IN MAKING DECISION DURING CONSTRUCTION  
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A project report submitted in partial fulfillment of the  
requirements for the award of the degree of  
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the Name of Allāh, the Most Gracious, the Most Merciful

**Specially Dedicated To:**

*My Beloved Mother, My Family, My Friends and My Beloved One.*

*Thank you for your support, love and encouragement.*

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## ABSTRACT

Construction industry consists of multidisciplinary teams such as employer, architect, engineer, quantity surveyor, contractor and etc. The architect is one of the professional who play the main role in the construction industry. This is because, the architect is the party who has the closest relationship with the employer and the contractor. As the professional in the construction industry, the architect will act on behalf of the employer especially as the employer's agent. Besides that, the architect can also act as the contract administrator, independent contractor, adjudicator and quasi arbitrator in the construction industry. In this study, the architect can be as the quasi arbitrator in order to solve the problems that arise between the employer and contractor. As the middle person who will resolve the dispute between the contract parties, the architect shall be impartial and fair in giving the decision. The architect also must act in good faith for both contracting parties. However, there is an issue due on the impartiality of architect's decision where the architect acts as the employer's representative. So, the architect has the capability to be learning towards or bias to the contractor. Because of that, the objective of the study is to identify whether the architects can be held liable to the contracting parties for any decisions made in the context of his acting as a quasi arbitrator. Other than that, data collection of research methodology for the study is documentary analysis which it based on the legal cases. There are 6 cases selected for analysis to answer the objective of the study. The architect will be found liable if he is not acting in a quasi judicial immunity as the quasi arbitrator. He is also liable for the bad faith decision.

## ABSTRAK

Industri pembinaan adalah terdiri daripada ahli-ahli professional seperti klien, arkitek, jurutera, juruukur bahan, kontraktor and sebagainya. Arkitek merupakan salah seorang ahli professional yang memainkan peranan penting dalam industri pembinaan. Hal ini adalah kerana arkitek merupakan ahli yang mempunyai hubungan rapat dengan klien dan juga kontraktor. Sebagai ahli professional yang terlibat secara langsung dalam industri pembinaan, arkitek boleh bertindak sebagai agen kepada klien, pentadbir kontrak, *adjudicator* dan juga sebagai *quasi arbitrator* dalam menyelesaikan pertelingkahan yang timbul antara klien dan kontraktor. Arkitek sebagai *quasi arbitrator* seharusnya berfungsi sebagai orang tengah yang neutral dalam memberi keputusan yang adil dan disertai dengan niat yang baik. Walaubagaimanapun, arkitek boleh bertindak berat sebelah terhadap kontraktor dalam membuat keputusan berdasarkan tugasnya sebagai agen kepada klien. Oleh itu, objektif kajian ini adalah untuk mengenalpasti bilakah arkitek dikatakan bertanggungjawab kepada ahli yang berkontrak atas keputusan yang dibuat dalam konteks arkitek sebagai *quasi arbitrator*. Selain itu, kutipan data bagi metodologi kajian ini adalah analisa dokumen di mana kajian ini berdasarkan kes undang-undang. Sebanyak 6 kes undang-undang dipilih untuk dianalisa bagi menjawab objektif kajian ini. Arkitek dilihat bertanggungjawab sekiranya dia tidak bertindak dalam imuniti *quasi judicial* sebagai *quasi arbitrator* di mana dia telah memberikan sesuatu keputusan yang berat sebelah dan dibuat atas dasar niat yang tidak baik.

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**LIST OF ABBREVIATIONS**

AC	-	Appeal Court
AIA	-	American Institute of Architect
BLR	-	British Law Report
COW	-	Clerk of Work
ER	-	English Report
JCT	-	Joint Council Tribunal
LAD	-	Liquidated Ascertained Damages
MLJ	-	Malaysian Law Journal
PAM	-	Pertubuhan Arkitek Malaysia
RIBA	-	Royal Institute of British Architect

## **CHAPTER 1**

### **INTRODUCTION**

#### **1.0 Background of Study**

Construction industry consists of multiple stages which are the inception stage, design stage, tender stage, construction stage, completion stage and demolition stage. Besides that, because of many stages involve in the construction, this industry is categorized as one of the complex industries. So, due to the complexity of the construction industry, the involvement of the multidisciplinary team is important. Who are the members of these multidisciplinary teams? This team comprises of employer, architect, engineer, consultant, contractor, sub-contractor and supplier<sup>1</sup>.

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<sup>1</sup> Weiming Shen *at el.* (2009), Systems Integration and Collaboration in Architecture, Engineering, Construction, and Facilities Management: Review, Elsevier Journal, Volume 24, Issue 2.

The architect is one of the professionals who provide the service in the construction field. According to the Architect Act (2002), professional architect will be defined as the person who is registered under subsection 10 (2). A professional architect must be a registered architect, obtain the practical experience and pass the examination set by the Board of Architects and he or she must be the corporate members of the Institution of Architect Malaysia<sup>2</sup>.

Architect liability will be divided into three categories which is a liability under contract, liability under tort and liability under statutes. The architect will be liable under the contract if he fails to perform the standard expected service of professional belong to the employer and finally contribute to breach of contract. Furthermore, the architect will be found liable under tort if negligence occurs and he is liable for the lack of standard duty of care<sup>3</sup>. Under statutory liability of the architect, the architect may be liable for any breach of the relevant act such as planning act and building control act<sup>4</sup>. However, the majority of architect's liability suits against architect are liability under contract (breach of contract) and liability under tort (negligence)<sup>5</sup>.

The architect is one of the multidisciplinary team members who play the main role in the construction industry. This is because the architect has a relationship with the employer, consultant and the contractor<sup>6</sup>. Due to the relationship between the parties, the architect will have a contractual relationship with the employer. At the same time, he has a tortuous and professional relationship create between the architect and employer and

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<sup>2</sup> Architects Act 1967 (Amendments up to 1 December 2002) Board of Architect Malaysia. P. 17-18.

<sup>3</sup> Ibid,n2

<sup>4</sup> John C., (2004) Architect's Duties. Page 1-7

<sup>5</sup> Greenstreet B., Greenstreet K., Schermer B., (2005) Law and Practice for Architects: Elsevier Publishing.

<sup>6</sup> Ibid,n5

contractor<sup>7</sup>. Figure 1.0 shows the relationship of the architect with employer and contractor.

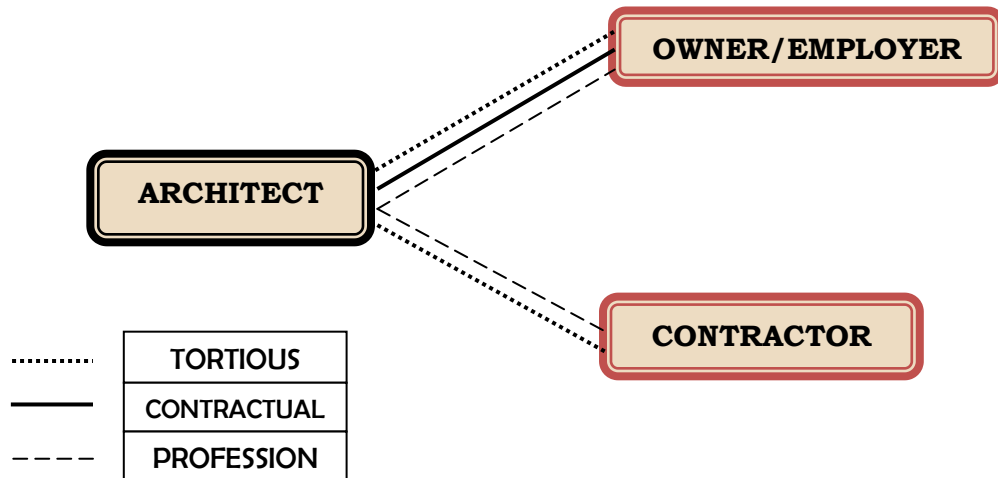


Figure 1.0: Relationship between the architect with the employer and contractor.  
Source: Ashworth A., Hogg K., (2002)<sup>8</sup>.

According to the relationship between the architect and the employer, there are three principle roles of architect under contract which is the agent of the employer, contract administrator, adjudicator or quasi arbitrator behalf of the employer<sup>9</sup>.

<sup>7</sup> Greenstreet B., Greenstreet K., Schermer B., (2005) Law and Practice for Architects: Elsevier Publishing.

<sup>8</sup> Ashworth A., Hogg K., (2002) Willis's practice & Procedure for the Quantity Surveyor: 11<sup>th</sup> Edition, Blackwell Science Publishing.

<sup>9</sup> Atkinson D. (2002) Architect/ Engineer Role, Adjudication, Arbitration, Mediation Article. (2002)



The duty of the architect as an agent for the employer exists when he has been given the mandate of authority from the employer as his principal. In the relationship between the principal and the agent, the architect will be found liable when he oversteps his authority<sup>10</sup>. In addition, the architect also will be liable to the third party whom he deals with if there is no authority or he already exceeds his authority<sup>11</sup>. This is because the architect does not have any power in order to change what was originally agreed between him and the employer<sup>12</sup>.

Besides that, the architect can also be regarded as a contract administrator where he or she is responsible to issue the certificates of payment and extension of time. The architect must also exercise their skills and care as a professional with fairness and impartiality.

On the other hand, the professional architect has to maintain their professional standard of service with the employer. He must also make sure that his competency in providing the service in areas relevant to his professional works, upgrade his knowledge and skills, adequately supervise the employer and be responsible to give impartial decision, opinion and advice between the employer and contractor when a dispute arises<sup>13</sup>.

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<sup>10</sup> Atkinson D. (2002) Architect/ Engineer Role, Adjudication, Arbitration, Mediation Article. (2002).

<sup>11</sup> Murdoch. J, Hughes. W., (2008) Construction Contracts Law and Management :Taylor & Francis Publishing

<sup>12</sup> Ibid,n11

<sup>13</sup> Board of Architect Malaysia., (2006) Code of Professional Conduct for Professional Architects.

Moreover, the architect also can act as a dispute resolver<sup>14</sup>. Other than acting as the agents for the employer, the architect is responsible to act as a quasi arbitrator in order to make judgments on certain issues impartially<sup>15</sup>. The certain issues will consist of the issuing of the certificate on which the architect will exercise judgments regarding the quantity the works done by the contractor, making a decision about how much the contractor should be paid, and etc. Not only that, the quasi arbitrator also is acting in quasi arbitral capacity in making a decision. The failure of the architect to act impartial between the employer and contractor will make him liable.

In addition, the role of the architect as a quasi arbitrator relying on the analogous action where the architect is exercising authority as an arbitrator and a judge acting in his judicial function<sup>16</sup>. In this role, the architect will act as the person who is solving the dispute that arises between the employer and the contractor during the construction process where he is acting in some of the quasi judicial capacity. Due to this capacity, the architect is clothed with the immunity he will be required to act in the capacity of a judge<sup>17</sup>. Besides that, he would be liable if he fail to act in the capacity of a quasi arbitrator to determine the disputed issues which arises between the contract parties fairly and impartially<sup>18</sup>.

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<sup>14</sup> Greenstreet B., Greenstreet K., Schermer B., (2005) Law and Practice for Architects: Elsevier Publishing.

<sup>15</sup> Murdoch. J, Hughes. W., (2008) Construction Contracts Law and Management :Taylor & Francis Publishing

<sup>16</sup> Charles S (2008) Qualified Immunity for Architects and Engineers: Construction Accounting and Taxation.

<sup>17</sup> J.J. Craviolini v Scholler & Fuller Associated Architects (1961)

<sup>18</sup> Sutcliffe v Thackrah (1974) AC 727 case.

## 1.1 Problem Statement

The architect is one of the main players and plays an important role in the construction industry. Basically, the architect has a contractual relationship with the employer. In the practice, the architect also acts as an agent and makes a decision on behalf of the employer.

The architect does not only involve in the design stage for design the drawing but he is also involved in the overall process of construction. There are several duties of the architect in the construction project that can be simply listed out such as the preparation of plans and specification, supervision, advising, inspection and etc<sup>19</sup>. Not only that, the architect also has a duty due to site inspection, instruction and variations, certificates and payments, practical completion, adjustment of the contract sum, final certificate and etc<sup>20</sup>.

Disputes may arise during the construction process. Usually, the disputes will be arising between two contract parties which are the employer and contractor<sup>21</sup>. At the same time, the architect will act as the quasi arbitrator or acting in a judicial capacity for giving the impartial and good faith decision for the disputing parties such as giving the extension of time or certification event<sup>22</sup>. Besides that, the architect shall be neutral in giving the decision in order to avoid the biased decision due to the performance of the employer and the contractor.

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<sup>19</sup> Murdoch. J, Hughes. W., (2008) Construction Contracts Law and Management: Taylor & Francis Publishing.

<sup>20</sup> David C., Andrew W., (2005) The Architect in Practice: 9<sup>th</sup> Edition, Blackwell Publishing.

<sup>21</sup> Nickolas J D., (1990) Architects as Arbiter, Construction Law Journal, Volume 10, Page 9.

<sup>22</sup> Ibid, n21

In terms of liability of the architect as a quasi arbitrator, the architect should make impartial, fair, good faith and neutral decision for the employer and contractor. Moreover, if the architect fails or been negligent in performing his duty improperly due to impartial decision given, it will be a basis to bring the dispute to litigation<sup>23</sup>.

There is one case where the dispute was brought to litigation and it was related to the biased decision made by architects. The relevant case was *Sutcliffe v Thackrah* (1974)<sup>24</sup>.

The architect was held to be liable for the money loss that suffered by the employer because of the architect over valued a series of certificates and the employer duly paid the contractor for that. The contractor then when to a liquidation before the job was complete due to the failure of the employer to recover the amount that have been to pay. The court held that the architect was not acting in a quasi-judicial capacity and had no immunity from liability. Because of that, the architect had failed to act as quasi arbitrator in order to be impartial in giving the decision on the certificate between the employer and the contractor. So, he was liable to compensate the employer for the money lost.

The case above relates to the failure of the architect to act as the quasi arbitrator to solve the problem between the employer and contractor due to an overvaluation of a series of certificates. The architect should act as the initial decision maker and be impartial in making the decision regarding the performance and dispute that arises between the contracting parties. Besides that, he also must be impartial as quasi arbitrator in making a decision even though he has the authority on behalf of the employer that is as an employer's representative. There is a criticism of immunity even

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<sup>23</sup> Nickolas J D., (1990) Architects as Arbiter, Construction Law Journal, Volume 10, Page 9.

<sup>24</sup> *Sutcliffe v Thackrah* (1974) AC 727

where limited to a good faith decision by the design professional<sup>25</sup>. Basically, the immunity will protect the design professional from being sued for decisions made. However, there is a limitation due to the immunity and design professional also can be found liable for their decision. Based on the study, the design professional which being the focus is on the architect. Can the architect truly be neutral in rendering a decision even though he has been selected and paid by the employer<sup>26</sup>? What is the nature of circumstances handled by the architect as quasi arbitrator which give rise to dispute? Besides that, can the architects be liable for the contracting parties for any decisions made<sup>27</sup>?

## 1.2 Objective

The objective of the study is:

- 1) To identify whether the architects can be held liable to the contracting parties for any decisions made in the context of his acting as quasi arbitrator.

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<sup>25</sup> Sweet J., Schneier M. M., (2004) *Legal Aspects of Architecture, Engineering and the Construction Process*, 7<sup>th</sup> Edition, Thomson Publishing.

<sup>26</sup> Sweet J., Schneier M. M., (2004) *Legal Aspects of Architecture, Engineering and the Construction Process*, 7<sup>th</sup> Edition, Thomson Publishing.

<sup>27</sup> Murdoch. J, Hughes. W., (2008) *Construction Contracts Law and Management*: Taylor & Francis Publishing.

### **1.3 Scope of the Study**

The scope of the study will be based on the case law regarding the professional liability of the architect. Besides, this study is focused on English and Malaysian law case regarding the professional architect. Other than that, the case referred will be focusing on any scope of architect liability during the construction process. According to the Board of Architects Malaysia<sup>28</sup>, professional architect shall issue the instruction or variation, be responsible in order to make a periodic interval inspection, make the estimated costs and time, and etc. The architect also makes a decision in relation to certificates of payment to the contractor<sup>29</sup>. Moreover, any material changes shall be informed by the architect to the employer. All the duties of the architect require them to make a decision, form opinions and also advise the employer and the contractor. So, the relevant case related to the architect's liability in the context of him or her acting as a quasi arbitrator of the dispute will be referred to.

### **1.4 Significant of the Study**

This study is significant because it tries to identify the architect's duties as a quasi arbitrator in relation to solving the disputes between the employer and the contractor. Besides that, the architect shall not be biased in every decision made by him. This is because, the partial or biased decision will make the other parties not satisfied and leading to the dispute brought to court.

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<sup>28</sup> Architects Rule 1996 (Incorporating Amendment up to June 2011), Board of Architects Malaysia, [www.lam.gov.my](http://www.lam.gov.my)

<sup>29</sup> Murdoch. J, Hughes. W., (2008) Construction Contracts Law and Management: Taylor & Francis Publishing.

In the construction process, sometimes the architect will act as a quasi arbitrator to solving the dispute arises between the contracting parties. Not only that, he also must make a neutral decision due to both dispute parties even though he has already had a contractual relationship with the employer. The failure of the architect to make impartial decisions will make him liable.

That is why this study wants to find out the nature of circumstances that leads to dispute handled by the architect as a quasi arbitrator during the construction process. Besides that, these studies also focus on whether the architect can be found liable for the contracting parties for any decision made.

## **1.5 Research Methodology**

Research methodology will be as a sequence of the study. This method has been followed in order to make the research become more systematic. Basically, this research has been divided into five (5) stages which is identification of the issue, literature review, research methodology, data analysis, conclusion and recommendation. Figure 1.1 shows the Flow Chart for Sequence of Research Methodology.

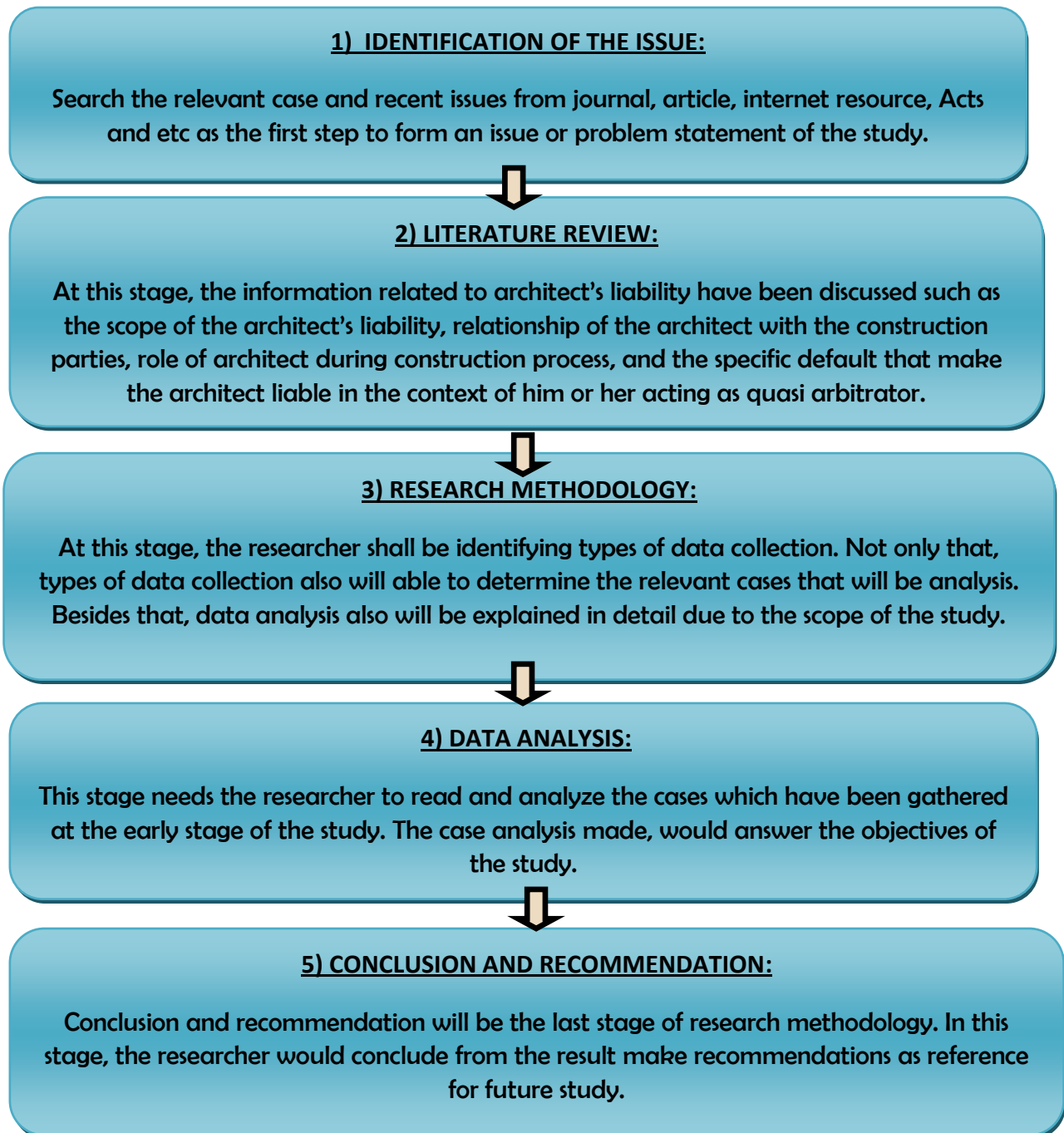


Figure 1.1: Flow Chart for Sequence of Research Methodology



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