Commentary on Beijing Arbitration Commission Arbitration Rules (2015)

Compliance and Ethics

“Communist Party of China (CPC) Central Committee’s Decision to Comprehensively Promote the Rule of Law in China” explicitly requires it to “improve the arbitration system and enhance the credibility of arbitration,” and the “CPC Beijing Municipal Committee’s Opinion on Advocating the Spirit of the 4th Plenary Session of the 18th CPC Central Committee to Comprehensively Promote the Rule of Law” also explicitly provides that “Beijing shall be built as the preeminent legal construction zone.” With this knowledge, the Beijing Arbitration Commission (BAC) thoroughly amended its arbitration rules and published the Beijing Arbitration Commission Arbitration Rules (2015) (the revised BAC arbitration rules). The revised BAC arbitration rules came into effect on April 1, 2015.

I. Overview of the rules’ revisions

The revised BAC arbitration rules have adopted multiple amendments and supplements to every chapter of the currently effective arbitration rules. In our view, the above amendments and supplements can be categorized in three groups. The first group contains revisions based on the structure and wording of the currently effective arbitration rules, which make its structure more reasonable, its wording more normative, and its style more comprehensive. The second group contains amendments and adjustments based on the BAC’s practical experiences to solve the problems raised in applying the currently effective arbitration rules. For instance, adding factors to be considered when deciding not to accept the amendments to the claim or counterclaim, and extending the time limit for parties to challenge any arbitrator after receiving arbitrator’s written disclosure. The third group contains revisions that attempt to adopt international arbitration practices and introduce the latest arbitration mechanisms such as interim measures and an emergency arbitrator. Due to limited space, we only focus on several parts of the revised BAC arbitration rules.

II. Incorporating provisions on multi-party and multi-contract arbitration

As business transactions are becoming more complex, more parties may be involved in a single contract, and the same parties may also execute and carry out multiple contracts. Therefore, multi-party and multi-contract transactions become issues. To solve this problem, besides revising the provision of “consolidations of hearings,” the revised BAC arbitration rules add provisions of “joinder of additional parties,” “claims between multiple parties,” and “consolidations of arbitrations.”

(1) Joinder of additional parties (Article 13 and Article 19.6)

According to the revised BAC arbitration rules, the parties may, by submitting a written application, apply to join an additional party under the same arbitration agreement. If the application is made before the arbitral tribunal is constituted, it shall be subjected to the approval of the BAC. If the application is made after the arbitral tribunal is constituted, it shall only be accepted under the consensus agreement of the claimant, the respondent, and the party to be joined. With regard to the appointment of arbitrator, the joined party shall nominate the arbitrator jointly with either the claimant or the respondent as is appropriate. If no such nomination has been made, all members of the arbitral tribunal shall be appointed by the chairman of BAC (see Article 19.6).

The mechanism of joining an additional party is of great importance to improving arbitration efficiency, saving judicial resources, and achieving the goal of final settlement of the disputes. It is worth noting that the mechanism of joining an additional party has been established in many international arbitration institutions. For instance, the rules of arbitration of the International Chamber of Commerce (2012) (the ICC arbitration rules (2012)) emphasize that “no additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree;[1]” the Hong Kong International Arbitration Centre administered arbitration rules (2013) (the HKIAC administered arbitration rules (2013)) that have more detailed and comprehensive provisions for “joinder of additional parties,” which allow not only the parties in the arbitration proceedings to request for joinder, but also a third party can join by submitting a request to HKIAC.[2] In addition, the rules of major Chinese arbitration institutions, such as the China International Economic and Trade Arbitration Commission (CIETAC) arbitration rules (2015) (the CIETAC arbitration rules (2015))[3] and the China (Shanghai) Pilot Free Trade Zone Arbitration Rules (2015) (the FTZ arbitration rules (2015)),[4] also provide the mechanism of joining an additional party.

Although many arbitration institutions allow the joinder of additional parties, there are many differences in practice. It is necessary to have a set of detailed and operative rules in this regard.

1 See Article 7.1 of the ICC Arbitration Rules (2012).

2 See Article 27.6 of the HKIAC Administered Arbitration Rules (2013).

3 See Article 18 of the CIETAC Arbitration Rules (2015).

4 See Articles 37 and 38 of the FTZ Arbitration Rules (2015). Compared to the Revised BAC Arbitration Rules and the CIETAC Arbitration Rules (2015), the FTZ Arbitration Rules (2015) additionally allow that third parties other than those under the same arbitration agreement may also be joined into the arbitration proceedings.

(2) Claims between multiple parties (Article 14)

With the increasing complexity of business transactions, there are more and more arbitrations that involve multiple parties. Especially in arbitrations where an additional party joined, the additional party shall be entitled to raise claims against any other party in the arbitration proceedings. Therefore, adding the provision of “claims between multiple parties” can help to improve the arbitration rules and protect the parties’ rights and interests.

Some international arbitration institutions have added the provision of “claims between multiple parties” in their newly revised versions of arbitration rules. For instance, the ICC arbitration rules (2012) provide that, in a multi-party arbitration, any party can make claims against any other party under several conditions. It also provides specific procedures for making such claims.[5]

The revised BAC arbitration rules also add the provision of “claims between multiple parties.” Where there are two or more claimants or respondents in an arbitration case, or where any additional party has joined the arbitration, any party may raise claims against any other party under the same arbitration agreement. Provisions regarding the original claims shall apply *mutatis mutandis* to the submission of, acceptance of, defense to, and amendment of, those new claims (see Article 14.2).

It is worth noting that, in China, only the revised BAC arbitration rules contain the provision of “claims between multiple parties.”

5 See Article 8 of the ICC Arbitration Rules (2012).

(3) Consolidation of arbitrations (Article 29)

Consolidation of arbitrations refers to the practice of merging two or more arbitrations pending under the same arbitration rules into a single arbitration. According to the revised BAC arbitration rules, the BAC may decide the merger of arbitrations when the parties have agreed to consolidation, or when the BAC considers it necessary to conduct such consolidation. In deciding whether to consolidate, the BAC may consider the following factors: the arbitration agreements on which the relevant arbitrations are based; the nexus among the relevant arbitrations; the stage of proceedings of the relevant arbitrations; and whether the arbitrators are already nominated or appointed in the relevant arbitrations.

A few arbitration institutions have established the mechanism of consolidation of arbitrations in their newly revised arbitration rules. Arbitrations rules usually provide that an arbitration institution may decide the consolidation of arbitrations when the parties have agreed to the consolidation, or the arbitration institution considers that it’s necessary to conduct the consolidation (see relevant provisions in the revised BAC arbitration rules, the CIETAC arbitration rules (2015)[6], the ICC arbitration rules (2012)[7] ,and the HKIAC administered arbitration rules (2013)).[8] With regard to the issue of the designation of arbitrators after the consolidation of arbitrations, most arbitration rules have no specific provisions. However, the HKIAC administered arbitration rules (2013) provide that the parties to the consolidated arbitrations shall be deemed to have waived their rights to designate an arbitrator, and the HKIAC may revoke the appointment of any arbitrators and appoint the arbitral tribunal in respect of the consolidated proceedings.[9] The revised BAC arbitration rules, along with most other international arbitration rules, provide similar provisions for “consolidation of arbitrations.” The BAC adopts a flexible and broad approach in its arbitration rules, which allows the parties to resolve all disputes in a single arbitration and saves arbitration resources and cost to the maximum extent.

6 See Article 19 of the CIETAC Arbitration Rules (2015).

7 See Article 10 of the ICC Arbitration Rules (2012).

8 See Article 28 of the HKIAC Administered Arbitration Rules (2013).

9 See Article 28.6 of the HKIAC Administered Arbitration Rules (2013).

II. Revising provisions of preservation measures, adding special provisions of interim measures, and emergency arbitrator

The revised BAC arbitration rules take into consideration the differences between international commercial arbitration cases and domestic ones, and provide for different rules respectively: putting the provision of “preservation measures” in the general rules and putting provisions of “interim measures” and “emergency arbitrator” in the chapter of “special provisions for international commercial arbitration.” In fact, interim measures already include the contents of preservation measures. However, the PRC Civil Procedure Law and the PRC Arbitration Law only stipulate that the competent court may order preservation measures. Therefore, the above arrangement made by the revised BAC arbitration rules caters to the legal environment in Chinese arbitration and facilitates the parties to protect their legitimate rights and interests by better applying the arbitration rules.

(1) Preservation measures (Article 16)

The revised BAC arbitration rules provide three types of preservation measures: preservation of property, preservation of evidence, and preservation regarding behavior. Also, the revised BAC arbitration rules allow a party, in an emergency, to apply for preservation measures before submitting its application for arbitration. One highlight of the newly revised PRC Civil Procedure Law is to allow preservation measures regarding behavior and application for pre-arbitration preservation measures. Therefore, the above amendments of the revised BAC arbitration rules are consistent with the newly revised PRC Civil Procedure Law.

(2) Interim measures (Article 62)

Considering the characteristics of international commercial arbitration, the BAC adds the provision of “interim measures” in the chapter of “special provisions for international commercial arbitration” of the revised BAC arbitration rules. According to this provision, the arbitral tribunal may order any interim measures it deems proper and shall have the power to require the party requesting for interim measures to provide appropriate security. However, the revised BAC arbitration rules have not stipulated on any practical matters of interim measures, for instance, relevant factors to be considered when deciding whether or not to order interim measures, and a granted interim measure’s modification, suspension, or termination. Therefore, the arbitral tribunal may have wide discretion in dealing with these matters. In addition, Article 62.2 of the revised BAC arbitration rules provides that the parties have an option to directly apply for interim measures to competent court in accordance with the applicable law.

In fact, the rules of almost every international arbitration institution have provisions for interim measures. However, when an arbitral tribunal is granting interim measures, it shall consider whether the law of the place for enforcement permits such interim measures and to what extent it permits. Some arbitration rules have only general provisions for interim measures, for instance, the ICC

arbitration rules (2012) only stipulate that an arbitral tribunal may grant interim measures and require the requesting party to furnish it by appropriate security.[10] On the other hand, other arbitration rules have detailed and practical provisions of interim measures, for instance, the HKIAC administered arbitration rules (2013) provide the contents of interim measures, relevant factors to be considered when deciding whether or not to order interim measures, modification, suspension or termination of a granted interim measure, and compensation of costs and damages caused by interim measures, etc.[11]

Arbitration institutions in China must consider the practical situation when providing for interim measures. The revised BAC arbitration rules confine the application of interim measures to international commercial arbitration, and adopt general provisions on this matter, which is an appropriate and mature way to practice in China.

10 See Article 28 of the ICC Arbitration Rules (2012).

11 See Article 23 of the HKIAC Administered Arbitration Rules (2013).

(3) Emergency arbitrator (Article 63)

The provision of “emergency arbitrator” is newly incorporated into the chapter of “special provisions for international commercial arbitration” of the revised BAC arbitration rules. According to the revised BAC arbitration rules, where the BAC approves the appointment of an emergency arbitrator, it shall appoint an emergency arbitrator from the panel of arbitrators within two days after the parties concerned pay the fees for appointing emergency arbitrators, and the emergency arbitrator shall issue a decision, order, or award on the application for interim measures within 15 days after his or her appointment. Meanwhile, the revised BAC arbitration rules also provide that the parties shall have a reasonable opportunity to present their case and are entitled to raise their objection to the decision made by the emergency arbitrator.

The mechanism of emergency arbitrator offers remedies for the parties to seek urgent interim relief in case of emergency. This mechanism was first introduced in the international arbitration rules of the American Arbitration Association (AAA) (2009). At present, many international arbitration institutions have adopted emergency arbitrator in their arbitration rules. For instance, the ICC arbitration rules (2012) provide comprehensive stipulations in its Appendix V, including the application for emergency measures, appointment of emergency arbitrator, transmission of the file, challenge of emergency arbitrator, proceedings, order, and costs of the emergency arbitrator proceedings. In our opinion, it is necessary for an arbitration institution to provide a practical and detailed guideline as to how to apply the provisions for “emergency arbitrator.”

With regard to the time limit for the appointment of emergency arbitrator and the issuance of order, different arbitration rules provide different stipulations. The arbitration rules of the Arbitration Institution of the Stockholm Chamber of Commerce (SCC) (2010) provide a shorter time limit, i.e., an emergency arbitrator shall be appointed within 24 hours of the SCC’s receipt of the application for the appointment of an emergency arbitrator, and an emergency decision on interim measures shall be made no later than five days from the date on which the SCC has referred the application to the emergency arbitrator.[12] Generally speaking, most of the international arbitration rules provide that an emergency arbitrator shall be appointed within two days after the arbitration institution’s receipt of the application for the appointment of an emergency arbitrator (and the application deposit),[13] and an emergency decision shall be made within 15 days from the date on which the arbitration institution has transmitted the file to the emergency arbitrator.[14] However, some arbitration rules (e.g., the FTZ

arbitration rules (2015))[15] provide a longer time limit.

12 See Articles 4 and 8 of Appendix 1 of the Arbitration Rules of the Arbitration Institution of the Stockholm Chamber of Commerce (2010).

13 For instance, the ICC Arbitration Rules (2012) and the HKIAC Administered Arbitration Rules (2013) provide such time limit.

14 For instance, the ICC Arbitration Rules (2012), the HKIAC Administered Arbitration Rules (2013) and the CIETAC Arbitration Rules (2015) provide such time limit.

15 See Articles 21 and 22 of the FTZ Arbitration Rules (2015).

VI. Introducing the mechanism of *ex aequo et bono*

The revised BAC arbitration rules have added the mechanism of *ex aequo et bono* into the chapter of "special provisions for international commercial arbitration." Article 69.3 of the revised BAC arbitration rules provides that: "By agreement of the parties, or upon the parties' consensus during the arbitral proceedings, the Arbitral Tribunal may render its award amiable compositeur or ex aequo et bono, but such award shall not violate the mandatory provisions of law and the public interest."

The mechanism of *ex aequo et bono* empowers the arbitral tribunal, when properly authorized by the parties, to make binding awards regarding substantial issues of dispute according to principles of good faith, fair trade or honesty, rather than following the relative laws. Many international arbitration institutions have acknowledged the mechanism of ex aequo et bono. For example, Article 21.3 of the ICC arbitration rules (2012) stipulates that "The arbitral tribunal shall assume the powers of an *amiable compositeur* or decid*e ex aequo et bono* only if the parties have agreed to give it such powers." Also, Article 35.2 of the HKIAC administrated arbitration rules (2013) provides that "the arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly agreed that the arbitral tribunal should do so."

However, according to Article 7 of the PRC Arbitration Law, arbitration must be conducted according to the facts and complying with the law in order to settle the disputes fairly. Therefore, the application of *amiable compositeur* or *ex aequo et bono* still needs to exceed the circumscription of the current PRC Arbitration Law.

V. Improving and updating the arbitration rules based on practical experiences

In this revision of the BAC arbitration rules, not only some new mechanisms have been introduced to the rules, more importantly, the revision is based on previous experiences from arbitration practice, and has put the convenience of the parities as its purpose, thus promoting the development of the arbitration system and the improvement of the mechanisms. For example:

(1) Add provision of appointing stenographers to record the hearing (Article 40.5)

Hearing transcript is not only important to arbitrators and arbitration institutions, but also to the parties, especially in some complicated cases. Nevertheless, in previous domestic arbitration

practice, the parties were not allowed to make sound recordings or videotapes of the hearing, nor could they gain access to audio/video materials made by the arbitration institutions. Therefore, the parties were unable to accurately recall the entire hearing process. In international commercial arbitration practice, however, the parties not only can receive the audio/video materials from the arbitration institution, but also may appoint stenographers to record the hearing. The revised BAC arbitration rules have taken the parties' special needs into consideration and specially provide that parties of the arbitration can appoint stenographers to record the hearing. This initiative deserves high appraisal.

(2) Extend the time limit of challenging the arbitrator by the parties (Article 21.3)

The current BAC arbitration rules stipulate that the parties shall state in writing if it intends to challenge the arbitrator within five days from its receipt of the arbitrator's written disclosure. This may not be sufficient during the course of representation of a case. Therefore, the revised BAC arbitration rules have extended the time limit to 10 days, which has facilitated the parties and their counsels, enabling them to prepare the relevant documents under a more abundant time schedule.

(3) Allow the arbitral tribunal to delegate the case manager to organize the parties to examine and verify the consistency between the originals and copies of the evidence (Article 36 .1)

In practice, substantial time is needed to examine and verify evidence. In order to carry out the arbitration more efficiently, the revised BAC arbitration rules particularly allow the arbitral tribunal to delegate the case manager to organize the parties to carry out the aforementioned examination and verification. This will help save the arbitration resources and reduce the arbitration costs.

(4) Amend the fee schedule of the arbitrators in international commercial arbitration, specifying that the parties may agree to pay the arbitration fee according to Annex 2: "Arbitration Fee Schedule for International Commercial Arbitration"

According to Article 6 of Annex 2 of the revised BAC arbitration rules, the arbitrators' fee shall be determined according to either one of the following methods: (1) calculation by hourly rate; (2) calculation based on the amount in dispute. This innovation of BAC has made a breakthrough of the predicament that has upset the Chinese arbitration circle for many years, and will be of great use to address the unbalanced situation of the workload, responsibility and rewards of the arbitrators, thus to improve the efficiency and quality of arbitration awards, and to promote the development of the Chinese arbitration and to converge with international arbitration practice. However, the impact to the parties under the new fee schedule shall still await to be evaluated.

VI. Conclusion

In the past two years, several Chinese arbitration institutions have published their new arbitration rules, and one of the common highlights is that they have all introduced many international arbitration mechanisms such as interim measure, emergency arbitrator, consolidation of arbitration, etc., which indicates that Chinese arbitration institutions have improved their services and it will be beneficial to the parties. We observe that the BAC has thoroughly revised its rules as compared to other Chinese arbitration institutions, and some of its amendments are real innovations. The revised BAC arbitration

rules put much emphasis on the needs of the parties and the practical operation of the rules while introducing new arbitration mechanisms. And we believe that with tomorrow's practice, the present's amendment to the rules will gradually meet the parties' needs and match the nature of arbitration system, as well as to bring it closer to the international arbitration practice.

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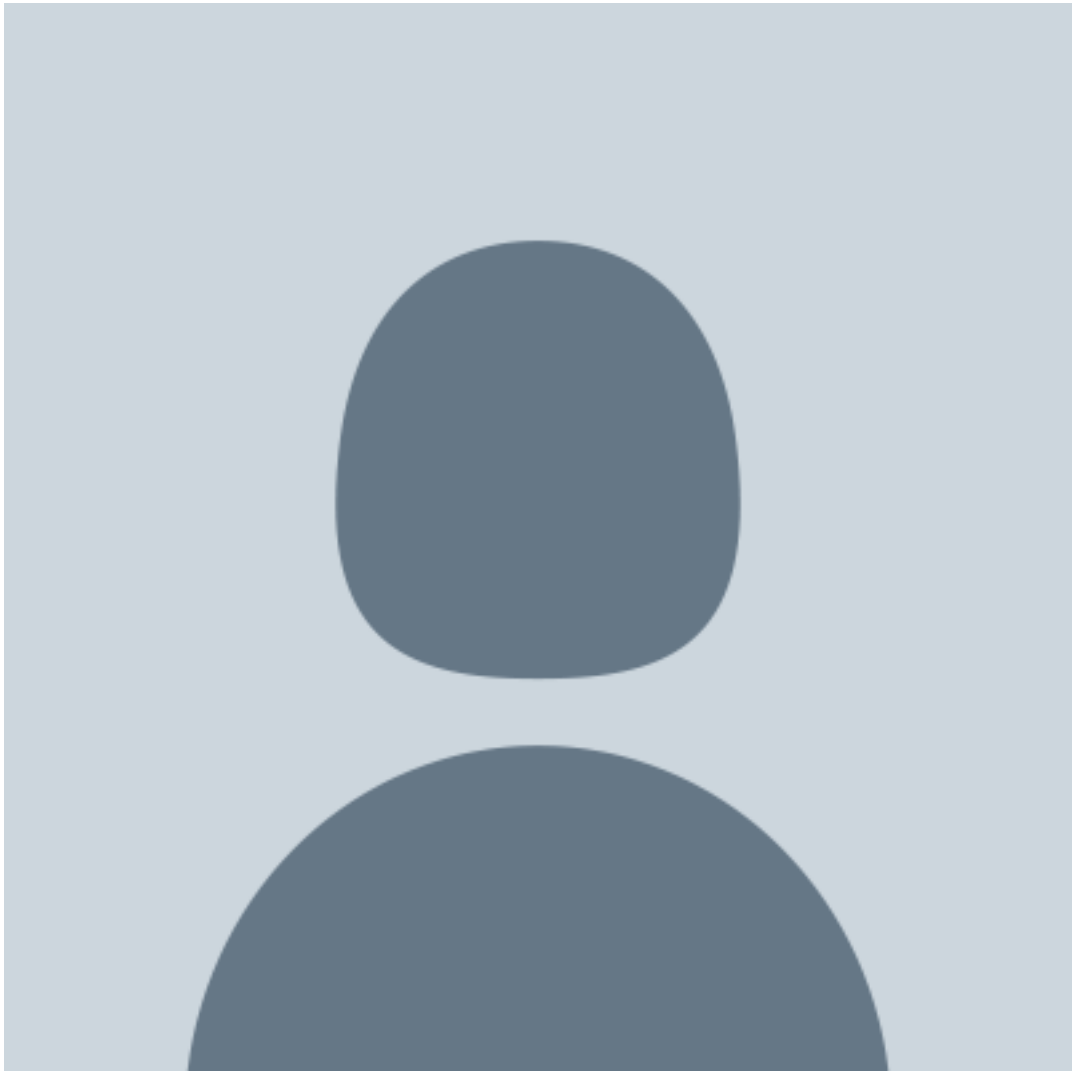

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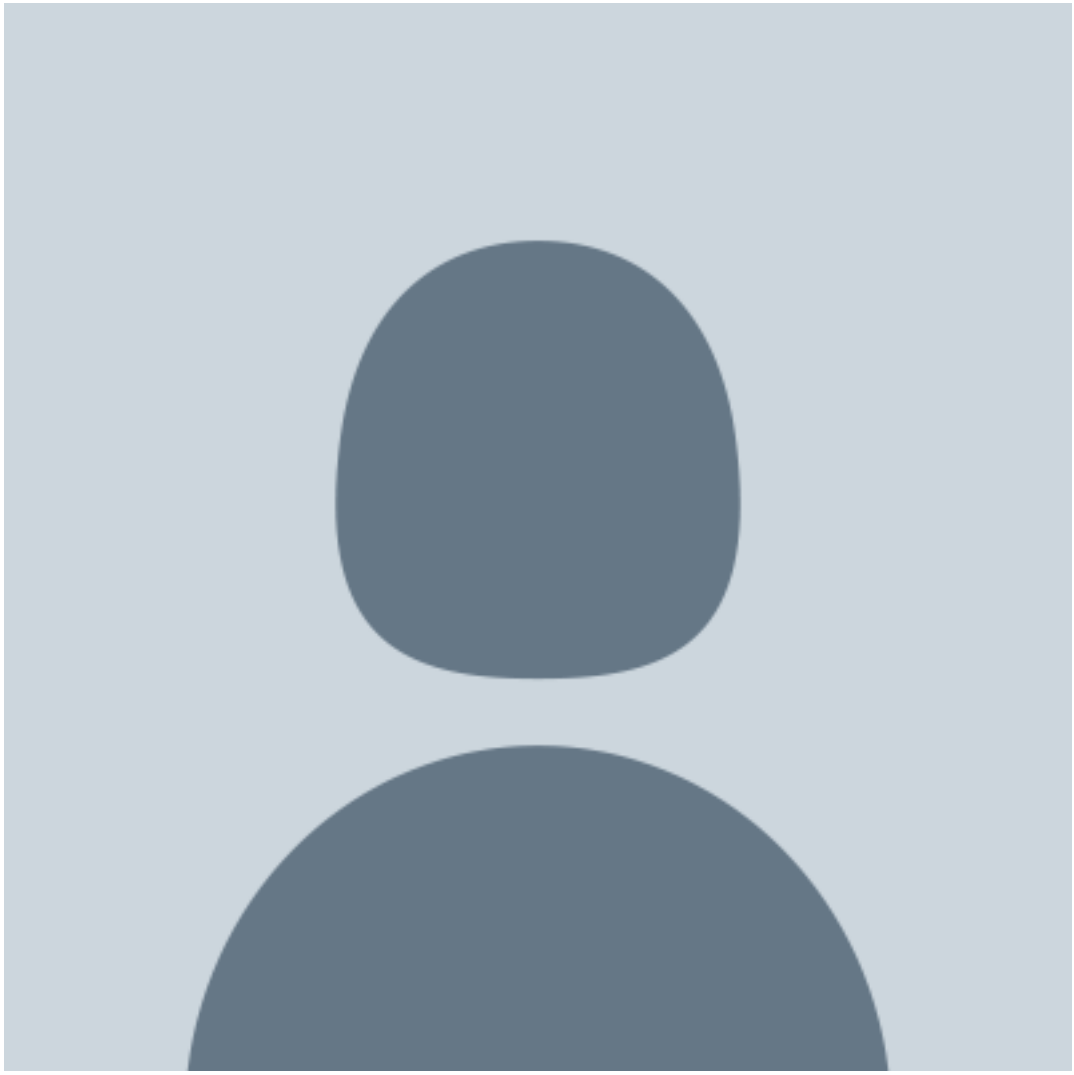

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