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Research Article

Comparative Analysis of Usual and Incidental Contractual Conditions in the Albanian and English Contract Law

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Abstract

The contract concluded by the parties, in addition to the essential conditions, which must necessarily exist in every contract; otherwise, it is invalid, also contains the usual conditions and the incidental conditions. This paper consists of two main issues. In the first case, the usual conditions and the incidental conditions will be treated according to contractual law in Albania. In the second case, these conditions will be addressed in accordance with English contract law, which is commonly referred to as "conditions negotiated by the parties". The issues to be addressed in the first case pertain to the fundamental features that characterize the usual and incidental conditions under Albanian contract law, their content, and the consequences of their omission in the contract.

In the second part of this paper, we will delve into the interpretation of miscellaneous clauses, both ordinary and incidental, under English contract law. We will explore the evolution in their interpretation within English judicial practice and examine the consequences of parties anticipating these terms. Particular attention will be paid to the challenges that have arisen in English judicial practice when resolving disputes between parties. In this manuscript, we will not only discuss the various positions held by different authors on this matter but also reference select decisions from English courts.

In conclusion, we will provide a summary of results, focusing on the disparities between contractual law in Albania and UK concerning typical and incidental contract conditions. We will also address the issues that have arisen in the judicial practices of both countries, emphasizing the need for a fair and accurate interpretation of such conditions.

Keywords: contract law, boilerplate clauses, case terms, good faith and contractual impartiality.

1. Introduction

"One of the conditions that may be included in a contract between parties pertains to *"usual conditions"*. These conditions are *established by civil legislation, with legal provisions authorizing their inclusion, and are typically encountered in specialized contracts governed*

by such legislation. Since usual conditions are primarily found in specialized contracts falling under the purview of specific segments of contract law, a comprehensive discussion of them lies beyond the scope of this paper.

However, given the significance of usual conditions in comprehending the concept of contracts in a broader context, this paper will restrict its focus to providing an understanding of the meaning and key characteristics of these conditions. Since usual contract terms are delineated by dispositive or permissive legal norms, they exhibit the following fundamental attributes.

i. It is not necessary for the parties to expressly include these conditions in the contract. The contract remains fully valid if it includes all essential conditions as required by law.
ii. The usual conditions, even though they are provided by the civil legislation with permissive provisions, are mandatory for implementation by the parties and the court in case of legal conflict, if the parties have not provided otherwise by agreement on the content of these conditions;
iii. These conditions are typically stipulated by law for each specific type of contract and are applicable even if they are not explicitly provided in the contract. In other words, if the parties do not stipulate these conditions in the contract, they are presumed to be included because they are stipulated by law for that type of contract.
iv. The usual terms give the parties the opportunity to make provisions or choices different from those stipulated by the law through the permissive norm. When the parties to the agreement choose to provide differently than what is determined by the content of a legal norm that expresses a common condition, then this condition no longer exists, but is transformed into a case condition.
v. Practically, usual conditions can be found in the Albanian Civil Code within permissive legal norms that conclude with phrases such as "unless otherwise stipulated" or "unless there is a contrary agreement.

As an illustrative example of usual conditions found in the general part of contract law, we can reference Article 590 of the Albanian Civil Code. According to Article 590 of the Civil Code:

"*Bailiff is solidary obliged over the main debtor for the execution of the obligation, except when differently provided by agrement".*

The formulation of this provision clearly designates it as a usual condition. This determination is evident from the presence of the distinguishing expression, as stated in civil legislation: "except when it is provided otherwise by agreement."[1]

By applying the basic features that characterize the usual conditions for this legal provision, we can analyze that, if the parties are silent and do not mention such a condition in the contract, this condition is mandatory for implementation by the parties and the court, as it is provided for in the law in the form of a permissive norm. But, if the parties by agreement between them choose to provide differently than what is provided in Article 590 of the Civil Code, for example, providing that

[1] See also: Article 590 of the Albanian Civil Code.

the Bailiff is not jointly and severally obliged to execute the entire obligation of the debtor, but is obliged to execute it together with the debtor, each executing ½ of the value of the obligation or providing that the Bailiff is obliged to execute the debtor's obligation, only when it is proven that the debtor has not managed to execute the obligation himself, since he has no solvency, etc., then the usual condition provided for by Article 590 of the Civil Code, no longer exists and becomes an incidental condition.

Regarding the usual conditions, it is worth emphasizing the fact that, in addition to being provided for by permissive legal provisions, if the parties have not reached an agreement on these conditions in the concluded contract, they will apply to their contract, because they are provided for in a legal provision that regulates the legal relationship between them. But if the parties do not want to apply the usual conditions, they must provide in the contract concluded between them, the exception or avoidance from the application of these conditions provided by law, in the manner and form that was clarified (Nuni, Mustafaj and Vokshi, 2008).

The usual terms of the contract are also provided by the Albanian Civil Code of 1982 with legal provisions, which were binding on the parties if they did not foresee in the concluded contract the change of the content of these provisions. Even the theory and judicial practice of the time considered these conditions as not necessary for the existence of the contract, but considered as taken for granted if the parties did not mention them in the concluded agreement.[2]

The 1956 Albanian Law "On Legal Actions and Obligations" contained usual terms of the contract, both in the provisions governing the general part of the contract and especially in the provisions governing separate contracts. The doctrine of contract law of the time accepted as usual conditions those provided by the law with legal provisions. These conditions were applicable even if the parties had not made an agreement on these conditions, as they were provided for in the legal provisions. If the parties wished not to implement the above conditions, they should have expressed in the contract their non-implementation, providing in the terms of the contract a content different from that provided by legal provisions for the usual conditions (Sallabanda, 1962).

Another type of terms that a contract may contain are incidental conditions. By incidental conditions are understood, those that are provided in the contract based on the will of the parties, as well as those that are provided by their agreement, contrary to or with different contents from those provided by the usual conditions.

Since the incidental conditions are not provided by the law, but are provided by the parties with an agreement between them, they must have a content that they do not contradict the mandatory norms of the law, otherwise known as the "clause of public order". If one or several incidental conditions contradict a mandatory norm of the law, they are considered invalid or as if they do not exist. However, this fact has no impact on the validity of the contract. The contract will be valid, regardless of whether one, some or all incidental conditions are invalid, if the contract contains all

[2] See also: Article 124 of the Civil Code of the People's Socialist Republic of Albania.

its essential conditions and the latter are valid.

Incidental conditions are also considered as conditions that are neither essential nor usual for a contract, but that are found in it because the parties have desired something like that. This implies the fact that, when the parties by their agreement agree not to provide the incidental conditions, the contract is fully valid, but if the parties agree to provide such conditions, they are obliged to implement them (Nuni, Mustafaj and Vokshi, 2008).

A specificity of case conditions is the fact that they usually apply to special contracts that are regulated in the special part of contract law. Such a situation arises due to the very nature of these conditions, which contain additional circumstances or clauses that are not provided for by law, but which are placed in the contract based on the will of the parties. However, the incidental conditions can also be found in the general part of the contract law and in these cases it is the case when the parties, by agreement between them, provide the opposite or different from the content of the usual conditions of the contract.

As examples of the incidental conditions of the contract, we can mention some of them, emphasizing the fact that they are infinite by nature, because the circumstances or clauses that the parties can provide in the contracts they conclude, depending on the interests, are also infinite. These conditions can be of a material nature, that is, belonging to the material law, but they can also be of a procedural nature, referring to the civil procedural law.

Incidental conditions of a material nature include the condition of keeping the movable or immovable property for lease by the seller even after selling it to the buyer. Another example is the condition of repurchase within a sales contract, wherein the parties agree that if the buyer sells the purchased asset, they must sell it back to the original seller. There's also the condition stating that if the parties terminate the contract prematurely due to their free will, each of them must pay the other party a reasonable compensation in money. Additionally, in a donation contract, a condition may be established in which the beneficiary is not allowed to sell the asset during their lifetime but can only pass on ownership through legal inheritance (Tutulani-Semini, 2016).

Incidental conditions of a procedural nature include instances where the parties stipulate that the arbitration court will have jurisdiction to resolve disputes arising during the contract's implementation. Furthermore, parties may also mutually agree to modify the territorial jurisdiction of the court, designating a court different from the one where the contract is executed as the competent authority. Another example pertains to situations where the parties specify a legal framework distinct from that of the country where the contract is concluded.

Another significant issue requiring consideration concerning incidental conditions is the differentiation of these conditions from the elements of an incidental contract, which were examined earlier. The distinction between incidental conditions and the incidental or accidental elements of the contract encompasses both formal legal and substantive aspects. From a formal legal standpoint, a clear differentiation is essential.

Incidental conditions are inherently expansive since the circumstances and clauses that parties can stipulate in a contract as incidental conditions have no defined limits. In contrast, the incidental elements of the contract are constrained in number, as the law comprehensively and thoroughly prescribes only three of them: condition, term, and burden or modus.

From the essential point of view, the incidental conditions as one of the types of conditions of the contract, differ from the condition as its accidental element. Thus, the incidental conditions of the contract are, in any case, facts and circumstances that are part of the contract and the civil legal relationship that the parties have concluded between them, while the condition as an incidental element of the contract, constitutes a fact or circumstance that is not an element of the contract, but it is an uncertain event.

For example, if the parties stipulate in the sales contract that the seller will remain as a lessee in the sold apartment, for a period of 6 months after the conclusion of the sales contract and after the transfer of ownership of the apartment from the seller to the buyer, this is an incidental condition to this contract. On the other hand, if the seller and the buyer in this contract of sale of the apartment state that the seller will sell the apartment to the buyer, in case the seller wins the American lottery and following the process of the procedures of this lottery he leaves for the US, in this case we are before the condition as an incidental element of the contract.

2. Contract terms negotiated by the parties under English contract law

English contract law pays great attention to the terms of the contract to which the parties agree, otherwise known as usual conditions and incidental conditions. Such a thing happens due to the fact that it is mainly based on judicial precedent. According to it, the conditions of the contract can be divided in two groups. The first group are those that are drawn up by each of the parties and then presented to each other for negotiation in order to conclude a contract. This set of conditions is commonly known as miscellaneous clauses, where in the English language the term is called "boilerplate clauses".

The second set of conditions includes a number of standard conditions and clauses that a business is required to include in all contracts it enters into with third parties. These conditions are usually formulated as written additions to the contract or included in the standard documentation that the business sends on its behalf, in any case that it seeks to enter into a contract. It is understood that these conditions are drawn up in advance by the business party and that the other party has the right to choose to accept them or not, and such conditions are also recognized by the Albanian Civil Code with the term general conditions, but under the English legal system the party who has sent these conditions has the right to add her own conditions and send them to the other party for acceptance (McKendrick , 2020).

In the case of the first conditions, it is important to treat them in the context they have. Here we will focus on the treatment of miscellaneous clauses by two well-

known authors of English contract law. The first is author Richard Christou (2015), who focuses his discussion on miscellaneous clauses on the structure and agreement between the parties as a whole. In relation to this issue, this author, among other things, states that:

"...The term `` boilerplate clauses is more broadly used to describe the terms found in almost all commercial contracts, indicating the way in which a contract is usually concluded, including the right of the parties to establish the essential terms of the contract. The boilerplate clauses regulate, control and in some cases change the substantive terms and the manner of their operation and entry into force. There is thus an essential part of every contract, without which the fundamental rights of the parties to the contract would have no meaning.

In the absence of boilerplate clauses by the parties, they must be based on the general system of laws applicable to contracts and ask the court to apply them to resolve disputes. In extreme cases, however, the questions of which legal system is applicable and which court is competent will have to be decided by reference to the rules provided by private international law. This fact destroys the entire purpose of commercial contracts, which is to create security in the agreements concluded between the parties and an effective method for realizing their rights, if necessary. After reflecting the data of the parties, several paragraphs can be placed in the contract in which, after the definitions in the contract, the main conditions of the agreement or its essential provisions are set. These conditions sometimes have an introductory part that begins with the words: "Between the parties it is agreed as follows: ...". Also, usually this expression does not have any legal function, as long as the essential conditions will be seen as a matter on which the parties have agreed. To ensure that the logical order of the essential terms is not interrupted or obscured by a very detailed agreement, it is useful to place many of these provisions of essential detail in an appendix or addendum to the contract. (Christou, 2015).

The second group of authors who deal with the miscellaneous clauses of the contract, are Murray, Holloway and Timoson-Hunt (2012) who express, among other things:

"...The importance of good drafting of general business conditions for international sales contracts cannot be denied. They are particularly important both in the standard conditions of sales contracts for export, and for the standard contracts used in these cases. Disputes can be avoided when the seller is able to refer to the buyer a condition provided in the terms of business, which is at the mercy of the will of the buyer in the act of his acceptance, as well as the fact that these terms will apply in all transactions that the seller will perform in the future.

The most important terms that the exporter should include in the general terms of business are:

- the general condition containing the conditions of the contract established by the seller in each sales contract;
- the right to retain ownership of the sold assets, which provides that until the seller receives the full sale price:
    - the seller retains the legal title to the goods and enjoys the inalienable right to enter the premises of the goods sold at any time, without prior notice to the

buyer, in order to recover possession of the goods sold and
  - the buyer may resell the purchased assets only as an agent of the seller and only under the conditions of acting in good faith as a repurchaser and if he does so, he will receive the proceeds from the resale of the assets as an agent and representative of the seller and must places the proceeds resulting from the sale in a separate bank account in the name of the seller;
- the right to increase prices, which provides that unless the parties have agreed otherwise, regarding the prices and costs of the sold assets, the seller has the right to increase the prices and costs of the sold assets, in proportion to these prices increase in the relevant market, including the cost of work to be paid by the seller, between the date of conclusion of the contract and the date of payment of the price by the buyer;
- the interests to be paid by the buyer in favor of the seller, which are foreseen in the event that the buyer pays the price of the assets after the date specified in the agreement of the parties;
- the condition of force majeure;
- the choice of the applicable law, which determines that for the implementation of the contract between the parties, English law will apply;
- the election as a competent body for the settlement of disputes between the parties of the arbitration court;
- the choice of jurisdiction by determining as the competent body for the resolution of disputes the English courts.

Herein we will deal, in summary, with some of the conditions mentioned above, which are of essential importance for the drafting of a contract according to English contract law. Their treatment is important not only to compare them with Albanian contract law, but also to better understand the miscellaneous clauses of a commercial contract.

a) General condition. Many sellers include in their contracts a general condition, as one of the standard terms of the contract, which implies that such a condition is not disputed by them to be effective and enforceable in every case. Thus in the case of Butler Machine Tool Co Ltd v Ex-Cell-O Corporation Ltd (1979) the sellers included such a general condition in the standard terms of the contract, with the following content: "All conditions provided for in the contract are accepted according to the terms defined by her. These terms and conditions take precedence over any terms and conditions that the buyer may submit".[3]

b) The seller's right to retain ownership of the assets sold. The purpose of this right is to protect the seller in the event of the buyer's insolvency. While it is a common practice for sellers to include such a condition in their standard terms and conditions, its efficacy in achieving its intended purpose cannot be assumed in every instance. The legal landscape regarding this matter is complex and often subject to interpretation. The legal concept of "retention of title" over goods sold gained significant prominence

[3] See also: London Court of Appeal decision in Butler Machine Tool Co Ltd v Ex-Cell-O Corporation Ltd, 1976.

following the judgment of the London Court of Appeal in Aluminum Industrie Vaasen BV v Romalpa Aluminum Ltd (1976). In this pivotal case, it was established that the right of retention of title over goods sold serves not only to reserve the seller's ownership rights in the goods transferred to the buyer but also to assert the seller's claim to the proceeds generated from the sale of those goods by the buyer. This claim to the sale proceeds becomes enforceable when the funds originate from the goods initially sold by the seller to the buyer. The Aluminum Industrie Vaasen BV v Romalpa Aluminum Ltd decision, therefore, underscored the significance of the retention of title concept in commercial contracts. It is crucial for parties involved in such contracts to be aware of and understand the implications of this legal principle, as it can have a substantial impact on ownership and financial interests in the context of commercial transactions.The above condition in this case was stipulated as follows: "The right of ownership of the assets delivered by A.I.V will only be transferred to the buyer, while this right remains the owner of the assets sold by A.I.V, regardless of any circumstances. Until the date of payment of the price of the sold assets, the buyer, if A.I.V. wishes, is obliged to keep the assets in such a way that clearly shows the ownership of A.I.V. A.I.V and the buyer agree that, if the buyer will: a) add new assets to the sold assets, mix the sold assets with other assets, A.I.V will become the owner of these assets, until full payment that the buyer wants to make A.I.V. Finally, A.I.V and the buyer agree that the ownership of the above assets shall be transferred to A.IV and that the transfer of ownership shall be deemed to have taken place at the moment it has added the new assets to the sold assets or mixed them with other assets".[4]

c) *The right to increase the prices of the assets sold*. The significance of this right becomes evident for sellers in situations involving long-term contracts and extended durations between contract formation and the buyer's payment for goods and services. The case of Butler Machine Tool Co Ltd vs Ex-Cell-O Corporation Ltd (1979) emphasized the concept of a variable or adjustable price and the seller's entitlement to raise the price of the goods being sold. As demonstrated by this case, it is not only crucial for contract terms to be clearly formulated but also for them to be formally and explicitly incorporated into the contract, following mutual agreement between the parties.

d) Payment of interest. The inclusion of a stipulation in the contract regarding the payment of interest by the buyer, in cases where the buyer fails to pay for the purchased asset within the contractually specified timeframe, stems from the historical limitation in English law. Previously, English law did not permit sellers to seek interest as a component of compensation for the buyer's delay in paying for the purchased asset. As a result, it became imperative for the contracting parties to incorporate a provision in the contract, mandating interest payment by the buyer in the event of delayed payment. However, with the enactment of the "On late payment of commercial obligations" Law in 1998 the necessity for such a provision has diminished. Article 1 of this law, provides:

[4] See also: Judgment of the London Court of Appeal in Aluminum Industrie Vaasen BV v Romalpa Aluminum Ltd, 1976.

"It is an implied term of the contract to which this law applies that every matured obligation created by the contract contains the recognition of a simple interest in accordance with this law".

Article 2 of this law provides that it applies to "every contract for the supply of goods and services, where the buyer and the seller mutually exercise commercial activity, except when otherwise provided in the contract.[5]

e) Force majeure condition

The condition of force majeure is that it gives the right to the parties to suspend or terminate the continuation of the contract due to the occurrence of an event that is beyond the control of the parties and which stops, prevents or delays the performance of the contract. The concrete purpose of a force majeure condition is contingent upon the manner in which the parties choose to articulate it within the contract, often entailing complex negotiations. The inclusion of a force majeure clause in a contract is typically motivated by the constrained application of the doctrine of contractual impossibility. Recognizing the courts' general reluctance to intervene in contractual terms once a contract is being executed and their inclination toward affording greater flexibility to one party, contracting parties seeking a degree of flexibility in contract performance must come to mutual agreement to incorporate a force majeure clause within the contract.

An example of a force majeure clause is found in Article 22 of the contract in Toepfer vs. Cremer case, which provides:

"Sellers shall not be liable for delay in delivery of goods wholly or partly caused under the Law "On Goods", by strike, state of emergency, riot or civil strife, labor unrest, breakdown of machinery, fire or any other cause which constitutes force majeure. If the delay in the delivery of the goods occurs for one of the above reasons, the senders must notify their buyers by telegram, fax, email, within 7 days from the occurrence of the event, but no later than 21 days from the end of the fulfillment period. obligation. The notification must contain the reasons for the delay in the delivery of the goods."[6]

f) Choice of applicable law. The choice of applicable law becomes important in cases where the parties entering into a contract belong to different countries or have different citizenships. Let us take an example of a contract entered into between a seller in England and a buyer in France. The seller wants English law to be applied to the regulation of the contract, while the buyer will by all means request that French law be applied. This raises the issue known as conflict of laws. What will happen in such a case? The answer depends on the will of the parties. The law allows the parties to choose the law that will govern the contract they have entered into. Article 3 of the EU Regulation no. 593/2008, "On the applicable law in contractual obligations", commonly known as the "Rome Regulation 1", provides: "*A contract may be governed by the law chosen by the parties. The choice may be made expressly by the terms of the contract or may result from the circumstances of the case. By their choice, the parties can provide that this law can be applied to a part of the contract or to the whole contract*" (Briggs, 2008).

[5] See also: Article 1 and 2 of the English Late Payment of Commercial Debts Act 1998.

[6] See also: Article 22 of the contract in Toepfer v Cremer.

g) Determination of the competent court for resolving disputes. If the parties have chosen the court for the resolution of disputes that may arise between them, then it must be determined by them which will be the competent court for their resolution. In the civil law system, the law gives the parties considerable freedom to choose the competent court. Regulation of the European Union no. 1215/2012, dated December 12, 2012 "On jurisdiction and recognition of the power of judgments in civil and commercial matters", known as "Brussels Regulation 1" provides: "*If the parties, regardless of their nationality, have agreed that a court or courts of a Member State shall have jurisdiction to resolve any dispute existing between the parties or which may arise in the future, in relation to the legal relationship created between them, the court or courts shall have such jurisdiction, unless the agreement is absolutely void, according to the legal provisions of the Member State. This jurisdiction will be the only jurisdiction, unless the parties have provided otherwise*".
The jurisdiction agreement must also:

- be made in writing or prove to exist in writing;
- to be done in a form which is in accordance with the previous practices that the parties have implemented between them;
- in international commercial contracts to be made in a form that is compatible with the possibility of its use by each of the parties or that they should have known of its use according to the rules of international trade.[7]

An example of such a condition can be found in the case Superior Overseas Development Corporation v. British Gas Corporation (1982), in the following terms:

- If at any time during the contract extension period, a substantial change occurs in relation to the economic circumstances of the implementation of the agreement, when the party estimates that these changes cause economic difficulties in the implementation of the contract, the parties will discuss together any possible adjustment of the terms of the contract;
- If the parties do not reach an agreement within 90 days of making a request for changes to adjust the terms of the contract due to a substantial change in economic circumstances, the matter may be sent by each of the parties to experts to decide;
- The experts may decide, if necessary, what adjustments should be made to the prices or any price changes that are necessary in this case and this decision of the experts will take effect 6 months from the date on which the parties have made a request for their appointment.

Such a condition must specify the circumstances in which the difficulties exist and must specify the procedure to be applied in the event that such circumstances occur. A very important issue is ensuring that the above clause provides for a mechanism or sanction to be applied in the event that the parties fail to reach agreement or refuse to enter into negotiations to adjust the terms of the agreement. A common sanction that applies is the provision of the intervention of a third party as an expert or of sending the case to arbitration if the parties fail to reach an agreement.

[7] See also: Article 25 (1) of the European Union Regulation no. 1215/2012, dated December 12, 2012 "On jurisdiction and recognition of the power of judgments in civil and commercial matters".

3. Conclusion

Looking in a comparative perspective, the way in which ordinary and incidental contractual conditions are regulated by English and Albanian contract law, we find that there are important differences between them. The differences are based on their meaning, where Albania's contractual law calls as usual conditions those conditions that are regulated by permissive provisions and provided for in the contract with the will of the parties, and as incidental conditions those that are neither essential nor usual, but which are foreseen by the parties in the contract with their will and when foreseen, they are binding for the parties.

In contrast to the Albanian contract law, the English one calls the usual and incidental contractual conditions by the name "miscellaneous clauses", which means that the parties are free to decide on their content. But this freedom of the parties in determining the miscellaneous clauses is not unlimited, it cannot contradict the principles that apply in contract law, such as the principles of good faith, impartiality and correctness in the conclusion and execution of contracts.

Another difference that exists between them is the fact that by Albanian contract law, ordinary and incidental conditions are treated separately from each other and each of these conditions has a different nature and brings different effects, while English contract law treats them together and their presence in the contract brings the same effect. Miscellaneous clauses under English contract law can be drawn up, initially by one party, but the other party has the right to change the content of one or some of these conditions in whole or in part during negotiations.

Another difference, is that the judicial doctrine and practice in Albania pays special attention to the features of ordinary and incidental contractual conditions, while the legal doctrine of English contract law stops at the special treatment of each of them. Thus, in the practice of concluding commercial contracts in UK, it is common to specifically define as "miscellaneous clauses", conditions ranging from "general conditions" to "choice of competent court for the resolution of disputes", while in commercial practice in Albania, these conditions are usually not reflected in the contract.

Finally, it can be said that the judicial practice in Albania in dealing with ordinary and incidental contractual conditions is not very much developed, while the English judicial practice is richer in clarifying the correct and fair meaning of these conditions.. This is the reason why this paper does not present any judicial decision of the Albanian courts that analyzed this topic, while some decisions of the English courts are presented.

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