

THE DELOCALISATION OF DIFC ARBITRATION IN DUBAI AND THE ENFORCEMENT OF ARBITRAL AWARDS

By

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A. INTRODUCTION

This article aims to provide an overview and appraisal of the developments of international arbitration in Dubai. Dubai, beacon for the growth of international arbitration in the Cooperation Council for the Arab States of the Gulf [hereinafter referred to as the Cooperation Council (GCC)], is on the verge of achieving its goal of becoming an international centre of arbitration. As such, a closer look is necessary regarding the growing role of the Dubai International Financial Centre (hereinafter “DIFC”) seated arbitration and the enforcement of arbitral awards in Dubai.

B. DIFC SEATED ARBITRATION

The DIFC is in essence a jurisdiction within a jurisdiction,¹ or another way to put it, a seat within a seat. The creation of the DIFC financial free trade zone as it exists today in Dubai was largely motivated by the UAE’s desire to attract foreign investment and to position itself as the Middle East business hub. The DIFC Court is a common law jurisdiction and acts as the independent judiciary of the DIFC.² Recently, DIFC arbitration and its jurisdictional reach have moved from arbitration limited to the jurisdiction created by the DIFC, into a system of international arbitration that has taken much advantage of delocalisation.

¹ The DIFC itself was designed as a city within a city. See DIFC Website, *Discover DIFC*, available at <http://www.difc.ae/discover-difc>

² It is now common knowledge that the DIFC is a common law jurisdiction within the UAE and the Emirate of Dubai.

Prior to the 2008 DIFC Law,³ “arbitrations conducted in the DIFC were limited to disputes only connected with the DIFC.”⁴ With the 2008 amendment to the 2004 DIFC Law, the DIFC Court was given a wider jurisdictional reach in Dubai with regards to arbitration, covering arbitration disputes that are outside of the DIFC zone regardless of whether the dispute or the parties have any connection with the DIFC, so long as the parties hold their arbitration in the DIFC. In other words, parties, whether foreign or domestic, may arbitrate disputes in the DIFC even without a connection with the DIFC⁵ by expressly submitting to the jurisdiction of the DIFC.

In *Al-Khorafi v. Sarasin*,⁶ the DIFC Court of Appeals further shed light on the scope of its extended jurisdictional reach, and signals that the DIFC Court may assert jurisdiction despite the existence of a clear foreign forum selection clause that the parties to the dispute have previously agreed to. It is still important, however, as indicated by the ruling in *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE*, that parties “expressly select the DIFC as the seat of arbitration”⁷ as the DIFC Court has refused to apply DIFC rules to a case, where the parties chose DIFC-LCIA rules but Dubai as the place of arbitration and “the laws of the Emirate of Dubai” as the applicable law. DIFC Courts are “bound by the New York Convention and that awards made within the jurisdiction of the DIFC are to be enforced by Dubai courts without further review of the tribunal’s decision.”⁸ Further, the DIFC Court can order the enforcement of arbitral awards inside and outside the DIFC zone, as long as the arbitral award was issued in the DIFC under Dubai Law No 16 of 2011.

Aside from the DIFC Court, the DIFC partnered with the LCIA to create the DIFC-LCIA Arbitration Centre. It is now common practice that the DIFC Court will ratify DIFC-LCIA

³ DIFC Law No 1 of 2008; DIFC Law No 8 of 2004.

⁴ P Appenzeller and S Harr, *An American in Dubai - An Overview of Dubai's Arbitration System* (16 Aug 2011), available at: <http://www.terralex.org/publication/p653857f06d/an-american-in-dubai-an-overview-of-dubai-s-arbitration-system>

⁵ See DIFC-LIAC Website, *FAQ*, available at: <http://www.difcarbitration.com/base/faqs/index.html>

⁶ *Al-Khorafi v Bank Sarasin*, DIFC CA 003/2011 dated 5 Jan 2012.

⁷ *Amarjeet Singh Dhir v. Waterfront Property Investment Limited and Linarus FZE* (Claim No CFI 011/2009), Grounds of Decision, 8 July 2009, at para. 92.

⁸ See DIFC-LIAC Website (n 5).

awards, or convert the award into a DIFC Court judgment,⁹ which can then be endorsed by the Dubai Courts under the Protocol of Enforcement between the DIFC Courts and the Dubai Courts.¹⁰ There is no need for the Dubai Courts to ratify the DIFC-LCIA award. The case of *Property Concepts FZE v. Lootah Network Real Estate & Commercial Brokerage*¹¹ was the first example of a DIFC-LCIA arbitral award that was then ratified by the DIFC Court and consequently executed directly by the Dubai Courts under the Protocol of Enforcement.

If the arbitration clause identifies the DIFC as the arbitral seat, but without any reference to the DIFC-LCIA, the tendency in practice is to logically assume that the DIFC-LCIA rules apply. Parties are otherwise free to choose any other arbitral institution rules to govern the dispute as long as the arbitration is held in the DIFC. It is, therefore, possible to hold the arbitration in the DIFC but using a non-DIFC arbitral institution like the International Chamber of Commerce (hereinafter “ICC”), and still have the award enforced by the DIFC Court inside and outside the DIFC zone. Furthermore, the DIFC Arbitration Law even allows that the venue for the arbitration could be outside of the DIFC as long as the DIFC is the seat of arbitration, or the juridical seat.¹² Under Article 27(2) of the 2008 DIFC Arbitration Law, “the Arbitral Tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.”¹³ It is clear from these provisions that the DIFC Arbitration Law is delocalised.¹⁴

⁹ R Ashraf, J Brown, & V Lysenko, *Enforcement of Foreign Arbitral Awards Against UAE Counterparties: DIFC-LCIA Awards Versus New York Convention Awards*, 12 March 2012, HadeF& Partner, available at: www.hadefpartners.com

¹⁰ Protocol of Enforcement, dated 7 December 2009; GQ Audi and A Tricoli, *Updates on the Ratification and Enforcement of Arbitration Awards in the UAE and DIFC Courts*, 30 August 2012, available at: http://www.fichtelegal.com/en/news_article.php?news_id=195

¹¹ *Property Concepts FZE v Lootah Network Real Estate & Commercial Brokerage*, Dubai Court of First Instance (Oct 19, 2010). In *Property Concepts*, the Dubai Court of First Instance ratified the DIFC-LCIA award and ordered the Defendant to pay damages of US\$7.2 million plus interests and costs.

¹² “Seat” is defined in the Schedule to the DIFC Arbitration Law as “the juridical seat which indicates the procedural law chosen by the parties to govern their arbitration awards.” Schedule, DIFC Arbitration Law; SR Luttrell, *The Arbitration Law of Dubai International Finance Centre*, vol 3, Issue 3, Journal of Int’l Commercial Law and Technology (2008) 174.

¹³ Article 27(1) of DIFC Law of 2008.

¹⁴ SR Luttrell, *The Arbitration Law of Dubai International Finance Centre*, vol 3, Issue 3, Journal of Int’l Commercial Law and Technology (2008) 174 (explaining delocalisation theory as holding that “there should only be

DIFC is considered an “offshore” jurisdiction from the point of view of Dubai civil and commercial laws. Enforcement “outside” the DIFC but within Dubai falls under Article 7(2) of the Judicial Authority Law. Under Article 7(2) of the Judicial Authority Law, Dubai Courts (“onshore”) will enforce an arbitral award rendered or ratified by a DIFC Court (“offshore”).¹⁵

Recognition and enforcement of DIFC awards before the Dubai courts is facilitated by reference to the 2009 Memorandum of Understanding¹⁶ and the related Protocol of Enforcement between Dubai Courts and DIFC Courts, provided the awards are final and certified by the DIFC court.¹⁷ The first step in enforcement of a DIFC award is for the DIFC Courts to recognise the award.¹⁸

DIFC arbitral awards recognised and enforced in the UAE, but not in Dubai Courts, are likely treated as a foreign judgment through a DIFC court order,¹⁹ or pursuant to Federal Law No (11) of 1973 Regulating Judicial Relations between Member Emirates in the Federation. With regards to a GCC-wide enforcement of a DIFC arbitral award that has been converted into a Dubai Court Judgment, the GCC Convention will likely play a vital role. The DIFC Court White Paper advises that for enforcement of DIFC awards in the rest of the UAE outside Dubai and overseas, seeking an enforcement order from the Dubai Courts under the Protocol of Enforcement is recommended because some jurisdictions may be slow to recognise that the DIFC is part of the legal system of Dubai, or because the DIFC operates under the common law

one point at which national control is asserted over the arbitral process” and “that single procedural point of control should be the state in which enforcement is sought.”).

¹⁵ Three conditions must be met: (1) the award is final and executory, (2) the award is translated into Arabic, and (3) the award is certified by the DIFC Courts for execution and have a formula of execution affixed by the Courts. Article 7(2) of Dubai Law No 12 of 2004.

¹⁶ Entered into force on 16 June 2009.

¹⁷ Prior to amendment of Judicial Authority Law, Article 7(2) required that the award be “appropriate for enforcement.” The meaning of the phrase “appropriate for enforcement” was never defined by the courts or the DIFC bodies.

¹⁸ Under Article 43 of the DIFC Arbitration Law, recognition of an award qualifies as “ratification” for purposes of Article 7 of the Judicial Authority Law.

¹⁹ H Al Mulla and G Blanke, Global Arbitration Review, *Commercial Arbitration: UAE*, <http://www.globalarbitrationreview.com/know-how/topics/61/jurisdictions/33/united-arab-emirates/> (noting that under the Judicial Authority Law, Article 7(2) of Law No. 12 of 2004, the award is likely enforceable in the UAE as a foreign judgment).

while other jurisdictions operate under the civil law system and/or Shari'a principles. Though there is still no case law to demonstrate the matter, the DIFC White Paper notes that such DIFC awards may also be enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention"), the Recognition and Enforcement of Foreign Judgments and Arbitral Awards (hereinafter "Riyadh Convention"), and the Cooperation Council for the Arab States of the Gulf (hereinafter "GCC Convention"), all of which the UAE has ratified.

Additionally, a non-DIFC arbitral award that was rendered by a Dubai Court can be executed in the DIFC under Article 7(4) of the Judicial Authority Law. Likewise, under Article 7(6) of the Judicial Authority Law, an arbitral award that was rendered outside the DIFC by any court other than Dubai Courts shall be executed under the Rules of DIFC Courts. Non-DIFC arbitral awards can thus be (1) recognized by a DIFC Court under the DIFC Arbitration Law and the New York Convention, (2) enforced within the DIFC, and (3) once recognized (and hence ratified via Article 43 of the Judicial Authority Law), enforced outside the DIFC zone in "onshore" Dubai under Dubai Law No 16, or in other Emirates under Federal Law No (11) of 1973.

The delocalisation of DIFC Arbitration gives it much advantage in attracting people to conduct arbitration in Dubai and also to enforce their arbitral awards through the DIFC Courts. What remains to be seen now is how the rest of the UAE and GCC Countries will receive such liberalised system of arbitration in a mixed common law jurisdiction within a Shari'a jurisdiction. It also remains to be seen how Dubai will improve its enforcement of arbitral awards currently under the UAE Civil Procedure Code (UAE CPC).

C. ENFORCEMENT OF ARBITRAL AWARDS UNDER THE UAE CPC

The UAE's current arbitration rules can be found within the UAE CPC. Outside of the financial free trade zones, therefore, Articles 203-218 of the UAE CPC govern arbitration.²⁰ The UAE CPC has, however, proven inadequate in the context of modern international commercial arbitration. The Code provides for frequent court intervention during the course of arbitration²¹ and essentially a *de facto* review of the arbitral award.²²

At first glance, the UAE CPC seems to lean towards recognizing foreign arbitral awards since it states: "an award rendered in a foreign country may be enforced in the UAE under the same conditions applicable under the laws of the foreign country." Historically, however, UAE courts have not been too friendly to the enforcement of arbitral awards, domestic or foreign, and have refused recognition and enforcement based on technicalities. Even after the UAE's accession²³ to the New York Convention in 2006, courts have been reluctant to apply the Convention. The reluctance may perhaps stem from numerous reasons including judges not being familiar with the New York Convention continuing to apply the UAE CPC even when it contradicts the New York Convention.

*International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai*²⁴ is often cited as a prime example of Dubai Courts setting aside a foreign arbitral award on formalistic grounds. In *Bechtel*, the Dubai Court of Cassation set aside an arbitration award rendered in favour of the claimant in Dubai because the arbitrator failed to swear witnesses in the manner prescribed by the UAE. Since *Bechtel*, there have been signs of a pro-enforcement bias in recent cases from Dubai and Fujairah, but it remains unclear whether courts in Dubai have truly begun to favour enforcement of arbitral awards.

²⁰ See The UAE Civil Procedures Code, Federal Law No. (11) of 1992, Chapter III, available at: <http://www.diac.ae/idias/rules/uae/chapter3/>

²¹ See Articles 207 & 209.

²² See Articles 214 & 215.

²³ The UAE ratified the New York Convention without any reservation.

²⁴ 300 F. Supp. 2d 112 (DDC. 2004); Case No 288/2002 (Dubai Court of First Instance).

Unfortunately, the cumbersome requirements of ratification and the numerous opportunities for setting aside an award applicable to domestic arbitral awards under the UAE CPC have been continuously applied in practice by UAE courts to the challenge of foreign arbitral awards.²⁵ Having said this, Dubai's highest court, the Court of Cassation, recently made clear that foreign arbitral awards would be enforced in Dubai in accordance with its New York Convention obligations and without resort to the UAE CPC.²⁶ Meanwhile, despite that the UAE CPC's ratification requirement expressly excludes foreign awards; UAE courts continue to require ratification.²⁷ A foreign arbitral award must still be filed with and approved by a local court, which, in turn, may be willing to revisit the merits of an arbitral award.

Most importantly, an arbitral award will not be enforced in the UAE if it includes elements that "contradict public policy or morals." What is important, therefore, is how courts in Dubai and the rest of the UAE will define and limit the scope of public policy. For example, in *Baiti Real Estate Development v. Dynasty Zarooni Inc.*,²⁸ the Dubai Court of Cassation set aside an order to enforce a DIAC rendered domestic arbitral award made by the Dubai Court of First Instance and the Dubai Court of Appeals because the court misconstrued the limited scope of public policy under Article 3 of the UAE Civil Transactions Code.

On the other hand, recent trends in cases in Dubai and Fujairah show courts favouring enforcement and disregarding technical requirements of the UAE CPC. In one case, implying the UAE's less stringent adherence to the prohibition of the *riba*, the Dubai Court of First Instance, though ultimately refusing enforcement on evidentiary grounds because the claimant failed to

²⁵ E Al-Tamimi, *The Status of Arbitration in the UAE*, DIAC Journal, vol 1, No 1 (March 2004) 46 (observing that UAE judges tend to ensure that an arbitral award, even a foreign one, satisfies the UAE Code of Civil Procedures, making it difficult to enforce a foreign award in the UAE).

²⁶ Appeal for Cassation No 132/2012 Commercial – *Airmec Dubai, LLC v. Maxtel International, LLC*.

²⁷ "The UAE is a double *exequatur* jurisdiction." See H Kronke, P Nacimiento, D Otti and N Port, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 189 (stating that the New UAE Draft Arbitration Law would remove this "double *exequatur*" obstacle in place with the UAE Civil Procedures Code).

²⁸ *Baiti Real Estate Development v. Dynasty Zarooni Inc.*, Dubai Court of Cassation, Appeal No. 14/2012, Real Estate Cassation (Sept 16, 2012); N Carnell, LEXOLOGY, *Arbitrating in Dubai*, 31 Dec 2012, available at: http://www.lexology.com/library/detail.aspx?g=1a6ff022-e4dc450...+feed&utm_content=Lexology+Daily+Newsfeed+2013-01-09&utm_term (stating that many contracts name DIAC as the body whose rules govern the arbitration).

prove the finality of the award, dismissed the argument relating to the unlawfulness of an award that ordered a UAE entity pay the amount owed plus 7.75% interest.²⁹

Recent cases have shown that, at least in Dubai, courts are more reluctant to interfere with the merits of awards. In Dubai Court of Cassation, Case No. 273/2006, judgment dated 4 Feb 2007, the court stated that “when the court ratifies an arbitration award, it may not deal with it from the point of view of the merits or the extent to which it complies with the law...”³⁰ The Union Supreme Court echoed similar language in 2008 when it stated that “when the trial court is hearing an application for ratification of an arbitration award, it may not look at it from the point of view of the merits to the extent to which it coincides with the law...”³¹

Very recent cases in Fujairah and Dubai have shown a trend towards enforcing the New York Convention awards without re-examination of the merits. In April 2010, the Fujairah Court of First Instance in Commercial Case 35/2010³² ratified two arbitral awards made by a sole arbitrator in London in relation to a dispute under the London Maritime Association Arbitration Rules. The Fujairah Court decision of 2010 is commonly believed to be the first time a foreign arbitral award was ratified in the UAE in accordance with the New York Convention. The Fujairah Court followed two prior decisions by the UAE Court of Cassation. In the UAE Court of Cassation Case No. 556 of 19 April 2005, the court held that the enforcing court is precluded from examining the merits of the award.³³ In the second case, the UAE Court in Cassation No. 774 of 7 April 2005 held that conventions made between the UAE and other countries regarding the enforcement and execution of arbitral awards are to be considered domestic legislation.³⁴ Based on the holding of these UAE Court of Cassation cases, the Fujairah Court ratified both awards with interests, costs, and attorney fees.

²⁹ Dubai Court of First Instance, Judgment No 190/98, 10 Nov 1998.

³⁰ Dubai Court of Cassation, Case No 273/2006, judgment dated 4 Feb 2007.

³¹ Union Supreme Court, 486/Judicial Year 2 (Oct 30, 2008). See also, Union Supreme Court, 438/Judicial Year 23 (July 12, 2004) at [3].

³² Commercial Case 35/2010, Fujairah Court of First Instance (April 2010).

³³ United Arab Emirates Court of Cassation, Case No 556, 19 April 2005.

³⁴ United Arab Emirates Court of Cassation, Case No 774, 7 April 2005.

The Dubai Court of Appeals in *Maxtel International FZE v. Airmec Dubai LLM*³⁵ rejected an appeal against a decision of a Dubai Court of First Instance to issue an execution order to enforce two LCIA arbitration awards with an English Seat.³⁶ The *Maxtel* appellant sought to set aside the award based on procedural grounds in violation of the provisions of Article 216 (a) of the UAE CPC and Article V (c) of the New York Convention, and the UAE CPC. Though no arguments were made under the public policy exception,³⁷ the Dubai Court of Appeals decision is a promising sign for the enforcement of arbitral awards in the UAE. It is especially promising that the Dubai Court of First Instance discarded the application of Article 235 and 236 of the UAE CPC to enforce a foreign arbitral award and went directly to the New York Convention. By October 2012, Dubai's highest court, the Dubai Court of Cassation upheld the enforcement by the Dubai Court of Appeals of the above two related foreign awards in *Airmec Dubai LLM v. Maxtel International FZE*. The Court of Cassation made it clear that the New York Convention is the relevant law governing the enforcement of foreign arbitral awards and not the UAE CPC, which applies to domestic arbitral awards.

Additionally, the Dubai Court of Appeals in Civil Case No. 531/2011 on 6 October 2011 and in Civil Case No. 126/2011 on 22 February 2012 refused nullification of an arbitral award based on technical grounds, a sign that there may be a changing attitude among the Emirate judiciary in favour of more rapid enforcement procedures. If so, these decisions may show a trend among some Emirate judges to abandon the approach taken by the Dubai Court of

³⁵ In *Maxtel International*, the subsidiary of Maxtel was incorporated in the Jebel Ali Free Zone and was a Dubai-incorporated company. *Maxtel International FZE v Airmec Dubai LLC*, Court of First Instance Commercial Action No 268, January 12, 2011.

³⁶ It was seated in London. See also, Herbert Smith Freehills LLP, LEXOLOGY, *Developments in enforcement of judgments and awards: United Arab Emirates*, 25 April 2012, Association of Corp Counsel, available at <http://www.lexology.com/library/detail.aspx?g=7b1c9bcd-4768-4196-b56a-e37b5e83adad>; S Kantaria, *The Enforcement of Domestic and Foreign Arbitral Awards in the UAE under the Civil Procedures Code and Proposed Arbitration Law*, [2012] Int ALR, Issue 2 (2012) 61; J Martin and C Cheney, *GCC Update: Recent developments in enforcement of arbitral awards in the United Arab Emirates*, 12 May 2011, available at http://www.linklaters.com/Publications/GCC/May/Pages/Recent_Developments_Enforcement_Arbitral_Awards_United_Arab_Emirates.aspx (last accessed 12 Oct 2012); M Lawry-White, *Key Developments in Relation to Arbitration in Dubai*, Kluwer Arbitration Blog, 13 Jan 2012, available at <http://kluwarbitrationblog.com/blog/2012/01/13/key-developments-in-relation-to-arbitration-in-dubai/>

³⁷ *Maxtel International FZE* (n 35).

Cassation in *Bechtel*.³⁸ The trend, however, cannot be celebrated too quickly as exceptions remain.

The Dubai Court of First Instance,³⁹ for example, refused to enforce an award rendered by the Singapore International Arbitration Centre because, according to the Court of First Instance's erroneous application of the UAE CPC, the award was not ratified in the country of origin and could, therefore, not be executed under Articles 235 and 236 of the UAE CPC. The ratification process under the UAE CPC, however, is only required for domestic awards; and should not be required under the New York Convention. In another example, the Court of Appeal, later upheld by the Dubai Court of Cassation in September 2012, refused to ratify an arbitration award because a dissenting opinion, although attached to the majority opinion, was not referred to in the majority opinion. Further, the Dubai Court of First Instance had previously rejected an application made under the NYC (in the correct terms) for 'recognition and enforcement' of a London award on grounds that the Court could not 'ratify' a foreign award.

The most recent case that seems to have been a setback for Dubai's reputation as moving towards a pro-enforcement stance is the recent decision by the Dubai Court of First Instance in Case No. 489/2012 on December 18, 2012,⁴⁰ where the Dubai Court of First Instance refused to enforce an award issued by the ICC International Court of Arbitration in Paris against the Government of Sudan in favor of a French Claimant, *la Compagnie Française d'Entreprises S.A.* (CFE) for several millions in US dollars for works performed by the CFE in South Sudan.⁴¹ The Dubai Court erroneously held that it had no jurisdiction to enforce the arbitral award because "the UAE Courts lack jurisdiction over the cases brought against any foreigner having no domicile or place of residence within the UAE"⁴² unless the foreigner has a business obligation to be performed in the UAE or has a branch office in the UAE and the dispute relates to the

³⁸ *International Bechtel Co Ltd v. Department of Civil Aviation of Government of Dubai*, Dubai Court of Cassation, Petition No 503/2003, Judgment dated May 15, 2005). Most practitioners caution, however, that while these cases are positive examples, there is no system in the UAE of binding precedent and the Fujairah and Dubai Courts of First Instance have no persuasive force.

³⁹ Dubai Court of First Instance, Case No 531/2011, judgment dated 18 May 2011.

⁴⁰ Dubai Court of First Instance, Case No. 489/2012, judgment dated Dec 18, 2012.

⁴¹ Dubai Court of First Instance, Case No. 489/2012, judgment dated Dec 18, 2012.

⁴² Dubai Court of First Instance, Case No. 489/2012, judgment dated Dec 18, 2012.

branch. Such ruling by the Dubai Court of First Instance is a clear violation of the UAE's obligations under the New York Convention, which does not require a geographical nexus, but instead allows enforcement of a foreign award in any country that is a signatory to the New York Convention.

D. CONCLUSION

The UAE has made great strides towards its goal of becoming the centre of dispute resolution in the Middle East. Dubai seemed to have created a way forward. Still, questions remain as to the enforceability of foreign arbitral awards in the UAE, and whether UAE courts will continue its recent trends favouring enforcement. The way forward for the UAE is to create a culture among its judges favouring enforcement of foreign arbitral awards and not to lean towards setting aside an arbitral award for technical reasons. If the UAE can bridge the gap between policy and practice, then perhaps, the UAE will finally reach its goal of becoming the undisputed centre for international arbitration in the Middle East with Dubai leading the way.



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