

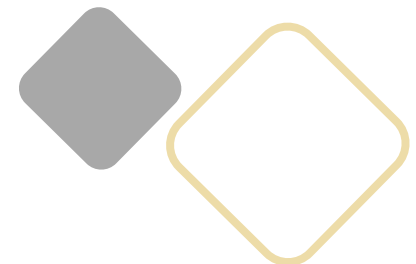
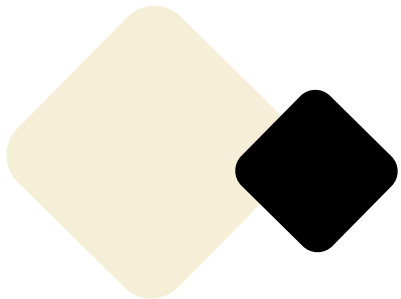
# Application of the CISG in the Hong Kong SAR: Resolved and Unresolved Issues

**Susan-Gale Wintermuth**

Distinguished Visiting Professor of Law

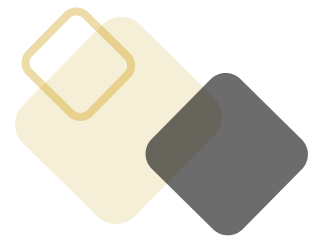
China-EU School of Law

China University of Political Science and Law



# CISG

THEMES



# Themes

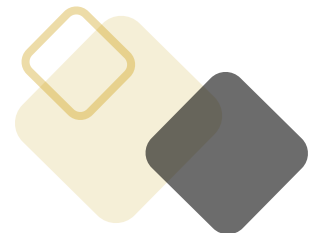
Notice (25)



# Themes

Notice (25)

Reasonableness (47)



# Themes

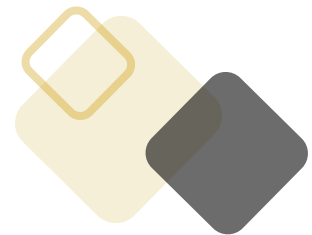
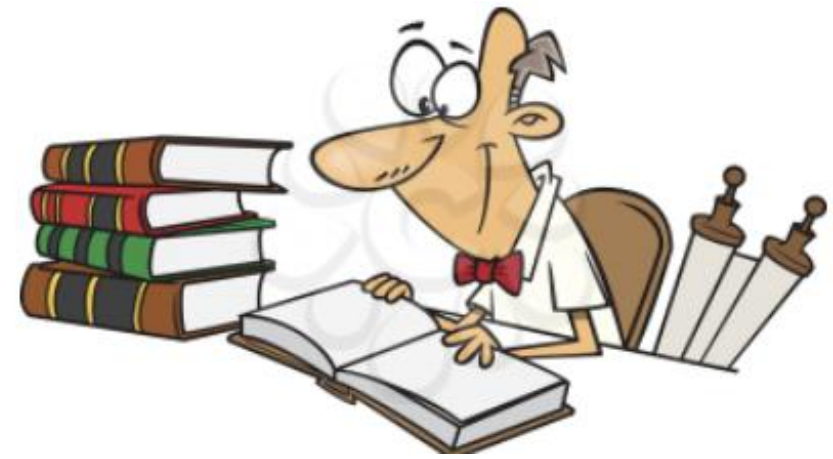
Notice (25)

Reasonableness (47)

Foreseeability (3)



# CASELAW

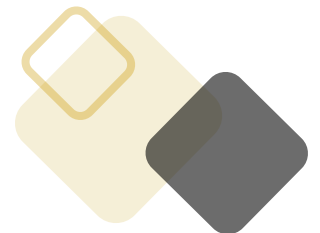


# CASELAW

Autonomous

Advisory Council Opinions

Authoritative courts





# APPLICABILITY

## Elements

- Goods, and
- Different states, and
- Contracting states

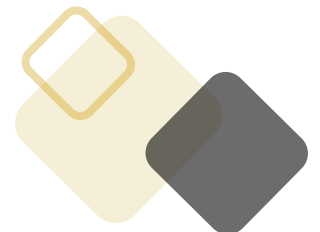


# Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; OR
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

....



# EXCLUDED “GOODS”

## Article 2

This Convention does not apply to sales:

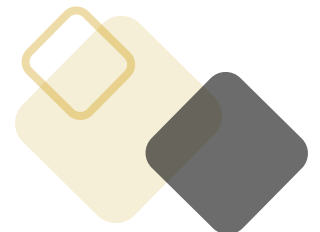
....

(b) by auction;

....

(e) of ships, vessels, hovercraft or aircraft;

....

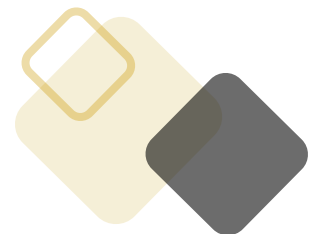


# MIXED CONTRACTS

## Article 3

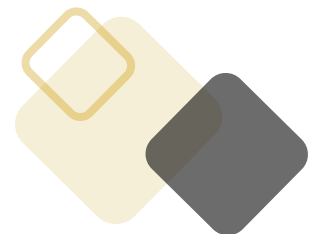
.....

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.



# CISG-AC 4

9. . . . primarily an "economic value" criterion should be used. An "essential" criterion should only be considered where the "economic value" is impossible or inappropriate to apply taking into account the circumstances of the case.
10. "Preponderant" should not be quantified by predetermined percentages of value; it should be determined on the basis of an overall assessment.



# DIFFERENT STATES

## INTERNATIONALS

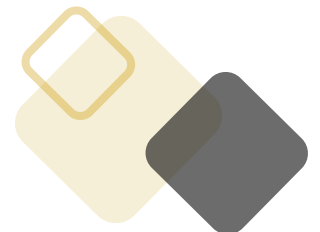


# Article 10

.....

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

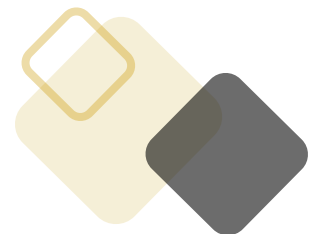
.....



# Case scenario

## Article 39(2)

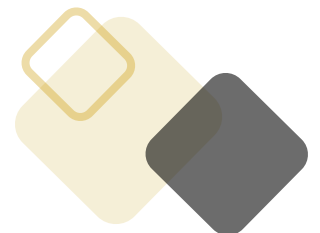
“In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, . . . .”



# Case scenario

## Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.



## FACTS

- In 2003, Buyer, a state-owned entity, contracted with foreign Seller, for delivery of electrical meters. Buyer's terms and conditions provided for application of Buyer's domestic law. (The Buyer's and Seller's States were Contracting States to the CISG.)
- Seller started delivering in 2004. Seller then set up a subsidiary in Buyer's state (Seller B) that was then involved in delivery under the contract.
- In 2009 Buyer filed suit under domestic law (within the statute of limitations) alleging an error "relate[ing] to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract," namely the quality of the goods.
- Seller and Seller B defended on the basis, *inter alia*, that the CISG applied and the notice of the alleged defect was after the two-year limitation under article 39(2).

## ISSUES

- a. Whether the domestic law or the CISG applies.
- b. Assuming *arguendo* the CISG applies, whether you dismiss or . . . .
- c. Were you counsel for the plaintiff, whether you would have . . . .

# Article 35

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
  
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

# BREACH

- Simple
  - any breach
  - notice and an opportunity for
    - repair
    - substitution
    - additional time
- Fundamental
  - foreseen
  - substantial deprivation of what [the party] is entitled to expect

# Article 25

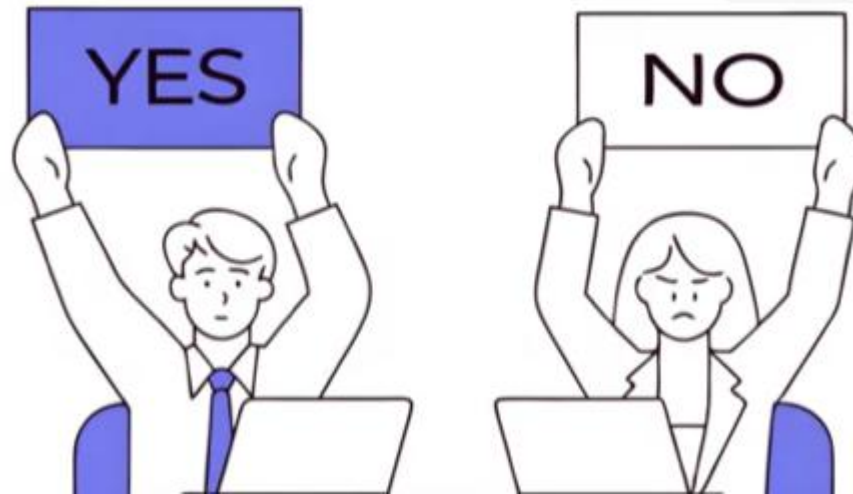
A breach of contract committed by one of the parties is fundamental if

[1] it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract,

[2] unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

[HADLEY V BAXENDALE]

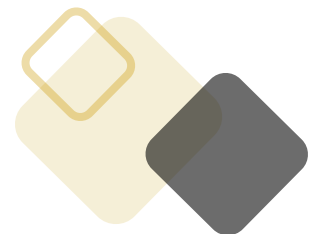
# COMPROMISES IN DRAFTING THE CISG



# Compromises

states differ

- Only one contracting
- Oral contracts
- Specific performance

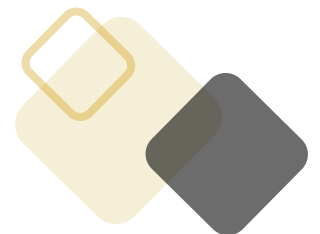


# Compromises

Only one contracting state

## Article 95

Any State may declare . . . it will not be bound by subparagraph (1)(b) of article 1 . . . .

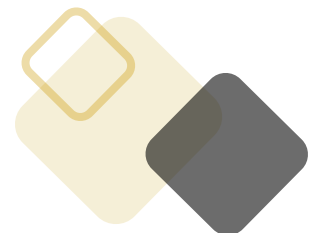


# Compromises

Only one contracting state

Article (1)(1)(b)

... when the rules of private international law lead to the application of the law of a Contracting State.

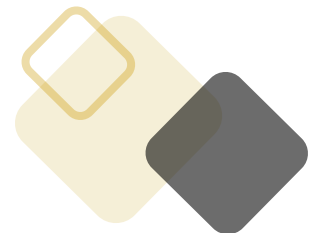


# Compromises

Oral agreements

## Article 96

A Contracting State whose legislation requires [written evidence, may] make a declaration [that oral evidence is not admissible] . . . where any party has his place of business in that State.

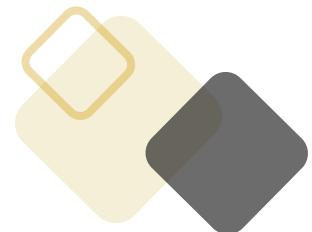


# Compromises

## Oral agreements

### Article 11

- A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

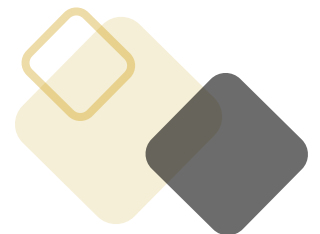


# Compromises

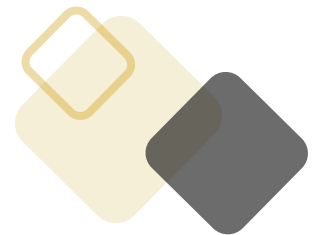
## Specific performance

### Article 28

- . . . a court is not bound to enter a judgement for specific performance unless the court would do so under its own law . . . .



# A UNIFIED CHINESE CONTRACT LAW



AIL Annual Lecture Series: **The CISG and International Trade Law**

# A UNIFIED CHINESE CONTRACT LAW

“[T]he author proposes that the . . . CISG should become the default sales law governing transactions between the PRC’s territorial units. . . . [T]he PRC should deposit the following notification to the United Nations:

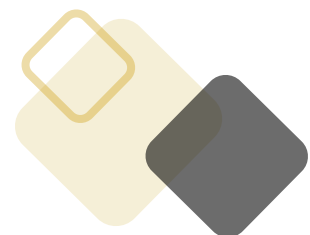
*The People's Republic of China declares that the Convention applies to sales between all its territorial units. Other than this declaration, the PRC has not made any other reservation under Article 93 of the CISG.”*

FAN Yang, *A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and Taiwan – the CISG*, available [https://cisg-online.org/files/commentFiles/Yang\\_15\\_VJ\\_2011\\_345.pdf](https://cisg-online.org/files/commentFiles/Yang_15_VJ_2011_345.pdf).

# A UNIFIED CHINESE CONTRACT LAW

Add:

“In so declaring, the [PRC] reaffirms its sovereignty over all its territorial units and this Declaration is not to be construed to the contrary.”



# CONTRACT DRAFTING



# CONTRACT DRAFTING

## Applicable law

“[T]he CISG holds great potential to lead the way in the application of a single legal instrument . . . [also] in contexts of pure service contracts.”

Ingeborg SCHWENZER

SCHWENZER, Ingeborg, RANETUNGE, Julian *et. al.*, *Service Contracts and the CISG*, *Journal of Law & Commerce*, vol. 38, p. 305, 332 (2019-2020).

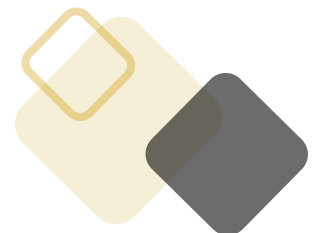
# CONTRACT DRAFTING

“Any and all disputes, . . . .

The law applicable to this contract and to this arbitration agreement shall be the CISG and the law of [insert domestic law] with the exclusion of its conflict of laws provision.

The Convention is also applicable to service and labour provisions in their entirety.

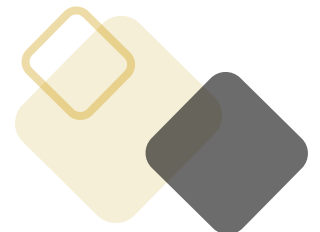
The seat of arbitration shall be \_\_\_\_\_.



# CONTRACT DRAFTING CIETAC 2024

## **Article 7 Place of Arbitration**

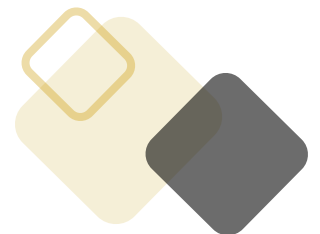
1. Where the parties have agreed on the place of arbitration, the parties' agreement shall prevail.
2. Where the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of CIETAC or



# CONTRACT DRAFTING CIETAC 2024

- Article 7

3. The arbitral award shall be deemed as having been made at the place of arbitration.



# CONTRACT DRAFTING

The number of arbitrators shall be ... (one or three).

The arbitration proceedings shall be conducted in [insert language]. If there is more than one version of the contract, the English version shall prevail.

**The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation in accordance with the mediation rules of the arbitration institute for the time being in force.**

**Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal and may be made a consent award on agreed terms.”**

# CONTRACT DRAFTING

## The revenge of the comma



### Applicable law

Know thy commas

. . . all claims are subject ‘exclusively to Austrian law, except the rules on the conflict of laws, and the CISG’.

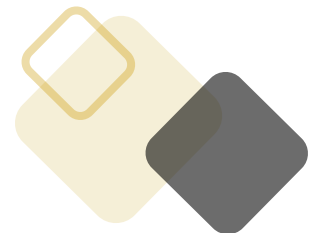
QUERY: whether the CISG is included or excluded.

8 Ob 125/08b, Austria Supreme Court, 2 April 2009.

HONG KONG



AIL Annual Lecture Series: **The CISG and International Trade Law**

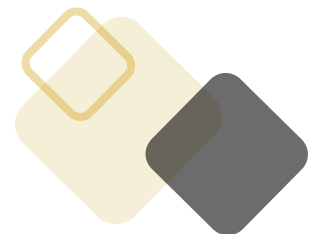


# HONG KONG LAW

REMEMBER:

## Article 4

- This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. . . .



# HONG KONG LAW

## CONCEPTS NOT COVERED BY THE CISG, e.g.,

- Auctions
- Capacity
- Duress, undue influence
- Future, perishable
- Illegal contracts
- Liens
- Misrepresentation
- Mistake
- Stoppage
- Unconscionability
- Warranties

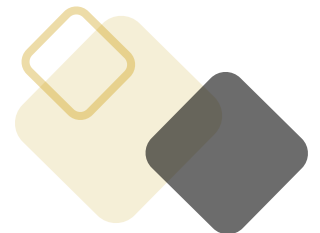


# HONG KONG LAW

## Formation

### Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. . . .



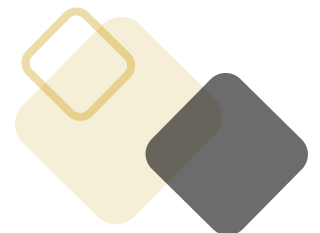
# HONG KONG LAW

## Formation

### Article 19

....

(2) However, a reply . . . which . . . contains additional or different terms **which do not materially** alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects . . . . If he does not so object, the terms of the contract are the terms of the offer **with** the modifications contained in the acceptance.



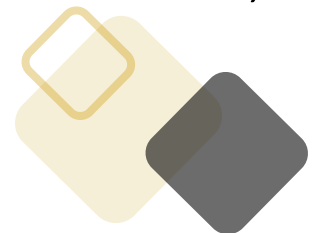
# HONG KONG LAW

## Formation

### Interpretation of intentions

“reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract[.]”

Sinoearn International Ltd v Hyundai Ccecc Joint Venture (A Firm), (FACV No. 22 of 2012, September 30, 2013).



# HONG KONG LAW

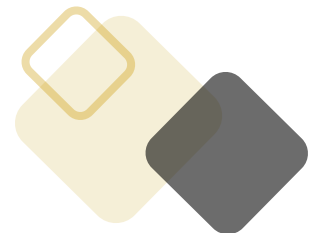
## Formation

### Interpretation of intentions

CISG Article 8

.....

(2). . . statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.



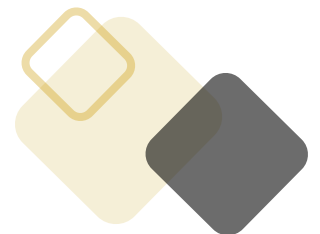
# HONG KONG LAW

## Formality

No statute of frauds

Article 11 allows “any means”.

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.



# HONG KONG LAW

## Estoppel

There is no similar concept, but

Article 80 provides:

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

# HONG KONG LAW

## Termination

## Avoidance

### Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or . . . .

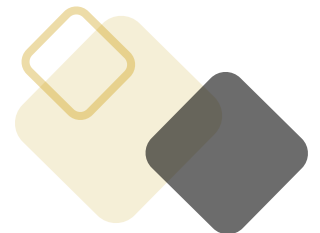
# HONG KONG LAW

## Termination

## Avoidance

### Article 25

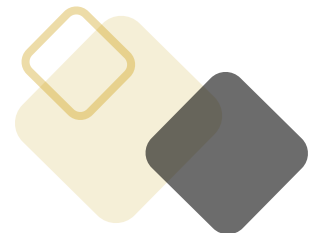
A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.



# DAMAMGES

- **Article 74**

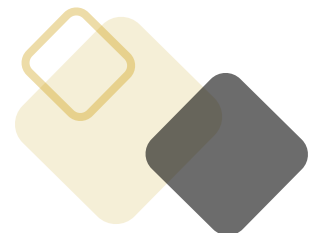
Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.



# FORCE MAJEURE

- **Article 79**

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an **impediment beyond his control** and that he could **not reasonably be expected to have taken the impediment into account at the time of the conclusion** of the contract **or** to have avoided or overcome it or its consequences.



# Scenario

- Buyer from state A and seller from State B, entered into a contract for sale and installation of a “central heating system”. The contract stated, “This is a contract for the sale of goods and the services and labour are free.”
- The parts unloaded on the Buyer’s loading dock. Three years passed before the buyer realized that the contract had not been performed.
- Buyer sued seller for specific performance under domestic law with a four-year statute of limitations.
- Seller defended on the basis it was a contract for the sale of goods and subject to a two-year statute of limitations.
- Issue: Whether the CISG or domestic law applies.

## Cases

Electronic electricity meters case, 4A\_543/2018, Swiss Federal Supreme Court, 28 May 2019.

Sinoearn International Limited v Hyundai–CCECC Joint Venture (a firm), FACV No.22 of 2012, HKSAR Court of Final Appeal, 30 September 2013.

Pellet heating system case, 8 Ob 125/08b, Austria Supreme Court, 2 April 2009.

## Articles

FAN Yang, *A Uniform Sales Law for the Mainland China, Hong Kong SAR, Macao SAR and Taiwan – the CISG*, available [https://cisg-online.org/files/commentFiles/Yang\\_15\\_VJ\\_2011\\_345.pdf](https://cisg-online.org/files/commentFiles/Yang_15_VJ_2011_345.pdf) .

LIU Ying & WANG Xin, *Exploring Alternative Pleading in Civil Cases*, China Business Law Journal (2 August 2024), available at <https://law.asia/alternative-pleading-civil-litigation-cases/> .

MAGNUS, Ulrich, *The Remedy of Avoidance of Contract Under CISG—General Remarks And Special Cases*, Journal of Law and Commerce, vol. 25, p. 423 (2005-2006).

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