

Chapter 4

The Soft Codification of the UNIDROIT Principles of International Commercial

Contracts: Process and Outcome

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4.1 Introduction

There are different types of process for codifying a legal text. Most commonly found codification exists in the forming of a statute being conducted under the direct auspices of the State's authority and being eventually passed through the legislative process in a specific jurisdiction. Such type of codification is also commonly used to establish international norms, such as treaties and other international agreements.

Another important codification is "soft codification" or "non-State codification". It can be understood as the legal rules being elaborated in writing in a systemic way, not with any automatic binding force, but for the purpose of being incorporated by the transacting parties or being used by the courts or arbitral tribunals as applicable rules with the nature of *lex mercatoria* or the principles of law, or as the supplementary basis for law interpretation. Such soft codification is used both at national and international levels.

An Italian Professor Vittorio Scialoja once Stated: "... the community of commercial relations existing between civilized nations should lead to the reconstruction, at least partially, of a 'common' law which was for centuries a powerful force for civilization in Europe, and which was destroyed . . . in the great movement of renovation which began in the eighteenth century."¹ Non-State codification of international private law can be seen as a process of reconstructing some kind of "international common law" to be directly or indirectly used by traders from different nations and applied by courts and arbitral tribunals in different jurisdictions.

Comparing with State codification, which is the process of codifying legal principles by individual States, non-State codification of law normally involves many States or experts from many States. Thus although non-State codification is not supported

¹The Statement was quoted from Michael Joachim Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Trade Law*, 27(2) *Int'l and Comp. L. Q.* 413 (1978).

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by States' legislative powers to make them enforceable in different jurisdictions, the results of such non-State codification could have wider implications concerning the possible applications by traders at international level.

Due to the difference between the soft-codification and the State codification and due to the importance of such soft codification, it is of high practical and theoretical significance to look more into the process of such codification. The paper uses the UNIDROIT Principles of International Commercial Contracts (hereinafter "UNIDROIT Principles"; it is also called by some authors as the "PICC") as an example to review the codification process and to examine whether there are positive experiences for other fields of law to learn.

The UNIDROIT Principles is a comprehensive and widely covering rules to deal with almost all substantive aspects of international commercial contracts, including the general provisions to cover freedom of contract, bidding character, mandatory rules, good faith principle, usages and practice, among other things; formation of contract and authority of agents; validity of contract; interpretation of contract terms; content and third party rights; performance; non-performance; set-off; assignment of rights; transfer of obligations and assignment of contracts; and limitation periods.² The contents of the UNIDROIT Principles are "sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice and attempt to ensure fairness in international commercial relations."³

The paper is not to examine the substantive contents of the UNIDROIT Principles, but to focus on the codification aspects of the Principles, including their initiation, criteria, stages, sources being based, function, reception and application, authority and legitimacy, and State's participation. It is hoped that the review will provide useful basis for other fields of law to consider the value of soft codification.

4.2 Initiators and Drafters of the UNIDROIT Principles

4.2.1 The Institutional Initiator of the UNIDROIT Principles

Although, as in most international initiatives, actually many key persons were behind the initiation of the UNIDROIT Principles, institutionally, it was the International Institute for the Unification of Private Law (UNIDROIT) responsible for the initiation and realization of the codification for the international commercial contracts principles. The UNIDROIT Principles were drafted and first published in 1994 and then revised in 2004 and 2010 by UNIDROIT. UNIDROIT is an independent intergovernmental organization, first established as an auxiliary organ of the League

² See the text of the UNIDROIT Principles at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

³ See the Introduction to the 1994 Edition, attached to the text of the UNIDROIT Principle. Available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

of Nations and reestablished in 1940 based on the Statute of UNIDROIT,⁴ with the purpose of “studying needs and methods for modernizing, harmonizing and coordinating and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.”⁵ The independent status of UNIDROIT “has enabled it to pursue working methods which have made it a particularly suitable forum for tackling more technical and correspondingly less political issues.”⁶

UNIDROIT has the General Assembly as the ultimate decision-making organ of UNIDROIT, composed of one representative from each member Government. The General Assembly elects 25 members to the Governing Council to supervise all policy aspects, which in turn appoints the Secretary-General to carry out work programs.⁷ In short, the Institute and its operation have very close connection with its member countries.

The purpose for the initiation of the UNIDROIT Principle was to comprehensively elaborate principles of international commercial contracts so as to “establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.”⁸ In 1971, the Governing Council decided to include the subject of such elaboration in the Work Programme of UNIDROIT. In the beginning, the Council set up a small Steering Committee, composed of three professors representing the civil law, the common law and the socialist systems, for the purpose of conducting preliminary inquiries about the feasibility of the project. It was until 1980, a Working Group being established under the Governing Council for preparing the draft of the Principles.⁹ And thus the drafting process was formally launched.¹⁰ From the explanation, it is apparent that UNIDROIT played very unique and important institutional role in the codification of the UNIDROIT Principles.

4.2.2 Individual Initiators and Drafters of the UNIDROIT Principles

The idea of creating a non-binding set of rules “reflecting the common principles that can be extracted from the case law of the various countries” was suggested by the

⁴ The Statute can be found at <http://www.unidroit.org/mm/statute-e.pdf>.

⁵ See the official website of UNIDROIT at <http://www.unidroit.org/dynasite.cfm?dsmid=103284>.

⁶ *Id.*

⁷ <http://www.unidroit.org/dynasite.cfm?dsmid=103284>.

⁸ See the Introduction to the 1994 Edition, attached to the text of the UNIDROIT Principle. Available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

⁹ See the Introduction to the 1994 Edition, attached to the text of the UNIDROIT Principle. Available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

¹⁰ *Id.*

then Secretary-General of UNIDROIT, Mario Matteucci in 1968.¹¹ This was before the Steering Committee mentioned above was established.

The original duty of the Working Group was for “Progressive Codification of International Trade Law” when it was established in 1980. The initiative was revised to “preparation of Principles for International Commercial Contracts” in 1985.¹² The Working Group included academics and lawyers who were experts of major legal systems throughout the world. They were participating in the discussions in their personal capacity, not representing the views of their governments.¹³ These members of the Working Group were the real drafters of the UNIDRIOT Principles. In addition, the Group also circulated its drafts to a wide range of expert to invite comments.¹⁴ Thus, experts not formally within the system also indirectly participated in the drafting process.

4.3 Criteria of Codification under UNIDRIOT

UNIDROIT has its own comprehensive “legislative policy”¹⁵ to serve as the criteria of codifying legal rules. Concerning the selection of subjects and scope of rules to be codified, it is stated that: “UNIDROIT’s basic statutory objective is to prepare modern and where appropriate harmonized uniform rules of private law understood in a broad sense.”¹⁶ But it also indicates that “experience has demonstrated a need for occasional incursion into public law especially in areas where hard and fast lines of demarcation are difficult to draw or where transactional law and regulatory law are intertwined. Uniform rules prepared by UNIDROIT are concerned with the unification of substantive law rules; they will only include uniform conflict of law rules incidentally.”¹⁷

According to UNIDROIT, there are a number of factors being used to determine the eligibility of subjects for uniform law treatment. “Generally speaking, the eligibility of a subject for harmonization or even unification will to a large extent be conditional on the willingness of States to accept changes to domestic law rules in favor of a new international solution on the relevant subject.” “Similar considerations will also tend to determine the most appropriate sphere of application to be given to uniform rules, that is to say, whether they should be restricted to truly cross-border transactions or extended to cover internal situations as well. While commercial law topics tend

¹¹ Stefan Vogenauer and Jan Kleinheisterkamp, *Commentary on the UNIDROIT principles of international commercial contracts (PICC)*, at 7 (Oxford University Press, 2009).

¹² *Id.*

¹³ *Id.*

¹⁴ See the “Introduction to the 1994 Edition” attached to the PICC.

¹⁵ Since the rules drafted and adopted by UNIDROIT are not legislations in strict sense, the term “legislative policy” used by UNIDROIT is actually referring to the “soft-codifying policy”.

¹⁶ <http://www.unidroit.org/dynasite.cfm?dsmid=103284>.

¹⁷ *Id.*

to make for most of the international harmonization initiatives, the broad mandate given to UNIDROIT allows the organization to deal with non-commercial matters as well.”¹⁸

In addition to the factors to decide whether to codify certain legal rules or principles, UNIDROIT also lays down factors to determine the kinds of instrument to be prepared. It is stated that: “The uniform rules drawn up by UNIDROIT have, in keeping with its intergovernmental structure, generally taken the form of international Conventions, designed to apply automatically in preference to a State’s municipal law once all the formal requirements of that State’s domestic law for their entry into force have been completed. However, alternative forms of unification have become increasingly popular in areas where a binding instrument is not felt to be essential. Such alternatives may include model laws which States may take into consideration when drafting domestic legislation or general principles which the judges, arbitrators and contracting parties they address are free to decide whether to use or not. Where a subject is not judged ripe for uniform rules, another alternative consists in the legal guides, typically on new business techniques or types of transaction or on the framework for the organization of markets both at the domestic and the international level. Generally speaking, ‘hard law’ solutions (i.e. Conventions) are needed where the scope of the proposed rules transcends the purely contractual relationships and where third parties’ or public interests are at stake as is the case in property law.”¹⁹ Apparently, UNIDROIT considered that a subject of principles of international commercial contracts is ripe for uniform rules and thus it decided to resort to soft law approach in codifying principles.

4.4 Stated Stages of Codification under UNIDROIT and the Actual Process for the Principles

4.4.1 The Standard Methods of Codification Under UNIDROIT

According to UNIDROIT, there are the standard methods to formulate rules.²⁰ The initiation of the UNIDROIT Principles was based on certain objectively stated criteria. The reasons are basically not political in nature. It is not for the purpose of transcending States or keeping States out of the process. As a matter of fact, States play key role in supporting the drafting the adopting the codified documents.

Basically, a number of stages will have to be gone through to ultimately realize or finalize the codification process. Soft codification might involve different stages of such process when comparing with State codifications of domestic laws. For instance, codification of the Taiwan’s Civil Code involved the drafting process by some eminent

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ <http://www.unidroit.org/dynasite.cfm?dsmid=103284>.

scholars from foreign countries, the discussion and amendment process among the experts and with different parts of government agencies, and the ultimate passage of the draft by the legislative body. However, the soft codifications generally do not involve the last stage, i.e., the legislative stage.

Nevertheless, it must also be noted that different kinds of soft codification might also involve different stages of codification. Most other soft codification processes do not involve some kind of inter-governmental negotiations, nor formal adoption or approval process. However, the codification process by UNIDROIT will, in principle, go through inter-governmental negotiation stage and the “passing” stage.

According to UNIDROIT, there are the following stages to be gone through for the purpose of codifying some legal rules. These are more formal and far more complicated than many other soft codification processes:

Preliminary Stage (Drafting Stage)

Once a subject of codification has been entered on UNIDROIT’s Work Programme, the Secretariat of the Institute “will draw up a feasibility study and/or a preliminary comparative law report designed to ascertain the desirability and feasibility of law reform. Where appropriate and funding permitting, an economic impact assessment study is also carried out. The report, which may include a first rough draft of the relevant principles or uniform rules, will then be laid before the Governing Council which, if satisfied that a case has been made out for taking action, will typically ask the Secretariat to convene a study group, traditionally chaired by a member of the Council, to prepare a preliminary draft Convention or one of the alternatives mentioned above. The membership of such study groups, made up of experts sitting in their personal capacity, is a matter for the Secretariat to decide. In doing so, the Secretariat will seek to ensure as balanced a representation as possible of the world’s different legal and economic systems and geographic regions.”²¹

Intergovernmental Negotiation Stage

After the preliminary stage, “[a] preliminary draft instrument prepared by the study group will be laid before the Governing Council for approval and advice as to the most appropriate further steps to be taken. In the case of a preliminary draft Convention, the Council will usually ask the Secretariat to convene a committee of governmental experts whose task will be to finalize a draft Convention capable of submission for adoption to a diplomatic Conference. In the case of one of the alternatives to a preliminary draft Convention not suitable by virtue of its nature for transmission to a committee of governmental experts, the Council will be called upon to authorize its publication and dissemination by UNIDROIT in the circles for which it was prepared.”²²

²¹ <http://www.unidroit.org/dynasite.cfm?dsmid=103284>.

²² *Id.*

States' participation in this stage is more active and constant. "Full participation in UNIDROIT committees of governmental experts is open to representatives of all UNIDROIT member States. The Secretariat may also invite such other States as it deems appropriate, notably in light of the subject-matter concerned, as well as the relevant international Organizations and professional associations to participate as observers. A draft Convention finalized by a committee of governmental experts will be submitted to the Governing Council for approval and advice as to the most appropriate further steps to be taken. Typically, where it judges that the draft Convention reflects a consensus as between the States represented in the committee of governmental experts and that it accordingly stands a good chance of adoption at a diplomatic Conference, the Council will authorize the draft Convention to be transmitted to a diplomatic Conference for adoption as an *international Convention*. Such a Conference will be convened by one of UNIDROIT's member States."²³

Publication of UNIDROIT Working Materials

UNIDROIT has its Proceedings and Papers to publish the Annual Reports on the activity of the Institute, summaries of the conclusions reached by the Governing Council, the reports on the annual sessions of the General Assembly, the final texts of instruments prepared, documents adopted and the preparatory work.

Cooperation with Other International Organizations

UNIDROIT maintains close ties of cooperation with other intergovernmental and non-governmental organizations. UNIDROIT is sometimes commissioned by other international organizations to prepare comparative law studies and/or draft conventions designed to serve as the basis for the preparation and finalization of international instruments by those organizations.²⁴

4.4.2 Actual Process for the Codification of the UNIDROIT Principles

According to the above procedures, normally a preliminary draft instrument prepared by the study group should be submitted to the Governing Council for approval and advice as to the most appropriate further steps to be taken. However, the real situation for the process of the first edition (1994 edition) of the UNIDROIT Principles was quite different.

In the Working Group stage, the participants were not able to resolve some issues so as to form their consensus. They decided to submit them to the Governing Council for decision. The Governing Council decided that it would not formally approve

²³ *Id.*

²⁴ *Id.*

the Principles but only to authorize their publication. Apparently, this is not the procedure usually applied, and even not a procedure applied for the codification process of any other instrument under UNIDROIT.²⁵ However, this does not mean that the Governing Council failed to take any step in the realization of codification of the UNIDROIT Principles. As a matter of fact, the Governing Council did offer its advices on the policy to be followed, “especially in those cases where the Group had found it difficult to reach consensus.”²⁶

Different from the situation of 1994 edition, later editions (the 2004 and 2010 editions) of the UNIDROIT Principles were formally adopted by the Governing Council of UNIDROIT.²⁷

4.5 Sources and Materials Being Based upon by the Codification of the UNIDROIT Principles

Although the UNIDROIT Principles are only a set of non-binding rules, the sources were actually from the existing legislations and case laws of different countries. As described by some authors, the drafters “almost exclusively relied on the legislations and the case law of Western legal systems, without necessarily giving priority to the civil law or the common law tradition. Regard was usually had to the contract laws of the USA (with frequent references to the UCC and the Restatement 2d Contracts), England, France, Germany, and Italy. But the contract laws of smaller jurisdictions were influential we well, particularly those that were in the process of being codified, such as the Netherlands (1992) and Quebec (1994).”²⁸

As mentioned earlier, the purpose for the initiation of the UNIDROIT Principles was to comprehensively elaborate principles of international commercial contracts so as to “establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.”²⁹ Therefore, the drafters were not merely copying provisions from these sources and materials. The materials served only as references for the drafters to conduct their deliberations. The results have been that most provisions in the UNIDROIT Principles represented the general rules embodied in the majority of jurisdictions; whereas some others were created by the drafters. As indicated in the “Introduction to the 1994 Edition” published by UNIDROIT, the most part of the UNIDROIT Principles “reflect concepts to be found in many, if not all, legal systems. Since however the UNIDROIT Principles are intended to

²⁵ Stefan Vogenauer and Jan Kleinheisterkamp, *supra* note 11, at 9.

²⁶ See the “Introduction to the 1994 Edition” published by UNIDROIT.

²⁷ <http://www.unidroit.org/english/principles/contracts/main.htm>.

²⁸ Stefan Vogenauer and Jan Kleinheisterkamp, *supra* note 11, at 9.

²⁹ See the Introduction to the 1994 Edition, attached to the text of the UNIDROIT Principle. Available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2-004-e.pdf>.

provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.”

4.6 Function of the Codification of UNIDROIT Principles

Broadly speaking, there are three fundamental functions from the codification of the UNIDROIT Principles, namely the restatement function, the law function, and the model function.³⁰

The UNIDROIT Principles themselves are in the form of a “restatement”. The restatement function is shown by the fact that the most part of the UNIDROIT Principles “reflect concepts to be found in many, if not all, legal systems” and they are “intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted”, as mentioned above. So the Principles are partly the restatement of existing laws and partly the best practice of law to be applied by the parties of international transactions.

The law function is reflected in the following aspects: First, the parties can agree that their contract be governed by the UNIDROIT Principles. Actually, parties in the international commercial transactions are encouraged to expressly choose the Principles as the rules of law governing their contract. Second, even if the parties fail to include the UNIDROIT Principles as the applicable law of their contract, the Principles can still be applied “as a manifestation of ‘general principles of law’, the ‘*lex mercatoria*’ or the like referred to in the contract.”³¹ Third, if it is in an arbitration proceeding and if the arbitrators are permitted to apply “the rules of law which they determine to be appropriate” under the rules of arbitration (such as ICC Rules), the arbitral tribunal might still be able to apply the UNIDROIT Principles as the appropriate rules of law to decide the dispute.³² Fourth, the UNIDROIT Principles can also serve as a means to interpret and to supplement international uniform law instruments (such as the UN Convention on Contracts for the International Sale of Goods, (CISG)), or as a means of interpreting and supplementing domestic law.³³ But certainly, these interpreting and supplementing functions would depend largely on the nature of the issues.

The model function is also indicated in the Preamble of the UNIDROIT Principles. It states that the UNIDROIT Principles “may serve as a model for national and international legislators.” In addition to serving as a model to States, they also serve

³⁰ See Ralf Michaels, *Preamble*, in COMMENTARY (supra n. 2) nos. 1–8.

³¹ See the preamble of UNIDROIT Principles.

³² *Id.*

³³ *Id.* See also Anukarshan Chandrasenan, *UNIDROIT Principles to Interpret and Supplement the CISG: An Analysis of the Gap-filling Role of the UNIDROIT Principles*, 11 *Vindobona J. Int'l Comm. L. and Arb.* 65 (2007).

as a model for private parties when they draft their contract. The Preamble of the UNIDROIT Principles states in this regard that “the Principles may also serve as a guide for drafting contracts. In particular the Principles facilitate the identification of the issues to be addressed in the contract and provide a neutral legal terminology equally understandable by all the parties involved.”

4.7 Reception and Legitimacy of and States’ Participation in the Codification of the UNIDROIT Principles

4.7.1 Reception and Application

The result of soft codification is a set of certain rules recommended by the institution.

After codification, the codified principles are still “soft law”, i.e., the law not to be enforced through public force.³⁴ Thus the reception of the UNIDROIT Principles does not depend on the States’ action based on their sovereign powers, but on the private parties and courts or arbitral tribunals making use of them.

Although in academic circles, the UNIDROIT Principles do arouse considerable interest, their opinions concerning the practical use of the Principles are divided.³⁵

However, according to a statistical analysis, the outcome of the Principles being used is quite positive. It states: “First, the number of arbitral tribunals and domestic courts which have used the UNIDROIT Principles is considerable, as is their location, spread all over the world. Second, also the fact that the parties involved in the respective disputes were situated in so many different countries may be seen as confirmation that the UNIDROIT Principles are increasingly known worldwide. Finally, the substantive scope of application of the UNIDROIT Principles, though centering mainly on sales contracts, also covers a great variety of other important international commercial contracts, especially service contracts, distribution contracts and licensing contracts.”³⁶

4.7.2 Authority and Legitimacy

The suggestion by Nils Jansen that non-State codifications gain an important part of their reputation not from their substantive qualities but from their coherent and

³⁴ Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. Int’l Dispute Settlement, 1 at 2 (2010).

³⁵ Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. Int’l Dispute Settlement, 1 at 2 (2010).

³⁶ *Id.* at 721.

orderly form of the text and that the existence as a written and accessible text³⁷ do apply to the building of the authoritative position of the UNIDROIT Principles. But, still, the quality of the codification and the reputation of the drafters and the drafting institution together also contribute to the wide recognition of the authority of the UNIDROIT Principles.

Also the process of codification involves the participation by experts nominated by the contracting members of the Institute. Outside experts were also invited to make comments during the process. There is also the approving process by the Governing Council, the members of which were representatives from contracting countries. In other words, the Principles are formulated in a semi-democratic manner (i.e., quite wide participations), widely endorsed by a large number of countries, which are basically the main regions where traders are coming from. These all contribute to the establishment of the authority and legitimacy of the Principles.

4.7.3 *States' Participation*

As mentioned above, although the UNIDROIT Principles were only the result of a soft codification, actually States have certain high degree of involvement in the codification process. The whole process, including the establishment of the Working Group and the secretariat and financial supporting as well as the final endorsement of the Principles, was conducted and made under UNIDROIT, an intergovernmental organization. Thus, although States do not directly engage in the “State-to-State negotiation” and the “ratification” of the text of the UNIDROIT Principles, their involvements are so apparent and crucial.

Concerning the codified UNIDROIT Principles relating to States' law, if the parties agree to use them as the governing law for their contract or if the parties agree to use general principles of law, the Principles can be applied as the applicable law or as a manifestation of “general principles of law”. It is also possible that the UNIDROIT Principles can be used for interpreting and supplementing domestic law.³⁸ It is also contemplated to have the UNIDROIT Principles serving as a model for national legislations. Thus the relations between States' law and the Principles are obvious, although they might not be so direct and intimate.

³⁷ NILS JANSEN, *THE MAKING OF LEGAL AUTHORITY* chap. 4 (Oxford University Press 2010).

³⁸ *Id.* See also Anukarshan Chandrasenan, *UNIDROIT Principles to Interpret and Supplement the CISG: An Analysis of the Gap-filling Role of the UNIDROIT Principles*, 11 *Vindobona J. Int'l Comm. L. and Arb.* 65 (2007).

4.8 Some Concluding Remarks

This chapter examines the soft codification process of the UNIDROIT Principles, including their initiation, criteria, stages, sources being based, function, reception and application, authority and legitimacy, and State's participation. It finds the codification is not that "soft".

The non-State codification of the Principles is actually the collaborative efforts by experts in international contract law from wide range of countries, under an intergovernmental organization, with States' systemic supports and endorsement. If we look at the States' involvement and participation in the process, it is apparent that such non-State codification process is not done in genuinely and purely private setting. States' involvement is quite substantial. They actually participated in the process in an indirect way. But individual drafters were still given very high degree of autonomy in formulating their drafts. Such public-private cooperation is an excellent model for providing a solid foundation for the Principles to be widely welcome and accepted. The codification of the UNIDROIT Principles is definitely a positive experience to be shared for possible soft codification of law in other fields.

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