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# THE DISPUTE RESOLUTION REVIEW

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SEVENTH EDITION

EDITOR  
JONATHAN COTTON

LAW BUSINESS RESEARCH

# THE DISPUTE RESOLUTION REVIEW

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## Chapter 46

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# UNITED ARAB EMIRATES

*D K Singh*<sup>1</sup>

### I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The United Arab Emirates (UAE) is a federation of seven emirates comprising Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain, with each of them enjoying a certain degree of autonomy both economically and judicially. The UAE is governed by a federal Constitution, which was promulgated in 1971. Under the Constitution each of the emirates within the UAE ceded certain elements of their sovereignty to the federation and retained some elements for themselves. As a result, the federation exercises executive and legislative jurisdiction in certain defined matters. Matters that have not been assigned specifically to the exclusive jurisdiction of the federation remain vested with each emirate.

As a result the legal system in the UAE is complex, in part because each emirate has its own legislature and court structure in place, as well as a federal system of laws and a federal judiciary to hear and determine federal legal issues. The UAE federal courts are also the courts with final appellate jurisdiction for the majority of the emirates. There are tangible differences in procedure and law at regional level, which are unfamiliar and frequently challenging to lawyers trained in the common law systems. Only Emirati nationals may be granted rights of audience before the UAE courts, and therefore while lawyers of other nationalities may be registered with the Legal Affairs Department and are permitted to provide legal advice to clients, they are required to appoint a local advocate to conduct UAE court proceedings.

Dubai and Ras Al Khaimah maintain their own independent court structure and are not subject to the UAE Federal Judicial Authority; however, they are nevertheless bound to federal law and apply it in conjunction with any locally enacted laws and decrees. There are three main branches within the court structure of the UAE: civil,

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criminal and shariah law. The legal system is based on civil law principles and Islamic shariah law, and the legislation is primarily sourced from federal codes, decrees, resolutions and cabinet decisions.

In addition to the civil law structure most emirates have enacted various laws for the establishment of free zones, which have been given different levels of operational autonomy. There are many commonly used free zones within the UAE, which are designed to satisfy niche business purposes, such as the Jebel Ali Free Zone, the Dubai International Financial Centre (DIFC) or the Dubai Media City. They offer very attractive business opportunities for investors; for instance, 100 per cent foreign ownership, 100 per cent repatriation of profits to the home jurisdiction of the company concerned, relatively low incorporation costs and minimal or non-existent taxation on income.

The DIFC is an onshore free zone with its own independent English-speaking court system based on common law principles. It boasts a full set of laws, regulations and court procedures largely based on English law and the relationship between the DIFC courts and the Dubai courts is the subject of a memorandum of understanding between the courts. A protocol with regard to jurisdiction has also been put in place to avoid conflicts between the courts and this has largely been working very efficiently. Issues of reciprocal enforcement of court orders are also regulated and this has further enhanced the reputation and effectiveness of both the Dubai courts and the DIFC courts.

## II THE YEAR IN REVIEW

This year has seen the delivery of a number of interesting judgments from the DIFC courts, both at first instance and the Court of Appeal. Particularly noteworthy was the long awaited decision in the DIFC courts case *Rafed Abdel Mohsen Bader Al Khorafi & 2 Ors v. Bank Sarasin-Alpen (ME) Ltd & Bank Sarasin & Co Limited*. In brief, the claimants had claimed against the defendants for damages of \$225 million for breach of the DIFC Regulatory Law, breach of contract and for providing negligent investment advice and misrepresentation. The case was filed in 2009 and after a lengthy process, including two separate appeals to the Court of Appeal on interlocutory issues, and a two-week trial in May 2013, judgment was handed down in August 2014 in favour of the claimants. The case represents a landmark judgment of the DIFC courts in relation to the mis-selling of financial services products by a financial institution both within and outside the DIFC, and will have international ramifications. An application for permission to appeal is awaiting the decision of the Court of Appeal.

In another case attracting wide international interest, CFI 032/2014 *The Dubai Financial Services Authority v. ES Bankers (Dubai) Limited*, the DIFC courts issued a winding-up order and appointed liquidators to the troubled Portuguese bank ES Bankers (Dubai) Limited. The Dubai Financial Services Authority (DFSA) petitioned the court for a winding-up order pursuant to Article 93 of the DIFC Regulatory Law, on the grounds that it was just and equitable and in the interests of the DIFC that ES Bankers be wound up.

In a further judgment handed down in September in CA 005/2014 *Meydan Group LLC v. Banyan Tree Corporate Pte Ltd*, the DIFC Court of Appeal determined that the DIFC courts have jurisdiction to recognise and enforce a domestic arbitration

award made within the Emirate of Dubai but outside the DIFC. This is a potentially game-changing decision, as it effectively allows a party to circumvent the cumbersome and highly technical ratification process in the local Dubai courts (which is not governed by a comprehensive arbitration law) and opt for a ratification in the DIFC, which is completed relatively swiftly and which is governed by the DIFC Arbitration Law, thus making possible challenges to ratification extremely limited.

Judgment in the consolidated cases of *Amit Dattani & Another v. Damac Park Towers Limited* and *Masood Rahman & Another v. Damac Park Towers Company Limited* was handed down in July 2014 and is expected to have significant implications for both investors and property developers in the DIFC, not only legally, but also in terms of investor confidence. The claimants in these consolidated proceedings entered into SPAs for the purchase of residential and retail units in the Park Towers development in 2004. Following significant delay by the defendant, the claimants served notices to remedy in the third quarter of 2011. Shortly thereafter the defendant issued handover notices, but upon inspection of the units it was the claimants' case that the units were not ready for possession and occupation, not least because the common areas, including passage to units themselves, were unsafe for use. Accordingly the claimants served notices of termination of the SPAs. The following were the key issues before the court:

- a* whether the completion certificate was final or provisional pending specified works to be done;
- b* whether the defendant prematurely issued the handover notices;
- c* if the defendant knowingly issued the handover notices prematurely to avoid the termination notices, whether it would be appropriate for the court to award an increase in damages under Article 40(2) of DIFC Law No. 7 of 2005 (punitive damages);
- d* whether the claimants were entitled to terminate the SPAs; and
- e* whether having access to part of the plot and commencing construction constitutes plot handover and thereby establishes the date from which the anticipated completion date is calculated.

The judge at first instance found in favour of the claimants in both sets of proceedings; however, an application for permission to appeal is pending. These cases are also interesting as they are the first DIFC court proceedings to be consolidated on the basis that the facts in each case were substantially similar.

At another level, the DIFC courts continue to enhance their processes and procedures. In 2014 the courts issued new Registrar and Practice Directions, offering practitioners guidance for the consolidation of cases, costs, wasted costs orders, the confidentiality of mediation proceedings and on the requirement to specify in a claim and the particulars of a claim the laws governing the dispute and the basis upon which the DIFC courts have jurisdiction.

### **III COURT PROCEDURE**

#### **i Overview of court procedure**

The court procedure in the federal courts is governed by UAE Federal Law No. 11 of 1992 as amended (the Code). The judicial system is essentially inquisitorial in nature and is heard at first instance by a single judge. As in other civil law jurisdictions there is no concept of a jury trial. In reaching a decision, the judge will place little or no reliance on precedents but will investigate the facts and apply the law accordingly; often judges will rely heavily on expert witnesses in reaching their judgments. In the DIFC the court procedure can be found in the Rules of the DIFC Court (RDC), which, on the whole, are very similar to the English Civil Procedure Rules. In addition, the RDC has incorporated certain provisions of court procedure from other common law jurisdictions.

#### **ii Procedures and time frames**

The time limits to bring civil claims under UAE law vary. Generally the limitation period is 15 years for a contractual claim, three years for a tort claim and one year for employment claims. To commence proceedings a claimant is required to file a claim in the relevant court office and pay the applicable fee. Depending on the type of claim, or the nature of any application, deadlines for the filing of documents and hearing dates can vary. The procedural timetable is flexible to accommodate the complexity of the issues in a case; it also depends on the number of hearings required to address the pleaded issues in the case.

The limitation period to bring civil claims in the DIFC is generally six years for contract claims, including employment contracts.

All proceedings in UAE civil matters are based upon the written pleadings of the parties supported by the documentary evidence. Witnesses and experts are not required to give oral evidence at a trial. There is no standard disclosure and inspection process under the UAE civil procedure. A party is therefore only required to produce the written evidence it seeks to rely on. However, there is scope under the UAE Law of Evidence for a party to apply for disclosure of specific documents in the other party's possession in certain limited circumstances. Expert evidence is also not usually exchanged in UAE court proceedings. Instead either party may request that the court appoint an expert from a list of experts maintained by the court, or the court may do so of its own volition.

The DIFC courts utilise both written and oral advocacy submissions. If either party feels that expert evidence is required, an application for permission to adduce expert evidence can be made, usually at the case management conference. Experts are usually appointed by the parties, although an expert's overriding duty is to assist the court and not to the appointing party.

#### **iii Class actions**

There are no specific provisions in the Civil Procedure Law in relation to class actions. The RDC, on the other hand, do make provision for what is known as a group litigation order. The Chief Justice will consider the similarities of fact and law between two or more cases when deciding whether to make such an order. If such an order is made, the court has a wide discretion as to how the matters are to be dealt with. The rules envisage that

a register will be maintained by the DIFC court and that a 'test' case can be run to trial, following which all facts and findings from the case will be equally applicable to those cases that have been accepted on the Group Litigation Register.

**iv Representation in proceedings**

Parties to litigation proceedings in the UAE may appoint a local advocate who has rights of representation and audience; the courts will require an attested power of attorney to accept submissions from the local advocate on behalf of their clients. Generally only Emirati nationals may represent a party in the UAE courts. A party may also appear in person, utilising a translator if necessary.

Lawyers or counsel from other jurisdictions and particularly from common law jurisdictions are able to conduct and appear in proceedings in the DIFC courts. Litigants in person are also permitted to appear, although there are special requirements for a company appearing in person. The DIFC courts have also pioneered a pro bono scheme to encourage access to justice. A number of free legal sessions are held throughout the year where participating firms provide free legal advice in short interviews. A party seeking pro bono representation in the DIFC courts must file an application with the registry. Those that are accepted are allocated to one of the participating firms in the pro bono scheme.

**v Service out of the jurisdiction**

Service of UAE process must generally be served through diplomatic channels. This can be extremely time-consuming.

The RDC, in acknowledgment of the international nature of the DIFC, provide that no special permission is required to serve DIFC court documents out of the jurisdiction, provided that service is effected in accordance with the law in the place of intended service.

**vi Enforcement of foreign judgments**

The UAE is a signatory to the New York Convention. Additionally, it has signed a number of bilateral treaties with other countries, such as India, and others in the GCC, and therefore the UAE courts are bound to ratify and enforce certain foreign arbitral awards and judgments, provided these meet the specified criteria in the Convention or the treaties. However, there have been isolated cases where this has not been implemented and foreign judgments have not been ratified; in particular, where the foreign judgment is at odds with the local laws or policy decisions. This area of law is developing fast and the legal position on such matters is expected to be clarified in the near future, with new legislation under discussion.

**vii Assistance to foreign courts**

The DIFC courts have entered into cooperation agreements with a number of common law courts such as the Supreme Court of New South Wales in Australia and the Commercial Court of England and Wales, and there are more such agreements expected as the DIFC courts continue to strengthen their links across the world. There are provisions within the RDC for providing assistance to foreign courts; for example, in taking evidence on oath.

**viii Access to court files**

Only the parties and their lawyers are entitled to access the court file in the UAE federal courts.

Access to DIFC court files is governed by Part 6 of the RDC. With the exception of insolvency proceedings, parties who are not party to proceedings may only obtain from the court record the statements of case (but not attachments) and judgments, which are in any event made available to the public through the DIFC court's website.

**ix Litigation funding**

Litigation funding is not a common practice in either court or arbitration proceedings in the UAE, although the law does not specifically preclude it. Most recently, however, an increasing number of law firms are prepared to fund part of their clients' proceedings in exchange for an increase in their fees or a share of the recovery in the event of a successful outcome. Third-party funding remains unlikely in the federal courts because there is minimal recovery of costs from the losing party and therefore the practice is unprofitable.

On the other hand, many DIFC firms operate under conditional fee agreements with their clients, and, rather encouragingly for the legal community in the DIFC, there has been a steady increase in the number of claims being funded by third parties. This difference is primarily due to the nature and amount of potential costs that can be recovered in the common law system.

**IV LEGAL PRACTICE**

**i Conflicts of interest and Chinese walls**

Although Dubai lawyers are required to be registered with the Dubai Ruler's Court, there is little supervision of the legal profession beyond that requirement. Therefore, the management of conflicts of interest, both ethically and practically, is largely a matter for individual firms. Lawyers practising in the DIFC are additionally required to be registered with the DIFC courts to be eligible to conduct litigation in the DIFC.

The DIFC court has a new mandatory code of conduct, which came into force in September 2014, and which all practitioners in the DIFC must abide by. The new code of conduct deals very broadly, *inter alia*, with conflicts of interest.

**ii Money laundering, proceeds of crime and funds related to terrorism**

UAE statutory provisions prohibiting money laundering are contained in UAE Federal Law No. 4 of 2002, Regarding the Criminalisation of Money Laundering in the UAE,

and in Federal Law No. 1 of 2004 on Combating Terrorism. Within the UAE, the Central Bank is the competent body to receive and investigate activity reports concerning suspicious financial activity. Any financial proceeds from the following are criminalised under anti-money laundering (AML) legislation in the UAE:

- a* narcotics and psychotropic substances;
- b* kidnapping, piracy and terrorism;
- c* offences violating the environmental law;
- d* illicit dealing in firearms and ammunition;
- e* bribery, embezzlement and misuse of public funds;
- f* fraud, breach of trust and related offences; and
- g* any other related offences specified in international agreements to which the UAE is a party.

Sanctions for breach of AML legislation include:

- a* imprisonment for up to seven years;
- b* fines up to 300,000 dirhams;
- c* confiscation of the proceeds (or the equivalent thereof); and
- d* criminal liability of financial institutions.

Within the DIFC, authorised firms and ancillary service providers (such as law firms) are governed by the Anti-Money Laundering Module and the DFSA Rulebook, and are subject to strict requirements to undertake due diligence to identify their clients and to report suspicious money transactions. Firms licensed by the DFSA are required to implement adequate policies, procedures, systems and controls to prevent money laundering and terrorism financing. Law firms in the DIFC are subject to annual audits regarding their compliance with these AML obligations. These requirements are consistent with international standards, including those of the Financial Action Task Force.

While the DIFC has its own AML regulations, as promulgated by the DFSA, UAE AML legislation still applies, with criminal sanctions for breach of the UAE AML laws.

## **V DOCUMENTS AND THE PROTECTION OF PRIVILEGE**

### **i Privilege**

The rules governing privilege in the DIFC are contained in Part 28 of the RDC. Part 28.16 of the RDC, read with Part 28.42 of the RDC entitles a party to object to producing documents that are subject to legal impediment or privilege under the legal or ethical rules determined by the court to be applicable.

Part 28.50 of the RDC states that where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court.

Because the DIFC courts are common law courts operating according to their own set of procedural rules, which are broadly based on the Civil Procedure Rules of the English courts, only in the event that the RDC fails to provide a more appropriate legal basis for privilege may the DIFC court rely upon English legal principles to do so.

Therefore, all lawyers, both local and foreign, who practise within the DIFC are bound by these principles regardless of the laws pertaining to privilege in their home jurisdictions.

The English law principles of privilege can be broken down into two parts. Those of litigious or dispute resolution-related privilege and those of legal advice privilege.

Litigious privilege relates to the principle that all confidential communications between a lawyer and anyone else that are for the sole or dominant purpose of obtaining or providing legal advice or evidence for use in existing or foreseeable litigation or which are aimed at the settlement of a dispute must be kept private and confidential unless it is absolutely necessary to do otherwise. In practice, although it is not completely necessary, all communications that are a genuine attempt aimed at the settlement of a dispute should be articulated to be 'without prejudice' for the legal privilege to apply.

Similarly, the privilege associated with the giving of legal advice ensures that all confidential communications between a lawyer, both in-house and otherwise, and its client, for the specific purpose of obtaining or providing legal advice, must be protected and should only be released outside that lawyer–client relationship to the extent that it is deemed to be in the best interests of society to do so.

## **ii Production of documents**

A party to proceedings in the UAE courts may produce whatever documents it seeks to rely on, and is not obliged to produce any documents that do not support its case.

This is in contrast to the position in the DIFC courts. The RDC defines 'document' as anything in which information of any description is recorded, including electronic documents, such as email and other electronic communications, word-processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and backup systems and electronic documents that have been 'deleted' as well any additional information stored and associated with electronic documents known as metadata.

Unlike some other jurisdictions where a party is required to submit all relevant documentation, in the DIFC courts a party is only required to submit to the other parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party.

Notwithstanding the above, Part 28 of the RDC entitles a party to submit a request to the other party to produce documents. In the event of a dispute, the court will ultimately rule on an interlocutory basis as to what documents are required to be produced. A failure to adhere to a court order for production of documents can result in an adverse inference being made by the trial judge. The position in the DIFC courts is said to combine elements of both the civil law UAE courts practice and the rules of disclosure familiar in the common law system.

## **VI ALTERNATIVES TO LITIGATION**

### **i Overview of alternatives to litigation**

Alternatives to litigation are becoming increasingly viable options within the UAE. Parties to disputes in the Dubai courts, for example, are encouraged to explore settlement procedures in the Centre for Settlement of Disputes through Conciliation prior to commencing litigation. This forum is overseen by experienced judges, and early anecdotal evidence suggests that this is an effective means for parties to resolve issues amicably.

### **ii Arbitration**

Outside the courts, arbitration remains the most popular method of dispute resolution in the UAE, particularly for construction and property-related cases. Dubai has two arbitration centres – the Dubai International Arbitration Centre and the DIFC LCIA Arbitration Centre. Abu Dhabi has its own centre.

Arbitration in the UAE is presently governed by the Civil Procedure Code, and the supervising courts are the relevant local courts in each emirate. The Civil Procedure Code is not comprehensive when it comes to arbitration, containing only a few relevant provisions.

Despite its popularity, arbitration in the UAE presents significant challenges, which are in large part due to the lack of a specific arbitration law. This frequently causes problems at the ratification and enforcement stages of proceedings, where parties almost invariably challenge and courts frequently disallow ratification of awards on highly technical grounds, although courts are not permitted to go behind the merits of an award. Coupled with an automatic right to appeal, this makes the ratification and enforcement stage of a dispute time-consuming and unpredictable.

A draft arbitration law, which is expected to resolve some of these challenges, has been circulated for comment. As yet, however, there has been no indication of when such a law might come into effect.

The DIFC, however, has promulgated the Arbitration Law, being Law No. 1 of 2008. The supervisory jurisdiction of the DIFC courts will extend to arbitration being conducted within the DIFC, or where the seat of the arbitration is deemed to be in the DIFC. In practice, it is likely that most arbitration procedures, which are governed by the DIFC LIA Arbitration Rules (the DIFC LIA Rules), are likely to have DIFC courts exercising a supervisory role. Further, under the DIFC LIA Rules, and also under Law No. 1 of 2008, the DIFC courts can grant interim relief in and of arbitration being conducted within the DIFC.

The advantages of DIFC LCIA arbitration is that the ratification process is conducted in the DIFC courts, which is much quicker and whose outcome is much more predictable.

### **iii Mediation**

Mediation is a less common in the UAE, and there is no specific law in place to supervise this more informal type of dispute resolution. The DIFC LCIA does have a framework of rules to conduct mediation and can act as an appointing body if parties wish to pursue this option.

The DIFC courts often encourage parties to seek amicable resolution by reconciliation and this has led to *ad hoc* mediation being conducted to enforce a settlement. Litigants have yet to be convinced about the efficiency of such a process and are often reluctant to engage with this alternative method.

**iv Other forms of alternative dispute resolution**

Within the DIFC, the RDC allow parties to proceedings to agree to participate in what is known as justice by reconciliation. Litigants can seek an order for justice by reconciliation at any stage after a claim has been filed, and are free to appoint their own independent adjudicator and to select their own procedural framework. This allows for greater informality of proceedings, which in some cases can be an advantage over traditional court proceedings. Typically, parties to justice by reconciliation opt for a model similar to mediation.

**VII OUTLOOK AND CONCLUSIONS**

Still in its infancy, relative to much of the rest of the world, the UAE legal system continues to evolve, rapidly coming into line with international best legal practice, while retaining a distinctive Middle Eastern influence.

The UAE legal system is unique to the extent that it allows for two contrasting judicial systems to coexist within the same jurisdiction. After amendments to the laws, it is now possible for parties to ‘opt in’ to the DIFC courts’ jurisdiction for adjudication of their disputes. This represents a significant and positive development for foreign investors who are more familiar with the common law system and who can have their disputes determined in English, which is frequently the language used for contracts and for business generally.

The following are key issues in the development of the UAE legal and court system that can facilitate more efficient resolution of disputes:

- a* a more harmonious relationship between the Dubai and DIFC courts as promoted by the Summary of the Protocol of Enforcement between Dubai courts and DIFC courts;
- b* development of an arbitration law that would enhance the effectiveness of *ad hoc* and institutional arbitration proceedings conducted in the UAE with support of the law and the courts (a current lacuna being the inability of courts to provide injunctive relief in and of the arbitral process); and
- c* enlargement of treaties and agreements for mutual and reciprocal enforcement processes between UAE and other countries following treaties such as the GCC Convention 1996, the Riyadh Convention 1983 and the Paris Convention 1992.

In December 2013, the DIFC Arbitration Law was amended to remove a potential inconsistency with the UAE’s obligations under the New York Convention. The potential inconsistency was flagged in a judgment of the court of first instance, where it was held that the DIFC Arbitration Law did not provide the DIFC court with the power to stay court proceedings pending the outcome of the foreign-seated arbitration proceedings. The amendment has rectified that inconsistency, clearly specifying that the

court does have such a power. This amendment demonstrates the DIFC's commitment to honouring its obligations under the New York Convention and will give reassurance to the wider arbitration community.

Following the havoc wreaked in Dubai by the severe property downturn in 2008 and 2009, the Dubai government took steps in 2013 through a number of legislative measures to promote stability and growth in the property market and to prevent such devastation in the future. One such measure was the increase of the property registration fee from 2 per cent to 4 per cent, in an effort to curb the 'flipping' of properties, a practice widely considered to have contributed to previous instability and sudden price increases. This will potentially reduce the number of disputes coming to court in the future.

New laws that strengthen investor protection, with provisions aimed at limiting fast resale of property, setting thresholds for premiums and reducing developers' reliance on off-plan sales to fund construction, are still awaiting implementation.

The overall outlook, both economic and regarding the development of the legal system is very positive. It is expected that as more contracting parties use the 'opt-in' provision to adjudicate their disputes in the DIFC, and the number of cases coming to DIFC courts increases, the development of local jurisprudence will acquire depth and maturity.

## Appendix 1

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# ABOUT THE AUTHORS

### **D K SINGH**

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D K Singh is a dual-qualified lawyer with over 20 years' experience of and permission to work in three jurisdictions, the United Arab Emirates, India and the United Kingdom. He is the managing partner of KBH Kaanuun and his expertise covers mainstream company, commercial and financial services work. He has brought a wealth of experience to KBH Kaanuun, particularly in the areas of property, financial services, employment and the energy sector.

Mr Singh is also an experienced arbitration lawyer and assists clients in international arbitration proceedings. For three years running he has been listed as a leading individual by *Chambers Asia-Pacific* for his dispute resolution work and is also listed as a leading individual for developing the Indian practice of a UK-based firm. Mr Singh continues to be ranked in leading directories.

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