COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Italy

FORCE MAJEURE

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This country-specific Q&A provides an overview of force majeure laws and regulations applicable in Italy.

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ITALY
FORCE MAJEURE

1. May *force majeure* be relied on by a party to a contract, even if the parties have not included a *force majeure* clause?

Yes. When a force majeure event occurs, the contractual obligation may become impossible or excessively onerous to perform. According to the general principles set out in Article 1218 of the Italian Civil Code (titled "*Liability of the obliged party*"), the debtor shall not be liable for breach of contract or a delay in performing, if he demonstrates that the breach or delay was caused by an event beyond his control.

Pursuant to Article 1256 of the Italian Civil Code (titled "*Definitive impossibility and temporary impossibility*") if the performance has become definitively impossible due to a cause not attributable to the debtor (for instance, an event of force majeure), the obligation is extinguished even though there is no force majeure clause in the contract. Article 1256 paragraph 2 provides that when the impossibility is only temporary, the obligation is suspended until (and if) the performance becomes possible again. In this case, the obligation will follow the original terms, provided that the aggrieved party's interest in obtaining the performance remains. If the impossibility continues until the debtor can no longer be considered obliged to perform or the creditor has no longer interest in obtaining the performance, the obligation is extinguished.

The Italian Civil Code distinguishes between total impossibility and partial impossibility in synallagmatic contract and gives the parties different remedies.

Pursuant to Article 1463 (titled "Total impossibility") when a total impossibility affects only the performance of one party, the party who has been discharged from its obligations cannot claim the other party's performance and, if the party has received it in the meantime, the party must return it. Pursuant to Article 1464 ("*Partial impossibility*"), when the performance of a party becomes partially impossible, the other party has the right to obtain a correspondent reduction of its performance but if the party does not have any interest in receiving a partial performance, the party can decide to terminate the contract.

A force majeure event could also make the performance excessively onerous to perform. In synallagmatic contract, if only the performance of one party has become excessively onerous to perform due to an unforeseeable and unavoidable event, the affected party may demand the resolution of the contract if the supervening onerousness is not part of the normal risk of the contract (alea) (see Article 1467 of the Italian Civil Code (titled "*Synallagmatic contract*"). In this case, the other party may avoid the resolution by offering to modify the contractual terms proportionally.

Article 1468 of the Italian Civil Code (titled "*Contract with obligations of only one party*") provides that in contract with obligations of only one party, the affected party may demand a reduction of his performance or a change to the implementing rules.

2. If so, please explain in which circumstances *force majeure* may be relied on.

The Italian Supreme Court has repeatedly stated (for instance, Supreme Court, 18 May 2021, no. 13328) that a party can invoke force majeure if:

- the impediment was beyond its reasonable control;
- it could not have been reasonably foreseen at the time of the conclusion of the contract;
- its effects could not have been reasonably avoided or overcome by the affected party.

3. Is the concept of *force majeure* enshrined in legislation?

Even though there is no explicit definition of force majeure in the Italian Civil Code, a force majeure discipline results from Articles 1218 and 1256 of the Italian Civil Code. In fact, the concept of force majeure is

subsumed within the concept of "cause not attributable to the debtor" of articles 1218 and 1256 of the Italian Civil Code.

The Italian Civil Code also gives the parties remedies to face the consequences of events like force majeure, i.e., the supervening impossibility of the performance (Articles 1463 and 1464 of the Italian Civil Code) and the supervening excessively onerousness (Articles 1467 and 1468 of the Italian Civil Code).

In any case, the Italian Supreme Court has defined the force majeure as an abnormal and unforeseeable circumstance, the consequences of which could not have been avoided despite the adoption of all the necessary precautions (Supreme Court, 23 April 2020, no. 8094).

However, following the Covid-19 pandemic, the legislator's interest in force majeure gradually increased: for instance, Article 91 of Law Decree No. 18 of 17 March 2020 added a new paragraph (6-bis) to Article 3 of Law Decree No. 6 of 23 February 2020, which provides that "6-bis. Compliance with the containment measures referred to in this Decree shall always be assessed for the purposes of excluding, pursuant to and for the purposes of Articles 1218 and 1223 of the Civil Code, the debtor's liability, also with regard to the application of any forfeiture or penalties connected with delayed or omitted performances".

Additionally, Article 88 of the Law Decree No. 17 March 2020 has qualified as "supervening impossible" the performance of cinemas, theatres, museums and other cultural sites due to the respect of the containment measures that imposed a total closure of these activities.

This means that the legislator has qualified the containment measures as a force majeure event: consequently, the respect of measures enacted by the Italian legislator to face the pandemic may exempt the debtor from liability if he has been unable to fulfil his obligation in order to comply with the restrictive measures and if he has adopted the diligence required by Article 1176 of the Italian Civil Code (titled "*Diligence in performance*").

4. If so, may the parties agree to derogate from the provisions of this legislation?

As stated by the Italian Supreme Court (Supreme Court, 23 August 1993, no. 8903; Supreme Court, 26 January, no. 984; Supreme Court, 23 June 1984, no. 3694), parties of a contract may derogate from the provisions of the supervening impossibility1. Particularly, the Supreme Court affirmed that, due to their autonomy of negotiation, parties may foresee a contingency in the contract and assume, also unilaterally, the risk of it.

However, parties may want to derogate to the discipline of "supervenient impossibility" or of the "supervenient excessive onerousness", but they must respect some limits. For instance, clauses which partially or wholly exonerate the author of a standard form contract from the consequences of his breach are considered to be unfair. Pursuant to Article 1341 of the Italian Civil Code (titled "General terms and conditions"), such clauses whether contained in a standard form are effective only if specifically approved in writing by the affected party.

Clauses included in contracts with consumer are subject to Article 33, paragraph 2, letter a) and b) of the Consumer Code (Legislative Decree 6 September 2005, no. 206) which provides that "*2. Terms are presumed unfair, unless proved otherwise, where they have the object or effect of:=*

a. *excluding or limiting the liability of the professional in the event of the death of the consumer orpersonal injury to the latter resulting from an act or omission of that professional;*
b. *excluding or limiting the actions or legal rights of the consumer vis-à-vis the professional or another party in the event of total or partial non-performance or inadequate performance by the professiona*

Article 36 paragraph 1 of the Consumer Code ("*Nullity for protection*") provides that such terms shall be void and that such nullity operates only for the benefit of the consumer.

5. What is the approach taken to drafting *force majeure* clauses in your jurisdiction?

Under Italian law, parties are free to include a force majeure clause in their contracts and do not have to abide by any prescribed form.

A typical clause includes a definition of force majeure and a list of events that, by way of example, must be considered as force majeure events. Then, drafters usually provide that the party affected by the force majeure event shall notify the other party of any force majeure event occurrence which is likely to affect the fulfilment of contractual obligations within a certain number of days from the occurrence of the force majeure event.

Finally, the drafters agree that either party shall not be held liable for non-performance or be deemed to be in

breach of the agreement for any delay or inability to perform of any obligations due to a force majeure event. They also provide that the agreement may be terminated by either party by simple written notice or that the party affected by the force majeure event may suspend the execution of the contract or the performance of the specific obligation, as long as the force majeure event lasts.

6. Is it common practice to include *force majeure* clauses in commercial contracts?

Yes, it is common practice, especially with regard to international contracts.

7. Would the courts be willing to imply *force majeure* terms into contracts?

In the absence of a force majeureclause into contracts, Italian courts will apply the general principles set out in Articles 1218 and 1256 of the Italian Civil Code, which provide that the debtor is not liable for breach or delay in performing if the impossibility or the delay is caused by an event not attributable to him (Article 1218) and the obligation is consequently extinguished – or suspended in the case of a temporary impossibility (Article 1256).

When the impossibility affects a synallagmatic contract, courts will apply the provisions set out in Articles 1463 ("*Total impossibility*") and 1464 ("*Partial impossibility*"), which give different remedies to the parties.

If the force majeure event has rendered the obligation not impossible but excessively onerous to perform, courts will apply the rules provided for in Article 1467 ("*Synallagmatic contract*") and Article 1468 ("*Contract with obligations of only one party*").

8. How do courts approach the exercise of interpretation in relation to *force majeure* clauses?

Under Italian law, force majeure clauses will receive the same treatment as other clauses. This means that Articles 1362-1371 of the Italian Civil Code shall apply, which require the courts to interpret the contract as to identify the common intention of the parties as it appears from the wording of the contract.

The criteria of interpretation established in the Italian Civil Code are twofold:

1. Articles 1362-1365 provide for what are known as subjective interpretation criteria, because they seek to ascertain the common intention of the parties;
2. Articles 1366-1370 set out the criteria for objective interpretation, which refer to the concept of good faith or other criteria that cannot be traced back to the common intention of the parties. These criteria are triggered if the search for the parties' will fails, and they require the interpreter to seek the objective meaning of the contractual declaration.

With specific regard to contractual clauses, Article 1363 of the Civil Code ("*Overall interpretation of the clauses*") states that a specific clause shall be interpreted in light of the other clauses of the contract, giving each one the meaning which results from the entire act.

This way, the common intention of the parties is ascertained by considering the contract as a whole.

9. Are there any legislative or statutory controls on the use of *force majeure* clauses?

No, the Italian civil law does not provide for specific limits to the use of force majeure clauses.

10. Must an event have been unforeseeable at the time of the contract to permit a party to rely on it as *force majeure*?

Yes. A party may invoke force majeure whether (*i*) the impediment was beyond its reasonable control, (*ii*) it could not have been reasonably foreseen at the time of the conclusion of the contract; and (*iii*) its effects could not have been reasonably avoided or overcome by the affected party.

11. What types of events are generally recognized by courts of your jurisdiction as being *force majeure*?

The types of events generally considered as force majeure events are unforeseeable and unavoidable events, such as:

1. acts of God, mobilizations, wars, riots, insurrections, acts of terrorism, sabotage, strikes, lockouts;
2. environmental disasters (earthquakes, floods,

fires, etc.), epidemic disease;
3. import or export restrictions, embargoes;
4. prohibitions, limitations, suspensions or restrictions of any kind whatsoever introduced by law, regulation, decree or any other order, measure or act of national or local authorities pursuant to which the performance of the obligations arising out of the agreement or the carrying on of business of the party affected by such force majeure event becomes impossible or against law (so-called, factum principis) (see Supreme Court, 10 March 2021, no. 6550; Supreme Court, 23 February 2021, no. 4920; Supreme Court, 28 November 2019, no. 31066; Supreme Court, 10 June 2016, no. 11914).

12. What types of events have been dismissed by courts of your jurisdiction as not being *force majeure*?

Under Italian law, there is no force majeure if the event were foreseeable at the time of the conclusion of the contract and if it could have been avoided by the diligence required to the debtor by Article 1176 of the Italian Civil Code.

Therefore, in order to determine whether an event can be qualified as force majeure and is capable of extinguishing the obligation that has become impossible, courts must assess the existence of these conditions on a case-by-case basis.

For instance, the Italian Supreme Court has not considered a rogue wave which had hit a boat an event of force majeure, because a rogue wave has been considered a foreseeable situation during navigation, unless the party invoking force majeure demonstrates the anomaly of the wave and to have act with the appropriate diligence (Italian Supreme Court, 22 February 2021, no. 4666).

Another example of an event which in the specific case was held by the judges not to fall under the concept of force majeure was a bank strike which did not make the obligation impossible to perform, but only more difficult. The Italian Supreme Court ruled that a monetary obligation is not extinguished if a bank strike makes it more difficult for the debtor to obtain the necessary money, since the "supervening impossibility" requirement is not met with an increased difficulty in performing (Italian Supreme Court, 15 November 2013, no. 25777).

13. Have courts recognized the COVID-19 pandemic as *force majeure* in your jurisdiction?

COVID-19 will not automatically qualify as an event of force majeure capable of extinguishing the debtor's obligation. As seen above, in addition to the unforeseeability and inevitability of the event, it is necessary that the debtor has adopted the diligence required by Article 1176 of the Italian Civil Code and that, therefore, the negative event has broken the etiological link between the debtor's conduct and the impossibility to perform.

In any case, Italian courts shall take into account that the legislator confirmed the extraordinary and unforeseeable nature of Covid-19: Article 91 of Law Decree no. 18 of 17 March 2020 added a new paragraph (6-bis) to Article 3 of Law Decree No. 6 of 23 February 2020, which provides that "*6-bis. Compliance with the containment measures referred to in this Decree shall always be assessed for the purposes of excluding, pursuant to and for the purposes of Articles 1218 and 1223 of the Civil Code, the debtor's liability, also with regard to the application of any forfeiture or penalties connected with delayed or omitted performances*."

Therefore, compliance with the containment measures enacted by the Italian legislator to face the pandemic may exempt the debtor from liability if he has been unable to fulfil his obligation in order to comply with the restrictive measures.

However, in the event of delay in performance or non-performance of contractual obligations which took place during the Covid-19 health emergency, the determination of liability of the non-performing debtor is left to the discretion of courts: it is for the court to determine, on a case-by-case basis, whether the government measures adopted to contain contagions actually resulted in an objective impossibility for the debtor to perform his obligations, or whether the breach was the result of a mere subjective difficulty, which as such does not deserve protection (as stated by Court of Bologna, 11 May 2020 and Supreme Court, 28 September 2020, no. 20389).

14. Would a governmental decision or announcement that an event is a *force majeure* influence courts of your jurisdiction (e.g. *force majeure* certificates provided by the Chinese Government to Chinese companies during the covid19

pandemic)?

With the introduction of Article 91 of Law Decree No. 18 of 17 March 2020, the legislator has already confirmed the extraordinary and unforeseeable nature of Covid-19 health emergency: in fact, Article 91 added a new paragraph (6-bis) to Article 3 of Law Decree no. 6 of 23 February 2020, which provides that "*6-bis. Compliance with the containment measures referred to in this Decree shall always be assessed for the purposes of excluding, pursuant to and for the purposes of Articles 1218 and 1223 of the Civil Code, the debtor's liability, also with regard to the application of any forfeiture or penalties connected with delayed or omitted performances* ".

By introducing restrictive and containment measures, the emergency legislation concealed a factum principis (meaning a legislative measure that makes the performance of the debtor impossible).

However, this does not in any way entail an automatic declaration of non-liability for all debtors invoking the emergency legislation: in fact, the judge will evaluate, case-by-case, if the debtor acted with the proper diligence (see Article 1176 of the Italian Civil Code).

15. Does *force majeure* allow a party to suspend its obligations? If yes, for how long?

Pursuant to Article 1256, paragraph 2, of the Italian Civil Code, a temporary impossibility of performance resulting from a cause not attributable to the debtor determines the suspension of the contract, without any liability for the debtor for the delay in performing.

The obligation is suspended until (and if) the performance becomes possible again. In this case, the obligation will follow the original terms, provided that the aggrieved party's interest in obtaining the performance remains.

Paragraph 2 of Article 1256 of the Italian Civil Code provides that if the impossibility continues until the debtor can no longer be considered obliged to perform or the creditor has no longer interest in obtaining the performance, the obligation is extinguished.

Moreover, Article 1460 of the Italian Civil Code provides that in synallagmatic contract either party may suspend its own performance if the other does not perform or does not offer to perform at the same time.

According to the Italian Supreme Court, this defence "does not depend on the liability of the other party" and it can be invoked even when "*non-performance is the result of a failure to perform for reasons not attributable to the debtor" (Supreme Court, 19 October 2007, no. 21973)*.

16. Does *force majeure* allow a party to totally or partially avoid liability for failure or delay in performing its obligations?

Yes, a party can totally or partially avoid liability for failure or delay in performing its obligations if: (i) the impediment is beyond the party's reasonable control, (ii) it could not have been reasonably foreseen at the time of the conclusion of the contract and (iii) its effects could not have been reasonably avoided or overcome by the affected party.

17. Does *force majeure* give a party the potential right to terminate the contract?

Pursuant to Article 1464 of the Italian Civil Code ("*Partial impossibility*"), when the performance of a party becomes partially impossible, the other party has the right to obtain a correspondent reduction of its performance but if the party has no interest in receiving a partial performance, it can decide to withdraw from the contract.

Even if the force majeureevent has caused an excessive onerousness of the performance, Article 1467 of the Italian Civil Code allows the party who has suffered the event to demand the resolution of the contract. The termination of the contract can be demanded only if the supervening excessive onerousness is not part of the normal risk of the contract (*alea*). However, the other party may avoid the resolution by offering to modify the contractual terms proportionally.

18. On whom would the burden of proof lie when attempting to rely on *force majeure*?

Pursuant to Article 1218 of the Italian Civil Code, the burden of proof lies on the debtor that alleges the existence of an impossibility to perform for reasons not attributable to him, therefore, when a party invokes the force majeure, the burden of proof lies on it (as recently stated by the Italian Supreme Court, 31 May 2021, no. 15100).

19. What would a party seeking to rely on *force majeure* be required to show?

According to Article 1218 of the Italian Civil Code, the

debtor has to prove that there has been an impossibility to perform and that this impossibility is not attributable to him. This means that, pursuant to Articles 1176 and 1218 of the Civil Code, the debtor must show that he has diligently endeavoured to perform, but that he has failed to do so with no fault of its own but due to an external event that has prevented him from fulfilling his obligation.

20. To what extent is a party required to mitigate its position/losses before seeking to rely on *force majeure*?

According to Article 1375 of the Italian Civil Code ("*Performance in good faith*"), the contract shall be performed in good faith. It follows that good faith, understood as loyalty and fairness that extends the contractual regulation, constitutes a source of supplementary obligations of protection and security. Therefore, during the execution of the contract, the parties are required to comply with supplementary and instrumental duties of notice, information, solidarity and protection with regard to the person and property of the opposing party.

To this extent, it is necessary that the party invoking force majeure has made every reasonable effort to mitigate the harm suffered by the other party and has looked for alternative ways for fulfilling its performance. In fact, the Italian Supreme Court has stated that the principle of good faith requires each party of a contractual relationship to act in such a way as to preserve the interests of the other party (Supreme Court, 6 August 2008, no. 21250).

21. Are there any applicable notice requirements which an affected party would be required to comply with before invoking *force majeure*?

Notice requirements descend from the application of the principle of good faith (Article 1375 of the Italian Civil Code). A party that cannot fulfil its obligation should communicate to the other party the impossibility to comply with the contractual terms in a spirit of full cooperation[2].

22. What is the consequence of failing to comply with such notice requirements?

A breach of the duty of good faith normally entails an obligation to compensate the harm caused to the other party.

23. What would be the impact of *force majeure* on any prepayments made under contractual arrangements?

According to Article 1463 of the Italian Civil Code ("*Total impossibility*"), the party who has been discharged from its obligations by reason of force majeure cannot claim the other party's performance. If the party has received the other's party performance in the meantime, it must return it.

24. What contractual remedies are available to affected parties, other than *force majeure*?

Force majeure is not in itself a remedy. The remedies which the parties may invoke if a force majeure event has rendered the contractual performance impossible are:

- resolution of the contract, in the event of a total impossibility of the performance of one party in synallagmatic contract (Article 1463 of the Italian Civil Code);
- reduction of the performance, in case of partial impossibility to perform (Article 1464 of the Italian Civil Code) and in the event of a supervening excessive onerousness affecting a contract in which only one of the parties has assumed obligations (Article 1468 of the Italian Civil Code, "Contract with obligations of only one party");
- withdrawal from the contract, if the partial impossibility has affected the obligation of only one party in a synallagmatic contract and the other party has no interest in a partial performance (Article 1464);
- suspension in the event of temporary impossibility (Article 1256, paragraph 2 of the Italian Civil Code); and
- renegotiation: this remedy performs a conservative function by restoring fairness to contractual regulations that have suffered an imbalance between the parties' performances due to contingencies, such as force majeures events.

In Italian codified law, there is no general rule that obliges the parties to renegotiate the contract when it has become unbalanced because of unforeseeable and unavoidable events.

Due to the negative impact of the pandemic on contracts, the Italian Supreme Court report no. 56 of 8 July 2020 on "*Substantive regulatory innovations of the*

anti-Covid 19 "emergency" law in the field of contracts and breach" stated that principles of fairness and good faith (Articles 1175 and 1375 of the Italian Civil Code) oblige the parties to renegotiate rents.

Contractual good faith entails the right of the party affected by the negative contingencies to request and obtain the re-balance of the agreement.

However, it has been specified that the duties of fairness and good faith oblige the parties to start the renegotiation, but not to conclude the amending contract. In fact, the contracting party is not obliged to consent to the claim made by the party who has suffered the disadvantage, or to express itself in favour of the conclusion of the contract in any event, because such evaluation is made on grounds of economic convenience.

Following this report, several courts have welcomed this position (for instance, Court of Rome, 27 August 2020 and Court of Milan, 21 October 2020).

The legislator intervened on this issue by providing for an express obligation for the parties to renegotiate commercial leases that has become unfair due to the covid-19 outbreak: in fact, Article 6-novies of the Law 21 May 2021, no. 69, which has converted the Law Decree 22 March 2021, no. 41, provides that *"In those cases where the lessee has suffered a significant decrease in turnover, sales or amounts as a result of health restrictions, as well as of the economic crisis in certain sectors and of the reduction in tourist flows due to the current pandemic crisis", "lessee and lessor are obliged to cooperate with each other to redetermine the rent".*

Since this rule does not provide for parameters to evaluate the degree of fairness of the rent renegotiation, Italian courts hold that the commercial lessee is entitled to receive a reduction of the rent "*in proportion to the supervening reduction of the use of the property*" and identified the parameter for this reduction as 50%, by analogy with the previsions of Article 216 of the Law no. 77/2020 (about gyms, swimming pools and sports facilities, see Court of Milan, 18 May 2021).

25. What effect does *force majeure* have on consumer contracts? When can a producer or retailer effectively rely on this concept?

Since the abrogation of Article 96 of the Consumer Code, which provided for the exemption of the organiser and the retailer from the liability pursuant to Articles 94 and 95 where the failure to perform or inadequate performance of the contract was due to a fortuitous event or force majeure, Italian civil law does not provide any specific rule on force majeure in relation to consumer contracts.

This means that an organiser or a retailer can rely on the concept of force majeure according to the traditional regime provided for all contractual obligations, with some limits.

In fact, Article 33 of the Consumer Code ("*Unfair clauses in the contract between professional and consumer*") specifies that terms which, despite good faith, cause the consumer to suffer a significant imbalance in the rights and obligations arising under the contract are considered to be unfair.

Article 36, paragraph 1, of the Consumer Code provides that terms considered to be unfair within the meaning of Articles 33 and 34 shall be void, while the rest of the contract remains valid.

In conclusion, when a force majeure clause is unfair, this will be void and the organiser/retailer will not be able to rely on it.

26. What type of insurance policy could cover *force majeure* events in your jurisdiction?

Liability insurance certainly does not cover force majeure events: as stated by the Italian Supreme Court, liability insurance shall not cover purely accidental events, i.e. events due to unforeseeable circumstances or force majeure, because no liability arises from them (Supreme Court, 26 February 2013, no. 4799).

Instead, All Risks insurance policy and Business Interruption insurance would cover force majeure events.

The only article of the Civil Code that refers to so-called catastrophic damages, although they are not so defined there, is Article 1912. Pursuant to it, insurers are not required to cover damage resulting from earthquake, war, insurrection or popular riots, but they can choose to do so.

27. Are there any plans for reform in your jurisdiction, in terms of enacting new legislation or amending existing legislation (both for the short-term and long-term), to assist parties with *force majeure*, given the

recent COVID-19 pandemic?

Italy had already adopted numerous emergency measures to deal with the upheavals resulting from the pandemic. With specific regard to force majeure, Law Decree No. 18 of 17 March 2020 introduced into Article 3 of Law Decree no. 6 of 23 February 2020 a new paragraph, 6-bis, which provides that "*6-bis. Compliance with the containment measures referred to in this Decree shall always be assessed for the purposes of excluding, pursuant to and for the purposes of Articles 1218 and 1223 of the Civil Code, the debtor's liability, also with regard to the application of any forfeiture or penalties connected with delayed or omitted performances*".

This means that it is not the pandemic itself that is an event capable of excluding the debtor's liability under Articles 1218 and 1256 of the Italian Civil Code, but rather the respect of the restrictive measures adopted by the public authorities to contain the contagion.

In any case, the Supreme Court has repeatedly held that the debtor may invoke exoneration from liability because of an order or prohibition of the administrative authority only for those facts that could not be overcome with the required diligence or were not at all foreseeable at the time of the assumption of the obligation (Supreme Court, 8 June 2018, no. 14915). Consequently, courts must evaluate on a case-by-case basis.

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