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The construction & energy law specialists

International Quarterly

Issue 02, 2012

Our newsletter provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

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Contract Corner:

A review of typical contact clauses

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FIDIC's approach to subcontractors

A new feature where in every issue we look at typical contract clauses

**By Jeremy Glover
Partner, Fenwick Elliott**

In our last edition of *International Quarterly*, we looked at the new FIDIC subcontract, so in the first in our new regular feature – Contract Corner, it seemed appropriate to look at how, in this instance, the FIDIC contracts deal with sub contactors.

What does the clause mean?

The key clause is sub-clause 4.4. Under the Red Book, the basic obligation can be broken down as follows:

(i) Unless otherwise agreed the contractor cannot subcontract the whole of the Works;

(ii) The contractor remains wholly responsible to the employer for the acts of that subcontractor as if those acts had been carried out by him;

(iii) The prior consent of the engineer is required[1] for all subcontractors apart from suppliers and subcontractors named in the contract;

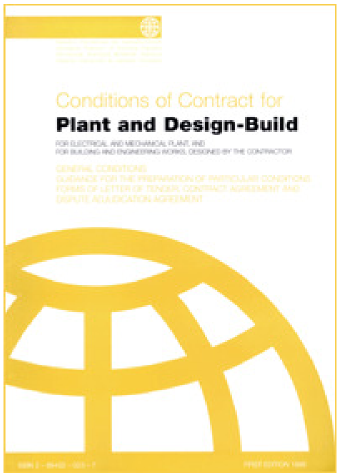
(iv) The contractor must give the engineer 28-days notice of both the intended and actual commencement date of any subcontractor's work; and

(v) The subcontract must contain suitable provisions entitling the employer to require the subcontract to be assigned to him in the event of termination.

There are certain differences across the FIDIC Rainbow suite. For example, under the Silver Book, the contractor only has to notify the employer of the appointment of a subcontractor giving details of that parties' experience and when they are to start; whilst only the Red and Pink books contain the assignment provision noted at point (v) above. Under the Gold Book, if the subcontractor is entitled to any relief from risk on broader terms than those specified between contractor and employer, then those additional circumstances shall not serve as an excuse for non-performance by the contractor.

What all version do, however, is to make it clear that the contractor is wholly responsible for the performance of the subcontractors. This obligation extends not only to the subcontractors appointed by the contractor but also to the subcontractors nominated by the employer in accordance with clause 5 of the Red Book[2].

It is important that the contractor appreciates how wide the obligations here are. The contractor is responsible for all the acts and defaults of the subcontractors. This is why under sub-cl.2.2 of the FIDIC Subcontract 2011, the subcontractor is to assume the duties and obligations, of the contractor under the main contract which relate to the subcontract Works[3].



Typical amendments

There are a number of amendments that are often made to these clauses. Some follow the lead of the Pink Book, in requiring that the contractor shall ensure that the requirements of confidentiality imposed on the contractor by sub-clause 1.12 apply equally to each subcontractor.

1 Where the engineer's consent to any proposed sub¬contracting is required, it cannot be unreasonably withheld or delayed.
2 Or clause 4.5 of the others.
3 For example, under English Law a contractor is not necessarily responsible for any design carried out by a nominated subcontractor or compliance with performance specification and selection of goods and materials. In those circumstances the contractor would only be liable for poor workmanship and poor quality of goods and materials.

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Also, the Pink Book, requires that where practicable, the contractor shall give fair and reasonable opportunity for contractors from the country where the pojrect is sited to be appointed as subcontractors. This is a typical requirement where the funding comes from the World Banks and other similar funding insitutions. And if there is no actual formal contractual clause, such a requirment will often form part of the tender critieria.

As noted above, if the subcontractor is named in the contract or if the subcontractor will merely be supplying materials, then the consent of the engineer is not required. In all other circumstances, the consent of the engineer will be needed. The Pink Book puts forward a practical option suggesting dispensing with prior consent if the value of the proposed sub-contract is very small compared with the overall contract value.

A typical requirement imposed on contractors follows from the requirement that although the contractor cannot subcontract the whole of the project works, he can subcontract a part of them. Often, a percentage limit or restriction will be placed on the contractor's ability to do this in the tender documentation. This is all part of the trend towards restricting the abilty to subcontract.

Going further than imposing percentage limits, employers will often look to ensure that key equipment or materials are provided by particular subcontractors. Remember there are no nomination provisions in the Silver Book.

Employers often look to adopt similar provisions from the Red Book giving them the right of approval of certain subcontractors into the Yellow and Gold Books. Where the contractor is responsible for the design, if that responsibility is to be subcontracted, an employer may also look for a warranty from the subcontractor in question. Taking this control one step further, employers will often look to the right to approve the actual subcontract itself.

It will be interesting to see whether FIDIC gets round to drafting subcontracts for the Yellow or Silver Book and if so, whether any of these typical amendments find a way into them. Alternatively when FIDIC releases the draft of the new Yellow Book, which is due out later this year, will it decide to make any amendments to the subcontracts clauses.

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India held liable for failure to enforce an ICC arbitral award

By David Robertson
Partner, Fenwick Elliott

A recent investment treaty arbitration decision highlights the potential value of bilateral investment treaties in supporting the enforcement of international arbitral awards.

Bilateral investment treaties

Bilateral investment treaties (BITs) are agreements between two States which are intended to promote trade between those two countries. All BITs are different. However, they typically contain clauses protecting the rights of investors from one State when making investments in the other.

The types of rights which are typically protected include:

- the right to receive equal treatment to that given to local companies and to other foreign investors
- the right not to have your investment taken (or expropriated) by the Government; and
- the right to insist that the Government honours its obligations under a contract.

BITs will usually allow an aggrieved investor to bring an action directly against the host State Government in international arbitration, rather than having to bring any action in the host State's own courts.

BITs can be directly relevant to companies working in the construction and engineering sectors as investment treaty cases have found that construction contracts are an investment which can be protected. Therefore, if the actions of a host State (whether in its capacity as a project participant or in another regulatory or enforcement capacity) causes an 'investor' to suffer losses in connection with a project, a remedy may be available under a BIT (if one exists between the host State and the investor's home State).

If you do have a claim under a Bilateral Investment Treaty, that claim is made not against your contract counterparty directly (unless that counterparty is the government) but against the central government, for failing to ensure that one if its subdivisions or agencies complied with their treaty obligations.

Claiming directly against a host State could obviously have serious commercial (and political) implications. However, this is becoming an increasingly popular method of protecting investor rights in foreign countries and the final awards are more easily enforced than private international arbitration awards.

When you are looking at business opportunities in a new country – or if you have a large value dispute which has proven difficult to resolve – it is worth investigating whether a BIT remedy may be available.

The India decision – White Industries Australia Limited v Republic of India (UNCITRAL)

Coal India Limited (CIL) and White Idustries Australia Limited signed an agreement in September 1989 for the turnkey development of the open-cast coal mine at Piparwar in Uttar Pradesh, India. The agreement contained an arbitration clause providing for ICC arbitration with Paris as the seat.

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During the course of the project, disputes arose in relation to the deduction of penalties by CIL. Ultimately these were referred to arbitration. In March 2002 an ICC Tribunal issued a substantial award in White Industries' favour. From 2002 onwards White Industries attempted, unsuccessfully, to enforce that award through the Indian courts. At the beginning of 2012, the action had reached the supreme court.

ICC
International Chamber of Commerce
The world business organization

In July 2010, frustrated with the lack of progress, White Industries commenced an action against India under the Australia-India BIT, claiming that India had breached its treaty obligation to provide a foreign investor with "effective means of asserting claims and enforcing rights". What was interesting here was that this obligation was not one which was within the Australia - India BIT itself, but in a BIT entered into between India and Kuwait. However, the Australia - India BIT did contain what is known as a "most favoured nation" clause which means that White Industries were also to make use of provisions in other BIT's if the provisions of that other BIT gave investors of another nation greater protection. White Industries also claimed it had been denied justice in violation of the obligation to provide "fair and equitable treatment" to foreign investors.

Having decided that the ICC award was "an investement"[1] which could be protected under the BIT, the UNCITRAL tribunal agreed with White Industries that the nine-year delay by the Indian courts in acting to enforce White Industries' award amounted to a breach of India's obligation to provide an effective means of enforcing its rights.

The Tribunal did not accept that India had breached its fair and equitable treatment obligation. This was because White Industries had not done everything it could to prevent the delay.

Therefore, White Industries was awarded the amount due under the original ICC award plus interest dating from 2002 and costs. In other words, White Industries was awarded the amount it would have been entitled to but for the delays it faced in the Indian courts.

Where there is a BIT in existence between the host State in which your project is located and your own country, the decision in *White Industries v India* will provide additional support in attempts to enforce arbitral awards. Where other attempts to enforce or negotiate payment against an award have been exhausted, the threat of direct action against the host State Government may very well introduce new pressures which could lead to a satisfactory result.

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ICC

ICC (International Chamber of Commerce) is the voice of world business championing the global economy as a force for economic growth, job creation and prosperity.

1 The ICC award was considered to be part of the contract because it dealt with the parties' rights under that contract.

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European Account Preservation Order (EAPO)

By David Toscano
Assistant, Fenwick Elliott

Overview

In July 2011, the European Commission released its proposed European Account Preservation Order (EAPO) Regulation, currently under consideration by the European Parliament and the Council of the EU. In October 2011, the UK government announced that it would not opt in at this stage but will participate in future negotiations with a view to opting into the Regulation in the future.

The proposed EAPO is designed to make it easier to recover debts in cross-border cases and will therefore create a new and additional type of freezing order, available throughout the EU to litigants in civil and commercial claims. It would broaden the range of tools available to enforce EU judgments and decisions including those obtained in construction disputes.

What is an EAPO?

It is important to stress that, at this stage, the draft Regulation has not yet become law, but potentially, its impact could be considerable.

An EAPO is a freezing order which allows a creditor to freeze funds in any bank accounts held by a debtor and located within the EU. This applies to cash as well as financial instruments held in those accounts, including joint accounts. The purpose of freezing funds would be to satisfy payment of a debt, damages, interest or costs.

The scope of an EAPO will apply to all monetary claims in civil and commercial

matters where there is a cross border issue. This would include if either party or any of the bank accounts are domiciled outside the jurisdiction where the application is being made.

At present, creditors are reliant on taking steps in the jurisdiction where the accounts are domiciled such as obtaining domestic freezing orders and third party debt orders or by seeking other forms of cross border enforcement such as using Worldwide Freezing Orders. These options require an undertaking to be given for any damages which might arise if the order should not have been granted.

How would an EAPO be granted?

An EAPO would be granted ex parte and a creditor could apply prior to or during its recovery action, or post-judgment as part of the enforcement process. The basic conditions for granting an EAPO are that the claim against the debtor "appears to be well founded" and that there is a "real risk" that the funds will be dispersed.

Unlike a freezing order, an EAPO would not grant a creditor disclosure from the debtor of its asset information. Instead, it is proposed that the state in which the application is made would obtain the debtor's bank details either by asking all banks in the jurisdiction whether the debtor holds an account with them or by referring to a central register. While some EU states already hold central registers, the UK does not and this would be a radical expansion of the steps English courts could take in enforcement proceedings.

Once granted, an EAPO would be served on the debtor and the relevant bank. The bank would then be obliged to ensure

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that the amount specified in the order remains in that account.

Unlike similar orders currently available under English law, there is no duty for an EAPO applicant to give 'full and frank disclosure' of all relevant facts or any undertaking as to damages. Further where a creditor already has an enforceable judgment against the debtor, there are almost no conditions to be met for the issue of an EAPO, making it much more pro-creditor than current enforcement tools.

Can an EAPO be challenged?

A debtor can challenge an EAPO on the basis that the Court did not have jurisdiction to make the order or that the creditor had failed to meet the basic conditions.

The EAPO proposal appears easier to obtain than to challenge. There is no discretion for the Court to refuse to grant the order if the basic conditions are met and it must do so within seven days of any application. In contrast, there is no tight timetable for dealing with challenges by a debtor who will be suffering from the effect of the freezing of its account. In England, the Courts are reluctant to issue a freezing order without hearing evidence from both parties.

The current UK view

As noted above, following a public consultation in January 2012, the UK government announced that it would not be opting in to the EAPO regime, although it would participate in the negotiations to agree the final wording of the Regulations.

One significant factor behind this decision was concern over the lack of adequate safeguards for defendents. There is currently no general requirement for a claimant to provide security for any issues that might follow for the granting of an unjustified order. Equally, the courts are not given sufficient discretion to decide whether to grant an order or even decide the the amount of any freezing order.

Accordingly as currently drafted, the government felt that the procedure did not maintain an even balance between the rights of the creditor to recover debts and the provision of adequate protection for defendents.

How could an EAPO affect your business?

For EU employers and contractors, an EAPO could provide an additional and powerful tool for enforcement of judgments and debts. While the proposal specifically excludes arbitration awards, if an award was backed by a judgment in the court of a member state, a creditor could turn to an EAPO to enforce that award. For debtors, the limited grounds for challenging an EAPO mean that you should be vigilant to any judgment or decision obtained against you in EU courts.

At present, the proposals remain under consideration but if passed, possibly this year, it will be interesting to see how the EAPO regime is applied and whether the UK decides to opt in.

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Negotiating and concluding contracts by email

By Jeremy Glover
Partner, Fenwick Elliott

In the increasingly electronic world in which we all live and work, traditional rules, regulations and standards are coming under more and more scrutiny. In the UK, there have been a number of legal cases relating to the question of whether an email, or even the typing of a name at the bottom of an email is sufficient to amount to a binding contract. In March of this year, the second highest appellate court, the Court of Appeal, had to consider[1] whether or not a contract of guarantee was enforceable when it was contained not in a single document signed by the guarantor but in a series of documents, including emails said to have been authenticated by the signature of the guarantor.

Although clearly a decision binding only under English law, the case raises a number of issues which are relevant to any contract negotiations. The dispute related to a claim by Golden Ocean under an alleged guarantee for some US$57 million arising out of the alleged repudiation of a long term charter. In early 2008 Golden Ocean offered to charter to SMI (or an account guaranteed by SMI) a vessel with an option to purchase the vessel at the end of the charter period. The entity nominated by SMI to enter into the charter was Trustworth Shipping Pte Ltd. Trustworth was a related company. The negotiations following this offer were conducted by email and proceeded on the basis "Trustworth fully guaranteed by SMI." When disputes arose it was argued that the email chain was too disjointed and insufficient to constitute a guarantee. There was no single document that could be identified as the contract of guarantee. It was further said that the guarantee was unenforceable, under section four of the Statute of Frauds[2] provides:

"No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

The original Judge, Mr. Justice Christopher Clarke had commented that as a matter of commercial good sense it was:

"highly desirable that the law should give effect to agreements made by a series of e-mail communications which follow, more clearly than many negotiations between men of business, the sequence of offer, counter offer, and final acceptance, by which, classically, the law determines whether a contract has been made."

Further, he held that the fact that the emails which constituted the contract were signed by the electronically printed signature of the persons who sent them was sufficient to constitute a signature for the purpose of the Statute of Frauds. His approach was followed by the Court of Appeal.

In the Court of Appeal, Lord Tomlinson looked at why there was a requirement that the agreement must be both in writing and signed by the guarantor. There was nothing in the Statute of Frauds containing an express indication that the agreement in writing must be in one or even a limited number of documents. The purpose of the requirement that the agreement must be both in writing and signed by the guarantor was not there to ensure that the documentation was economical. The reason was to ensure that the parties knew exactly what had been promised and to avoid ambiguity and the need to decide which side was telling the truth about whether or not an oral promise had been made[3].

Further, the conclusion of commercial contracts by an exchange of emails[4], in which the terms agreed at an early stage are not repeated later in the course of correspondence, is far from unusual. Whilst it may be more common and is certainly more convenient in commercial

1 The case is *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd and Anr,* [2012] EWCA Civ 265.
2 The Statue dates from 1677, a time when feather quills dipped in ink were the writing instrument of choice.
3 Following Lord Hoffman in Actionstrength Ltd v International Glass Engineering SPA [2003] 2 AC 541.
4 And it was not so long ago that you could substitute the fax for an email.

transactions for a contract of guarantee to be contained in a single document, it is today equally commonplace for charterparties, as it is for many different forms of contract to be concluded by an email exchange, and the parties here had no difficulty in knowing at exactly what point they had undertaken a binding obligation and on what terms. In fact it was only necessary to look at two of the emails to identify a clear agreement. Lord Tomlinson said that:

"The present case is not concerned with prescribing best or prudent practice. It is concerned with ensuring, so far as is possible, that the adoption of usual and accepted practice cannot be used as a vehicle for injustice by permitting parties to break promises which are supported by consideration and upon which reliance has been placed."

It is often said that the parties are the masters of their contractual bargain. If the documents relied upon in making up a contract contemplate the execution of a further contract it becomes a question of construction as to whether the execution of that further contract is a condition of the bargain (in which case there will be no enforceable contract either because the condition is unfulfilled) or whether it is a mere expression of the desire of the parties as to the manner in which they would like to proceed (in which case provided there is a binding contract, the lack of a formal contract does not matter). The proposed guarantor could have made it clear that that it was not to be bound until execution of a formal document, of whatever kind, but it did not do so. Equally, the owners too could have stipulated that they too were not to be bound until execution of a formal document. Neither party did so.

When it came to the signature, it was accepted that all that is required is that the guarantor's name is written or printed in the document[5]. The document here which confirmed the conclusion of the contract of guarantee was an email ending with the name Guy, indicating that it was sent by Mr. Hindley, the broker. It was suggested that this was not a signature at all. It was no more than a salutation, and it was certainly not a signature appropriate or effective to authenticate a contract of guarantee.

In the view of the court, by putting down his name at the end of the email, Mr. Hindley indicated that the email duly came with his authority and that he took responsibility for the contents. Further, professional brokers understand that their communications give rise to obligations binding their principals. This was not simply an inconsequential communication. It was a communication which the brokers will readily have appreciated brought into being both the charterparty and the guarantee. It was therefore sufficient to act as a signature as required by the Statute of Frauds.

Indeed, if you think about it, not everyone when they sign their name, actually sets out their name in full. Some use just one word, others the four or five that make up their entire name. In the world of today, why should it be so different when you type your full name or just your first? Some people have electronic signatures which replicate their written one. Remember that all can be equally binding.

So what can you do?

We all do business by email. First of all, remember that an email (as quite probably is a text if you regularly use sms in the course of your business dealing) is the equivalent of a letter. Second, if you are negotiating by way of email, you may want to take a cautious approach and mark your emails "subject to contract,"[6] or perhaps some other condition. For example, it may be that final agreement will not be made unless and until the parties have signed a formal final document.

Thirdly, before you press send, read your email through, have you actually accepted or confirmed the terms (or some of them at least) you are meant to be negotiating? Remember too, that if you start performing the contract before the formal terms are agreed (and there are often pressing commercial reasons why this is so, whatever the lawyer may say) then you may find that you are left with a contract that is only partially agreed. It may be that in the future, a dispute arises over one of the grey areas that were left unresolved. Keep a checklist, so you know what is and is not agreed. And finally, of course, and it is easier said than done – just check who you are actually sending your email to.

5 Indeed, following, WS Tankship II BV v The Kwangju Bank Ltd & Anr [2011] EWHC 3103 (Comm) the words "Kwangju Bank Ltd" which were contained in the header to the SWIFT message from a bank was a sufficient signature for the purposes of the Statute of Frauds. The words "Kwangju Bank Ltd" appeared in the header, because the bank caused them to be there by sending the message. Whether or not automatically generated by the system, and whether or not stated in whole, or abbreviated this was a sufficient signature.

6 Although remember that simply adding the words "subject to contract" may not be enough. It is not just the title given to a letter it is how you are acting that counts. If the parties by their correspondence are acting inconsistently with the subject to contract designation, the protection will fall away

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International Quarterly

News and Events

Trends, topics and breaking news from Fenwick Elliott

Issue 02, 2012

This edition

We hope that you have found this edition of International Quarterly informative and useful. We aim to keep you updated regarding legal and commercial developments in construction and energy sectors around the world. Fenwick Elliott's team of specialist lawyers have advised on numerous major construction and energy projects worldwide, nurturing schemes to completion with a combination of careful planning, project support and risk assessment. From document preparation to dispute resolution, our services span every stage of the development process.

We also offer bespoke training to our clients on various legal topics affecting their business. If you are interested in receiving bespoke in-house training please contact Susan Kirby *skirby@fenwickelliott.com* for a list of topics.

The arrival of Jatinder Garcha and David Toscano strengthens our team

Fenwick Elliott is pleased to welcome Jatinder Garcha and David Toscano. Both have extensive experience throughout the construction industry at home and abroad. Jatinder will focus primarily on non-contentious projects work whilst David's main interests lie in dispute resolution. Both Jatinder and David have experience working on international projects. To find out more about Jatinder and David please go to the "Our team" page on our website.

7th ICC International Commercial Mediation Competition in Paris

Nicholas Gould was one of the judges on the panel to judge the 7th ICC International Commercial Mediation Competition, 3-8 February 2012 in Paris, which Fenwick Elliott supported. The annual event organised by the International Chamber of Commerce (ICC) has become the "must attend" event in international mediation and is the only moot devoted exclusively to international commercial mediation. Nicholas judged the semi-final stage of the competition. Fenwick Elliott has been instrumental in promoting mediation, and a range of ADR techniques such as early neutral evaluation, project mediation and expert determination, and dispute boards throughout the construction and energy industries.

Our international work

Our firm continues to secure instructions on projects outside the UK. Recently we have received instructions relating to road projects in Eastern Europe and an infrastructure project in the West Indies. We are also drafting contracts for the innovative renewable ocean current energy generation project in the Firth and Orkney Waters, Scotland. Our client produced the world's first commercial scale grid connected shoreline wave energy device, and this technology has played a substantial part in developing commercial use of this renewable energy source. For more information about our role on this project please contact Susan Kirby *skirby@fenwickelliott.com*

About the editor, Jeremy Glover

Jeremy has specialised in construction energy and engineering law and related matters for most of his career. He advises on all aspects of projects both in the UK and abroad, from initial procurement to where necessary dispute avoidance and resolution. Typical issues dealt with include EU public procurement rules, contract formation, defects, certification and payment issues, disruption, loss and/or expense, prolongation, determination or repudiation and insolvency.

He has advised clients in international arbitrations under ICC, UNCITRAL and ad hoc rules as well as in relation to all sizes of domestic disputes. He is an accredited adjudicator and regularly advises on both the conduct of adjudication and the enforcement of adjudicator's decisions. Jeremy is also increasingly involved in the dispute resolution opportunities offered by mediation, expert determination and other forms of ADR.

Jeremy is the co-author of Understanding The New FIDIC Red Book: A Clause by Clause Commentary, the second edition of which was published in January 2012. He also works with Robert Fenwick Elliott preparing annual updates of Building Contract Disputes: Practice and Precedents. Jeremy is a member of the Board of Examiners on the Centre of Construction Law MSc programme at King's College, London where he also teaches on adjudication and FIDIC issues. Jeremy organises and regularly addresses Fenwick Elliott hosted seminars and provides bespoke in-house training to clients. He also edits Fenwick Elliott's monthly legal bulletin, *Dispatch*.

International Quartely is produced quartely by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

International Quartely is a newsletter and does not provide legal advice.

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