

# ELECTRONIC EXECUTION OF TRUST DOCUMENTS

An examination of the rules of electronic execution and delivery of trust documents in offshore jurisdictions

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## ABSTRACT

- *It has become increasingly common for documents, particularly in a commercial context, to be executed electronically, and the trend has been accelerated by the distancing requirements of COVID-19. These factors have also impacted the private client world, notably in relation to wills, but the trend is relevant to the execution of all types of document.*
- *At the same time, the topic is complicated by the fact that it encapsulates a number of different issues, including: the formal requirements for different types of document, for example, deeds and trust documents; delivery; the meaning of electronic signature and the differing rules across jurisdictions. The last of these is particularly relevant to international private client practitioners.*
- *In this guide, the authors focus on trust instruments and supplemental trust documents (Trust Documents) and examine the rules in four offshore jurisdictions: the British Virgin Islands, the Cayman Islands, Guernsey and Jersey.*
- *All four jurisdictions have enacted legislation dealing with electronic execution but, with the exception of Guernsey, the legislation does not deal explicitly with Trust Documents. Consequently, the common-law position must be considered first. As shall be demonstrated, it may also be relevant to the position in Guernsey.*

## COMMON LAW

## ELECTRONIC SIGNATURES

English and Welsh case law indicates that whether the mark that appears in a document amounts to a signature depends upon whether whatever was used was inserted into the document in order to give, and with the intention of giving, authenticity to it.<sup>1</sup> Its inclusion must have been intended as a signature. The test is one of function, not form.

The courts in England and Wales have, for example, held that the following non-electronic forms amount to valid signatures:

- signing with an X;
- signing with initials only;
- using a stamp of a handwritten signature;
- printing of a name;
- signing with a mark, even where the party executing the mark can write; and
- a description of the signatory if sufficiently unambiguous, such as ‘Your loving mother’ or ‘Servant to Mr Sperling’.<sup>2</sup>

Electronic equivalents of these forms of signature are likely to be recognised by a court as legally valid. In the case of statutory obligations in England and Wales to provide a signature, where the statute is silent as to whether an electronic signature is acceptable, the courts have, for example, held that the following electronic forms amount to valid signatures:

- a name typed at the bottom of an email;
- clicking an ‘I accept’ tick box on a website; and
- the header of a Society for Worldwide Interbank Financial Telecommunication message.<sup>3</sup>

The key question in each case is whether it was done with an authenticating intention.

The statutory provisions for each jurisdiction are considered below. However, those provisions do not expressly exclude the common-law rules in the case of the British Virgin Islands (BVI) or the Cayman Islands, or the customary rules in the case of Guernsey and Jersey, where it is the authors’ view that the customary rules will follow the common-law rules. The default position is, therefore, that the common-law rules will apply, although the position under Guernsey law is less clear and the contrary is arguable. This is discussed further below.

However, the trust instrument can exclude the use of electronic signatures or impose restrictions on their use, if that is done expressly, as any formalities specified by the donor of a power must be observed, provided those restrictions are not unlawful.<sup>4</sup> Similarly, although not aware of any authority on the issue, the authors’ view is that the parties to the trust instrument can agree to exclude the use of electronic signatures or restrict their use.

In summary, the authors’ view is that, under the customary and common-law rules, the extent to which electronic execution is permitted is determined:

- in relation to the trust instrument, by any agreement between the parties;
- in relation to any other trust instruments or supplementary trust documents (Trust Documents), by the terms of the trust instrument conferring the relevant power; and
- in default of any express such provision in each case, electronic execution of Trust Documents is permitted to the extent there is an authenticating intention.

ELECTRONIC DELIVERY<sup>5</sup>

Where a trust instrument provides for the delivery of notices, it is the authors’ view that the question of what constitutes delivery and, in particular, whether electronic delivery is permitted, is a matter of construction of the trust instrument. It is, therefore, typically advisable to include express provisions in relation to electronic delivery in the trust instrument. It does not matter whether the originator or recipient has agreed to service by electronic delivery or has agreed to exclude it where it would otherwise be permitted under the trust. But, for the avoidance of doubt, where electronic delivery is contemplated, it may be prudent to include express provision in the relevant supplemental trust document to avoid any question arising, as agreement may be required under the statutory provisions (as to which, see further below).

<sup>1</sup> *Caton v Caton* [1867] LR 2 HL 127

<sup>2</sup> *Electronic Execution of Documents*, Law Commission Consultation Paper 237 (LawCom 237) para.3.18

<sup>3</sup> Above, note 2, para.3.21

<sup>4</sup> See, for example, *Thomas on Powers*, 2nd edn (2012) at 7.103 (requirements specified by the donor of the power).

<sup>5</sup> In this context, the authors refer to the physical delivery of documents, not the common-law requirement for a deed to be ‘delivered’, which is an act done so as to evince an intention to be bound.

## EXECUTION BY COMPANIES

The same principles in relation to electronic signatures will apply to the question of whether an electronic signature by an authorised signatory on behalf of the company is valid.

The electronic execution of deeds by a BVI or Cayman Islands company is more straightforward than the electronic execution by individuals in one key respect: a witness is not required for valid execution either by a BVI or a Cayman Islands company under the statutory rules.<sup>6,7</sup>

## STATUTORY PROVISIONS

The statutory provisions in each of the jurisdictions will now be assessed to discuss the extent to which these have altered the common-law rules in relation to Trust Documents.

## BRITISH VIRGIN ISLANDS

Under the BVI's *Electronic Transactions Act, 2019* (the BVI Act):<sup>8</sup>

- Where a law requires any information or other matter to be in writing, that is satisfied if the information<sup>9</sup> or matter is: given in the form of an electronic communication;<sup>10</sup> and accessible to, and capable of retention by, the addressee for subsequent reference.<sup>11</sup>
- Where a law requires delivery, this may be satisfied by 'electronic communication if the originator ... states that the receipt of the electronic communication is to be acknowledged and the addressee has acknowledged its receipt'.<sup>12</sup>
- Where a law or agreement requires a signature, 'that requirement is satisfied in relation to an electronic communication if it is ... as reliable as appropriate for the purpose for which [it] was generated'.<sup>13</sup>
- Where an electronic signature is required by the parties to an electronic transaction and the

**'It is typically advisable to include express provisions in relation to electronic delivery in the trust instrument'**

parties have not agreed on the type of electronic signature to be used, there are specified default rules that apply.<sup>14</sup>

The BVI Act provides that nothing in it shall either:

- (i) require any person to use or accept electronic communications, electronic signatures or electronic contracts; or
- (ii) prohibit any person engaging in a transaction through the use of electronic means from varying by agreement any provision relating to, *inter alia*, writing, delivery and signatures.<sup>15</sup>

The BVI Act does not apply, *inter alia*, to any law requiring writing, signatures or original documents for: wills or testamentary instruments; the transfer of any interest in real or personal property; the creation, performance or enforcement of an indenture, declaration of trust or power of attorney;<sup>16</sup> or any other thing required to be done by deed.<sup>17</sup>

## Application to trusts

The statutory rules outlined above in relation to writing and delivery only apply where required by a law, so do not apply to requirements in a trust instrument. The rules relating to a signature apply to requirements by an agreement as well as by a law.

It is not entirely settled as to whether the *Statute of Frauds* (the Statute) is part of BVI law.<sup>18</sup> To the extent that it is, any declaration or creation of trust in relation to land must be evidenced in writing and signed,<sup>19</sup> and any grant or assignment of a trust must also be in writing and signed.<sup>20</sup> If it is part of BVI law, then the BVI Act will not apply to those types of documents. Even if the Statute

6 s.103(4), *BVI Business Companies Act 2004*

7 s.81(1)(a), *Companies Act (2021 Revision)*

8 The *Electronic Transactions Act, 2019* is not yet in force, so the position is currently governed by the *Electronic Transactions Act 2001*, although that does not affect any of the conclusions set out in this guide, except as otherwise provided (as to which, see note 22 below).

9 For these purposes, 'information' includes 'data, text, documents, records, electronic records, images, sounds, codes, computer programmes, software and databases': s.2, BVI Act.

10 A 'communication' must be 'in connection with the formation or performance of a contract': s.2(1), BVI Act.

11 s.7, BVI Act

12 s.10(1), BVI Act

13 s.21(1), BVI Act

14 ss.21(3) and (4), BVI Act

15 s.5, BVI Act

16 The 2001 Act does not refer to declarations of trust.

17 s.4(1), BVI Act

18 See, for example, Kessler, Pursall and Chand, *Drafting British Virgin Islands Trusts*, 1st edn (2014, Sweet & Maxwell), chapter 9, fn 21.

19 s.7, *Statute of Frauds*

20 s.9, *Statute of Frauds*. In this context, it is thought that 'trust' refers to an existing equitable interest.

does form part of BVI law, it will not normally be relevant to the trust instrument itself (except where it is in relation to land in the BVI)<sup>21</sup> as there is no legal requirement for a trust instrument to be in writing. It will also not normally apply to the exercise of powers of appointment, advancement and resettlement by trustees, as it is concerned with dispositions by equitable owners.

There is also a question as to whether a trust instrument is an agreement by a person engaging in a transaction for the purposes of paragraph (ii), above. Although a trust is not itself an agreement, it is arguable that a trust instrument is caught where there is an element of bargain between a settlor and a professional trustee. If it is an agreement for these purposes, any requirement that a power conferred by the trust instrument is exercised by, for example, a signed instrument in writing would be subject to the BVI Act, although it follows that those rules can be varied by the parties to the trust agreement. As discussed above, the common-law rules on electronic execution continue to apply to the extent they have not been varied by statute. There seems no reason in principle why those rules cannot be varied in the trust instrument, both in relation to the execution of the trust instrument itself and to any other supplemental trust documents.

That is subject to the one proviso that, if the Statute applies, those rules are mandatory, so the requirements for a signature cannot be excluded. The cautious approach, therefore, is not to permit electronic execution in such a way that it would not be regarded as a signature at common law. In practice, this is unlikely to create an issue, as the common law focuses on the authenticating intention, not the form of execution, so if a particular form of execution is specified as constituting a valid signature, it would normally be valid.

### Summary

In summary, it is the authors' view that, for all Trust Documents:

- the BVI Act does not apply (although, the contrary is arguable with respect to electronic signatures); and

- to the extent the BVI Act applies, the statutory rules in relation to both electronic execution and delivery can be varied by the trust instrument, provided the rules are not such as to prevent them being recognised at common law.

Therefore, it is normally preferable to include express provisions in Trust Documents that permit electronic execution and ensure that the provisions in supplemental documents are consistent with any requirements in the trust instrument.

### CAYMAN ISLANDS

The default position under the *Electronic Transactions Act (2003 Revision)* (the Cayman Islands Act) is as follows:

- writing includes information in the form of an electronic record;<sup>22</sup>
- a requirement for delivery is met by delivery in the form of an electronic record, if acceptable to the parties;<sup>23</sup> and
- an electronic signature is valid if it is as reliable as was appropriate for the purpose for which the electronic record was generated.<sup>24,25</sup>

The Cayman Islands Act does not apply to the creation, execution, variation or revocation of a will or other testamentary instrument.<sup>26</sup>

### Application to trusts

These provisions apply to any statutory provision, rule of law, contract or deed,<sup>27</sup> so they apply to Trust Documents executed as deeds, but it seems that they do not apply to Trust Documents that are not executed as deeds. Similarly, the Cayman Islands Act also provides that the default provisions may, in relation to any contract or deed, be varied or revoked by agreement.<sup>28</sup> With regard to Trust Documents executed as deeds, the default provisions may therefore be varied or revoked by agreement under the Cayman Islands Act, but that does not seem to apply to any

<sup>21</sup> Declarations of trust are not excluded from the ambit of the 2001 Act, so the position may be different with regard to declarations of trust over land in the BVI.

<sup>22</sup> s.7(1), Cayman Islands Act. For these purposes, 'information' includes 'data, text, images, sounds, codes, computer programmes, software and databases', as defined in s.2 of the Cayman Islands Act.

<sup>23</sup> s.8(1), Cayman Islands Act

<sup>24</sup> It is expressed in the negative: '... this law shall not be applied so as to exclude, restrict or deprive of legal effect, any method of creating an electronic signature ...'; s.18, Cayman Islands Act.

<sup>25</sup> s.19(1), Cayman Islands Act. The rules for determining reliability are set out in s.19(3).

<sup>26</sup> s.3, Cayman Islands Act

<sup>27</sup> s.19(1), Cayman Islands Act

<sup>28</sup> s.4, Cayman Islands Act

## ‘Given the uncertainty over the application of the Guernsey Law to Trust Documents, the prudent course is not to include any express provisions relating to the electronic execution of Trust Documents in those documents’

Trust Documents not made by deed. However, it is arguable that the provisions of the Cayman Islands Act would apply to a Trust Document that included contractual provisions (such as indemnities on a change of trustees).

For the reasons set out above, it is thought that the common-law rules continue to apply.

### Summary

In short, the position is the same as under BVI law, except that the Cayman Islands Act does apply to Trust Documents executed as deeds.

### GUERNSEY

Under the *Electronic Transactions (Guernsey) Law, 2000 (As Amended)* (the Guernsey Law):

- (i) A document, record, notice or instrument shall not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form.<sup>29</sup>
- (ii) A signature, seal, attestation or notarisation shall not be denied legal effect, validity, enforceability solely because it is in electronic form.<sup>30</sup>
- (iii) Where a law (statutory or customary) requires, *inter alia*, notices or instruments in writing or a signature, an electronic form satisfies the law.<sup>31</sup>

- (iv) Where a law (statutory or customary) requires or permits information or a document to be, *inter alia*, delivered, delivering it in electronic form or by electronic means satisfies the law.<sup>32</sup>

However, a person cannot be compelled to do or accept anything in electronic form or by electronic means.<sup>33</sup>

The above provisions (i) to (iv) do not apply to, *inter alia*:

- (a) the creation, execution, variation, rectification or revocation of a will, codicil or any other testamentary instrument; or
- (b) the creation, execution, variation, revocation or enforcement of an indenture, declaration of trust, power of attorney or any document required to be sealed.<sup>34</sup>

The explanatory note to the *Electronic Transactions (Exemptions) Order, 2001* (the Guernsey Order) states:

‘At least for the time being, the transactions and other matters specified in [the Guernsey Order] must still be transacted and done without the benefit of making use of electronic means or electronic form.’

### Application to trusts

Subject to the exceptions, provision (i) is wide enough to apply to trust instruments, but provision (iii) is not, as it only applies where a law requires notices, etc. The customary law position will therefore apply to delivery of notices and it is the authors’ view that this is the same as the common-law position set out above, i.e., that the rules can be set out in the trust instrument.

In short, the authors’ view is that electronic signatures are permitted in relation to Trust Documents (as the customary law rules have not been expressly excluded), but the position is not certain and the contrary is arguable.

### Summary

Given the uncertainty over the application of the Guernsey Law to Trust Documents, the prudent course is not to include any express provisions relating to the electronic execution of Trust

<sup>29</sup> s.5, Guernsey Law

<sup>30</sup> s.4, Guernsey Law

<sup>31</sup> s.8(i), Guernsey Law

<sup>32</sup> s.8(2), Guernsey Law

<sup>33</sup> s.9, Guernsey Law

<sup>34</sup> s.1, *Electronic Transactions (Exemptions) Order, 2001*

Documents in those documents and to ensure that they are executed using wet ink signatures, wherever possible.

#### JERSEY

Under the *Electronic Communications (Jersey) Law 2000 (as amended by the Electronic Communications (Amendment of Law) (Jersey) Regulations 2019* (the Jersey Law):

- Where a person is required or permitted by an enactment to give information in writing (which includes serving a notice),<sup>35</sup> that information may be given by means of an electronic communication<sup>36</sup> if it is reasonable to expect that the information will be readily accessible so as to be useable for subsequent reference.<sup>37</sup>
- Where a person is required by an enactment to provide a signature, that requirement is met if a method is used to identify the person and to indicate the person's approval of the information communicated.<sup>38</sup>
- A signature, seal, attestation or notarisation is not to be denied legal effect, validity or enforceability only because it is in electronic form.<sup>39</sup>

#### Application to trusts

As the Jersey provisions only apply where required or permitted by an enactment, they do not apply to Trust Documents. The customary law provisions will therefore apply, and it is the authors' view that the customary law will follow the common-law position set out above.

#### Summary

In short, the position is the same as under BVI law, except that it is clear that the Jersey Law does not apply to Trust Documents.

#### EXECUTION OF DEEDS

The analysis above applies to electronic execution generally, as well as the question of the delivery of notices electronically. Where a particular document is required to be executed as a deed for it to be effective (or the parties otherwise intend

that it should be executed as a deed), there are additional formalities: if they are not observed, that may affect the validity and enforceability of the document.

Guernsey and Jersey do not have the concept of a deed, so the following comments apply only to the BVI and the Cayman Islands, but the subsequent section concerns the witnessing of documents under Guernsey and Jersey law.

One of the statutory requirements for the valid execution of deeds by individuals under both BVI and Cayman Islands law is that the individual must sign the deed in the presence of a witness who attests the signature.<sup>40</sup> Cayman Islands law expressly permits deeds to be executed electronically,<sup>41</sup> but executing in the presence of a witness can sometimes be problematic in practice, for example, where a signatory is subject to social-distancing requirements due to COVID-19. As we have seen, the BVI Act does not apply where a law requires writing, signatures or original documents for anything required to be done by deed, but the common-law rules still apply, so electronic execution is, in principle, still permitted.

Therefore, the common-law position will normally apply, such that deeds will generally be able to be executed electronically, subject to issues regarding witnesses.

A practical solution to the statutory requirement for a deed to be executed in the presence of a witness is to execute the deed under the old common-law rules. Those rules were expressly preserved in both jurisdictions,<sup>42</sup> so a deed may still be executed under the common-law rules, which do not require a witness, so there is no requirement for any person to be physically present when the relevant signatory signs. Under the common-law rules, a deed must be signed, sealed and delivered. Delivery, in this context, refers to the requirement that the signatory must intend to be bound by the deed. As to the requirement for a seal, it must have a seal fixed or impressed on or attached to it, and the party professing to be bound by the deed must do some

<sup>35</sup> arts.11(1) and 11(3), the Jersey Law

<sup>36</sup> 'Information' and 'electronic communication' are defined in art.1 of the Jersey Law.

<sup>37</sup> There are additional requirements where the information must be given to a States entity: arts.11(1)(a) and (b), Jersey Law, as amended.

<sup>38</sup> art.12(1), the Jersey Law

<sup>39</sup> art.12(3), the Jersey Law, as amended

<sup>40</sup> s.8(3), *Property (Miscellaneous Provisions) Act (2017 Revision)* (Cayman); s.2(3), *Property (Miscellaneous Provisions) Act, 2003* (BVI)

<sup>41</sup> s.8(4), *Property (Miscellaneous Provisions) Act (2017 Revision)*; see also s.19(1), *Cayman Islands Act*

<sup>42</sup> s.8(5), *Property (Miscellaneous Provisions) Act (2017 Revision)* (Cayman); s.2(5), *Property (Miscellaneous Provisions) Act, 2003*

act expressly or impliedly acknowledging the seal to be theirs. It is not, however, necessary that any particular kind of seal is used, provided there is affixed to, or impressed on, the deed something that is intended to be a seal; as with signing a document, the test is one of function, not form.

Therefore, a wax seal may be affixed to the deed or attached to it by a ribbon, a wafer may be attached to the deed, or a stamp may be used to impress the seal on the deed. Alternatively, a printed circle with the letters LS, signifying *locus sigilli* (the place of the seal) inside it is also acceptable.<sup>43</sup> Where this approach is adopted and the signatory actually signs the deed, they should be advised to place their signature across the LS (although, in the authors' view, the deed would still be validly sealed if this was not done).<sup>44</sup>

BVI law expressly permits the use of electronic seals.<sup>45</sup> That is not explicit in the Cayman Islands Act, but there seems no reason why electronic seals should not be permitted under the common-law rules.

With regard to the Cayman Islands, there is now an alternative in the form of virtual witnessing. Under the *Property (Miscellaneous Provisions) (Amendment) Act 2020*,<sup>46</sup> virtual witnessing of deeds and instruments under seal is permitted under Cayman Islands law where:

- the witness is able to contemporaneously view the signing of the deed or instrument remotely; and
- if the signatory is not personally known to the witness, they must present a valid photo ID to the witness contemporaneously.

#### USE OF WITNESSES UNDER GUERNSEY AND JERSEY LAW

Although there is no requirement for the witnessing of signatures in Guernsey and Jersey, this is now the accepted practice, particularly in relation to the execution of Trust Documents. This is helpful for evidential purposes and is one reason why the use of an independent witness

is to be preferred. However, this may create practical problems where documents are to be executed electronically or a witness cannot be physically present (e.g. due to COVID-19 restrictions). In those circumstances, a witness can be dispensed with.

#### VIRTUAL CONDUCT OF NOTARIAL ACTS

It is sometimes necessary for Trust Documents to be authenticated by notaries, something else that has become more difficult due to social distancing rules under COVID-19. The Cayman Islands has passed legislation to make this easier by permitting notarial acts to be conducted virtually.<sup>47</sup> Any of the notarial acts set out in sch.5 to the *Notaries Public Act (2014 Revision)* and any act required to be performed by a notary under any law (including any treaty or convention or any related protocol) may now be conducted by 'communication technology',<sup>48</sup> provided the following conditions are met:

- the individual must demonstrate that they are physically present in the Cayman Islands;
- the individual must transmit the relevant document to the notary by fax, email or other electronic means;
- the notary may, after observing the relevant act, notarise the transmitted copy of the document and return it via fax, email or other electronic means;
- the notary must record the details of the notarial act in the Notarial Acts Book and indicate that it was performed in accordance with the regulations;<sup>49</sup> and
- if the individual is not personally known to the notary, the individual must present valid photo identification to the notary during the real-time interaction.<sup>50</sup>

The *Notaries Public (Virtual Conduct of Notarial Acts) Regulations, 2020* (the Regulations) came into force on 16 April 2020 and will remain in force until 16 April 2022 or until such other date as the Cayman Islands cabinet may appoint by order.<sup>51</sup>

43 See *First National Securities Ltd v Jones and another* [1978] 2 All ER 221

44 As that was the practice approved in *First National Securities*: above, note 43.

45 s.13(2), BVI Act

46 The *Property (Miscellaneous Provisions)(Amendment) Act 2020* amended the *Property (Miscellaneous Provisions) Act (2017 Revision)*. It came into force on 7 January 2021, and the amendment applies until 16 April 2022, or such other date as the Cabinet appoints by order.

47 *Notaries Public (Virtual Conduct of Notarial Acts) Regulations, 2020*

48 reg.3, the Regulations; 'communication technology' is defined in reg.2

49 Section 13(i) of the *Notaries Public Act (2014 Revision)* provides that 'every notary public shall maintain a book, called a "Notarial Acts Book" which shall be in the form set out in Schedule 6 in which he shall record the details of each notarial act carried out by him and shall preserve the record of each such notarial act ...'

50 reg.4, the Regulations

51 reg.10, the Regulations



‘What is certain is that electronic execution of documents and electronic giving of notice are on the increase and we see no likelihood of this trend reversing’

No specific legislation has been enacted in the BVI, Guernsey or Jersey in relation to the virtual conduct of notarial acts, but there is guidance for notaries practising in Guernsey and Jersey who are regulated by the Faculty Office of the Archbishop of Canterbury (the Office). On 7 May 2020, the Office issued a guidance note entitled *Covid-19: Guidance on remote notarisation* (the Guidance Note).<sup>52</sup> The conditions for remote witnessing, set out in the Guidance Note, are similar to those of the Regulations. However, the Guidance Note does contain certain additional conditions, the most significant one being that the notary must, if practicable, also record the videoconference or, if that is not practicable, endeavour to take screen captures of the individual, their identity documents and the document being authenticated.<sup>53</sup>

<sup>52</sup> The Guidance Note is available at [bit.ly/3uPsOyP](https://bit.ly/3uPsOyP)

<sup>53</sup> paras.3(d) and (e), Guidance Note

## CONCLUSIONS

The authors’ view is that the common-law rules regarding electronic signatures and delivery are likely to be applicable in the BVI, Cayman Islands, Guernsey and Jersey, but the point is not beyond doubt, particularly in Guernsey. It will normally be helpful to include express provisions dealing with electronic execution in Trust Documents, except for those governed by Guernsey law.

What is certain is that electronic execution of documents and electronic giving of notice are on the increase and the authors see no likelihood of this trend reversing. For Trust Documents governed by the laws of any of these jurisdictions, our recommendation is to include express wording permitting (or restricting) the use of electronic signatures and electronic delivery.

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