RISOLVIONLINE EXPERIENCE: A NEW ODR APPROACH FOR CONSUMERS AND COMPANIES

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1. Abstract

A new model of online mediation founded in Milan by the Chamber of Arbitration of Milan (Chamber of Commerce of Milan) will be analysed as a new method of online dispute resolution. This model could suggest if ODR will only improve traditional alternative dispute resolution (ADR) methods or more radically change the way to solve dispute. This paper would also underline the need for new standards and rules for the net economy, in order to avoid a lack of e-consumers protection.

2. ADR panorama

In the last two decades of the 20th century there has been an increasingly strong and widespread trend all over the world towards alternatives to the lawsuit. Such *alternative dispute resolution*, or ADR has now become a means for dealing with commercial (and other) disputes whose use is constantly growing in Europe as well, and in civil law countries generally. Moreover, the call for more speed and less formality in dispute resolution expresses a need found in all the major western countries.

In the USA, ADR already forms an important branch of procedural law, and indeed of the court system itself. We have only to consider the role of one of the best-known alternative procedures, mediation, which aim is negotiated agreement between the parties. This agreement is to be reached by the parties through the work of a neutral, the mediator, who

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helps them to analyse the true interests involved in their dispute; he also brings out the differences implied in the parties' respective positions, leading them towards composition of their dispute, without imposing any decision.

USA mediation has spread progressively to all subjects that can be disputed between parties: from the commercial sphere to labour law, from family matters to social, racial or cultural conflicts.

This expansion has been followed, as might be expected, by a phenomenon of 'institutionalisation', in which the courts themselves have increasingly come to use alternative instruments, as an 'internal' resource for settlement of disputes. We only need to consider the so-called 'mediation week': a week in which citizens and firms have the chance to use a considerable number of mediators who guide parties in the quest for an agreement to settle their dispute.

This is an opportunity offered by the court system itself. Courts know that these initiatives can free them from the burden of large and small cases. If we take a quick tour of the ADR phenomenon in Italy, we can see that though the situation is still unripe, the first signs of an awakening are there. They are indeed very recent, and all date from the second half of the 1990s.

Mediation and arbitration, which are still the most-used ADR instruments, are receiving more attention, both from the politicians and, fortunately, from the users (companies and consumers).

These two procedures have met different functional requirements. Arbitration, the classic dispute resolution system for companies, represents the strong alternative to an ordinary court case. Arbitration is not a composition but a decision; and the result it leads to, the arbitration award, is as weighty as the decision of a judge of first instance. The function which, in Italy, arbitration has fulfilled (and in great measure still fulfils) has been that of a parallel court system, one available by choice and, according to some, available especially to an élite, a *ius divitum* (law for the rich); but also one which has shown an ability to reinvent itself in part as an effective procedure for a lower level, suitable also for the cases of the small or medium enterprise (SME)[2]. If we set out to describe the typical Italian arbitration case (whether ad hoc

[2] A debate has been kindled recently concerning the decline of international arbitration compared with new forms of mediation and ADR, which appear to be more flexible in meeting the need for swiftness and informality. These new forms seem destined at least to erode some of the ground and market power of the classic international arbitration which is the jewel in the crown of the great European and American practices. See especially P. Lalive "Towards a decline of International Arbitration?", The Journal of the Chartered Institute of Arbitrators, v.65, n.4, 1999. The author considers that the functional requirements of arbitration cannot be entirely satisfied by the other, quicker, forms of ADR. And it is understood that arbitration still keeps one of its specific defining features which brought its success, i.e. professional and ethical standards of the arbitrators.

or "administered"[3]) we imagine a dispute over a contract for supplies worth some €400,000 which goes on for an average of eighteen months, and in the end costs each party somewhere between 2% and 6%.

When we speak of mediation, we are speaking of an instrument aimed at disputes which are smaller, in money terms, than those of arbitration, and which are limited, with regard to the subject matter: customer complaints, cases between SMEs, and some disputes outside the commercial area, such as employment and social/family cases.

Mediation never had much success in Italy, neither as a quasi-judicial instrument for courts to use during a case, nor as an instrument of private negotiation. The spirit of mediation is not some woolly benevolence; on the contrary, it is the demonstration of a purely rational and economical approach applied to a concrete case: to prefer, in any event, an effective solution , saving time and money, above all in those situations in which contractual duties are vague, and their ascertainment not clear-cut. In other words, it involves the application of rationality to negotiation, rather than litigation or a hole-and-corner accommodation. In recent years, mediation has gained a firmer footing in various sectors, and has been identified by legislation as one of the possible ways out of the present crisis in the courts. We need only think to italian legislation of consumer protection, to industrial subcontracting law and to the new italian company law : in these cases, recent laws have pointed to the Chambers of Commerce as the place in which to test whether this alternative dispute resolution methods works well or not.

We may say, therefore, that in Italy the ADR wagon has begun to roll. But no sooner had that happened, than there is talk of a new prototype, which some think ready to take the place of this newly-started machinery; others, meanwhile, consider it too innovative, destined to disappear after a few appearances; and yet others believe it is suitable only for certain instances. This is ODR, online dispute resolution: the ensemble of dispute resolution methods developed over the web and therefore sharing in its visionary aura of magic.

How do online services fit into the panorama of alternatives we have summarily reviewed? Who first began developing it? What changes could it bring? Might it hasten the development of those alternatives, or radically alter their direction and aims?

Some have spoken, when considering online services, of "PDR[4]", primary dispute resolution, at least for areas such as e-commerce and questions of Internet domains, in which speed of decision is just as essential as the business itself. Have things really come this far already?

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[3] The difference between administered arbitration and ad hoc arbitration lies, in the former, of an institution which coordinates and manages the whole procedure from presentation of claim to final arbitration award. This institution is normally called for in the Arbitration Clause of the contract between the parties. In ad hoc arbitration, in the absence of any institution with its arbitration rules, there are only the regulations in the Code of Civil Procedure to lay down how the arbitration is to

3. Online ADR

In recent years (2000-2003) we have seen a rapid growth of online sites set up for promoting ADR and, at the same, for resolving disputes online. In some cases these are institutional web sites which were already practising mediation and arbitration in a 'physical' (face to face, or offline) form. In others, they are initiatives that have been online from the start. From this fact alone we may conclude that the web is, or has already been, the cross-roads between the old and the new economy of dispute resolution.

But the most significant feature which emerges is, in any case, the total number involved.

If I enter "mediation" in the search engine www.google.com, I get some 306,000 hits. If I enter "mediation AND arbitration", narrowing the field, I still get 177,000[5]. For all that the web is immensely diffuse, these figures are enough to give us some idea of the size of the phenomenon. It is still a US one though the earliest cases of online mediation and arbitration are beginning to be seen in Italy as well.

At the beginning of our *RisolviOnline* prject (2001) we had to compare with this odr panorama and models:

- the "blind" model or fully automated model
- the open model.

4. The blind model: online negotiation

This is a negotiation model, without any intervention of a third neutral mediator or conciliator. The blind model works like a kind of auction. It is "blind" in that the parties never see, until the end, the amounts offered online by the other party; they only know when the other side has improved its offer.

One of the best known sites that operate this arrangement is Cybersettle, www.cybersettle.com.

The system usually starts off with the plaintiff's claim, compiled and sent online. The defendant is contacted by the service and may agree to submit the dispute to the mediation procedure. If so, the procedure begins.

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function, supplemented by regulations which may be provided by the parties in the Clause, or set out by the arbitrators during the procedure.

[4] The expression is used by Professor Ethan Katsh in *"New frontier. Online ADR becoming a global priority"*, Dispute Resolution Magazine, winter 2000. Professor E. Katsh is co-director of the 'Center for Information Technology and Dispute Resolution', University of Massachusetts.

[5] Numbers referred to August, 2003.

The software program assigned to the parties arranges for plaintiff and defendant alternately to exchange offers and counter-offers, expressed in money terms. First round of Cybersettle provides for 3 offers for each party. Each new offer must be better than the previous one.
All offers are blind: their amount is not known to the other party. All that party knows is that an improved offer has been made.
Resolution is achieved if the plaintiff's demand is within 20% of the defendant's offer. Parties are asked to agree on this feature (the 20% common area) before the start of the online proceeding.
Everything is based on software with a fairly simple calculation system, which notifies the parties of the arrival of a new offer, without revealing the amount. This is clearly a pattern which is indicated above all for the settlement of disputes about money. In particular, the model has shown a special suitability for insurance disputes; but commercial disputes also, and industrial ones generally, could make use of a similar instrument.
At the same time, it has obvious limitations when it comes to disputes requiring more articulation of details, some of them not purely monetary.
The strength of the blind model lies in the fact that it enables one of the main obstacles to success in two-party negotiations to be overcome: the fear on each side of revealing its own hand and appearing weak in the eyes of the other.
Because of the presence of a calculation software (instead of a "physical" mediator), the system arranges for the parties to convey information without communicating directly with each other.

5. The open model: the online mediation

Other web systems are based on a different concept: that online communication and direct exchanges between two parties should primarily be encouraged, and that the role of a third neutral mediator could help the parties to discuss things openly.
This different concept is also more in keeping with the traditional image of offline mediation, where mediator uses a whole set of techniques to induce the parties to adopt a collaborative and cooperative attitude to each other; in seeking to overcome the parties' reticence and misgivings, indeed, the expert mediator has a range of psychological techniques to apply, which make possible an interpretation of the parties' non-verbal language, attitudes, emotions and most immediate reactions. Naturally, there are great difficulties in the way of reproducing this model online. The online mediation systems based on this open model are in fact severely limited because of the poverty of communication available with current software. They mainly use e-mail or chatroom conferencing systems, and try to recreate in a virtual environment the typical situation of a mediation hearing, so far as they can. Just like a real

arbitration institution, the mediation service provider makes available to the parties a virtual meeting-place (the resolution room), together with a qualified, experienced mediator.

Two of the main sites applying this model are: www.onlineresolution.com and www.ecodir.org .

The service provider based on the open model has a submission form on its web site to be completed for beginning the procedure; here the party gives identity details as well as details of the matter in dispute. On receipt (by e-mail, of course) of the completed form, the service provider contacts the other party. If that party agrees, the mediator is appointed, and a dedicated channel of communication opened (access is limited to the parties and the mediator, each with a password); the whole procedure takes place over this channel.

Once this virtual contact has been established between the parties and with the mediator, the procedure will tend to reproduce the traditional pattern of non-virtual mediation. The mediator needs to introduce him- or herself and invites the parties to do the same; then each party is asked to set out (to write online) their own version of the facts. The mediator can then ask the parties for clarification, and in this way move to the next stage, of identifying the matters in dispute, formulating suggestions, discussing, and moving to definition of an agreement.

Like traditional mediation also, the virtual system must be able to guarantee the procedure's confidentiality, ensuring that conversations between each party and the mediator remain secret, and granting that no extraneous party can access any of the communications.

The system certainly offers advantages: use of e-mails makes for rapid communication between parties who are unable, or unwilling, to meet in person; and without incurring too much cost. The system also allows the service provider to appoint experienced and well-trained mediators, without any difficulties of distance or travel costs.

However, the system has drawbacks also. Virtual communication - at least in the present state of the arts – is not really very "communicative", especially in its emotional or non-verbal aspect.

The pioneers in this sector agree that this model is inadequate, and that further effort is absolutely necessary in order to improve the level of virtual communication. Certainly some improvement might come from the spread of video and audio communication (webcam) systems to make possible some visual communication between the parties, even at a distance.

6. *RisolviOnline*: the choice of the online model

In designing the new service, between 2001 and 2002, we had to evaluate some different options: mediation or arbitration?

Mediation is more suitable than arbitration on the web. Arbitration needs a greater degree of formality that is still difficult to realize on line (written form; signature and other). The internet environment seems to be more favourable to the tipical informality of mediation procedures. Therefore, we have chosen mediation.

Blind negotiated model or open model?

For our *RisolviOnline* we finally chose the open model. The blind model, infact, could be particularly useful where the disagreement is only over money; the open model, instead, seems to be more suitable where the dispute involves other issues (i.e. the quality of the good purchased or matters related to consumers' protection). In the open model, which is a model of online mediation, we have a complete online dialogue between the parties and the online mediator in a chat room, not limited to the economic amount in dispute.

7. The process of *RisolviOnline*: how it works

The mediation procedure of *RisolviOnline* - www.risolvionline.com - can be activated only electronically, through the web site of the Milan Chamber of Arbitration. Claimant must fill out the form and email it to the Chamber of Arbitration. The information required are: name and last name; address, email and telephone number. The claimant shoud also specify the name and address and email (if known) of the other party.

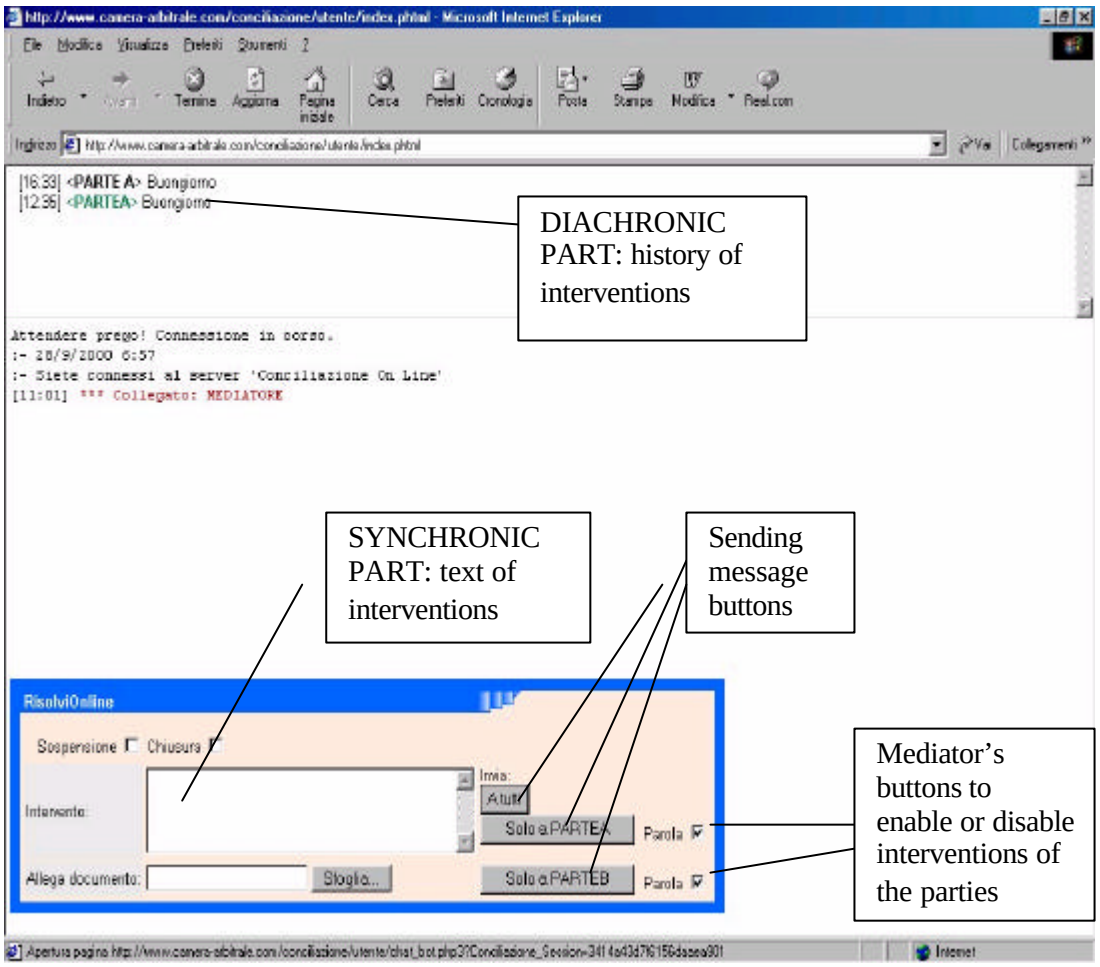
The claimant is required to briefly describe the dispute, according to its point of view, and to indicate the amount of the dispute. He may also adds attachments. Claimant should indicate his credit card number for payment.

On receipt of the form, *RisolviOnline* contacts - either by email or by telephone – the opposing party and seeks to obtain their consent to participate in online mediation.

If that party agrees, the mediator is appointed to the case; at this moment *RisolviOnline* officially communicates to the parties the day and time for the first virtual meeting. *RisolviOnline* also assignes to the parties the number of the procedure and a personal password to access the chatroom.

In the chatroom the mediator can then initiate the dialogue with the parties and try to settle the case. Email are used for all communication. The system is arranged in such a way that the parties and the mediator can choose the type of contact they intend to have: either with everybody (reply to all) or with one of the party or with the mediator only. As happens in traditional mediations the system allows the mediator to meet online separately with either party for a private discussion (caucus). If an agreement is reached, the mediator drafts the agreement and communicates it via email to the parties.

RisolviOnline: the chat

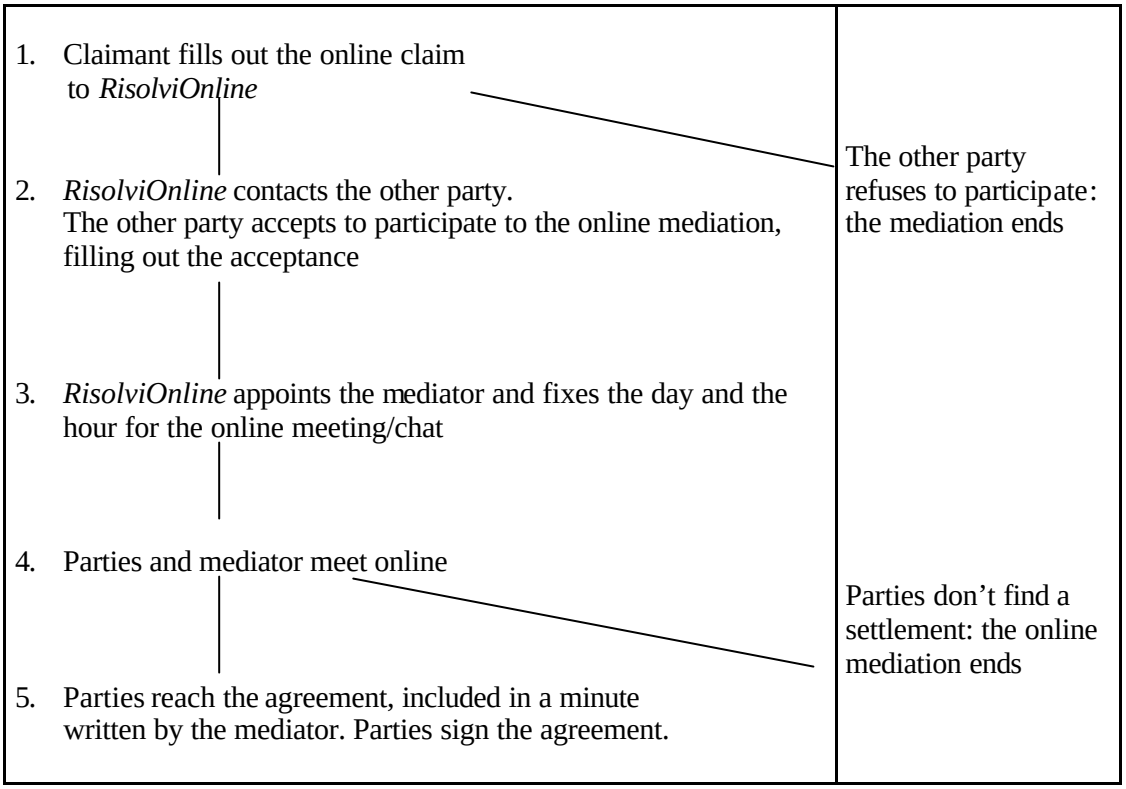


The basic idea, underlying ***RisolviOnline,*** is that mediation should encourage communication and direct exchange between the parties and that the mediator should just help them to discuss issues openly and find, through dialogue, a solution satisfactory to both. This idea is more in keeping with the traditional (non virtual) mediation: indeed, the traditional mediator has a range of psychological techniques to apply, which make possible an interpretation of the parties' non verbal language, attitudes, emotions and most immediate reactions.

RisolviOnline has those main aims:

- to offer a new mechanism for internet and ecommerce disputes;
- to verify whether ODR could improve traditional ADR methods or radically change the way to resolve disputes;
- to introduce rules and standards for the net economy, in order to avoid a lack of consumer and small companies protection.

RisolviOnline: flowchart



8. Statistics of 18 months (January 2002 up to June 2003)

One year after the start-up of *RisolviOnline* it is possible to take a first stock of the activity. Many requests for online mediation attempts have been submitted to *RisolviOnline*, but not all related to our scopes. That's probably because this innovative service may not be so clear and familiar to the Italian web surfers as its scopes, nature and modalities.

The cases

From January 2002 up to June 2003, *RisolviOnline* received 47 pertinent requests for mediation. Part of them (6.4%) are still going on. An agreement between the parties has been reached in about 15%, sometimes also thanks to a simple contact of *RisolviOnline* that backed a renewal of negotiation between the parties. In 2 cases the procedure did not lead to an agreement, in all the remaining 28 cases the request for online mediation have been refused by the counterpart. 15% of the claims have been transmitted to an offline mediation service or to other organization service (like Telecomunication Agency or Consumers Organizations)

The economic value

A significant number is that in the 74,2% of cases the economic value falls into the first bracket of our costs (until 500 Euro).

The parties

68,5% of the requests involve a consumer and a business (B2C), 22% two businesses (B2B). This hopefully means that e-commerce actors start to appreciate the benefits of these innovative tools, which, from one hand, have the same immediacy and informality as their economic activity, and from the other hand enforce the trust of their customers (which, in an Internet based relationship is a very hard aim to reach).

At the moment (August, 2003) the web site and nearly all the documents concerning *RisolviOnline* are written in Italian, but we are working to the English version for October, 2003.

The object

In the majority of the cases the matter of the dispute has been the buying of software and hardware for PC, a few requests concern Internet connections and online auctions.

Statistics

Successfully mediated cases	7	14.9 %
Unsuccessfully (non mediated)	2	4.2 %
Refusal of the other party	28	59.6 %
Claim transmitted to other mediation service or public organizations	7	14.9 %
Still opened cases	3	6.4%
Total	*47*	*100 %*

9. New odr phase and trends

It is clear that the Internet philosophy, which lends itself to rapid information, cannot fail to affect the ADR industry, which, quite independently of the Internet and indeed before it existed, made speed the fundamental basis for its development. ADR and Internet speak the same language.

We need to wait and see whether the development of online DR will revolutionize methods, instruments and objectives. Certainly online DR can be expected to grow vigorously. The impression we get at present is that mediation is much more suitable than arbitration when it comes to extension to the Internet. Arbitration, even today, needs a greater degree of formality: it requires more signed 'papers' , and more open discussion. Informality favours mediation.

The most likely guess is that the online mediation route will show itself best for the strictly commercial disputes, for purely monetary ones, for insurance disputes, for online users' problems in general, for banks' online trading services, for e-commerce, and for disputes over domain names. Lastly, one particularly suitable field would seem to be that of *web*

marketplaces or the web *'hubs'*, where buyers and sellers from a particular sector get in touch to exchange goods among themselves.

Those disputes which need more room for dialogue will certainly remain more firmly anchored in traditional offline mediation.

In summary, what we can see in online dispute resolution is a curious combination:

contradictory tendencies about the role of mediator: towards a diminishing, in some cases, of the mediator's role (the blind negotiated model); but also the discovery that the machine can help a mediator in mediating and reducing differences (the 'open' model, with expectations of software improvement in the future). The secret of successful online DR lies in combining these two trends;

a globalizing tendency: e-commerce disputes take place between parties who may be geographically very far apart, who have never met but have done business together, and who resolve their dispute without ever meeting in person. These parties do not even need to know the location of their 'court';

a localizing tendency*:* the parties find themselves in an environment (the Internet) which both creates the context for their business and finds the means of resolving any disputes. The Internet is the widest possible environment, but it is *an environment*, and, within an environment, the "group justice" of the participants prevails; you behave yourself and settle your disputes according to the environment's rules, or you cannot belong any more. Virtual marketplaces, from this point of view, are no more than the historical continuation of the old merchant courts.

I am well aware that it is only possible to give an indication or two: the web is a most variegated thing and even nowadays it is somewhat nebulous; trends can be perceived, but sure and absolute definition is not possible – not beyond a certain degree of precision. It more or less resembles the everyday world.

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