

The licence agreement in view of the new legislation in the Republic of Kosovo

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Abstract:

Industrial property rights such as patents, industrial example, the model, and know-how are, first and foremost, dedicated to the economic exploitation.

The inventor, who protects his invention by patent, and the holder of other rights of industrial property, has the possibility to use this right economically, in order to enable the legal circulation of the rights from the industrial property, which is realized through the instruments of the law of contract – licence agreement (a contract for the licence).

Law on Obligational Relationships adopted in Kosovo in 2012, which is an applicable law in Kosovo until the adoption of the new law, regulates issues related to the licence agreement.

Patent law, adopted by the Assembly of Kosovo, represents a basis, which will be enriched in the future from the business and judicial practice, and this legal vacuum, regarding the licence, will be completed.

These two laws represent the basic legal framework for the licence agreement and as such are treated in this paper.

Key words: licence contract, the law on obligational relationships, patents, industrial example.

INTRODUCTION

Issues in the paper the **Licence Agreement** are treated by different aspects of the theory, commercial and legal practice, and particularly in view of new legislation in Kosovo.

Through this approach, the intention is to; somehow, fulfil the knowledge on this contract (agreement).

This is important due to the fact that business and judicial practices in Kosovo are poor, whereas the role and importance of this contract to economic development in the post-war period is highly important.

The aspects of the licence agreement that are specific to this contract are treated, such as: the notion, types, rights and obligations of the licensee and the issuer of the licence and the licence agreement forms.

At the same time, these aspects have been enriched with cases from the legal practice of comparative law. In this regard, studies and papers conducted by national and international authors¹, on this issue, as well as the legal practice of the countries that have a long tradition in this area, are highly appreciated.

Patent Law adopted by the Assembly of Kosovo represents a basis, which will be enriched in the future from the business and judicial practice and will complete the legal vacuum regarding the licence.

1. NOTION AND LEGAL DEFINITION OF CONTRACT FOR LICENCE

The term licence derives from the Latin word **licentia**²³, which means permit, permission and is used in the field of industrial

¹ A special study has been conducted by the national author dr. Mehdi Hetemi

² Law No. 04/L-29 on Patent, Official Gazette, of the Kosovo Republic, no. 12/29 August 2011, Prishtine.

property, to name legal relationship that allows, respectively enables to third party economic exploitation of the exclusive rights of industrial property such as patents, the industrial example, i.e. knowledge and experience that the licence provider has.

The industrial property rights such as patents, the industrial example, model, and know-how, first and foremost, are dedicated to the economic exploitation, and according to the principles of economy (Economy of scale), the profit deriving from the circulation of industrial property rights is increased with the growth of the volume of economic exploitation of these rights.

An inventor who has protected his invention by the patent, i.e. holder of other rights of industrial ownership, will be able to utilize its right to full volume only if it comes to large enterprise.

Natural person, as the owner of such right, may be eligible to use it only economically depending on its willingness and ability to invest in production. At the same time, large and small manufacturers are not always able to realize modern and commercial inventions, or to refine their regular production.

In such circumstances of the development of production, modes of production and their specialization, was developed the legal circulation of industrial property rights, which is realized with the instruments of the binding right - licence agreement.⁴

The licence agreement is a **sui generis** contract, by which the licence provider is obliged to provide to the licensee, in whole or in part, the right to use the patent, while the licensee is obliged to use the subject of the licence on the contracted manner, and must pay the contracted compensation to the licence provider.

³ A. Verona Licence Agreement in Yugoslav, foreign and international law, Zagreb, 1981, page 1.

⁴ Prof. dr. Deša Milkotin -Tomič, Restricted conditions of the licence agreement of a patent: permitted and prohibited activities (professional article) Accounting and Finance no.1 January 1994, Zagreb.

After many fluctuations, legal theory in comparative law accepted such definition of the licence agreement.

The licence agreement, for a long period of time, was not regulated by specific provisions of contract right.

The national rights of many countries had not defined the contract on licence, and this aroused the curiosity of legal doctrine and case law to determine what legal norms can be applied to these contracts. In European countries, the judiciary had originally taken the position that the licence agreement be equal to one or a few types of denominated contracts.

The dominants, position that the licence agreement is most similar to the leasing contract and on the basis of this attitude, courts, regarding licences, courts applied the codified law on leasing.

Although this attitude had a powerful impact in legal doctrine, later, appeared attitudes that accepted some similarities between these two contracts, but showed the essential differences between the lease and licence.

Thus, Roubier warned that the licence provider has the freedom and opportunity, to simultaneously give to the third party, the non-exclusive licence, and in such case to retain himself the right to use the subject of the licence, however this situation was fully excluded in the lease contract.⁵

Under the influence of such argument, increasingly prevailed the opinion that the licence agreement is an atypical unnamed contract, which under certain conditions of the factual character may have evident similarities with one or other typical contract.

Today, this attitude is dominant in literature, and is supported by most contemporary authors who deal with the issue of industrial property.

⁵ Dr. Albert Verona, Licence Agreement in business practice, Zagreb, 1984, page 9.

In previous legislation, which was in force, namely in the LOR;⁶ the licence agreement is defined as a legal instrument by which the provider of the licence, as a holder of certain rights of industrial property - patent, trademark or industrial model, of goods and knowledge or know-how experience, with which it possesses, allows the licensee the economic exploitation of the right or knowledge mentioned above.

Now Kosovo has adopted the Law on Obligational Relationships, which stipulates that "Through a licence agreement the licence provider undertakes to wholly or partly cede to the licence acquirer the right to exploit a patented invention, technical know-how or experience, or a trademark, pattern or model, and the licence acquirer undertakes to make a specific payment for such".⁷

The new Law on Obligational Relationships requires that contracting parties when entering into the contract clearly specify the limits of this contract.

"The licence acquirer shall only acquire the exclusive right to exploit the subject of the licence through a licence agreement if such is expressly agreed (an exclusive licence), whereas other possibilities for exploiting the subject of the licence shall be retained by the licence provider."⁸

"If the licence agreement does not state the type of licence involved a non-exclusive licence shall be deemed to have been issued".⁹

According to this definition, the Law on Obligational Relationships accepts division made by the legal theory to exclusive and non-exclusive licence.

⁶ See article 686 of LMD Official Gazette of RSFJ 29/1978, 26.5.1978.

⁷ Law no. 04/L-077 on Obligational Relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, article 700 (<http://gzk.rks.gov.net/ActDetail.aspx?ActID=2828>)

⁸ Law no.04/L-077 on Obligational Relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, Article 703.1.

⁹ Law no. 04/L-077 on Obligational Relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, Article 703.2.

The Law on patents expressively states that the exclusive licence is a licence that is granted only to one licensee and deprives the owner of an industrial property object to use it, and deprives the same owner to licensing it to other persons. Whereas non-exclusive licence, is a licence that does not deprive the owner of an industrial property object to use it or licensing it to others.¹⁰

Exclusive licence may also be closed. Open exclusive licence means that the licence provider is obliged to ensure that in the same contracting territory will not give the same or similar licence to third parties, and that he himself will not make competition to the licensee.

In this case, the licensee is protected from the competition of third parties and from the licence provider, but only in the specific territory (contracted) and in relation to the patented product.

Closed exclusive licence implies full territorial protection, which is realized through a guarantee of the licence provider, given in the contract that he/she would not grant the licence in other territories outside the contracted territory.

The non-exclusive or simple licence is a licence that gives to the licensee the right of use within the limits of the contract, together with existing and future users of the licence.

Simple licence is such a licence where the licence provider reserves the right of personal use, and the right to grant other licences for the use of the same invention in the same territory and time.¹¹

In theory and practice of the comparative right, depending on set criteria, other types of licences' division have been made, but we consider that this is the most important

¹⁰ Law no. 04/L-29 on Patents, Official Gazette of the Kosovo Republic, no. 12/29, August 2011, Prishtine, Article 2.1.15,2.1.16.

¹¹M. Janjić, Licence agreements - in particular international licence agreements, Beograd, IOK, 1967, page 3-109.

division which should be kept in mind whenever concluding (signing) a licence agreement.

2. OBLIGATIONS OF THE LICENCE PROVIDER

Comparative law and legal theory, in today's business practice, are clearly defined obligations of the licence provider, and even by the Law on Obligational Relationships, the basic obligations of the licence provider are:

Submission of the licence subject to the licensee

This is the most important obligation for the recipient of the licence, and depending on the situation can be met in different ways.

According to the Law on Obligational Relationships, the licence provider is obliged to submit the licence subject to the winner of the licence within a specified period, and the licence provider is obliged, to submit to the winner of the licence, the technical documentation for the practical implementation of the licence subject.¹²

The previous law envisaged that if the subject of the licence is the protected invention, the obligation of the provider would not only be fulfilled with granting the permission for usage. With the submission of the required document on the patent, which is issued by the competent body, that contains a clear description of the patented invention, but the provider is also obliged to give to the licensee the necessary clarification and guidance of the intellectual character.¹³

Under the new law, the licence provider is obliged to submit to the winner of the licence all the guidelines and

¹² Law no. 04/L-077 on Obligational Relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, Article 705.1.2.

¹³ See articles 691, 692, LOR Official Gazette of the RSFJ 29/1978 , 26.5.1978.

notices that are necessary for successful implementation and utilization of the licence subject.¹⁴

In case, the licence provider did not use his invention himself or through other persons in industrial production, the provider will not have the possibility to give practical guidance to the licence recipient on the application of the licence, because he does not possess that knowledge. In such circumstances how shall the legal provisions be interpreted, under which the licence provider is obliged to submit technical documentation necessary for practical application of the licence?

There are different views on business practices and comparative law, and there are different attitudes regarding the issue of whether the licence provider is obliged to give to the licensee the entire know-how for the practical application of the licence if such liability is not provided by the contract. Some rights, laws and our law do not contain provisions on this issue.

We believe that in this matter we should find a better and more precise solution, that binds licence provider in providing all information and other important facts regarding the licence; and in particular to determine the obligation of the licence provider to give, to the licence recipient licence, the technical experience achieved with the application of the invention only if such an obligation is particularly contracted.

This solution would be more comprehensive and would not contain gaps that the existing law has on this matter.

The obligation of the licence provider to guarantee for legal flaws - protection from eviction

The obligation of the licence provider is to guarantee for legal flaws, by understanding that the licence provider guarantees that in the licensed right there is no lien (charge) and limits in

¹⁴ Law no. 04/L-077 on Obligational Relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012 Article 706.

the benefit of a third person.¹⁵ However, this should not be understood in the absolute sense, because the exclusive licence may cover only a fraction of the patented invention, i.e. only the certain way of usage. In such circumstances, the provider of an exclusive licence guarantees that he did not give that part of the invention to the third party, or did not give the manner of use that is the subject of the contract, namely to use the invention in a manner that is not subject to licence agreement.

Guarantee on legal flaws is given upon signing of the contract, after signing the contract and is valid during the duration of the licence agreement.

If the licence has had legal flaws, and licence provider has hidden them, and failed to inform the licensee, such as: the validity of the licence, the patented invention has been contested in front of the competent body for patent, that is sought the annulment or that is the subject of litigation. The licensee in this case has the right to demand cancellation (annulment) of the contract, remain in the contract, and seek to reduce compensation (payment) for a licence.¹⁶

In practice and comparative law practice the cancellation of the contract cannot be asked ex-tank i.e. you cannot require the return of compensation for the period from signing the contract until the final cancellation of the patent.

The American judiciary has concluded that, due to the cancellation of the right of licence, the licensee cannot require the return of the salaries for the licence prior to the cancellation (annulment) of the patent. Instead, he has the right to demand repayment of part of pay in the event that the agreed payment lump sum and payment are made in full.¹⁷

The French law retains the same approach, and analogously, the provisions of the previous LOR law should be

¹⁵ See article 694,1 of LOR , Official Gazette of RSFJ no. 29/1978 , 26.5.1978.

¹⁶ M. Janjić, Licence Agreement, Beograd, IOK 1967, page 39.

¹⁷ M. Janjić, Licence Agreement, Beograd, IOK 1967, page 42.

interpreted, stating that the licence provider is authorized to use the invention that is not included in the contract.¹⁸

Law on Obligational Relationships guarantees the licensee by specifying that the licence provider guarantees that the right of exploitation which is subject to contract to belong to him, that there is no burden, and that there is not limited in benefit of a third person.

This guarantee is particularly significant when it comes to exclusive licence, meaning that if the subject of the licence is an exclusive licence, the licence provider guarantees that the right of exploitation did not transfer it to another person, either wholly or partly.

The licence provider has a duty to preserve and protect the right of the licence transferred to the winner of the licence, from all claims of third parties.¹⁹

In commercial practice, it may happen that the licensee compensates in advance, the entire price that is eligible for the use of the licence, to the licence provider, and the patent to be revoked.

In this case, there will be a specific situation and the licensee is entitled to the return of payments **Pro rata temporis** for the period after the cancellation of the patent.

Business practices and comparative law, for this case have offered different solutions, but essentially agree that a licensee, under these circumstances, is entitled in principle to return the paid amounts.

However, the licence provider is not obliged to return the salaries received in its entirety, but only in proportion to the benefits (profits) that the licensee has had from its usage and those prior the annulment of the patent.

¹⁸ See article 695 LOR , Official Gazette of RSFJ no. 29/1978, 26.5.1978.

¹⁹ Law no .04/L-077 on obligational relationships, Official Gazette of Kosovo Republic, no. 16/19 June 2012, article 708.

Licence provider is obliged to prove that the licensee has gained profits from licence, and for that reason, the return of all paid salaries would be an injustice.

Guaranteeing the physical flaws of the licence

This responsibility of the licence provider to the licensee, that the licence is technically applicable, and that can be used, is accepted in comparative law, is in modern business practice, and is foreseen by the provisions of the previous LOR law.²⁰

The new law, the Law on Obligational Relationships contains this guarantee, so that the licence provider guarantees the licensee on the technical viability and usability of the licence subject.²¹

Licences would be technically applicable if the invention could be used.

According to general principles of contract right, the licence provider guarantees the licensee qualities of the licensed invention. In case it is proved that the subject of the licence is technically impossible, namely that there it doesn't have qualities guaranteed by a contract, the licensee may, analogous to the provisions of the Law on Obligational Relationships, terminate the contract and seek compensation for the damage.

The guarantee of the licence provider does not include profitable use of the licence, except if he has exclusively received such obligation.

The stand that the licence provider does not guarantee the licensee for placing goods on the market is well accepted in legal doctrine and legal practice in the comparative law.

Thus, the judicial practice of Bosnia states that the licensee is not entitled to terminate the payment of

²⁰ See article 683 of LOR Official Gazette of RSFJ 29/1978, 26.5.1978.

²¹ Law no. 04/L-077 on obligational relationships, Official gazette of the Kosovo Republic, no. 16/19 June 2012, article 707.

compensation to the licence provider, because the licensee has not placed on the market the patented products.²²

According to the Austrian judicial practice, the licence provider guarantees only for the possibility of using the licence. The court has determined that the licence provider does not guarantee for technical and economic usefulness of the patented invention.²³

In Croatian judicial practice, there is a case in which, the indictment of the licence provider is approved for the contracted payment against the United Labour Organization with whom the licence agreement was signed. The organization refused the payment of compensation on the grounds that according to its calculations the licence agreement was harmful. During the development of the dispute, the licensee claimed that the licence provider has not provided the technical documentation for the licensed production.

The court stated that the United Labour Organization,²⁴ the sued, the licensee, for years had produced the licensed production, and under this, the claim, for lack of technical documentation, cannot be granted.

The respondent has signed the contract based on his calculations, and has contracted the amount of compensation for the licence, and therefore under such condition, the question, for the damage from the contract, cannot be factual.²⁵

Obligation of the licence usage

The obligation of the licence usage is the fundamental right and purpose of the licensee, for which the contract was concluded.

²² Vrhovni Sud BiH , G-125/87.od 28.2.1988 god.

²³ Dr. Albert Verona: Licence Agreement in Yugoslavia, foreign and international law,Zagreb, 1981, page. 82.

²⁴ Organization of the United Labour was the form of production and economic enterprises that were in social ownership.

²⁵ Higher Commercial Court R. Croatia, 4.12.1979, informer no. 2753/54, dated on 26/30.VII.1980, page. 4.

The fundamental right of the licensee, which is the main purpose of signing the licence agreement, is the right to use the licence.²⁶ In the comparative theory and practice it is highly contentious and there is no unanimous approach on the issue whether the licensee has only the right or is also obliged to use the licence. Regarding this issue, the early German theory, and practice distinguishes the exclusive and non-exclusive licence. The exclusive licence obliges the licensee to use such a licence. Reasons and arguments, which defend such an approach, are many and vary, but the main ones are for example, those of the moral nature, which are based on the fact that the exclusive licence takes from the licence provider any possibility to use his invention himself.

In addition to these more or less moral reasons, it is important to emphasize that the non-utilization of the licence may result on the violent licence application. The licensee, who has a non-exclusive licence, is not required to use it because the licence provider can issue simultaneous non-exclusive licence, and if the licensee fails to use it, does not have the consequence that has the non-utilization of the exclusive licence.

Law on Obligational Relationships obliges the licensee to use the licence subject in the contracted manner, capacitance, and contracted margins.²⁷ Today, in contemporary right is stated that the licensee should use it as provided in the contract, especially when it comes to exclusive licence.

This stand is expressed in American and German judiciary, while in the French law, Roubier is committed for the usage of the licence by the licensee, even if the licence is not exclusively contracted. The judicial practice agrees with this opinion.²⁸

²⁶ Prof. Dr. Mehdi Hetemi , The right, no. 2, Prishtine, 1996, page 84.

²⁷ Law no.04/L-077 on obligational relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, article 710.

²⁸ M. Janjić, Licence Agreement, Beograd, IOK, 1967, v.c., page 45, 46.

Mathely supports the obligation of the usage of the licence regardless of whether it is exclusive or non-exclusive licence, on the grounds that the use of the contractual licence is a legal obligation.²⁹

We believe that the law should oblige the licensee to use it. This should be provided separately for cases when the licence is not used to the extent necessary, although such a possibility exists, and to prevent monopolistic behaviour which in contradiction with the public interest of the licensee.

The obligation of paying compensation for the licence

Having analyzed the provisions of the law, we see that the law gives the definition of the licence agreement and establishes the obligation of the licensee to pay the agreed compensation.

In addition, the law provides that the licensee is obliged to pay to the licence provider the agreed reward in the time and manner as set out in the contract.³⁰

The obligation of compensation (payment) for the licence in principle represents an essential obligation of the licensee if the contracting parties have not agreed otherwise.

Compensation for the licence in contemporary commercial practice is contracted in various forms as an award for the whole duration of the duration of the contract, lump sum, given for a certain periodicity in relation to the licensed production; or as per unit produced, in the portion of the selling price in the market of the licensed products and in other forms.

We believe that the business practices of the developed countries are very rich in terms of the manner and forms of the licence compensation, and it would be good to take this practice into account when signing the licence agreement by economic entities in Kosovo.

²⁹ M. Janjić, Licence Agreement - Beograd, IOK, 1967 v.c. page 47 .

³⁰ Law no. 04/L-077 on obligational relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, article 715.

With the provisions of law in Kosovo is foreseen the obligation of the licensee for the submission of periodic accounting, for periods provided by the contract for the volume of licensed production, namely the sale of these products, and if it is not otherwise provided, the recipient is obliged to submit an annual report every year.³¹

The form of the licence agreement (data ese rei form)

In business practice, the licence agreement is always concluded in the written form. In addition, the written form of the licence agreement under threat of nullity is foreseen by most of the laws in comparative law governing the rights of industrial property. Some laws require the legalization of the licence agreement. The written form of the licence agreement is required in more than 50 countries.³²

Even, the dispositions of the Kosovo Law on patents, provides that any contract which alters in favour of another person, the patent application or patent shall be in writing, otherwise it considered invalid.³³

The reason for this is clear: licence agreement, for a long term, regulates legal relations that are more complex and specific between the issuer and the recipient of the licence, which have as content issues of a technical, production, economic, and legal nature, and the manner of eventual dispute settlement is often contracted.

Legal safety of the contracting parties will be greater if they have planned in detail all-important issues, especially if the country's laws have not regulated the licence agreement with special norms.

³¹ Law no. 04/L-077 on obligational relationships, Official Gazette of the Kosovo Republic, no. 16/19 June 2012, article 716.

³² See the states' register in Verona, Licence agreement, Zagreb, 1981, . v.c., page 63.

³³ Law no. 04/L-29 on patents, Official Gazette of the Kosovo Republic, no. 12/29, August 2011, Prishtine, article 30.

Drafting a written licence agreement is of particular importance in the case of interpretation.

Especially if there are shortcomings on licence agreements, judicial practice will avoid them, by making the interpretation of the provisions contained in the licence agreement, and this will affect in the successful fulfilment of such contract.

Another important reason for concluding a written licence agreement is that this binding contract, as well as any other binding contract, creates a legal relationship between the contracting parties directly.

Recording in the registry, which is done only on the basis of a written document, protects the licensee from the machinations of the licence provider, such as e.g. granting of the licence to a third person in violation of obligations under the licence agreement.³⁴

If the earlier contract was recorded in a public book, no one can invoke non-acknowledgement for such contract. This is particularly important in the eventual dispute between the licence provider, licensee, and the third person, who in this situation cannot be called into **bona fide**, therefore, the licensee has special reasons for licence registration in the register of patents, also because his right is protected in particular from other actions of the licence provider. The law of Albania foresees the written form of licence agreement, as a condition for its validity.

Besides the written form of the contract, it also requires its registration in the Patent Office.³⁵

Regardless of whether the law requires the written form of the licence agreement or not, for safety reasons and in the interests of the contracting parties, the contract must always be concluded in a written form.

³⁴ Law no. 04/L-29 on patents, Official Gazette of the Kosovo Republic, no. 12/29, August 2011, Prishtine, Article 30

³⁵ See article 69, Industrial Property Law, no. 7819, 27.4.1994-Albania

The written form of the licence agreement is in the interest of the contracting parties, given the complex nature of this contract, jurisprudence, and very poor business practice in Kosovo.³⁶

Even the LOR foresees the written form as an essential condition of the licence agreement. We believe that despite the fact that the written form of the licence agreement is an essential element thereof, one must not be excessive with this element and should avoid the rigid formalism.

The judicial practice of Croatia has made a good step in this direction, which is expressed through the decision of the Supreme Court of Croatia in the dispute between the provider of the licence and the licensee, which has taken the position that under the law, the licence agreement has no legal force unless it is concluded in writing.

Necessarily, the written form has nothing to do with secondary issues, for example, provisions for the submission of technical documentation and other details that may be found even orally in the written licence agreement.

CONCLUSION

In national legal systems, and other countries, the licence agreement is a contract of the commercial right, shaped in the contracting practice and the judiciary of local courts and international arbitration.

The industrial property laws, that many states have enacted, contain special provisions for the conditions of the issuance of the licence.³⁷

³⁶ During my research on the Supreme Court, in the meeting and discussions with Halil Ilazi former, head of the civil division in this Court , said: "In this Court, till today, there was no case - dispute related to the licence . "

³⁷ See the states registry of professor dr. Deša Milkotin - Tomič , Restricted conditions of the licence agreement of a patent: permitted and prohibited activities (Professional paper) accounting and finance, No.1, January 1994, Zagreb.

The new provisions of the law on the content and structure are issued and denominated as technology transfer laws (Argentina), in some states are nominated also the laws of competition.

In addition to these provisions of the licence agreement, are provisions contained in the EEC Regulation, 2349, which applies within the European Union.

In Kosovo, we have a sui generis situation, as the provisions that were applicable in this area in the past, we encounter them in some laws³⁸ that are outdated today. Given this situation, efforts have been made to find a solution, therefore the law on patent³⁹, which regulates various aspects of the patent, has been adopted.

We believe that although there several articles on licence, this is insufficient, therefore it is up to the business, and the judicial practice to fill this legal vacuum in the future, by considering such practice of comparative law.

The need for consulting the business practice and the law of countries, which have a great tradition in this field, is necessary for the fact that, as professor Hetemi assesses⁴⁰, the number of licence agreements is growing enormously in the circulation of goods. This requires the knowledge of international circumstances, acts and bilateral and national conventions, especially in the developed countries, and the implementation of national law and regional conventions.

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