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A CRITICAL ANALYSIS ON INTERNATIONAL COMMERCIAL ARBITRATION, COURT INTERVENTION AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BANGLADESH

by Al Amin Rahman & Tasmiah Nuhiya Ahmed

I. INTRODUCTION

International commercial arbitration is increasingly utilized as a dispute resolution mechanism throughout the world. The primary reasons for its increase in popularity is the globalization of business and its perceived ability to be more adaptable, speedier, and confidential than ordinary lawsuits in court.¹ The most essential aspects of arbitration is that arbitral awards are final and binding, and awards are easily enforceable globally in countries that are signatories to the New York Convention of 1958 (“New York Convention”), while preserving confidentiality and neutrality.²

Both Bangladesh and India are parties to the New York Convention. Previously, the law relating to arbitration for each country was governed by the Arbitration Act of 1940 (the “1940 Act”).³ Under the 1940 Act, local courts had wider power to intervene in arbitrations; meanwhile, enforcement proceedings were slow and cumbersome, requiring a previous order from a district court to be valid.⁴ In addition, the 1940 Act only governed domestic matters, which posed a principal problem following the enactment of the New York Convention. Many provisions of the 1940

¹ Lucy Greenwood, *Sketch: The Rise, Fall and Rise of International Arbitration—A View from 2030*, 77 *ARB.* 4, 435-41 (2011).

² Jean-Claude Najar, *Inside Out: A User’s Perspective on Challenges in International Arbitration*, 25 *ARB. INT’L* 515 (2009) (quoting V.V. Veeder QC as saying, “There are too few national courts as accommodating to foreigners as international commercial arbitration in a neutral forum”, making arbitration “the only game in town”).

³ A.F.M. Maniruzzaman, *The New Law of International Commercial Arbitration in Bangladesh: A Comparative Perspective*, 14 *AM. REV. INT’L ARB.* 139(2003) (hereinafter “Maniruzzaman”).

⁴ See Dr. Kamal Hossain and Associates, *Arbitration: Bangladesh Chapter*, SAARC Arbitration Council, available at <http://sarco.org.pk/bangladesh.html>.



Act were inconsistent with the modern laws and concepts of international arbitration.¹

In light of common historical experience, India in 1996 enacted the Arbitration Act (amended in 2015).² In 2001, Bangladesh also enacted its Arbitration Act, which is based on United Nations Commission on International Trade Law (UNCITRAL) Model Law (the “Arbitration Act 2001” or the “Act”).³ The Arbitration Act 2001 governs domestic and international proceedings, and it has repealed the Arbitration (Protocol and Convention) Act of 1937 as well as the 1940 Act.⁴

The enactment of the Arbitration Act 2001 has opened Bangladesh’s doors to international commercial arbitration, modernizing arbitration law in Bangladesh and making it an attractive place for the international commerce and investment.⁵ However, enforcement of foreign arbitral awards still faces some difficulties in the country due to unnecessary court interference. This difficulty is greater if a foreign party seeks enforcement against a local party.⁶

This article will discuss the Arbitration Act 2001 with reference to, where relevant to (1) the Model Law (as revised 2006 and 2010); (2) the Singapore International Arbitration Act of 1994 (as amended in 2012) (“Singapore International Arbitration Act 1994”); and (3) the Indian Arbitration Act of 1996 (as amended in 2015) (“Indian Arbitration Act 1996”). The purpose of this study is to examine the Arbitration Act 2001 with a special focus on court intervention and the enforcement of foreign arbitral awards in Bangladesh, along with its counterparts India and Singapore. It endeavors to serve as a possible source of inspiration to bring some changes to the Act to keep pace with the recent trends and modernization of international

¹ See Commentary on the website of SAARC Arbitration Council, Bangladesh, available at <http://sarco-sec.org/bangladesh>.

² Loukas Mistelis, *Seat of Arbitration and Indian Arbitration Law*, 4 INDIAN J. OF ARB. L. 2, 1 (2016).

³ Maniruzzaman, *supra* note 4.

⁴ *Id.*

⁵ *Id.*

⁶ Norton Rose Group, “Arbitration in Asia Pacific: Bangladesh”, 7 (2010), available at <http://www.idacindia.org/pdf/bangladesh-26261.pdf>.



arbitration law.

II. ARBITRATION ACT 2001

The Arbitration Act 2001 provides flexibility in the following areas: the procedure for appointing⁷ and challenging the appointment of an arbitrator;⁸ the determination of the rules of procedure to be adopted in arbitral proceedings; the competence of an arbitral tribunal to rule on its jurisdiction;⁹ and general provisions on the setting aside¹⁰ and enforcement of arbitral awards.¹¹

It further includes a mandatory stay of court proceedings¹² and empowers the court to grant interim measures¹³ in various forms, and recognize and enforce foreign arbitral awards,¹⁴ and supplies the grounds for refusing recognition or execution of such awards.¹⁵

A. Scope.

The Arbitration Act 2001 is applicable to both domestic and international

⁷ Arbitration Act 2001, art. 12: “Appointment of arbitrators. (1) Subject to the provisions of this Act, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. (2) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.”

⁸ *Id.* at arts. 13-14.

⁹ *Id.* at art. 17: “Competence of arbitration tribunal to rule on its own jurisdiction. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely (a) whether there is existence of a valid arbitration agreement; (b) whether the Arbitral Tribunal is properly constituted; (c) whether the arbitration agreement is against the public policy; (d) whether the arbitration agreement is incapable of being performed; and (e) whether the matters have been submitted to arbitration in accordance with the arbitration agreement.”

¹⁰ *Id.* at arts. 42-43.

¹¹ *Id.* at art. 44.

¹² *Id.* at art. 10(2): “Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration.”

¹³ *Id.* at art. 7A.

¹⁴ *Id.* at art. 45.

¹⁵ *Id.* at art. 46.



commercial arbitration.¹⁶ However, Section 3(1)¹⁷ limits its scope to instances in which the seat of the arbitration is in Bangladesh. On the other hand, several sections still apply even if the seat of the arbitration is outside of the country.¹⁸ Bangladeshi courts sometime render controversial opinions regarding the scope of the Act. The controversy seems to have originated from the meaning and use of Section 3 of the Act. In 2012, the High Court Division rendered contradictory decisions in two famous cases. In *HRC Shipping Ltd v MV X-Press Manaslu and Others*,¹⁹ the High Court of Bangladesh stayed a domestic suit in favour of an arbitration conducted outside of Bangladesh, while in *STX Corporation Ltd v Meghna Group of Industries Limited and Others*,²⁰ it refused to grant an interim remedy when the arbitration was seated abroad.²¹

By comparison, the Singapore International Arbitration Act 1994 was amended in 2012 to align its provisions related to this point with the revisions made to the Model Law in 2006²² and 2010. At the same time, India also amended the Indian Arbitration

¹⁶ *Id.* at art. 2(c): “International Commercial Arbitration’ means an Arbitration relating to disputes arising out of legal ‘relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is: (i) ‘an individual who is a national of or habitually resident in, any country other than Bangladesh; or (ii) a body corporate which is incorporated in any country other than Bangladesh; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or (iv) the Government of a foreign country[.]”

¹⁷ *Id.*, art. 3(1): “This Act shall apply where the place of Arbitration is in Bangladesh.”

¹⁸ *Id.*, art. 3(2): “Notwithstanding anything contained in sub-section (1) of this section, the provisions of sections 45, 46, and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh.”

¹⁹ This case has been recently reported in 1 LCLR [2012], Vol. 2, 207–22.

²⁰ Arbitration Application No. 16 of 2009 [unreported]. This case has been recently reported in 1 LCLR [2012] Vol. 2, 159–78.

²¹ Sameer Sattar, *Asian Pacific Arbitration Review on Bangladesh, Country Chapter (2016)*, available at <http://globalarbitrationreview.com/reviews/71/sections/238/chapters/2878/bangladesh/> (hereinafter *Sattar*).

²² As part of the revisions, the original Article 17 of the Model Law was replaced by a new chapter on interim measures. This contains a new Article 17(J), which provides: “A court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation



Act 1996 in 2015 based on the 2010 Model Law. However, these issues remain in Bangladesh as it is the sole responsibility of the Bangladeshi Parliament to amend the Arbitration Act 2001 to remove the ambiguity and confusion created by these court decisions, which has not been done yet.

B. *Court Intervention.*

Generally, the Arbitration Act 2001 dictates that courts shall take a minimal interference approach in favor of arbitration proceedings, which is clearly defined in Section 7. Article 5 of the 2006 Model Law sets out a similar principle.²³

Section 7 of the Act restricts the role of the courts in instances where one of the parties involved in arbitration proceedings triggers court proceedings. In the case of *Bangladesh Jute Mills Corporation v Maico Jute and Bag Corporation & Others*,²⁴ the court held that it could not try the case, which was already pending before an arbitral tribunal. In addition, Section 7A of the Act empowers district courts to make interim orders in certain matters, such as, *inter alia*, interim injunctions to restrain the transfer of property which would likely frustrate enforcement of an arbitration award.

On the other hand, Section 10 of the Act complements Section 7, and is closely modelled from Article II(3) of the New York Convention. Section 10 ensures that no Bangladeshi court shall interfere with a matter that is subject to an arbitration agreement between contending parties. If a party to an arbitration agreement commences litigation in a Bangladeshi court and the other party objects before the filing of its statement of defense, then the Bangladeshi court shall,²⁵ unless convinced that the agreement is void, inoperative or incapable of determination by arbitration, stay the proceedings and refer the parties to arbitration.

to proceedings in court.”

²³ UNCITRAL Model Law, art. 5 (“In matters governed by this Law, no court shall intervene except where so provided in this Law.”).

²⁴ 22 BLD (HCD) (2002) 320.

²⁵ It is important to note here that the use of the term “shall” implies that the local court is under a positive obligation to refer the parties to arbitration and not merely on exercise of its discretion, albeit to be exercised sparingly and for the reasons mentioned in the legislation.



Few decisions of the Bangladeshi courts guarantee that a local court will apply such principles strictly,²⁶ even though the Arbitration Act 2001 provides the limited areas where a court may intervene during an arbitration. *Saipem v. Bangladesh*²⁷ is the key example of interference by national courts in an international commercial arbitration, and which ultimately led to a successful claim of expropriation against Bangladesh. This ICSID award held the State responsible for expropriation based on local judicial interference in arbitration proceedings.²⁸

C. Interim Measures.

The Act provides in more detail the power of the arbitral tribunal to order interim measures²⁹ than the Model Law³⁰ and Indian Arbitration Act 1996.³¹ In fact, the Model Law and the Indian Arbitration Act 1996 contain identical provisions. No doubt, like the Indian Act 1996, the Bangladesh Arbitration Act 2001 adopts the Model Law's provision on the matter; however, it also includes some added features, such as the requirement to notify the other parties involved and apply to a court for the enforcement of an arbitral tribunal's interim orders.³² In all the aforementioned frameworks, party autonomy is limited in the matter of interim measures, in that the parties can bypass the arbitral tribunal and have recourse directly to the court for interim measures. An arbitral tribunal has the power to issue an interim order,³³ but

²⁶ For example, in the case of *Civil Engineering Company v. Mahkuta Technology & Others*, 14 BLT (HCD) (2006) 103, it was held that the court shall not interfere with a matter covered by an arbitration agreement, and those who agree to settle their disputes through arbitration must be encouraged to follow that route. However, a limitation to this provision, as illustrated by *Seafarers Insurance Co v. Province of East Pakistan*, 20 DLR (SC) (1968) 225, 228, is that the party contending the suit must raise its objection with respect to the arbitration before the filing of the statement of defense.

²⁷ *Saipem Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award (June 20, 2009).

²⁸ See Sameer Sattar, *National Courts and International Arbitration: A Double-edged Sword?*, 27(1) J. INT'L ARB. 51, 72 (2010).

²⁹ Arbitration Act 2001, art. 21.

³⁰ UNCITRAL Model Law, art. 17.

³¹ The Indian Arbitration Act, art. 17.

³² Arbitration Act 2001, art. 21(3)-(4).

³³ *Id.* at art. 21: "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral



because it is not directly considered as a decree or court order,³⁴ the prevailing party should apply for the enforcement of that interim order.³⁵

The Model Law and original version of the Indian Arbitration Act 1996 discuss the same procedure regarding the jurisdiction of the arbitral tribunal on interim measures. However, following the 2015 amendment of the Indian Arbitration Act 1996, any order passed by the arbitral tribunal under Section 17 will be deemed to be an order of the court for all purposes and be enforceable under the Code of Civil Procedure 1908 (CPC).

The question may arise, however, whether an arbitral tribunal sitting abroad may order an interim measure that is enforceable in Bangladeshi courts. Section 3(1) of the Arbitration Act 2001 applies where the place of arbitration is in Bangladesh.³⁶ Interim measures ordered by an arbitral tribunal are not applicable, however, if the place of arbitration happens to be outside of Bangladesh.³⁷ In India, the situation was the same, but following the 2015 amendment of the Indian Arbitration Act 1996, the scope was broadened and the national barrier distinction was removed. Bangladesh, on the other hand, is still struggling with the old regime. National courts seem to be very confused regarding the provisions of the Arbitration Act 2001.

The decision of the Bangladeshi High Court in *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited*³⁸ seems to follow the approach of *STX Corporation Ltd v. Meghna Group of Industries Limited and others*³⁹ in refusing to grant interim relief to an arbitration seated outside of Bangladesh. This reflects a tendency on the part of Bangladeshi courts to interpret Section 3 of the Arbitration

tribunal may consider necessary in respect of the subject matter of the dispute, and no appeal shall lie against this order.”

³⁴ See Maniruzzaman, *supra* note 4.

³⁵ Bangladesh Arbitration Act 2001, Art. 21(2); UNCITRAL Model Law, art. 17.

³⁶ *Id.* at art. 3(1).

³⁷ *Id.* at art. 21.

³⁸ Arbitration Application No. 11 of 2010 [unreported].

³⁹ Arbitration Application No. 16 of 2009 [unreported]. This case has been recently reported in 1 LCLR [2012] Vol. 2, 159–178.



Act 2001 restrictively.

In relation to interim remedy issues, Bangladesh could take valuable lessons from a developed arbitral jurisdiction like Singapore. In *Multi-Code Electronics Industries v Toh Chun Toh and Others*,⁴⁰ the Singaporean High Court took a less restrictive approach on that issue, deciding that under its general statutory power, it could grant injunctions in support of foreign-seated arbitral proceedings.

D. *Time Limit for Arbitral Award and Fast Track Procedure.*

Fast track arbitration is a moderately recent invention in the continuous mission for quicker, less expensive and more productive dispute resolution mechanisms.⁴¹ This is because the determination of disputes in arbitration using conventional litigation techniques may not work as efficiently as was hoped. However, fast track arbitration is not a distinct kind of arbitration.⁴² Its implementation is to expedite arbitration procedures. The focal point of fast track arbitration is strict time limits. The parties are required to complete certain procedures, e.g., appointment of arbitrators, within an agreed timeframe. Following their appointment, the key boundary for arbitrators is a time limit to issue an award.⁴³

However, there is no such kind of process in the Arbitration Act 2001. Only Section 37 specially authorizes the chair of an arbitral tribunal to render its decision.⁴⁴ Section 29 of the original version of the Indian Arbitration Act 1996 states the same provision regarding decision-making by a panel of arbitrators. However, the 2015

⁴⁰ [2009] 1 SLR 1000.

⁴¹ Alan Redfern, *Stemming the Tide of Judicialization in International Arbitration*, 2(5) *WORLD ARB. & MED. REV.* 21 (2008).

⁴² Irene Welser & Christian Klausegger, *Fast Track Arbitration: Just fast or something different?*, *AUSTRIAN ARB. Y.B.* 259, 260 (Klausegger et al. eds., 2009).

⁴³ Mirèze. Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?*, *PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS, THE (HRSG.), Arbitration in Air, Space and Telecommunications Law*, 253 (Den Haag, 2002).

⁴⁴ Arbitration Act 2001, at art. 37: “(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. (2) Notwithstanding anything contained in sub-section (1), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the Chairman of the arbitral tribunal.”



amendment to the Act included two new Sections at 29A and 29B.

Under Section 29A, the arbitral award shall be made within a period of 12 months from the date the arbitral tribunal enters upon reference; however, upon mutual consent of the parties, the time may be extended for a further period not exceeding six months. If the arbitral tribunal fails to render the award within the stipulated time, its mandate shall be terminated, unless there are good reasons for delay. If the tribunal fails to show sufficient grounds for delay, the arbitrators' fees will be deducted by an amount not exceeding five percent for each month of such delay.⁴⁵ Section 29B deals with fast track procedures where the parties at any stage of an arbitration may apply for fast track proceedings.⁴⁶ Under this approach, the tribunal shall decide the dispute only on the basis of written pleadings, documents and submissions. No oral hearing shall be conducted unless requested by both parties, and the award shall be made within a period of six months, which may be extended following the mutual consent of the parties and not exceeding for a further period of six months. If the arbitrators fail to provide an award within the required timeframe, however, the sanction procedures are the same as Section 29A.

E. *Enforcement of Foreign Arbitral Awards*

Section 45 of the Arbitration Act 2001 embodies Article III of the New York Convention in that it makes a foreign arbitral award binding for all purposes on parties to the arbitration agreement, and that such an award may be executed by the local court as if it were a decree of the local court. Section 45(b) provides that a foreign arbitral award shall be enforceable on the application by any party in accordance with the Code of Civil Procedure in the same manner as if it were a decree of the court. This approach was confirmed in the case of *Canada Shipping and Trading S v. TT Katikaayu and another*⁴⁷ (following Section 45(b)).⁴⁸

Thus, there is no requirement to obtain separate permission from a local court for

⁴⁵ *Id.* at art. 29A.

⁴⁶ *Id.* at art. 29B.

⁴⁷ 30 CLC (HCD) (2001) (*Admiralty Jurisdiction*).

⁴⁸ Arbitration Act 2001, art 45(b).



enforcement. The court, however, may refuse to execute a foreign arbitral award for certain specified reasons. Foreign arbitral awards are defined as awards made pursuant to an arbitration agreement in the territory of any state other than Bangladesh, except those states that are specified by the Government of Bangladesh through a gazette notification.⁴⁹ Therefore, as the above provisions consider the territoriality of the arbitral award rather than the *lex arbitri* under which the award was rendered, the scope of the Arbitration Act 2001 is much narrower than either the Model Law or the New York Convention.⁵⁰

Furthermore, the provision that the Government of Bangladesh will be able to specifically exclude foreign arbitral awards delivered in certain states means that courts will be able to disrupt the enforcement of such awards by finding that the arbitration has taken place within the territory of a specified state.⁵¹ If a member state of the New York Convention is so specified, that will run contrary to the spirit of the Convention.⁵²

However, under the Indian Arbitration Act 1996, foreign awards from signatory countries of the New York and Geneva Conventions will be enforced directly as if they were a court decree, while preserving the power of a court to refuse execution if an award contravenes the public policy of India.⁵³

In 2015, however, India amended the Indian Arbitration Act 1996, introducing two identical explanations to Section 48(2)⁵⁴ and Section 57(1)⁵⁵ in an attempt to explain

⁴⁹ *Id.* at art. 47.

⁵⁰ Sattar, *supra* note 26.

⁵¹ Article 47 of the Bangladesh Arbitration Act 2001 stays the power of the Government to declare a specified state. For the purposes of this Chapter, the Government may, by notification in the official Gazette, declare a state as a specified state.

⁵² Sattar, *supra* note 26.

⁵³ See Indian Arbitration Act, arts. 48 and 57.

⁵⁴ *Id.*, Sub-section 2(b): “Enforcement of an arbitral award may also be refused if the court finds that ... (b) the enforcement of the award would be contrary to the public policy of India.”

⁵⁵ *Id.*, Sub-section 1(e): “the enforcement of the award is not contrary to the public policy or the law of India.”



the meaning of “public policy of India.”⁵⁶

On the other hand, enforcement of international arbitral awards in Singapore are governed by the Singapore International Arbitration Act 1994, which was amended in 2012 in line with UNCITRAL Model Law on International Commercial Arbitration as revised in 2010 and gives effect to the New York Convention.

International arbitral awards—whether made in or outside Singapore—may, by leave of the High Court of Singapore, be enforced in the same manner as a High Court judgment or an order to the same effect.⁵⁷ However, the award will be refused if Section 31 of the Singapore International Arbitration Act 1994 is applicable. However, the Singapore International Arbitration Act 1994 does not define public policy as India has done in its law. At the same time, Singapore has recognized and incorporated⁵⁸ the UNCITRAL Model Law directly into the Singapore International Arbitration Act 1994, which certainly has a positive effect to enforce foreign arbitral awards without much hindrance by local courts.

On the other hand, the issue of enforcement of foreign awards in Bangladesh is a crucial problem. It needs to be addressed and resolved quickly by amending the Arbitration Act 2001 to mirror the Singapore International Arbitration Act 1994 (as amended in 2012), Indian Arbitration Act 1996 (as amended in 2015) and Model Law (as revised in 2010).

III. CONCLUSION

International business and investment in Bangladesh are increasing, and the

⁵⁶ The explanations seek to narrow the scope of the definition of “public policy” which, to date, has been interpreted so broadly by the judiciary that almost all awards are challenged based on a violation of the public policy of India. Explanation 1 clarifies that an award conflicts with the public policy of India only in the following circumstances: “(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.” Explanation 2 attempts to clarify that when determining whether there has been a contravention of public policy, the courts will not review the case on the merits of the dispute. While some attempt has been made to explain what public policy is, the explanations may not be helpful as they are loosely worded and open to interpretation.

⁵⁷ Singapore Arbitration Act 1994, as amended, art. 19.

⁵⁸ *Id.* at art. 3.



enactment of the Arbitration Act 2001 was a first initiative to encourage that growth. Now, however, it is high time to amend the Act to include some key provisions.

It was expected that the Act would bring about important changes in some areas of arbitration law in Bangladesh, e.g., scope, court interference, clear judicial interpretation, time limits of arbitral tribunals and fast track procedure, as well as enforcement of foreign arbitral awards as provided in the New York Convention (to which Bangladesh is a party).

To be clear, however, there is no point in ratifying the New York Convention unless the concerned State institutions at the highest level are willing to honor its international obligations and implement and follow the Convention's provisions appropriately. An important way to address this underlying issue is to address the related problems of advanced education and training. No doubt more frequent or regular engagement with these issues and law by the judiciary would be helpful. Moreover, it is important to remove ambiguity arising out of different interpretations of arbitration law, and ensure that this dispute resolution mechanism is dynamic, efficient and acceptable to stakeholders concerning choice of law and foreign arbitral awards.

It is imperative to amend the Arbitration Act 2001 to make these important changes and continue to modernize Bangladesh's arbitration law, which will be welcomed by parties who may be involved in foreign-seated international commercial arbitrations. Like India, Bangladesh should continue to encourage foreign investments and update its arbitration law to provide parties access to local courts for interim relief against local parties regarding assets located within the country and to directly approach the High Court for interim protection.



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