UK schemes, plans and international recognition

Gerard McCormack

Abstract:

This paper examines the international recognition of UK schemes of arrangement and restructuring plans under the Companies Act 2006, particularly in the post-Brexit environment. It explores the statutory framework and practical application of UK court jurisdiction in sanctioning these restructuring mechanisms, emphasizing the 'sufficient connection' test that enables foreign companies to access UK proceedings despite not having their centre of main interests in the UK. The analysis highlights how schemes of arrangement, once limited by the Insolvency Regulation's scope, now operate as a flexible and stigma-free alternative to formal insolvency, and it evaluates the potential for cross-border recognition under instruments such as the UNCITRAL Model Law, Rome I Regulation, and the Lugano Convention. The paper further considers the challenges posed by jurisdictional differences and the impact on creditor rights in a global restructuring landscape.

Keywords: UK schemes of arrangement; restructuring plans; Companies Act 2006; international recognition; post-Brexit; cross-border insolvency; sufficient connection test; UNCITRAL Model Law; Rome I Regulation; Lugano Convention.

A. Introduction

This paper addresses briefly schemes of arrangement and restructuring plans under the UK Companies Act and their international recognition in the post-Brexit world. Section 221 Companies Act 2006 gives the English courts jurisdiction to wind up companies not registered under the Companies Act. But one should distinguish between the existence of the statutory jurisdiction and the actual exercise of that jurisdiction in a particular case. The courts have jurisdiction to sanction a scheme of arrangement under Part 26 Companies Act 2006 in relation to a foreign registered company. That theoretical jurisdiction is co-existence with the power to wind up a foreign registered company under s 221. There are now, however, well-developed principles that control and confine the exercise of that jurisdiction including the company having a 'sufficient connection' with the UK and that sanctioning the scheme will provide benefits to stakeholders in the company and achieve appropriate recognition overseas.

The same general principles have been held to apply also to the new 'super scheme' or restructuring plan procedure under Part 26A of the Companies Act 2006.

B. Schemes of arrangement

While once considered a somewhat clumsy mechanism,[1] schemes of arrangement allow certain corporate problems such as excessive levels of debt to be addressed without necessarily tending to all the corporate ills. Schemes of arrangement contributed to the UK becoming the restructuring capital of Europe with a number financially stretched foreign companies using the UK procedure to restructure their debts.[2]

The fact that schemes of arrangement were not listed in Annex A means that they were not entitled to the benefits of automatic EU-wide recognition under the Insolvency Regulation, but this was offset against the fact that the ability of the English courts to sanction schemes was not hampered by the jurisdictional conditions of the Regulation. In particular, there was no need to establish that the 'centre of main interests' (COMI) of the company was in the UK. It may be however, that an order of a court sanctioning ('approving') a scheme of arrangement is regarded as a court judgement for the purpose of the Jurisdiction and Judgments (Brussels 1) Regulation and is entitled to Europe-wide recognition on that basis. The courts could sanction a scheme if a foreign company was deemed to have a 'sufficient connection' with the UK, even though its COMI may not have been in the

1 Schemes were described in the Joint DTI/Treasury Review of Company Rescue and Business Reconstructions Mechanisms (London, TSO, 2000) at para 43 and the 1982 Cork Committee Report on Insolvency Law and Practice (1982, Cmnd 8558) Ch 7 as slow and cumbersome.

2 See Re Seat Pagine Gialle SpA [2012] EWHC 3686 (Ch); Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746 (Ch); Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus LR 1245 and see generally Ho JIBLR 434; J Payne, 14 European Business Organization Law Review, 563.

UK. The 'sufficient connection' test was established in cases like *Re Drax Holdings Ltd*[3] and in *Re Rodenstock GmbH*,[4] where a sufficient connection was deemed to exist by virtue of the fact that the company's credit facilities contained English choice of law and jurisdiction clauses and also by reason of expert evidence that the relevant foreign courts would recognise the scheme.

Schemes of arrangement enable a company to enter into a compromise or arrangement with any class of creditors, or members with some element of 'give and take' on both sides. In this way, the capital structure of an ailing company may be rearranged. Schemes of arrangement can also be approved in cases where there is no insolvency (e.g. mergers).

The company makes a proposal to rearrange its affairs and makes a proposal to the court to convene meetings of classes of creditors or members whose rights are proposed to be rearranged. The court will designate the appropriate classes and order class meetings to be convened. The class meetings are held and the relevant class consent is deemed to have been given if approval is forthcoming from a majority in number and 75 % of members or creditors or creditors within the relevant class. The scheme proposal becomes binding on the dissenting minority within the class whose rights are said to be 'crammed down' if it is approved by the court at a final sanction hearing.

The existing UK scheme of arrangement has been highly praised and, indeed, spoken of as a model for the 'early stage' restructuring procedures envisaged by the EU's recent Restructuring Directive – Directive 2019/1023.[5] It was suggested that a procedure modelled on the UK scheme would make restructuring 'procedures less cumbersome, less costly and speedier than they are currently in some Member States.'[6] Certainly, the procedure does not have any bankruptcy or insolvency stigma since it is a procedure based on company law rather than insolvency law.

The UK scheme can be used as a powerful instrument for debt restructuring, the court said in *Re Van Gansewinkel Groep BV*.[7]

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3 Re Drax Holdings [2004] 1 WLR 1049.

4 Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus LR 1245; See also Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746 (Ch); Re Seat Pagine Gialle SpA [2012] EWHC 3686 (Ch); Re Magyar Telecom BV [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418; Re Dtek Finance BV [2015] EWHC 1164 (Ch).

5 On the Directive see McCormack, passim.

6 See SWD (2014) 61, p. 38.

7 Re Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch).

The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.

The scheme involves 'debtor-in-possession'. The company management can prepare a restructuring plan and submit it to creditors, though obviously in practice there is likely to be a high degree of interaction and consultation with creditors in formulating the detailed terms of the plan and making sure that it is likely to meet with creditor approval.

At the final, sanction, stage, the scheme coming before the court for approval. The court must be satisfied that the scheme proposed is a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it.[8]

The scheme, however, lacks the facility of cross-class creditor cram-down. While dissenting creditors within a class may be 'crammed-down', there is no scope for dissenting classes of creditors in their entirety to be 'crammed-down'. This fact makes the composition of creditor classes very important and leads to more complicated strategies.

It has been held however, that it is only necessary to get the consent of those with an economic interest in the proposed restructuring. Schemes might therefore be used to 'squeeze out' creditors who are 'out of the money' as in *Re MyTravel plc*[9] and *Re IMO Carwash*.[10] In broad essence, company assets are transferred to a 'newco', together with some liabilities of creditors who are 'in the money', but 'out of the money' creditors are left stranded with claims against the 'oldco' which no longer has any assets. Such schemes are generally referred to as 'prepack' or 'business transfer' schemes. It may be however, that even more complicated mechanisms are

8 See Anglo-Continental Supply Co Ltd [1922] 2 Ch 723, 736.

9 See Re My Travel Group plc 2004 EWHC 2741 (Ch); Re Tea Corp Ltd 1904 1 Ch 12. For a general discussion, see Seah, International Insolvency Review 2011, 91 (161).

10 This case is also referred to as Re Bluebrook [2009] EWHC 2114 (Ch).

needed if the junior creditors have bargained for rights of a proprietary nature in a contractually agreed 'security package'.

Business transfer schemes may be complex and they also give rise to questions of fairness and procedural propriety.[11] The courts consider the question of valuation at the sanction stage but there may be difficult questions about where in the debt structure the value 'breaks', how one assesses value and what is the relevant comparator.

C. Restructuring plans

Since Brexit, the UK is no longer an EU Member State and was not obliged to implement the EU Restructuring Directive. Nevertheless, in line with the Restructuring Directive and also in line with the US Chapter 11[12], the Corporate Insolvency and Governance Act 2020 made certain changes to restructuring law and practice in the UK.[13] In particular, the Act introduced a new Part 26A in the UK Companies Act with provision for restructuring plans that add additional features to the previously existing schemes of arrangement procedure.[14] The 2020 Act makes provision for cross class cram down so long as certain conditions are satisfied.

Under a restructuring plan, a company is enabled to bind dissenting classes of creditors or shareholders, provided at least one class approves the plan by at least 75 % by value of those voting. A scheme of arrangement under Part 26 however, has to be approved by each class. Moreover, a

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11 See generally Crystal/Mokal, International Corporate Rescue 2006, 63 (123); Segal, Insolvency Intelligence 2007, 49.

12 For a general discussion of the issues see Payne, Law Quarterly Review 2014, 282.

13 For a comprehensive analysis see INSOL Special Report by McCormack, Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19 (London, INSOL International, October 2020).

14 UK Insolvency Service, A Review of the Corporate Insolvency Framework, p. 23, mn.9.9 states: The cram-down of a rescue plan onto 'out of the money' creditors is currently possible in the UK only through a costly mix of using a scheme of arrangement and an administration. The Government believes that developing a more sophisticated restructuring process with the ability to 'cram-down' may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern.<https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://assets.publishing.service.gov.uk/media/5a816394ed915d74e33fdef9/A_Review_of_the_Corporate_Insolvency_Framework.pdf&ved=2ahUKEwizna2ijaWKAxUPR_EDHX-CHNgQFnoECBIQAQ&usg=AOvVaw0Uzi3wz12uU8muQai6YbMo> (last accessed 02.07.2024).

scheme, unlike a restructuring plan, contains a 'numerosity' i.e. a majority in number of persons within each relevant class, requirement.

Like with a scheme, there are, typically, two hearings in relation to a restructuring plan. At the convening hearing, the court principally considers whether the proposed classes have been properly constituted and meetings of those classes ought to be convened to vote. There is a second (sanctioning) hearing where the court hears the result of the votes and has to decide whether to give its sanction.

In a plan, any creditor or member whose rights are affected by the plan must be permitted to participate in the process, but those who have no genuine economic interest in the company may be excluded. Affected members and creditors must be given sufficient information to be able to vote. A restructuring plan (or scheme) sanctioned by the court is binding on all creditors / shareholders of the relevant classes and the company. Valuation issues are likely to be particularly important at the sanction stage (and possibly even at the initial convening stage), including consideration of what is the likely alternative if confirmation is refused,[15] and whether those with a genuine economic interest have been excluded from participation in the process.

The court has to be satisfied that the proposal was a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it. While the court was not a rubber stamp[16], it need not be satisfied that the proposal is the only fair one. Thus, the court must be satisfied that, not only the statutory provisions have been observed, the relevant class must have been fairly represented by those who attended the meeting and that the statutory majority were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.

D. Schemes and international recognition and effectiveness

Re DTEK Energy BV [2021] EWHC 1551 (Ch) illustrates how schemes may still prove effective for international companies in post Brexit world. The same should apply for restructuring plans but with one added twist.

15 Possibly an alternative plan or a sale of the business rather than a liquidation/administration.

16 See in this connection Re All Scheme Ltd [2021] EWHC 1401 (Ch).

This restructuring concerned the restructuring of bank and bondholder (note holder) liabilities involving a group of companies. The financing arm of the group was incorporated in the UK but the parent company was located in the Netherlands whereas the main operating companies were located in the Ukraine where the companies supplied a large part of the energy market. It also appeared that the group had some operations in Cyprus. The group's operations had been adversely affected by the ongoing tension between Ukraine and Russia as well as other matters. The group proposed a restructuring of its loan obligations which essentially involved an amendment and extension of these obligations. These liabilities were governed by a mixture of English and New York law and some were subject to a Singapore arbitration clause. There was large scale creditor 'buy in' to the restructuring proposals but a Swiss-incorporated lender objected. This lender was part of the well-known Russian conglomerate, Gazprom.

Separate inter-connected schemes of arrangements were proposed for the bank creditors and the bondholder creditors. Separate class meeting was ordered to be he held and then held with unanimous creditor approval of the proposals by those attending and voting. The dissentient creditor, Gazprombank, who held up to 10 % of the outstanding liabilities failed to attend the meeting but nevertheless, objected to confirmation of the schemes at the court sanction hearing.

The court considered that the scheme was 'fair' and rejected the Gazprombank objection. It embodied a compromise or arrangement that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision having regard to its ordinary class interests. Gazprombank was not in a significantly stronger position as regards repayment of its loan than any other scheme creditor. The scheme did not operate unfairly by compelling it to compromise recovery rights which were materially better those of other scheme creditors,

Gazprombank also argued that the English Court could not be satisfied as to the international effectiveness of the scheme post-Brexit, such that any grant of sanction would be an act in vain. But the court said that there was undisputed evidence that the restructuring would be recognised in the US pursuant to Chapter 15 of the US Bankruptcy Code which implemented the UNCITRAL Model Law on Cross Border Insolvency Law in the US. The Model Law had also been implemented within the EU in Greece, Poland, Romania and Slovenia and also in Singapore

According to established principles governing the approval of schemes:

1. The Court must be satisfied that the scheme will achieve its purpose and will not make an order which has no substantial effect.
2. It must be satisfied that the scheme achieves a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets.
3. It does not need certainty as to the position under foreign law, but does require credible evidence it will not be acting in vain.
4. Credible evidence must show that there is a reasonable prospect that the scheme will be recognised and given effect.

The court stated that there was always uncertainty as to how schemes operate within the framework of Regulation 1215/2012 (the 'Judgments Regulation'). When considering whether the Judgments Regulation presented a jurisdictional bar to the Court exercising jurisdiction over EU domiciled scheme members or creditors, it was assumed to apply but when considering international effectiveness, the English Court would look for expert evidence which demonstrated alternative bases. The court said that 'English Courts have … never regarded the Judgments Regulation alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape' [para 31]. Such alternative bases included the Rome I Regulation (EU Regulation 593/2008 on the law applicable to contractual obligations)[17] and autonomous private international law rules in different States.

After hearing evidence from foreign law experts on whether the scheme would be recognised in Cyprus under Rome I, the court was satisfied that there was a reasonable prospect that the scheme would be substantially effective in Cyprus. It did not agree with Gazprombank's argument that Rome I covers only purely consensual variations or extinguishing of contractual rights.

On recognition in the Netherlands, the English court held that it could not decide between rival expert reports on foreign law matters. It focussed instead on the question of whether there was a reasonable prospect of the scheme having substantial effect in the Netherlands, both as regards the consenting creditors and as against Gazprombank.

17 The Regulation was 'onshored' in the The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/834.

E. Restructuring plans and their (non) recognition under the Judgments Regulation and the Lugano Convention

Since Brexit the Judgments Regulation does not provide a basis for recognising the effects of a UK scheme of arrangement in the EU 27. Moreover, schemes were not listed by the UK in Annex A to the Insolvency Regulation and were therefore outside that Regulation.

The Lugano Convention may provide a basis for recognising UK schemes, though not it seems for UK restructuring plans. The Lugano Convention forms the basis of the EU's private international law relationship with Norway, Iceland and Switzerland and is based on the original version of the Judgments. Regulation.

The Lugano Convention also applied to the UK by virtue of the UK being treated as an EU member State for the purposes of international agreements entered into by the EU. This arrangement ended at the end of the Brexit implementation period. On 8 April 2020 the UK applied to accede to the Lugano Convention as an independent contracting party.[18] That application is however subject to the agreement of the contracting parties to the Lugano Convention, including the EU, and that agreement has not yet been forthcoming. It should be noted that the Lugano Convention does not have the CJEU as the apex of judicial authority.[19]

While the Judgments Regulation applies generally to civil and commercial matters, there are certain exceptions stated however, in Article 1 (2) such that it does not apply to 'bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

While there are some indications that, in respect of certain insolvency-related matters, there may be overlaps and concurrent jurisdiction between the Judgments Regulation and the Insolvency Regulation, more recently the CJEU in affirmed that there should be no gaps and overlaps. In Case C-641/16 *Tunkers France v Expert France*[20] it held that actions excluded from the application of the Judgments Regulation insofar as they come

18 See UK Government, 'Support for the UK's intent to accede to the Lugano Convention 2007' <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> (last accessed on 02.07.2024).

19 See Swiss Confederation, 'Lugano Convention 2007' <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html> (last accessed 02.07.2024).

20 ECJ 09.11.2017 – case C-641/16, ECLI:EU:C:2017:847; and see also ECJ 20.12.2017 – case C-649/16, ECLI:EU:C:2017:986, para. 24 – Valach v Waldvierter Sparkasse

under 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of the Insolvency Regulation. Correspondingly, actions that fall outside the scope of the Insolvency Regulation fall within the scope of the Judgments Regulation.[21]

This dovetailing principle cannot be accepted in its entirety however, particularly when one considers the possible relevance of the Lugano Convention where there is an equivalent Article 1(2)(b) provision. In *Re Gategroup Guarantee Ltd,*[22] Zacaroli J addressed the possible relevance of this provision.

The case related to whether the jurisdiction of the UK court to sanction a restructuring plan had been affected by the Convention. The restructuring plan was submitted under Part 26A UK Companies Act and proposed the restructuring of bonds that by reason of Article 23(1) of the Convention were subject to an exclusive jurisdiction clause in favour of the Swiss Courts.

As of 1 January 2021 the UK is no longer a party to the Lugano Convention but the claim form was issued before that date. The company argued that the Lugano Convention had no application to a claim under Part 26A because it is not a 'civil and commercial matter' as it fell within the bankruptcy exception in Article 1(2)(b). But for the bankruptcy exclusion, the proceedings would be a civil or commercial matter.

Zacaroli J noted that it was up to an EU Member State to choose to submit its domestic insolvency proceedings for inclusion within Annex A of the Insolvency Regulation. Therefore, he suggested that the question whether proceedings, which on the face of it were insolvency proceedings, were excluded from Brussels I could not be answered solely on the basis that they were, or were not, listed in Annex A. In any event, certain countries that were parties to the Lugano Convention, such as Switzerland, were not also a party to the Insolvency Regulation. Proceedings in such a country could not be included in Annex A, and therefore the bankruptcy exclusion in the

Bank AG;; ECJ 14.11.2018 – case C-296/17, ECLI:EU:C:2018:902 para. 29 – Wiemer & Trachte GmbH v Tadzher.

21 See also ECJ 18.09.2019 – case C-47/18, ECLI:EU:C:2019:754 – Skarb v Riehl where the European Court affirmed that that the respective scopes of the two regulations are clearly defined and that an action which derives directly from insolvency proceedings and is closely connected with them falls outside the scope of the Jurisdiction and Judgments Regulation but rather within the scope of the Insolvency Regulation.

22 Re Gategroup Guarantee Ltd [2021] EWHC 304 (Ch).

Lugano Convention could not be interpreted as limited to proceedings that were listed in Annex A.[23]

The question had to be approached from first principles. One should identify the particular features of insolvency proceedings which mean that they require special treatment and enquire whether the Part 26A restructuring plan procedure contained the same features. The principal 'peculiarity' of insolvency proceedings which meant that special rules relating to jurisdiction and recognition were required is that they were a collective process, driven by the need to solve the problem that the debtor's assets are insufficient to satisfy the claims of all of its creditors, thus raising at least the possibility of competition among the debtor's creditors and stakeholders.[24]

A principle of 'modified universalism' was said to underpin the Insolvency Regulation. Under the English common law, a principle of modified universalism has also been enunciated under which insolvency proceedings opened in a debtor's 'home' jurisdiction should be recognised and given effect in other countries throughout the world.[25]

On the other hand, the judge in *Re Gategroup Guarantee Ltd* said that the approach to jurisdiction and recognition in the Lugano Convention was incompatible with principles of modified universalism. The relevant provisions provided a basis or bases for assuming jurisdiction against a person by reference either to that person's place of domicile or the nature of the claim made against that particular person. There were special rules where the claim was in contract, or tort, or related to insurance or consumer contracts, or employment.[26]The judge said: 'In my judgment, proceedings designed to enable a company in financial difficulties to reach a composition or arrangement ... with its creditors involves the same peculiar feature as a straightforward bankruptcy or winding-up. The need for the composition or arrangement arises from the company's inability to satisfy the claims of all its creditors. There is inherently competition between the company's creditors, requiring a collective solution that is fair to all. .... In any event, rules which allocate jurisdiction by reference to the domicile of each creditor, or the legal nature of each creditor's claim, or by reference to bi-lateral contractual provisions with different creditors, are as inapposite

23 Ibid., paras. 76,81.
24 Ibid., para. 91.
25 See generally McCormack, Oxford Journal of Legal Studies 2012, 325; McCormack, Law Quarterly Review 2012, 140.
26 Ibid., para. 93–96.

and impractical in the context of Part 26A proceedings, which are premised on the financial difficulties of the company, as they are for traditional insolvency proceedings.'[27]

Therefore, he concluded that proceedings under Part 26A could have been listed under Annex A Insolvency Regulation were the UK still an EU Member State.[28]

F. Conclusion

While the courts will not act in vain, schemes and restructuring plans are still likely to be approved by UK courts in a post-Brexit world if expert evidence is presented to the court that the scheme/plan is likely to achieve substantial effect in relevant jurisdictions.

- The UNCITRAL Model Law on Cross Border Insolvency which has been implemented in a minority of EU States may provide a basis for recognition in some cases. The US, for instance, which has also implemented the Model Law has recognised UK (and Irish) schemes on this basis.
- Schemes or plans which involve the replacement or modification of contractual obligations may also be recognised pursuant to the 'Rome 1' Regulation. Article 1(2)(f) excludes from the scope of the Regulation 'questions governed by the law of companies and other bodies, corporate or unincorporated'. Insofar as it concerns matters of EU law, the proper interpretation of the Regulation ultimately falls to be considered by the CJEU.
- Since schemes/plans are likely to involve largely financial creditors and the modification of contractual debt obligations on generally a contractual basis, it is primarily up to any dissentient creditor to challenge the debt modification. Financial and related considerations are likely to militate against the prospect of such challenge in a number of cases.
- Schemes/plans are likely to achieve practical effect in many EU and other countries on the basis of their domestic private international law rules which have not been harmonised by any EU or other instrument.
- Court judgments or orders confirming (sanctioning) a scheme may be entitled to EU wide recognition under the Lugano Convention though it

27 Ibid,, para, 100.
28 Ibid., paras, 83,133, 137.

is doubtful whether the UK will ultimately be accepted as a member of the Lugano Convention.
- It is likely however that restructuring plans will be regarded as excluded by virtue of Article 1(2)(b) from the scope of the Lugano Convention as 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

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