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MEDIATION SETTLEMENT AGREEMENT UNDER THE SINGAPORE CONVENTION AS A CROSS-BORDER RESTRUCTURING INSTRUMENT

ABSTRACT: Since its adoption, the UN Convention on Mediation has been signed by 58 states. It provides an important legal framework for resolving commercial disputes and allows for the cross-border enforcement of such agreements. The less formal, less expensive, and more confidential nature of the process makes its use even more attractive to potential parties compared to other instruments. Once a settlement agreement is reached, the Convention also enables the parties to enforce it without the need for complex recognition proceedings. Due to these characteristics, mediation can be used as an instrument for restructuring and preventing insolvency. The purpose of this paper is to highlight the advantages of using mediation in cross-border restructuring under the rules set by the UN Convention on Mediation. The authors analyze the application of mediation agreements in practice throughout each stage of the process, as well as the advantages and

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disadvantages of mediation and their effects on cross-border restructuring proceedings. This paper employs dogmatic, normative, comparative, and case study methods.

Keywords: *Singapore Convention, settlement agreement, mediation, cross-border proceedings, restructuring.*

1. Introduction

In past decades, dispute resolutions have been marked by an increased implementation of alternatives to classic legal instruments (alternative dispute resolution, arbitration etc.) as more efficient tools. Restructuring of a debtor, in distressed business or one facing insolvency, requires quick, flexible, confidential and easily enforceable legal instruments. Such an important instrument seems to appear in the international scene since the Singapore Convention entered into force on 12 September 2020. So far, 58 states signed the Singapore Convention. However, the Singapore Convention has been ratified in only 12 countries. EU member states, by now, have not signed the Singapore Convention.

Although it is not the only international document concerning this issue, the Singapore Convention covers the wider scope of possible disputes and is open for almost all countries in the world. In this article, we will inquire whether the Singapore Convention may be used as a basis to an instrument for a mediation in a cross-border restructuring or preventing insolvency. The research used in this paper is based on dogmatic, normative and comparative method, supported with the case study method. Firstly, we will approach "mediation" as a legal instrument with its most important *pro et contra* features (par. 2). Subsequently, we will set out the main issues characteristic to cross-border restructuring as a mediation matter (par. 3). Then, we will address mediation as a topic under the Singapore Convention, namely international commercial dispute settlement (par. 4). This is followed by the applicable legal rules for such cross-border proceedings under the Singapore Convention (par. 5). Furthermore, we will discuss the main features of the act of settlement ('settlement agreement') reached by the parties affected by restructuring process assisted by a mediator (par. 6). Finally, we will analyze the enforcement of the settlement agreement as outcome of the mediation in a cross-border restructuring matter (par. 7).

2. Mediation as a legal instrument

In a resolution adopted by the General Assembly on 20 December 2018, the United Nations recognize the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations (Preamble, UN Convention on Mediation, 2018).

Fundamentally, mediation is a negotiation process, slightly more formal than usual business negotiations. Mediation represents an alternative or negotiated dispute resolution (settlement) (UK Commercial Court Guide and Circuit Commercial Court Guide, 2022), conducted on a voluntary basis and being rather informal, in which two or more parties attempt to settle their dispute assisted by a third independent person/s (mediator/s). Mediation replaces, but does not undermine, judicial proceedings. The use of mediation may be imposed by the law or referred to by a court, but the final decision is made by the parties. If the law does not impose it, mediation is based on a special clause in the party agreement or settlement agreement, stipulated *ad hoc*. Compared to judicial proceedings and arbitration, it sets voluntary new equilibrium and results in a win-win outcome without undermining conventional proceedings and system (The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2021, p. 20). However, mediation is still infrequently used in practice. There are numerous reasons for this. Even as an alternative dispute resolution, mediation is rather new (*aliquid novi*) and parties are generally either referred to the mediation by court or required to use it by the law. Ignorance appears to be one of the biggest obstacles for its use. In practice, parties predominantly rely on their legal departments and classical approach to dispute resolution. Hence, it is necessary for them to take into account their interests and especially the cost-benefit ratio before eliminating the mediation as a possible resolution. Recent analysis shows that mediation in restructuring and insolvency matters provided good results in practice in those states where it has a longer tradition of use and where mediation culture has been developed (Mulder, 2017, pp. 8–13). Finally, a settlement agreement resulted from mediation is acceptable to parties from states with different legal, social and economic systems and it contributes to the development of harmonious international economic relations (Esher, 2015, p. 2). As it is easy to initiate and flexible to conduct, mediation may be used successfully as an early business crisis resolving instrument both within national and across national borders. Further, disadvantages of mediation lay in mutual distrust of the parties, usually short deadlines in complicated disputes, premature or late start of mediation process, lack of legal authority (such as arbiter or

judge) and often lack of knowledge required for successful settlement of the mediated matter, limitations for mediator to intervene in creation of the settlement agreement, difficulty for parties to reach consensus, presence of multiple parties etc. Especially in restructuring matters short time frame for reaching the consensus and multiple dissent parties stand regularly on the way of reaching consensus. They also require certain level of confidentiality in order to avoid negative impacts of the business crisis in public.

3. Cross-border restructuring as a mediated matter

Restructuring is a commonly used legal instrument in preventing a businesses' financial crisis and insolvency. It may be the subject of the regular restructuring of an out-of-court insolvency process (or workout) or an insolvency plan (insolvency reorganization), which, depending on the legal system, is based on voluntary, judicially adopted or judicially confirmed arrangements (Mokal, et al., 2018, p. 482). If the restructuring entity has multinational shareholders and creditors, it requires a specific legal instrument with cross-border effects providing equal protection for each one of them. Mediation may be useful both as international instrument and as crisis preventing instrument (Đurić & Jovanović, 2020, p. 185). If the business is at stake, it is necessary to secure its viability and to avoid any further loss of its value. That is why mediation has to be agreed and implemented in a short term. In the case of cross-border business restructuring, mediation, as a process, is perceived as suitable for a multi-party settlement agreement being a main pillar of a future restructuring plan, which is, in fact, a negotiated settlement (Đurić & Jovanović, 2023, p. 438).

If it is performed out of judicial or insolvency proceedings, the subject of restructuring is a very negotiable matter. The restructuring debtor still holds control over its business and assets and its creditors have interest to keep the debtor's business going concern in order to get their claims paid to a higher extent than in insolvency proceedings (Madaus, 2018, p. 621). No such agreement requires a mandatory confirmation by the court. On the contrary, in insolvency proceedings, any negotiation outcome has to have appropriate majority support of creditors and to be confirmed by the court. There are two possible solutions in this respect. First, if the insolvency debtor keeps the control over its assets (*debtor in possession*), it may try to negotiate the restructuring plan and to obtain creditors' majority support according to the amount of their claims. Secondly, the more usual situation is when the debtor loses control over its business and assets, which passes into the hands

of an insolvency administrator. In that case, any further negotiations on claims settlement may be conducted only between the insolvency administrators and (majority claim) creditors and in with respect of the ongoing insolvency procedure.

The subject of mediation may be different civil law claims, both monetary and non-monetary, as well as others in compliance with the law settle-able claims. However, in restructuring, it relates mostly to the monetary creditors' claims (principal, interest, etc.). Restructuring claims may be claims of creditors against the debtor or mutual claims of debtor and creditors. Creditors may be financial creditors, suppliers of goods or providers of services, public bodies, employees and finally debtor's shareholders. They also may be categorized as creditors of unsecured or ones of secured claims, which entitles them to separate settlement. Restructuring measures regarding claims may be enforced individually or combined (Walters, 2015, p. 378). They may be combined with claim restructuring and might include selling and liquidation of property or transfer of such property for the purpose of settling claims, conversion of receivables into capital (*debt equity swap*), issuance of securities and other measures for the implementation of restructuring (Čolović, 2023, p. 302). Such measures require an appropriate preceding decision of the assembly of equity holders. The aim of a mediated settlement agreement in restructuring is not only to resolve the commercial dispute between parties but also to provide sustainable recovery to the debtor. Mediation may help business parties in an international and multilateral relation to secure claim satisfaction and sustainable continuation of business.

Singapore Convention addresses exclusively international commercial disputes. May a restructuring process concerning international parties be regarded as a dispute? In such a matter when multiple parties are affected, consequently, different interests will necessarily come in collision. Therefore, the notion of dispute in terms of the Singapore Convention should be assumed in a broader sense (Zukauskaite, 2019, p. 212). Preventing disputes in the matter of restructuring has the same effect as resolving an existing dispute. In a multiple-interest matter such is a restructuring, a dispute may arise if any conflict of interests of parties exists (Meidanis, 2020, p. 278). That might be equity holders of the restructuring debtor or its creditors. Since the settlement is based on an agreement, there is no obstacle for the debtor to prevent future disputes by stipulating terms of restructuring with its creditors *ex ante*. However, if there is no such agreement, once the restructuring process is burdened by a dispute, interested parties may recourse to mediation by stipulating mediation agreement *ex post*. If such legal matter as restructuring

may be negotiable, there is no obstacle to make it a subject of mediation. Despite that, restructuring in insolvency is usually not considered as a commercial matter (Eidenmüller & Griffiths, 2009, p. 6).

For entrepreneurs and micro, small and medium enterprises (hereinafter: MSMEs), with predominantly international business partners, the use of mediation as restructuring and insolvency prevention instrument might be of crucial importance (Mokal, et al., 2018, pp. 65–72).

An important study of the European Law Institute, Rescue of Business in Insolvency Law, conducted in 2017, analyzed the resolutions for the rescue of financially distressed businesses. This study suggests in Recommendations 1.07, 1.08 and 1.09 that the cross-border mediated agreements may rather be implemented "voluntarily and preserve an amicable and sustainable relationship between parties" (Instrument of the European Law Institute, 2017, p. 126).

Additionally, World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (Principle B4) affirm that an informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiations or mediation or informal dispute resolution (The World Bank Revised Principles for Effective Insolvency and Creditor, 2011, p. 9).

In recent years, mediation has been introduced in several national legislations as an instrument of preventive and cross-border restructuring and insolvency. This should encourage parties in commercial matters to use mediation for settling international disputes as well.

4. Mediation matter under Singapore Convention

The Singapore Convention does not contain restraints on regulating claim settlements, but it strictly defines matters where it does not apply. Its rules apply to agreements resulting from mediation and conclusions, in writing, by parties to resolve international commercial disputes ("settlement agreement"). From the point of view of the subject, commercial disputes arise out of business relations and, within the framework of the Singapore Convention, between business entities. In practice, as mentioned above, mostly monetary claims emerge from such relations. However, in a settlement agreement, particularly in an event where the offsetting of mutual claims has been agreed upon, the claims may be settled by non-monetary means. Formally, these are disputes, which fall under jurisdiction of commercial courts (if such jurisdiction exists in a specific country) and arbitrations. In restructuring matters, in general,

such disputes relate to claims of creditors, shareholders, employees or even public bodies and their multiplication may result in an impending insolvency or in over-indebtedness. In such cases, but also in the event of insolvency, mediation provided by the Singapore Convention might be of great importance in reaching agreement on disputed claims (Lepetić, 2020, pp. 156–176).

The notion of dispute in terms of the Singapore Convention should be understood in a broader sense. Preventing disputes in the matter of restructuring has the same effect as resolving an existing dispute. In a multiple interest matter such as a restructuring, a dispute may arise if any dissent of interests of parties exists (Goldberg, Sander, Rogels, Cole, 2003, p. 438). That might be equity holders of the restructuring debtor or its creditors. Depending on its scope and effects, any dispute may have more or less impact on the sustainability of the debtor's business (Carballo & Fach 2017). If a dispute concerns a matter that was already resolved by a settlement agreement, the party is allowed to invoke the settlement agreement before the competent authority of the signatory state, in order to prove that the matter has already been resolved.

Though, the Singapore Convention does not apply to settlement agreements concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes, relating to family, inheritance or employment law. Furthermore, it excludes settlement agreements approved by a court or recorded and are enforceable as an arbitral award. In addition, the Singapore Convention does not apply to disputes referring to employment law (Art. 1.3. and 3.2. UN Convention on Mediation, 2018).

Therefore, at the first glance, there is no reason not to consider restructuring matter as a possible subject of a commercial settlement agreement resulting from mediation under Singapore Convention. Additionally, a debtor's restructuring plan, broadly supported by its creditors (and approved by a court), provides for the parties most desirable debt satisfaction. In order to enter into the scope of application of the Singapore Convention, the restructuring of business/a debtor has to have an international character. Primarily, the international character of the dispute exists if at least two parties to the settlement agreement have their places of business in different signatory states. Thus, a settlement agreement concluded under the rules of the Singapore Convention excludes all domestic dispute resolution and agreements with no relation to a signatory state.

If a party has more than one place of business, the relevant place will be the one which has the closest relationship to the dispute resolved by the settlement agreement. Thereby all circumstances known or contemplated by the parties at the time of the conclusion of the settlement agreement should be

taken into account. If any party does not have a regular place of business, the settlement agreement may refer to the party's habitual residence.

5. Mediation process under the Singapore Convention

Mediation means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute (Art. 2.3. UN Convention on Mediation, 2018). In international commercial matters, including cross-border restructuring, mediation serves as an instrument or a minimum formality process during which business parties and/or their legal representatives are brought together and assisted by mediator to resolve upcoming or already existing dispute. It may be regulated as mandatory by the law or voluntarily and embedded in a preceding mediation agreement or clause, but it entitles any party to give up at any moment and recourse to the usual judicial way of claim satisfaction.

In the matter of mediation, two agreements should be distinguished: 1) a mediation agreement or a clause on mediation and 2) a settlement agreement resulting from mediation. The first agreement or clause prorogates the ordinary jurisdiction and bounds parties to try to resolve their dispute in mediation. With the second agreement, parties settle their dispute partially or wholly. Both, the mediation agreement and the settlement agreement resulted from mediation, are governed by general rules of contract law, applicable to the respective agreement.

The mediator, under the rules of the Singapore Convention, may be a natural person with appropriate education and/or practice/knowledge accredited to mediate disputes (World Bank Group, 2022, p. 22). It may also be a legal person attested from the competent authority to carry out mediation. Contrary to the judicial authority, the mediator has no territorially related competence, but has to be an accredited professional or judge performing *extra fori*. This feature makes mediation suitable for resolving disputes without defined forum. Nonetheless, its neutrality is not intangible and has to be monitored during the whole process by the parties and/or their legal representatives. In some countries, it is required for a mediator to have domestic citizenship, thus reducing neutrality of mediator and use of mediation in cross-border commercial dispute resolution (Kınıkoğlu, Parmaksız & Solak, 2020, p. 1).

Parties voluntarily decide on applicable law (*lex voluntatis*) for the entire mediation process. They can make the right choice of applicable substantial law

and jurisdiction where the settlement agreement has to be enforced. Additionally, they may participate in the mediation process represented, personally, with or without their legal representatives. Legal representatives of parties need to have proper letters of authorization. In an international commercial mediation, language barriers may be overcome by using a common language for the negotiations or with the assistance of a sworn court interpreter.

In a mediated cross-border restructuring, three levels of possible mediation process might be considered. Firstly, mediation may be conducted internally by the debtor. This means that the debtor itself or its equity holders with dissenting interests (debtor internal negotiations) can reach a basic settlement agreement through a mediation process in order to prepare for negotiations with its creditors. Secondly, a settlement agreement may further be stipulated with foreign creditors based in the signatory states (external debtor – creditors' negotiations). Finally, the third level of mediation process represents negotiations with other creditors in non-signatory states.

The Singapore Convention provides that signatory countries will allow the party to raise the settlement agreement in order to prove that a commercial matter has already been resolved in accordance with its rules of procedure and in compliance with the conditions set forth in the Singapore Convention (Art. 3.2. UN Convention on Mediation, 2018).

The negotiation within the process of mediation is normally confidential and may include common sessions and separate ones. Negotiations are usually conducted physically. In modern time and if parties agree, they may be conducted as online mediation session as well (World Bank Group, 2022, p. 22). However, final session at which the settlement agreement is signed typically takes place in person.

6. Act of settlement under the Singapore Convention

According to the Singapore Convention on Mediation, a settlement agreement resulting from mediation has to be concluded in writing by parties in order for an international commercial dispute to be resolved. A settlement agreement is not bound to a strict form. It is considered as done "in writing", if its content is recorded in any form. The requirement that a settlement agreement is in writing is also met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference. The settlement agreement should have signatures of all parties and the mediator. If the mediator is a legal person, it should provide an attestation accompanying the agreement (Art. 4.2. UN Convention on Mediation, 2018).

A settlement agreement on commercial matters resulting from mediation has limited possibility to be voided. Parties may attempt to void the agreement on the grounds set by the Convention and subject to the applicable general rules of contract law solely. The validity of the agreement should be examined in accordance to the generally accepted rules of international commercial law (Bonell, 2018, pp. 15–41). The legal capacity of each party has to be examined in accordance to its national legislation (*lex nationalis)* (Walters, 2015, p. 386). Applicable legislation has to be determined regarding the content of the settlement agreement (*Leandro, 2017,* pp. 947–954). In cases where only debt relations are restructured, the applicable law remains a negotiable matter and primary *lex voluntatis* is applied. If the parties haven't determined any applicable law, *lex cause* steps on the floor. This principle embodies the closest connection for both a contractual dispute, a tort law dispute, property and internal affairs (Madaus, 2021, p. 10). However, if agreement relates to the debtor's assets, there are also alternatives to consider (the rule *lex rei sitae* for real assets, the rule *lex rei sitae* regarding movable assets, if assets do not change their location and *lex loci destinationis* regarding movable assets in transit) (Knežević & Pavić, 2017, pp. 101–104).

On an international commercial level, mediation settlement of disputes is based entirely on *lex voluntatis* of interested parties. If they conclude a settlement agreement assisted by a mediator, in some EU countries, they also may use the recently adopted legal restructuring framework to enforce it (Đurić, & Jovanović, 2023, p. 70).

Once concluded, settlement agreements may be directly enforced in a signatory country, in accordance with the rules of procedure and in compliance with the conditions set forth in the Singapore Convention. An interested party has to submit the agreement to the competent authority for this purpose (Art. 4.1. UN Convention on Mediation, 2018). A settlement agreement resulting from mediation in compliance with the Singapore Convention is easier to recognize with fewer formalities and to enforce in a signatory state. Moreover, it has the same effect as an arbitral award in compliance with the New York Arbitration Convention.

7. Enforcement of a cross-border settlement agreement

An international commercial dispute settlement agreement stipulating debtor restructuring and/or insolvency prevention concluded in compliance with the Singapore Convention should be considered to be a restructuring plan provided with enforcement title by the rules of the signatory state in

which debtor has its seat or assets (Koo, 2016, p. 94). However, the question remains how to protect the rights of dissent creditors/parties non-participating in the settlement agreement. Although the Singapore Convention provides the effect of an enforcement instrument to the settlement agreement resulted from mediation, post-mediation behavior of parties also remains rather important.

If a debtor meets its obligations under the settlement agreement no further actions are required. However, if the debtor fails to fulfill these obligations, the following alternatives have to be considered: 1) the settlement agreement is directly enforceable in a signatory country on all claims and all debtor assets, 2) the settlement agreement is enforceable only on claims and assets situated in the signatory country and 3) the settlement agreement has to be recognized.

In countries where a settlement agreement is directly enforceable, it produces effect as a resolved matter (*res iudicata*) (Walters, 2015, p. 388). Covering the enforcement expenses is generally determined in the settlement agreement. In restructuring and insolvency matters, mediation costs are paid by the estate in restructuring (Esher, 2015, p. 2). The same should be applied in the event of enforcement expenses. A party relying on a settlement agreement has to provide, to the competent authority, the settlement agreement signed by the parties and evidence that the settlement agreement resulted from mediation (Peters, 2019, p. 16).

If a dispute arises concerning a matter that a party claim to be already resolved by a settlement agreement, the competent authority of the signatory state has to allow the party to invoke the settlement agreement in order to prove that the matter has already been resolved (Anderson, 2015, p. 112). The competent authority may also refuse to grant the enforcement title (Art. 7, UN Convention on Mediation, 2018). Where a settlement agreement is enforceable on claims and assets situated in a signatory country solely, the competent authority has to consider if any other domestic or foreign proceedings are pending (Schnabel, 2019, p. 43). If this is not the case, the provisions of the settlement agreement resulted from mediation are partially enforced regarding the respective claims and assets.

8. Conclusion

The main objective of a mediated international settlement agreement aimed to resolve dispute in commercial matters is to provide the parties with an easily accessible and internationally enforceable instrument and to avoid any time and money consuming process. The Singapore Convention provides such an important instrument to the interested business parties. Interested

parties may agree to use it in a mediation agreement or a mediation clause. Contrary to some other international documents in this matter, it strives to have universal application and does not exclude restructuring and insolvency prevention issues as possible subject of a settlement agreement. If a restructuring represents the subject of such mediated settlement agreement, it has one more important objective – securing sustainable business performance of the debtor. Moreover, the restructuring based on a mediated settlement agreement may provide to the creditors an attractive debt payment without undermining legal framework in force. The advantage of mediation lays its non-mandatory use, but its effectiveness depends often on each particular case. Mutual distrust between(multiple) parties and lack of authority in reaching the settlement agreement represent its main disadvantages. Furthermore, mediation secures a less formal, but confidential process of dispute settlement. The act of settlement in compliance with the rules of Singapore Convention is disburdened from unnecessary formalities and relies on general rules of contract law. Interested parties decide on the collective effect of the mediated settlement agreement in restructuring matters. Consequently, only parties to the settlement agreement are bound by its effect. On an international level a settlement agreement allows to avoid obstacles of the difference between national legislations and to resolve disputes without a defined forum. Considerably less expensive than arbitration and judicial proceedings, it allows the debtor to avoid expenses jeopardizing a planned restructuring process. Thus, Singapore Convention allows not only cross-border restructuring and transnational dispute management instrument, but also insolvency preventive instruments. For MSMEs this might be of crucial importance. Once the settlement agreement has been signed, the Singapore Convention provides for an enforceable instrument in the signatory states to the parties. In non-signatory states, a settlement agreement requires recognition from the judicial or other competent authority in order to be enforced. From practical experience, mediation not only allows parties to control the process from its beginning to the moment of signing the settlement agreement, but it provides voluntary outcome and secure future trust between business parties. However, successful restructuring depends also on broader support of creditors. Mutual trust remains crucial for a successful conduct of restructuring process, recovery of the debtor and sustainability of future business.

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SPORAZUM O PORAVNANJU IZ MEDIJACIJE PREMA SINGAPURŠKOJ KONVENCIJI KAO INSTRUMENT PREKOGRANIČNOG RESTRUKTURIRANJA

APSTRAKT: Od usvajanja, Konvenciju UN o medijaciji potpisalo je 58 država. Ona pruža važan pravni okvir za rešavanje privrednih sporova i omogućava prekograničnu primenu takvih sporazuma. Budući da je manje formalan, jeftiniji i poverljiviji proces, to čini njenu primenu još privlačnijom za potencijalne stranke u poređenju sa drugim instrumentima. Kada se postigne sporazum o poravnanju, Konvencija takođe omogućava stranama u sporazumu da sprovedu izvršenje bez komplikovanog postupka priznanja. Zbog ovih karakteristika, medijacija se može koristiti kao instrument za sprovođenje restrukturiranja i sprečavanje stečaja. Cilj ovog rada je da istakne prednost primene medijacije u prekograničnom restrukturiranju prema pravilima UN Konvencije o medijaciji. Autori ovog rada analiziraju primenu sporazuma iz medijacije u praksi kroz svaki deo procesa, prednosti i nedostatke medijacije, kao i njegova dejstva u postupcima prekograničnog restrukturiranja. U ovom radu korišćeni su dogmatski metod, normativni metod, uporedni metod, metod studije slučaja.

Ključne reči: *Singapurška konvencija, sporazum o poravnanju, medijacija, prekogranični postupak, restrukturiranje.*

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