



Current Status and the Development Prospects of Mediation in Russia as an Alternative Means for the Settlement of Economic Disputes

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ABSTRACT

The article considers the current status and the ways for further development of mediation in Russia. A mediation procedure is considered as an effective and agile method for settlement of a number of economic conflicts, which can become a real alternative to state court proceedings. The concept of mediation is determined; its essence and nature is revealed as of an alternative procedure for settlement of differences between the parties with the assistance of an independent mediator; main distinctions from the public proceedings are indicated. Advantages of mediation are identified, of which it is necessary to inform the contemporary business community with the aim to actively implement this institute into practice. Based on the analysis of various experience of mediation, both Russian and foreign, proposals are made for perceiving in the Russian Federation certain positive trends in mediation procedure. The paper discloses the issues of mediators training and analyzes the statutory formalization of this institution in Russia. Gaps in regulation are revealed. Types of established and operating organizations in Russia to provide mediation and organizations for training mediators are disclosed. The positive experience of isolated constituent entities of the Russian Federation is studied. Common problems and reasons for inconsiderable use of dispute settlement procedure involving mediators in Russia are studied. Growth area for long-term development of mediation is determined.

Keywords: Mediation, Alternative Means, Procedure, Settlement, Dispute, Mediator

JEL Classifications: H72, H73, O24

1. INTRODUCTION

1.1. Introduce the Problem

Currently, mediation as an alternative to state justice, with a good reputation in foreign countries, is of great interest in Russia. It minimizes the disadvantages of the other alternative methods for disputes settlement. Mediation procedure allows the participation of a third party (as opposed to direct negotiations, and the claim settlement procedure), which facilitates the achievement of an agreement between the disputing parties. But unlike arbitration, it does not assume authoritativeness of the persons engaged, as well as coercion of enforcement of awards. Therefore, mediation is the optimal method. In practice, the states encourage practice of this institution, as mediation can reduce the load on the judicial system and can resolve conflicts by mutual consent of the parties. Notably, the development of mediation belongs to important

tasks of economically developed states. Russia should not be an exception in this respect.

The statement that the Russian procedural system needs such kind of the out-of-the court settlement of disputes as mediation was put forward years ago. First, this procedure has several advantages in comparison with the state justice (time saving, preserving business relationships, confidentiality, focus on the interests of the parties, etc.). Second, if the parties resort to it in the pre-trial stage, it could significantly reduce the court-load.

Mediation in Russia has been practiced since 1996 in the settlement of commercial disputes, albeit on a small scale, e.g., by the Center for mediation procedures in St. Petersburg (Davydenko, 2012). The first legal step in the development of such an alternative mechanism was made in 2002 by the adoption of the Arbitration

Procedure Code, which has established the right of the parties to address the third party in order to resolve the dispute (Part 2 Article 135 Part 1, Part 2 Article 158). Thus, the concept of “intermediary” was indeed introduced into the Russian legal system. The institute of mediation obtained the development basis upon the adoption of the Federal Law “On Alternative Dispute Settlement Procedure Involving a Mediator (Mediation Procedure)” of July 27, 2010 (Federal Assembly of the Russian Federation, 2010), as well as upon making relevant amendments to the Russian legislation.

1.2. Explore Importance of the Problem

The mediation procedure has evolved into a legitimate way of settling legal disputes upon being legislatively enforced in Russia. Nonetheless, it has not replaced the existing institutions (judicial procedure, settlement of disputes in the arbitral court or in the commission on labor disputes, as well as notarial procedures) but is harmoniously coexisting with them and providing new opportunities for the peaceful settlement of disputes. The development of mediation as an alternative dispute resolution procedure contributes to reaching the goal set by the Federal Target Program “Development of the Judicial System for 2013-2020” (Government of the Russian Federation, 2013), which is to create more favorable conditions for Russian companies to register nationally, as opposed to the offshore registration, to remain in the jurisdiction of the Russian Federation and to use the Russian judicial system to settle disputes. A certain experience in this area demonstrates that further improvement of the legislative regulation of mediation and its implementation is important.

1.3. Describe Relevant Scholarship

During the development and adoption of the Federal Law “On the Alternative Dispute Settlement Procedure Involving a Mediator (Mediation Procedure)” (hereinafter - the Law on Mediation), which entered into force on 1 January 2011, theoretical apprehension of various aspects of this institution was carried out by the Russian legal science (Zhilin, 2010; Kalashnikov, 2011; Lisitsyn, 2010; Hudoykina, 2012, etc.).

Mediation is considered by both Russian and foreign scientists as one of the alternative dispute settlements (Arnold, 1996; Nosyreva, 1999; Domenici and Littlejohn, 2001; Friedman and Himmelstein, 2009). Currently, in foreign science and practice there is a large number of studies that reveal various theoretical and practical problems of mediation (McCorkle and Reese, 2004; Kovach, et al., 2008). For example, it published the complete work on mediation including the information on the contemporary approaches to a mediation procedure (Moore, 2014). The international monographic study (Hoptand and Steffek, 2012) analyzed the legal and practical aspects of mediation in the developed countries (in the EU member states as well as in Switzerland, Norway, USA, Canada, Australia, New Zealand, Japan, China and Russia, as well). This study has taken into consideration legislation, judicial practice and scientific doctrine of these countries.

In the modern period in Russia a new surge of interest to this issue can be observed. Possibilities of using mediation in the settlement of various disputes are discussed (Kostina, et al., 2015; Korovyakovsky, 2014; Solovyev and Filippov, 2015;

Shamanov, et al., 2014). However, the study of the experience of mediation in the Russian Federation currently requires deep scientific and practical research.

1.4. State Hypotheses and Their Correspondence to Research Design

Currently, the need for the largescale implementation of mediation into settling disputes and conflicts is being discussed, with supporting programmes being developed, workshops and meetings being conducted. All of the mentioned above, certainly, promotes awareness of the importance and the need for mediation in the contemporary Russian society. However, it seems obvious that the success of promoting mediation largely depends on the professionals dealing with settling conflicts through mediation, that is, on the mediators (intermediaries) themselves. Therefore, it is necessary to make every effort to train them. Identification of the benefits, problems and prospects of development of this procedure will allow the government to adjust policy in the right direction. Institution of mediation in Russia currently is still difficult to put into practice due to legal relations arising in connection with business and other economic activities. This problem has not been studied adequately, and therefore requires a comprehensive and complete scientific analysis. The business community needs a gradual awareness of the benefits of using a mediation procedure.

2. METHODS

2.1. The Method of the Analysis of Documents

Russian laws and regulations, which embody the basics of mediation, have been studied. The Law on Mediation has been analyzed in detail, which allowed to give the essential characteristics of the institution which is under consideration and to identify regulations that require further development. It conducted the review of information materials and statistical data on the number of established self-regulatory organizations and of other mediators in Russia, on their active or passive (when only adopted and registered documents - the order on creation, statute or policy regulations of mediators - are present without actual activity) operation. Such organizations were created only in 35 of the entities of the Russian Federation. The state register contains 3 records on self-regulating organizations of mediators. Types of established and operating mediator organization in Russia are identified (such as unions, centers, non-profit partnerships, etc.). Organizations engaged in training of mediators are disclosed. Information in scientific and educational literature, in the materials of scientific and practical conferences, in the online resources, in the official sites of centers and universities was generalized using content analysis (formal, qualitative and quantitative study of the document). This method allowed to identify positive and negative trends in the implementation of mediation procedure in the economic situation in the Russian Federation, to assess the current practice of mediation, and to determine the real demand for the use of mediation procedures.

2.2. The Method of Generalized Observation and Logical Conclusion

This method allows to identify the features and benefits of mediation as an alternative method of dispute resolution, in

contrast to the state legal proceedings, to determine common problems and areas for the improvement of this institution. It discloses the conditions for reaching the quality of mediation services (specific training of mediators, improving their professionalism) and gives the recommendations on scaling up mediation (introduction of mandatory mediation in Russia in the first stage of its development). Types of promotion of mediation in commercial arbitration courts (establishing information stands and rooms of reconciliation) are disclosed. The positive experience of the mediation in isolated constituent entities of the Russian Federation, in organization and performance of intermediaries was revealed and it may be useful for the other constituent entities of the Russian Federation. The tasks that remain to be solved for the further development of the test Institute are determined (informing the public and the business community, introduction of special courses in educational programs of higher education institutions, etc.).

3. RESULTS

As stated in the law on mediation, it was designed to promote business partnership and establishment of ethical business practices, as well as harmonization of social relations. Most of the provisions of the law are dispositive. Its main idea is that mediation is based on the free will of the parties that have the right to refuse from the mediation procedure at any time.

By its definition, mediation is a conciliatory procedure for the settlement of a dispute or a conflict between the parties with the help of a third party called a mediator in order to work out an agreement on contentious issues. According to the Article 2 of the law the procedure of mediation is called the means of dispute settlement under the auspices of a mediator, that is, the legislator does not make any distinction between the categories “procedure” and “method.”

A mediation process consists of two components: The activity of the mediator and negotiations of the parties (Bryzhinskaya and Hudoykina, 2015). The mediator is an independent, neutral person brought by the parties to assist them in developing a mutually acceptable solution. Recommendations and decisions of the intermediary are not obligatory for the parties (the subjects of the conflict). If as opposed to the trial, the parties are obliged to obey the strict regulations, and their interests (in most cases) are presented by lawyers or legal advisers, in the mediation procedure of settlement of the conflict, as a rule, the opposite subjects control the whole course of events themselves, starting from the appointment of the mediator till the execution of the adopted agreement. Moreover, the parties may refuse to reach an agreement. Another important advantages of mediation are the main principles regulated by the Article 3 of the law on mediation (voluntariness, confidentiality, cooperation and equality of the parties, impartiality and independence of the mediator), as well as conditions such as the freedom to choose the mediator (Kuptsova and Zdorovinina, 2014), flexibility of the procedure and joint payment of intermediary services by the parties. Legal proceedings are a very long process, while the duration of mediation is determined by the conflict parties in agreement on mediation,

but cannot exceed 60 days (item 1 of Article 13 of the law on mediation). These benefits should be communicated to the business community to promote the use of mediation for future practice.

As a result of the adoption of the law on mediation, the institution of mediators was introduced, when mediators are individuals contributing to the resolution of disputes, as well as the institution of self-regulatory organizations of mediators that ensure the development of standards and rules of professional activities of mediators and their enforcement. The Law on Mediation stipulates that the activities of a mediator can be carried out on a professional and non-professional basis (Clause 1 of Article 15). A mediator on the non-professional basis can be any adult person with full legal capacity with no criminal record, who is not a state or a municipal employee.

The law on mediation contains provisions according to which the mediation on the disputes submitted to the court (the arbitration court) should only be carried out by professional mediators. The standards for professional mediator are stricter. He/she should be 25 year old or older, should have a higher education and undertake the additional training in the use of the procedure (Article 16 of Claim 1). Such training programme for mediators was approved on February 14, 2011 (Ministry of Education and Science, 2011). It is a full-time training, which consists of three modules: (1) “Mediation. Basic Course” (the basics of mediation activity at professional level; its completion for admission to the subsequent courses); (2) “Mediation. Characteristic Features of Mediation Process” (in-depth study of the specific features of mediation in various areas, for example, in commercial disputes, mediation at the court, etc.); (3) “Mediation. Training for the trainers of mediators” (gives the right to a person who completed it to conduct training in mediation (the first module) and to teach the basics of mediation in higher education institutions).

One of the leading and most experienced organizations related to the organization of the study and trainings for mediators is Moscow Scientific and Methodological Center for Mediation and Law (Autonomous Non-profit Organization “Center for Mediation and Law” 2015). It conducts the training courses; though, they cannot be considered inexpensive yet. For example, training course “Mediation. Basic Course,” which consists of 120 academic hours and in total costs 35000 rubles (around 500 U.S. Dollars). In the regions of the Russian Federation the costs can be lower. For example, Rostov Region Association of mediators “Reconciliation” and the Centre of out-of-court dispute resolution at the Rostov branch of the Russian Academy of Justice, arranges such a training for 25000 rubles (around 370 U.S. Dollars). At present, the training of mediators is carried out by other mediation centers on the basis of certain higher education institutions. For example, regional training in mediation is carried out by: The Mediation Center of the Ural State Academy of Law, Center for Development of Negotiation Process and Peaceful Strategies of the St. Petersburg State University, Center for Legal Innovation and Conciliation Procedures of the Voronezh State University, and others.

An important stage in the development of the Russian institution of professional mediation is the establishment of self-regulating

organizations of mediators, which should contain not less than one hundred professional mediators and (or) at least twenty organizations ready to provide mediation services (item 4 Article 18 of the Law on Mediation). The issues of legal status of self-regulatory organizations are recognized in detail in the Federal Law of December 1, 2007 “On Self-Regulatory Organizations.” Such organizations may have the form of associations (unions) or non-profit partnerships. At present, the number of the self-regulatory mediatory organizations in Russia is insufficient; the state register contained only three records on the self-regulatory organizations: In 2012 Non-profit partnership “Interregional Union of Mediators “Soglasie” and Non-Profit Partnership “The Alliance of Professional Mediators,” in 2013 Non-commercial partnership “National Organization of Mediators” (Official Website of Self-regulatory Organization, 2013). The most recent actually working organization is the latter one. Since according to the Law on Mediation, the membership of mediators in the self-regulatory organizations is not compulsory, to provide mediation services various organizations (providers of mediation services) are established.

According to the analyzed information and statistical data, the organizations providing mediation are established and operated only in 35 constituent entities of the Russian Federation. Their types are manifold: (1) Associations and unions (for example, the Association of Mediators of Rostov Region, of Kirov Region, of Perm Region, Interregional Union of Mediators in Moscow and others); (2) Centers and Boards (Board of Intermediaries to Conduct Conciliation Procedures was established at the Chamber of Commerce of the Russian Federation in 2006. The Chambers of Commerce of such constituent entities of Russia as Tambov, Voronezh, Samara, Perm, Nizhny Novgorod, Ulyanovsk region, Krasnoyarski region and others established their own centers and boards of mediators. Unfortunately, as of 2015, the Chambers of Commerce of many constituent entities of Russia have not started putting into practice settling economic disputes and conflicts by the means of the institution of mediation. Other organizations establish the mediation centers as well: Center for Mediation and Alternative Dispute Resolution of the Federal Chamber of Advocates, Center for Promotion of Mediation and Alternative Dispute Resolution at the Institute of Legislation and Comparative Law under the Government of the Russian Federation, and others); (3) Non-profit organizations in the form of non-commercial partnership (with a view to acquiring the status of a self-regulatory organization), including professional and non-professional mediators, such as in the Republic of Bashkortostan (Non-profit partnership “Guild of mediators of the Republic of Bashkortostan”), Non-profit partnership for disputes settlement “Mediation Center” (Ulyanovsk region), Non-profit partnership “League of Mediators” (Moscow), Non-profit partnership “Volga Center for Mediation” (Kirov Region) and in other regions.

The activities of existing organizations in mediation vary. The first ones have experience in holding no more than 1-5 mediation procedures, while the others - a few dozen. It can be considered as positive that reconciliation rooms appears, for example, in the Arbitration courts of Moscow, Amur, Voronezh, Lipetsk, Rostov, Sverdlovsk regions, in the Republic of Buryatia, the Republic of Tatarstan and other regions.

It is obvious that the widespread putting mediation into practice is impossible without the formation of initiative groups, both at the level of the Russian Federation, and at the level of its constituent entities. In this sense some regions actively try to keep up with the times. For example, even before the Law on Mediation came into force, the Coordination Center for Promoting Mediation was established in the Krasnoyarsk region with the support of government agencies. A special role in the activity of the Center is played by the Union of Industrialists and Businessmen of Krasnoyarsk region which established the Council of Mediation in June 2009. The Union has plans to organize a self-regulating organization of mediators in 2015 basing on the established Non-profit partnership “Siberian Center for Mediation and Law.” At present, the main efforts of the Krasnoyarsk Coordination Center for Promoting Mediation aimed at creating roadmap for training professional mediators at the Law Institute of the Siberian Federal University. The representative experience of the Krasnoyarsk region and of other regions of the Russian Federation should be an example of implementation of mediation at the level of constituent entities of Russia.

The Russian professional standard of the “Expert in the field of mediation (mediator)” was finally approved by Ministry of Labour and Social Protection of the Russian Federation in 2014, which may contribute to further increase in the number of mediators. This standard outlines the main functions of profession of a mediator, of general mediation and of specialized mediation. The requirements for education and training are provided as well (in Higher education: Bachelor degree, additional non degree training: Training programs in mediation).

Back in 2011 Russian Center for Assistance of Arbitration launched the project “Resource Center for Mediation,” which provides an information and organizational support for entrepreneurship and institutions providing mediation services, thereby developing the Russian market of mediation services, their transparency and accessibility for the business community. We voice a hope that this Center (Resource Center for Mediation, 2015) shall prepare the environment for the successful settlement of economic disputes in the Russian Federation.

4. DISCUSSION

While there exist multiple problems in mediation and reasons why mediation procedures are used infrequently in Russia. These are the following: (1) Lack of the legal regulation of mediation and, as a consequence, multiple practical problems in this area; (2) Lack of the centralized system of mediation (Isaenkova, 2013); (3) The mediation agreement (as of the Law on Mediation) as an ordinary transaction (Clause 4 of Article 12), its enforcement requires turning to the court; (4) Only if the mediation agreement is reached after the submission of the dispute to the court, the parties have the right to apply to the court for the approval of it as the settlement agreement; (5) Nevertheless, the mediation agreement shall be approved as a settlement, if it is not against the law or does not violate the rights of other persons or entities (Part 2 of Article 39 of the Civil Procedure Code). Therefore, the mediator should be able to assess the issue from a legal point of view. In this regard,

the Law on Mediation should contain a mandatory requirement of the higher legal education completed by the mediator; (6) No requirements exist for the organizations providing mediation services; (7) Non-developed training program for mediators (multi-stage training is required), as well as short and expensive training courses; (8) The procedure of mediation under the Law is not structured. Legislative subdivision of the process into steps shall promote meeting deadlines, while not limiting the freedom of the parties' rights; (9) Lack of computerization of the population and the business community; (10) The procedure of disqualification and replacement of the mediator does not exist; (11) The mediation still causes mistrust, as it is not built into the system of justice.

The adoption of the Law on Mediation is certainly an important step, but still much more is needed to be done for its regulations (of more likely declaratory nature at present), so that it would be possible to provide the possibility of effective mediation institution. The legislator needs to address a number of challenges to form the mediation as a real alternative to the litigation. It is necessary to solve the issue of integration of mediation into the civil and arbitration processes. For example, a stumbling block to the development of mediation is a conflict of time limits in the mediation and the civil proceedings. Another example of problem is that, according to the Arbitration Procedural Code of the Russian Federation, only 50% of the state fee returns to the plaintiff due to reconciliation of the parties. Also, a weak stimulus for the development of mediation in Russia could be a situation where the fee of mediation services (an average of 1 hour of a mediator services costs 1500 rubles (around 22 U.S. Dollars), which is more expensive compared to the state duty. One of the other important problems is that the terms of mediation agreement is often beyond the scope of the claimed action. This issue should be also resolved by the legislator.

The main trend of the state policy in the field of developing mediation should be the elaboration and the implementation of the concept of the systemic development of mediation in Russia, which should be a central (federal) one, but at the same time, the constituent entities of the Russian Federation need to make great efforts to promote mediation both by adopting legal acts to regulate and unify implementation of mediation and by developing and implementing tactical and strategic action plans, with the purpose of ensuring development of mediation in the regions. An important role in development of such plans should be given to the activity of generating images of mediation. Public relations and relations with business associations should be in the focus of promoting the mediation procedure.

The Russian business community should be completely informed on issues of using mediation. Great importance should be given to the information of the interaction of executive authorities, with the obligatory and accountable activity in the field of the development and implementation of mediation, as well of the business associations, both at the federal level and at the level of the regions of the Russian Federation. This interaction should be carried out in the form of meetings, round tables with the participation of representatives of major business structures and practicing mediators.

The major role in this information exchange could be played by the courts. Information displays in the courts containing information on what disputes can be settled by a mediator and addresses of entities providing mediation are needed. Judges need to directly inform the parties of the dispute. In certain countries, the judges themselves can act as mediators (Otis and Reiter, 2011). In Russia both the sitting and retired judges cannot be mediators. Relations of the courts and the mediators should have a common framework. They need to be determined at the federal level. This relation should contribute to the development of the recommendations for addressing the certain categories of cases to the mediation procedure by the magistrates' courts, courts of general jurisdiction and by the arbitration courts.

At present, the issue of the legislative introduction of mandatory mediation in simple cases which do not require serious judicial intervention and purely legal solution of the problem, as a tool to promote this institution should be raised. Of course, the main argument "against" this step is, in this case, a breach of its voluntariness, which is the basic principle of mediation. However, businesses should compulsory use this method. Upon the widespread introduction of mediation the administrative impact should be reduced. In many countries, judges actively promote the involvement of mediators. In some countries the courts regardless of the decision on the case, may assign all costs to the party that refused from participation in the mediation procedure. For example, more than 15 years ago, the mandatory mediation has been introduced in the UK. They used a "stick" policy, as the companies or the parties, which do not contribute to the mediation (or take a bad practice of this procedure), even in case of subsequent rendering judicial decision in their favor, were required to pay all court costs. The successful resolution of the conflict through a mediation procedure was a "carrot." The efficiency reached 80%. Therefore, benefits of mediation were gradually demonstrated to the business, the levers of power and financial sanctions were used, and only later the entrepreneurs, making out their benefits, have adopted this method, involving it into the business turnover (Shamlikashvili, 2009).

Thus, the mandatory mediation in judicial practice is another way of informing society about the possibilities of mediation in resolution of disputes and conflicts, though this option is a controversial one and can be achieved, in view of the already adopted Law on Mediation, as an experiment in certain courts and in specific disputes.

Another important activity in the frame of establishment and development of mediation in Russia should be the origination of a multi-stage training system for mediation, including: (1) Development of basic programs that allow students of various areas of training receive basic knowledge on mediation; (2) Development of training programs for professional mediators; (3) Development of training programs for professionals who are interested in gaining knowledge on mediation, to use them for their professional purposes, taking into account the characteristic features of their activities. Educational program for the students of secondary and higher education institutions should include courses on conflict management. Thus, in Law Departments it

is, as a rule, the course in “Legal Conflict Management” and in Economic Departments it may be the course in “Corporate conflict management.” These courses should include issues related to the alternative forms of dispute resolution. Formation and development of mediation techniques and their widespread introduction in a contemporary Russian society will require specific attention to the institution of mediation as the part of education institutions. Curricula of the already implemented technologies of mediation on the basis of higher education should be unified. The creation of mediation clinics at Higher Education Institutions is desirable as it allows to educate the future lawyers in the field of alternative dispute resolution. These clinics should provide free mediation services, as well as conduct consultations and education on mediation.

The main activity for establishing the institution of mediation should be the development of training system for mediators themselves. Moreover, due to the introduction of mediation institution those professionals who are engaged in identification, prevention and resolution conflicts need to have an accurate representation of a mediation procedure, its stages and the boundaries of applicability (such professionals may include judges, bailiffs, professionals of other public institutions). The Law on Mediation forbids them to act as mediators. Nevertheless, the knowledge of the mediation procedure, its principles and opportunities should become a part of their professional competence. Therefore, the development and implementation of mediation training programs for these types of professionals as well as for the lawyers, notaries, corporate lawyers, will play an important role in the development of mediation training system.

The solution to all these problems will contribute to the integration of mediation into the civilized processes and to the popularization of the procedure.

5. CONCLUSION

Summarizing all the above, it should be noted that the main directions of the state policy in the field of mediation should be as follows: (1) Further development and improvement of legislation in the field of mediation; (2) Development and subsequent implementation of the concept of systemic development of mediation in Russia; (3) Promotion of mediation among the individuals and the entrepreneurs; (4) Development of mediation training system, providing basic knowledge on a mediation procedure in secondary and higher education; (5) Effective and high-quality training of professional mediators; (6) Development of training programs for specific groups of professionals to use their knowledge of mediation in their professional activities. In our opinion, at present the priority must be the introduction of professional mediation in the resolving economic disputes and conflicts. The government should purposefully promote training of competent mediators.

The main approach to solving any problems related to the development of mediation in Russia should be in understanding that the development of this process eventually meets the priorities of any law-governed state. These priorities should include establishment of an effective judicial system; reduction of the

number of cases and the costs associated with their proceeding; ensuring rapid resolution of conflicts and settlement of their negative consequences; promotion of such settlement of conflicts, which corresponds to the interests of the parties; ensuring of the availability and variety of procedural forms. It is important to correct all actions for the further development and intensification of the process of institutionalization of mediation in Russia.

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