

# Litigation Funding 2021

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# Litigation Funding 2021

**Contributing editors****Steven Friel and Jonathan Barnes**

Woodsford

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Canada, France, Russia and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.



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# Contents

<b>Introduction</b>	<b>3</b>	<b>Israel</b>	<b>56</b>
Steven Friel and Jonathan Barnes Woodsford		Yoav Navon and Steven Friel Woodsford	
<b>Third-party funding in international arbitration</b>	<b>4</b>	<b>Italy</b>	<b>60</b>
Zachary D Krug, Adam Erusalimsky, Charlie Morris and Helena Eatock Woodsford		Davide De Vido Fideal S.R.L.	
<b>Australia</b>	<b>7</b>	<b>Mauritius</b>	<b>64</b>
Simon Morris, Martin del Gallego, Gordon Grieve and Greg Whyte Piper Alderman		Rishi Pursem and Taroon Ramtale Benoit Chambers	
<b>Austria</b>	<b>18</b>	<b>New Zealand</b>	<b>68</b>
Marcel Wegmüller and Jonathan Barnett Nivalion AG		Adina Thorn and Rohan Havelock Adina Thorn	
<b>Belgium</b>	<b>22</b>	<b>Russia</b>	<b>76</b>
Isabelle Berger Nivalion AG Hakim Boularbah Loyens & Loeff		Max Odenthal Aperio Intelligence	
<b>Canada</b>	<b>27</b>	<b>South Korea</b>	<b>80</b>
Ekin Cinar and Franca Ciambella Woodsford		Beomsu Kim, Bhushan Satish and Hyungwon Nahm KL Partners	
<b>England &amp; Wales</b>	<b>31</b>	<b>Switzerland</b>	<b>84</b>
Steven Friel, Jonathan Barnes, Alex Hickson and Fred Bowman Woodsford		Marcel Wegmueller, Isabelle Berger and Franziska Studer Nivalion AG	
<b>France</b>	<b>40</b>	<b>Thailand</b>	<b>90</b>
Isabelle Berger Nivalion AG Marina Weiss Bredin Prat		Surasak Vajasit, Melisa Uremovic, Chotiwit Ngamsuwan and Supawadee Vajasit R&T Asia (Thailand) Limited, a member firm of Rajah & Tann Asia	
<b>Germany</b>	<b>45</b>	<b>United States – New York</b>	<b>94</b>
Arndt Eversberg Omni Bridgeway		David G Liston, Alex G Patchen and Rebecca Rothkopf Liston Abramson LLP	
<b>Hong Kong</b>	<b>50</b>	<b>United States – other key jurisdictions</b>	<b>101</b>
Briana Young, Dominic Geiser, Priya Aswani and Simon Chapman Herbert Smith Freehills		Zachary D Krug, Robin M Davis, Alex Lempiner and Dan Kesack Woodsford	

# Belgium

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## REGULATION

### Overview

1 | Is third-party litigation funding permitted? Is it commonly used?

So far, the admissibility of third-party litigation funding has never been reviewed by the Belgian courts, which creates an uncertainty detrimental to its development. However, it is commonly accepted by legal scholars and practitioners that third-party litigation funding is valid and permitted under Belgian law.

Nevertheless, the use of third-party litigation funding has remained relatively limited, which might be because its admissibility has not yet been judicially confirmed. Moreover, the costs of Belgian judiciary proceedings are relatively low compared to the legal costs incurred in other jurisdictions. Similarly, the proceeds resulting from litigation or arbitration proceedings under Belgian law tend to be lower than in other – particularly common law – jurisdictions, since concepts such as punitive damages are not available under Belgian law. Consequently, third-party litigation funders have shown a relatively modest interest in the Belgium market so far, which prevented litigants from making vast use of third-party litigation funding.

### Restrictions on funding fees

2 | Are there limits on the fees and interest funders can charge?

There are no specific rules regarding the acceptable amount of the funder's return. As a general rule, the funder's profit should not exceed the litigant's share of the proceeds.

Typically, the funder's share is calculated based on a multiple of the funds contributed, a percentage of the proceeds or a combination thereof. In practice, the funder's success fee commonly ranges between 20 and 50 per cent of the net proceeds (with caps in the event of high amounts in dispute to make sure the funder's success fee remains reasonable).

### Specific rules for litigation funding

3 | Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

The Belgian legislator has not yet enacted a specific law designed to regulate the practice of third-party litigation funding. However, such legislative intervention could prove useful for the provision of legal certainty and the creation of a legal framework relating to third-party litigation funding. Moreover, it would be in line with the declared intention of the Belgian government to undertake substantial reforms of the Belgian judicial system to enhance access to justice.

In the context of international arbitration, the Guidelines of the International Bar Association on Conflicts of Interest in International

Arbitration suggest the disclosure of any non-party's financial interest involved in the arbitration proceedings.

### Legal advice

4 | Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

Lawyers are subject to rules contained in the Code of Ethics (Lawyer's Code of Ethics), which determines the information that is deemed confidential, and hence may not be disclosed to any third party, including the funder. The rule of confidentiality applies, *inter alia*, to the correspondence exchanged between the lawyer and the client and any written material drafted for the client. These documents benefit from a legal privilege and may not be disclosed by the lawyer to the funder without prior consent of the client. The funder's information rights regarding privileged information must, therefore, be precisely defined in the litigation funding agreement. In practice, such clauses are typically included in the litigation funding agreement and ensure that the disclosure of information to the funder is in accordance with Belgian Law and the Lawyers' Code of Ethics.

According to the 17 March 2008 Regulation of the French and German-speaking Belgian Bar governing the relation between lawyers and third parties (Regulation of the Belgian Bar), professional secrecy does not prevent the lawyer from sharing with the third-party funder the client's legal position and objectives, the strategy they intend to follow, as well as the means envisaged to reach their objectives, provided that the exchange of such information has been previously agreed by the lawyer and his or her client.

### Regulators

5 | Do any public bodies have any particular interest in or oversight over third-party litigation funding?

Since third-party litigation funding is not regulated under Belgian law, it generally escapes any type of supervision by public bodies. However, depending on the structuring of the funding agreement, it cannot be excluded that a specific funding model may be considered as a regulated service falling under the supervision of the Belgian financial regulator.

Typically, third-party litigation funding differentiates itself from most of the financial services regulated under Belgian law:

- It is not a *loan* or a *credit agreement* because the funded party has no mandatory duty to repay the provided funds to the funder but only an obligation to share potential proceeds with the latter. Similarly, third-party funders cannot be seen as credit institutions since they do not publicly collect refundable deposits, nor make available credit facilities for their own account;
- It is not a *legal protection insurance* since in a litigation funding agreement – unlike under an insurance policy – no premium for the coverage of a future litigation risk is paid.

Funds providing litigation funding may, in some cases, fall within the scope of the EU Alternative Investment Funds Managers Directive (AIFM Directive) implemented under Belgian law by the AFIM Act. The AIFM Directive defines the alternative investment funds as any collective investment that raises capital from a number of investors to invest it in accordance with a defined investment policy for the ultimate benefit of the investors.

## FUNDERS' RIGHTS

### Choice of counsel

#### 6 | May third-party funders insist on their choice of counsel?

As a matter of principle, the litigant's lawyer is independent from the third-party funder and must be able to act freely from any instructions from the latter. However, the third-party funder will only invest funds in a process that is conducted by a competent and duly specialised lawyer. The third-party funder will thus carefully examine the qualifications of the envisaged lawyer and the reasonableness of the proposed fees and only provide funding if the litigant's choice of counsel can be approved.

### Participation in proceedings

#### 7 | May funders attend or participate in hearings and settlement proceedings?

The third-party litigation funder's role and the funder's rights of information and participation are typically determined in the litigation funding agreement. Accordingly, a litigant might invite the third-party funder to participate in a court or an arbitral tribunal's hearing or settlement discussions on the basis of a respective clause in the litigation funding agreement, provided that this is in line with the envisaged litigation strategy and the counterparty does not object to it. Even if there is no respective clause in the funding agreement and the counterparty has not been informed about the funder's presence, a third-party funder may attend a court hearing since state court hearings are open to the public in Belgium.

### Veto of settlements

#### 8 | Do funders have veto rights in respect of settlements?

It is common practice to include a funder's veto right relating to a potential settlement in the funding agreement. This is to ensure that the third-party funder has the possibility to oppose to a settlement which is considered unreasonable on the basis of the funder's evaluation of the prospects of the case. That said, in practice, the interests of the funded party and the third-party funder are almost always aligned.

### Termination of funding

#### 9 | In what circumstances may a funder terminate funding?

Third-party funders and litigants are free to agree on various grounds that give reason to terminate the funding agreement. In practice, funders can typically terminate the funding agreement for the following reasons:

- a change of circumstances having a material impact on the chances of success of the funded case;
- a material breach of the litigant's contractual obligations;
- the insolvency of the litigant (it should be noted in this context that the trustee in bankruptcy decides whether the funded procedure may be continued or not); and
- the insolvency or a major change in the creditworthiness of the opposing party.

### Other permitted activities

#### 10 | In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Any rights and actions the third-party litigation funder wishes to exercise during the course of the funded proceedings must be determined in the funding agreement. This includes any information or participation rights, access to documents and any right to reject actions a litigant is usually free to take. Outside the scope of the funding agreement, there is no requirement for a third-party funder to take any active role in the funded proceedings.

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

#### 11 | May litigation lawyers enter into conditional or contingency fee agreements?

Belgian law prohibits contingency agreements under which the determination of the lawyers' fee depends exclusively on the outcome of the case to be litigated (see article 446-ter of the Belgian Judicial Code (BJC)).

Conversely, lawyers can be partly remunerated by a success fee defined as a percentage of the amount recovered by their clients. As a consequence, Belgian lawyers may enter into contingency fee agreements provided that their success fee is limited to a reasonable amount and that the fee arrangement agreed upon with their clients provides for a minimal remuneration independent of the outcome of the case.

### Other funding options

#### 12 | What other funding options are available to litigants?

The following options are available:

- Legal assistance insurance: pursuant to the Belgian Insurance Act (Insurance Act), the insurer has to bear the costs incurred in connection with the court proceedings of the insurance holder (legal fees and expenses, bailiff's fees, procedural indemnities, costs of technical advice, expert's fees, etc) but has no interest in the financial outcome of the litigation.
- Loan or credit facility agreement: the debtor must repay to the creditor the funds placed at its disposal.
- Assignment of claims: the original creditor assigns the claim for less than its original worth to an assignee in exchange for an immediate payment from the third-party debt collector who becomes the holder of the claim and a party to the pending or forthcoming litigation proceedings.
- Belgian state legal aid: under strict conditions a litigant may obtain legal aid from the state. Legal aid exempts the litigant in whole or in part from having to contribute to the costs of the proceedings.
- After-the-event (ATE) insurance: since third-party litigation funding agreements do not always cover the procedural and legal costs the litigant may be ordered to pay to the opposing party, the funded party frequently enters into an ATE insurance contract to have these costs covered.

## JUDGMENT, APPEAL AND ENFORCEMENT

### Time frame for first-instance decisions

13 | How long does a commercial claim usually take to reach a decision at first instance?

Depending on the complexity of the case and the territorial jurisdiction, it will take approximately one year following the submission of the claim for a decision to be rendered by a first instance court in a commercial dispute.

### Time frame for appeals

14 | What proportion of first-instance judgments are appealed? How long do appeals usually take?

There is no official statistics on the number of judgments that are appealed in Belgium. Appeal proceedings are however very frequent. Such proceedings may last between one to three years depending on the complexity and importance of the case and the court that exercises jurisdiction.

As regards arbitral awards, the parties – by an express statement in the arbitration agreement or by a subsequent agreement – may exclude any application to set aside the award if none of them is either a natural person having Belgian nationality or its domicile or habitual residence in Belgium, or a legal person having its registered office, principal place of business or branch office in Belgium. In addition, awards rendered by an arbitral tribunal having its seat in Belgium may only be challenged for limited grounds exhaustively mentioned in the Belgian Judicial Code (BJC). Challenges to an arbitral award generally last between one to two years.

### Enforcement

15 | What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no official statistics on enforcement proceedings. As a rule, judgments are immediately enforceable even if appeal proceedings are pending or may still be brought. In the absence of voluntary payment from the debtor, the intervention of a bailiff will be necessary to proceed to enforcement measures, such as the attachment and the sale of the debtor's property or other assets, garnishment of the debtor's receivables and bank accounts, etc.

As arbitration proceedings are based on the mutual consent of the parties, arbitral awards require less often enforcement proceedings, although such proceedings are not unusual. Arbitral awards, whether foreign or domestic, may only be enforced after the competent court of first instance has granted enforcement following an ex parte application of the award creditor. The grounds for refusal of recognition and enforcement of arbitral awards are exhaustively listed in article 1721 of the BJC.

## COLLECTIVE ACTIONS

### Funding of collective actions

16 | Are class actions or group actions permitted? May they be funded by third parties?

On 28 March 2014, a Belgian Act on class actions was introduced in the Belgian Code of Economic Law (CEL). The relevant provisions of the Act came into force on 1 September 2014. However, the scope of actions for collective redress has remained limited. These proceedings may only be brought before the Brussels Commercial Court by a group of consumers or SMEs represented by non-profit organisations or public

bodies against a company, and on the ground of an alleged violation of Belgian and European rules expressly provided for on the CEL.

Third-party funding of class actions is not prohibited under Belgian law. Such funding should, however, be disclosed in the application initiating the proceedings for the judge to rule on its adequacy, considering the influence it may have on the action for collective redress. However, third-party litigation funding seems to be of limited interest in the context of class actions since the CEL provides that a court-appointed administrator must pay any compensation directly to the members of the group under the court's supervision without any right for the third-party funder to receive a share of this compensation. This implies that a third-party funder could, in principle, not take a share of the proceeds of the action. However, in practice, there might be possibilities to structure a funding agreement in such a way as to overcome this obstacle.

Besides class actions, Belgian law also allows for other instruments of collective redress, in particular actions where (1) numerous claimants act together and unite their claims in one single procedure, or (2) instances in which a third-party purchases various claims and initiates proceedings on behalf of the former claimants. In such proceedings, claimants and third-party funders may enter into litigation funding agreements and share the proceeds of the procedure.

## COSTS AND INSURANCE

### Award of costs

17 | May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The costs of the proceedings that courts may order the losing party to pay to the successful party are exhaustively enumerated in article 1018 of the Belgian Judicial Code (BJC). The principal costs of the proceedings are the following:

- costs of service, filing and registration with the court registry. These costs are fixed and depend on the nature of the writ filed with the court and on the amount in dispute;
- costs of judicial expertise and other measures of investigation;
- a registration fee of 3 per cent on behalf of the tax authorities if the losing party is ordered to pay an amount exceeding €12,500; and
- a procedural indemnity that is a flat-rate contribution in the lawyers' fees. Its amount is set by the law and adjusted from time to time to account for inflation. Since 1 June 2016, the basic indemnity ranges from €180 to €18,000 for claims that can be appraised in monetary terms. If the claim cannot be appraised in monetary terms, the basic amount of the procedural indemnity is €1,440. These amounts may be decreased (to a minimum of €90) or increased (to a maximum of €36,000) by the court under specific circumstances, depending on different criteria, such as the financial capacity of the unsuccessful party, the complexity of the case, existent contractual compensation for the successful party, blatant unreasonable submissions (see article 1022, §3 BJC).

As a consequence, courts may not order the unsuccessful party to pay the litigation funding costs of the successful party. Nevertheless, the intervention of a third-party funder could indirectly be taken into account by courts when fixing the procedural indemnity on the basis of the above-mentioned criteria.

With regard to arbitration proceedings, article 1717, §6 BJC provides that the final award must fix the costs of the arbitration and decide which party shall bear what proportion of said costs. According to the above-mentioned provision, these costs include arbitration costs as well as party costs, defined as 'the fees and expenses of the parties'

counsel and representatives' and 'all other expenses arising from the arbitral proceedings' (unless otherwise agreed by the parties). It is generally considered that such costs must be reasonable. We are not aware of any arbitration proceedings having their seat in Belgium in which the unsuccessful party was ordered to pay the funding costs of the successful party. As article 1717, §6 BJC is drafted in general terms, one could, however, argue that funding costs should be taken into consideration in the allocation of costs by the arbitral tribunal.

### Liability for costs

18 | Can a third-party litigation funder be held liable for adverse costs?

A third-party funder does not become a party to the proceedings as a consequence of the funding agreement. Accordingly, a court or an arbitral tribunal may not directly order a funder to pay for adverse costs. However, provided that the litigation funding agreement contains an obligation of the third-party funder to cover the adverse cost risk, which is common practice for Continental European funders, the unsuccessful funded litigant has an enforceable claim against the funder for the payment of adverse costs.

### Security for costs

19 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Courts may only order a foreign claimant to provide security for the costs and damages potentially arising from the proceedings, if the security is requested by a Belgian defendant (see article 851 Belgian Judicial Code (BJC)). This *cautio judicatum solvi* is aimed at protecting Belgian litigants against pecuniary losses that may be caused to them by foreign claimants who do not offer enough securities in Belgium to ensure the payment of costs and damages that may result from the proceedings they have introduced. However, the Belgian Constitutional Court has qualified the granting of such security as discriminatory because it may only be requested from foreign claimants and the relevant provisions of the BJC must be modified on this point.

The relevant provisions of the BJC relating to arbitration proceedings do not address the issue of security for costs. It is, however, generally assumed that security for costs may be ordered by arbitral tribunals as part of interlocutory measures that arbitrators may adopt on the basis of article 1717, §1 BJC.

20 | If a claim is funded by a third party, does this influence the court's decision on security for costs?

Prior to the above-mentioned decision of the Belgian Constitutional Court, security for costs could only be ordered by Belgian courts if requested by a Belgian defendant against a foreign claimant. The existence of a third-party funding agreement was therefore not a criterion for the granting of security for costs under the relevant provision of the BJC.

In arbitration proceedings, it is generally considered that the existence of a third-party funding agreement may not in itself justify an order for security for costs by the arbitral tribunal.

### Insurance

21 | Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

After-the-event insurance is admitted and frequently used. It is usually offered by foreign insurance companies. However, if the funder has

an exclusive solution for the coverage of adverse costs by way of ATE insurance on offer, ATE insurance can also be included in the litigation funding agreement.

Additionally, insurance for legal costs linked to potential liabilities is well instituted and very common in Belgium. Such insurance is often part of other insurances (eg, automobile liability insurance, household insurance, etc).

## DISCLOSURE AND PRIVILEGE

### Disclosure of funding

22 | Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

In the absence of any act on third-party litigation funding, no legal provision imposes an obligation on the funded party to disclose the existence of a funding agreement. However, it is considered that in specific circumstances the principle of procedural loyalty justifies that the funded party discloses the existence of a funding agreement to the opposing party and to the court. Such disclosure would notably be necessary to ensure that there is no conflict of interest involving the third-party funder. Moreover, the disclosure of a funding agreement may be ordered by a court if the conditions required for the production of documents under article 877 Belgian Judicial Code (BJC) are met, namely the existence of serious, precise and concordant presumptions that a party or a third-party is in possession of a document containing evidence of a relevant fact. This scenario, however, seems rather unlikely in relation to a funding agreement.

As far as arbitration proceedings are concerned, it is considered that the principle of fairness of the debates enshrined in article 1699 BJC, imposes a duty on the funded party to disclose the existence of a third-party funder, should the party be aware of potential conflicts of interest between the funder and one or several arbitrators. Potential conflicts of interest occur more frequently in arbitration proceedings since arbitrators may have worked before with third-party funders when acting as a lawyer.

### Privileged communications

23 | Are communications between litigants or their lawyers and funders protected by privilege?

Communications between litigants and their lawyers are considered privileged. Consequently, they will not be allowed as evidence by the courts or arbitrators and disclosing such information may constitute an offence that could be criminally prosecuted.

The above does not apply to communications between litigants and their funders. As a consequence, the confidentiality of communications and documents exchanged between litigants and third-party funders must be provided for in the funding agreement.

## DISPUTES AND OTHER ISSUES

### Disputes with funders

24 | Have there been any reported disputes between litigants and their funders?

To our knowledge, there are no reported disputes between litigants and third-party funders in Belgium.

**Other issues**

**25** | Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

Third-party funding is still relatively rarely used in Belgium and there is no established rule or case law regarding this topic. Therefore, many questions remain unanswered. It is thus crucial that a clear and transparent contract be drawn up between the funded party and the third-party funder to cover all the relevant aspects of the funding relationship, including the interactions between the third-party funder and the litigant's lawyer.

**UPDATE AND TRENDS****Current developments**

**26** | Are there any other current developments or emerging trends that should be noted?

With the increase of collective and follow-on actions and a growing interest in the enforcement of arbitral awards against sovereign states in Belgium, it is likely that third-party funding will develop over the next few years with the intervention of Continental European and English funders.

**Coronavirus**

**27** | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

By Royal Decree No. 2 of 9 April 2020 (amended by Royal Decree of 28 April 2020), the Belgian government adopted several measures that have strongly impacted civil and business court proceedings. This Decree essentially provided for the automatic extension of all procedural time limits (such as deadlines for filing written submissions) and time limits for lodging an appeal, on the one hand, and of statutes of limitations and other deadlines to introduce new proceedings, on the other hand. Deadlines for filing written submissions and lodging an appeal that expired between 9 April and 3 May 2020 were automatically extended until 3 June 2020. However, a party could request the judge to set aside the extension of the deadlines for filing submissions and appeals if it proved that proceedings were urgent and that any delay could be detrimental. Statutes of limitations and other time limits for bringing an action that expired between 9 April and 17 May 2020 were extended until 17 June 2020. Additionally, all proceedings in which an oral hearing for pleadings on the merits was scheduled between 11 April and 17 June 2020, and in which all parties had filed written submissions, were, in principle, dealt with in writing, meaning that judges had to decide on the case on the basis of the written submissions and the exhibits filed by the parties without an oral hearing. Parties could, however, object to having their case assessed solely on the basis of their written submissions.

Since March 2020, courts and tribunals across the country have also adopted specific measures regarding the management of judicial proceedings during the crisis. These measures were followed by the adoption, mostly in May 2020, of various rules relating to the introduction and continuation of proceedings as well as the holding of oral hearings to organise the progressive resumption of court activities. It is, therefore, advisable to visit the website of the relevant court or tribunal to be informed of the measures currently applicable.

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