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In this issue of *The Arrest News:*

The Ever Given Saga – Law and Liability by Hany Mamoon & Karim Marouny & Omar Omar, Al Tamimi & Company (UAE)

The running aground of the Ever Given across the Suez Canal has raised questions as to who is responsible for grounding incidents under Egyptian law. The main points of concern are:

1. Are vessel owners, operators and or charterers liable in the event of grounding?
2. **Would vessels' owners, operators and or charters respond to a fault committed by the master;**
3. **Would pilotage shifts liability if an incident occurs as a result of the Pilot's negligence;**
4. Are waterway authorities liable in the event of vessels running aground?

This article provides some clarity regarding who is responsible for what and when.

Grounding of the Ever Given and a global disruption in shipping

On 24 March 2021, the world followed a developing story where a large container ship (the Ever Given) ran aground while navigating through the Suez Canal. The Ever Given was grounded for six days before salvage efforts and tugs and tow maneuvers succeeded in refloating it on 29 March 2021.

While grounding incidents may be frequent, the grounding of the Ever Given gained global attention due to the vessel's giant size and the disruption it caused in the vital waterway. The incident led to a

complete suspension of navigation in the Suez Canal, one of the most frequently relied upon waterways in international trade.

On 28 March 2021, four days after the vessel was refloated, the Ever Given was once again in the headlines when the Suez Canal Authority (SCA) lodged a $1 billion claim against the vessel owner. The SCA demanded compensation for the cost of refloating the vessel, the losses incurred from the disruption in traffic (amounting to $917 million), as well as for salvaging the vessel and goods on board. To preserve its rights, the SCA filed legal action to seize the vessel and goods aboard. So, the Ever Given remained in Egyptian waters. On the 7th of July 2021, it was announced that the vessel was released after an amicable settlement between the SCA and the owner of Ever Given was reached.

The Relevant Legal Framework

With respect to liability, Egyptian Maritime Law (EML) recognizes the application of the regulations issued by the administrative authorities with respect to Pilotage. In the case of the Ever Given, the rules of navigation issued by SCA should apply.

Articles 286 and 287 of the EML delineate liability for incidents that take place while the vessel is under pilotage. In line with most maritime legislations, the aforementioned articles state that:

1. The management and command of the vessel remains the master's responsibility during pilotage.
2. The ship's operator shall be held solely liable for damage caused to a third party as a result of faults committed by the pilot in implementation of the pilotage process.

Article 4 of the SCA rules provides further detail regarding the abovementioned principles with respect to navigation through the Suez Canal. In accordance with said article, owners and/or operators of a vessel are responsible for any direct or indirect damage and/or consequential loss caused by a vessel to itself, SCA properties, personnel, or obstructing navigation in the Canal, even if the fault attributed to the vessel or its crew is not intentional. It further outlines that owners, managers, charterers and/or operators hold themselves responsible for any mistakes resulting from the pilot's advice or SCA personnel.

Likewise, Article 11 of the same rules states that masters are solely responsible for all direct or indirect damages or accidents of any kind resulting from the navigation or handling of their vessels, and that the pilot is merely an advisor and is not held responsible for any damages sustained during transit as the master is solely responsible for the vessel.

Ever Given's defence

The owners of the Ever Given claim that the SCA is also to be held liable. Since the vessel was not escorted by tugboats while navigating the waterway in contravention of Article 58, which obliges the SCA to make available two tugboats to escort vessels like the Ever Given.

We cannot be sure if such defence is indeed righteous or not. However, given the number of vessels transiting and navigating through the canal on a daily basis, as well as the limited number of tugboats available, the SCA could not afford a tugboat per every vessel, which according to their rules does require the escorting of a Tugboat. Subsequently and according to the EG's owners, the first tugboat arrived almost an hour after the Ever Given was lodged across the canal. If this allegation is proven true, the SCA may be jointly liable for damages incurred.

Furthermore, according to Article 103 of the SCA rules of Navigation, when a vessel stops in the Canal as a result of an accident other than collision, engine troubles, auxiliary and steering gear troubles, the SCA will ensure speedy clearance of the waterway and assist with the necessary tugs to afloat the vessel in question, free of charge.

Notwithstanding the above, Article 103 of the Rules is in practice obsolete in cases of groundings, as the SCA compels vessels to submit a request to hire tugboats and other equipment to tow and re-float vessels for any reason.

Said request is made via a fixed form application submitted by the vessel local transiting agents to the SCA to hire tugboats as well as equipment and personnel necessary for re-floating and if necessary towing the vessel in accordance to the SCA's standard published tariff.

There is no doubt that the curtain has barely dropped on the largest claim ever presented by an Egyptian Authority against a single vessel, which both parties agreed to keep the terms of settlement confidential. However, the consequences of the incident and the vessel's long detention with approximately 18000 TUES onboard will be having its impact on all the parties having interests on the vessel as well as some of the cargo owners for the next couple of days, to say the least.

It's obvious that the main reason for the exacerbation of the crisis was the quantum of the SCA's unprecedented claim. And in this respect, it ought to be mentioned that should the SCA have applied its own standard tariff for the assistance and/or tugging requests referred above, in normal cases, the SCA's claim should not have exceed 15 percent of the figure claim. This is exclusive of the losses incurred by SCA, which if quantified and added to the salvage costs would not have come even close to the claimed figure either.

Conclusion

The Ever Given saga has given rise to numerous legal discussions and confusion. Hence, the potential settlement leaves us with the following important points to consider for the future:

1. The master is the ultimate commander on board his vessel and shall not refrain from taking all necessary decisions even if they lead to financial losses.
2. The master should refrain from commencing the Canal transit if he foresees that bad weather may affect commanding/steering the vessel through a relatively narrow waterway such as the Suez Canal.
3. Vessel masters should use the authority granted to them to dismiss the pilot if they foresee that his guidance is risky or not accurate. They are to then immediately request that the SCA substitute the pilot.
4. The SCA should issue a navigation protocol for giant vessels including the procedures and instructions to be followed for their safe navigation, including suspending navigation of said vessels during windstorms.
5. The SCA should upgrade its tugboat fleet to ensure availability with higher towing capacities that are adequate for the size of modern vessels. The SCA will also ensure tugboats are available at both entrances of the waterway.
6. Major shipping lines using the Canal should obtain any kind of assurances from the SCA that in case any of their vessels faced the same circumstances, the SCA will not issue such a prohibitive claim.

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What Constitutes Sheriff's Ship Maintenance Expenses? by Ashwin Shanker, Chambers of George Rebello (India)

The Indian Admiralty court works efficiently in ship arrests and towards auctions. Until an auction, it has to deal with abandoned arrested vessels requiring assistance that raise the following debates:

1. Is there an obligation upon the arresting Plaintiffs to maintain the vessel?

2. If the answer is no, is there an obligation upon the first arresting Plaintiff to maintain the vessel? If yes, should these expenses incurred be reimbursed as Sheriff's expenses.

3. Would ship maintenance expenses that are routed through the Sheriff only qualify under this category?

4. If yes, what if it is not a monetary expense, but simply of an accrual of charge such as Port Anchorage charges or crew wages?

5. What if the expenses incurred are not essential for the bare maintenance, but merely enhance the value of the ship such as its potential increased auction price e.g. painting of vessel?

6. Can a Defendant ship owner pay routine ship maintenance expenses and be entitled to reimbursement as Sheriffs' expenses?

7. Must these Sheriff's expenses be restricted to port dues, crew wages, food, fresh water, and bunkers/ lubes?

8. Would Port dues incurred subsequent to the ship arrest get classified as Sheriff's expenses, while those prior to the ship arrest be categorized as a maritime claim/lien?

9. Is the Port where the arrested Vessel is standing, entitled only to actual costs, or reimbursement as per their possibly higher tariff?

10. Would a P&I Club paying crew wages and repatriation pursuant to a Cover obligation given under the Maritime Labour Convention, also be entitled to be categorized as Sheriff's expenses?

11. A Port agent initially bears the primary liability to the Port for the time the Defendant vessel spends there whilst under arrest. Can that agent apply for these expenses to be treated as Sheriff's expenses, or must the Port alone be entitled to make such a request to the Admiralty Court?

12. Must Sheriff's expenses necessarily require prior approval of the Admiralty Court before they are incurred?

13. What about emergency services or expenses that had to be incurred absent approval of the Court (e.g. many Courts had minimal functioning in April 2020)?

14. Should Sheriff's expenses be reimbursed on actuals, or should a bonus be paid out of the sale proceeds to the Funder for these expenses?

A recent spate of ships abandoned, judicially sold have reignited this debate. These issues have occurred under common circumstances where a ship is abandoned, Port dues not paid, crew wages are paid, food, fresh water supplies often exhausted. Until the ship gets judicially sold, a couple of months worth of expenses need to be incurred. There is no available fund corpus for these with the Sheriff.

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The "Bill of Lading" Seen in the Singapore Bunker Industry is NOT the Key to the Warehouse by Kelly Yap & Gregory Toh, Oon & Bazul (Singapore)

In the very recently delivered landmark decision of The "Luna" and another appeal [2021] SGCA 84, the Singapore Court of Appeal held that a document titled "bill of lading" issued by local bunker barge operators was neither a contract of carriage nor a document of title and was, therefore, not a true bill of lading.

In a modern re-telling of the story of David versus Goliath, local bunker barge owners/charterers successfully resisted claims brought in the Singapore courts by Phillips 66 for misdelivery of bunkers.

The bunkers were sold by Phillips 66 to subsidiaries of OW Banker A/S. Following OW Bunker A/S' insolvency in 2014, which left Phillips 66's invoices unpaid, Phillips 66 arrested the barges, which had delivered the bunkers to various oceangoing vessels.

The claims were brought by Phillips 66, as the alleged shipper, on the basis of documents titled "bill of lading". The face of these documents bore what superficially appeared to be the usual hallmarks of bills of lading, which were prepared by the loading terminals but signed and stamped by representatives of the barges after loading. Phillips 66 argued that it had procured the issuance of such "bills of lading" as part of its risk management measure against its buyer's non-payment.

At the risk of over-simplification, the Singapore Court of Appeal adopted a substance-over-form approach and held that these documents were not true bills of lading. The Court of Appeal found that no contracts of carriage existed and these documents were not intended to be documents of title. That is why Phillips 66's misdelivery claims failed.

In arriving at this conclusion, the Court of Appeal emphasised the fact that the bunkers were consistently delivered by the barges to the ships shortly after loading, without any original bills of lading being surrendered, and well before the expiry of the 30-day credit period which Phillips 66 had given its buyers. This indicated that neither Phillips 66 nor the barge operators could have intended for delivery of the bunkers to be made only upon presentation of an original "bill of lading".

It was also telling that there was a conspicuous absence of any reference to bills of lading in the bunker sale contracts between Phillips 66 and its buyers. Phillips 66 also never once gave any instructions to the barges to make deliveries to specific oceangoing vessels.

Ultimately, the Court of Appeal found that it was untenable that the barge owners/ charterers would have agreed to assume the risk of non-payment by Phillips 66's buyers. Therefore, the documents titled "bills of lading" that Phillips 66 had relied on to sue and to arrest the bunker barges were not true bills of lading, in the usual sense as understood in the shipping industry, and they did not bestow any rights of suit.

This decision is highly relevant to players in the local bunker industry as it is not uncommon to see such "bills of lading" in circulation. Parties who procure the issuance of such "bills of lading" will have to reconsider their *modus operandi* and risk management strategies. The decision also serves as a timely reminder to barge owners/operators to exercise care when authorising masters or cargo officers to sign documents at loading.

This article is authored by Head of Litigation, Partner Kelly Yap and Senior Associate Gregory Toh.

Kelly Yap and Gregory Toh successfully represented the bunker barge operator of the "Luna" together with partners Bazul Ashhab and Prakaash Silvam.

Kelly Yap has substantial experience in handling misdelivery claims and bunker supply disputes.

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Bunker Supplies: The Extent of the *In Rem* Claim in English and Northern Irish Law by Craig Dunford QC (Northern Ireland)

In *The Columbus* and *The Vasco da Gama* [2020] EWHC 3443 (Admlty), the Admiralty Registrar was faced with a short but important point on the ambit of a claim in rem in respect of goods or materials supplied to a ship for her operation or maintenance. That is the wording of section 20(2)(m) of the Senior Courts Act 1981, and the same wording appears in the equivalent provision in Northern Ireland (paragraph 1(1)(m) of Schedule 1 to the Administration of Justice Act 1956).

Bunkers had been supplied to the vessels, and had (as the Admiralty Registrar put it) been *"…obviously supplied to the vessels for their operation"*. But the bunker suppliers' terms and conditions included provisions obliging the customer to meet interest on overdue payments, pay any administrative fees which the suppliers incurred as a result, and provide a costs indemnity to the suppliers with respect to any liability arising out of the customer's use and handling of the bunkers.

Counsel for the vessels' owners argued that the interest, the administrative fee and the costs indemnity were to be regarded separately, and were not "in respect of" the supply of the bunkers. Counsel for the suppliers contended that these elements were part and parcel of the bargain and that it was not permissible to "unpick" or "slice and dice" the package of contractual terms upon which the bunkers were supplied.

The leading modern case on section 20(2)(m) of the 1981 Act (and, by extension, paragraph 1(1)(m) of Schedule 1 to the Administration of Justice Act 1956) is *The Edinburgh Castle* [1999] 2 Lloyd's Rep 362, from which the following four propositions emerge:

1. The words "in respect of" are wide words which should not be unduly restricted: *The Kommunar*, [1997] 1 Lloyd's Rep 1 at p 5;
2. Section 20(2)(m) (which is in the same terms, as noted, as paragraph 1(1)(m) of Schedule 1 to the Administration of Justice Act 1956) contains a jurisdiction which is no narrower than the predecessor jurisdiction in respect of claims for "necessaries": *The Fairport* (No. 5), [1967] 2 Lloyd's Rep 162; *The Kommunar*, supra;
3. No distinction is to be drawn…between necessaries for the ship and necessaries for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category. [Roscoe, The Admiralty Jurisdiction and Practice, 5th ed., at p. 203; *The Riga* (1872) L.R. 3 Ad. & Ecc. 516]; and
4. The jurisdiction extends to the provision of services: *The Equator*, (1921) 9 Ll L Rep 1; *The Fairport* (No. 5), supra.

Counsel for the vessels' owners submitted that the claims for interest etc were merely "ancillary to" the supply of the bunkers; he argued that they were not sufficiently closely connected to be "in respect of" of that supply, and that the suppliers were therefore only able to pursue those items *in personam*.

The Admiralty Registrar held that it would not be appropriate or wise to gloss the statutory words "in respect of" or to attempt to define them further. They were ordinary words in the English language. He held that that they were wide words which should not be unduly restricted. The provisions for interest, administration fee (obviously meant to cover the administrative costs of chasing the debt) and costs were integral parts of a package of contractual terms. They were incidents of the contract which followed from non-payment of the price. In the case of the interest and the administration fee, they were calculated as a percentage of the price and therefore closely and directly related to it. There was nothing unusual about them.

The Admiralty Registrary further noted that in *The Kommunar*, supra, Clarke J had impliedly held that interest fell within section 20(2)(m). To hold that the price of the bunkers was within the section, but that the contractual consequences of non-payment of the price were not, would mean that a *bona fide* supplier of

necessaries to a ship would have to bring two separate claims – one *in rem* against the ship and the other *in personam* against the operator. That, said the Admiralty Registrar, made no sense at all, either in terms of fairness or procedure. It would, in many cases, allow the counterparty simply to ignore or bypass the consequences of their contractual bargain and it would lead to a wasteful multiplicity of actions.

Whilst acknowledging that the costs were further removed from the price of the bunkers than the interest and the administration fee, the Admiralty Registrar held that they were no less a part of the contractual bargain, and he saw no reason in principle to treat them differently. They too fell within section 20(2)(m).

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On Barratry and Exceptions of Owners Liability by John Harris & Yoav Harris, Harris & Co. (Israel)

Glencore Energy UK and Others V. Freeport holding Ltd, *The Lady M*

While either being under extreme emotional stress due to the illness of his mother or while suffering from an unknown and undiagnosed personality disorder or mental illness, or some other emotional disturbance, the chief engineer of the M/V Lady M deliberately started a fire inside the engine control room of the vessel which was in the course of a voyage from Taman, Russia to Houston, Texas, USA.

As a result, the Owners engaged salvors and the vessel was towed to Las Palmas, Spain where general average was declared. Messrs. Glencore Energy UK ("Glencore"), as owners of a cargo of 62,250 m.t. of fuel oil carried on board the vessel, brought proceedings in the Commercial Court claiming the sums it had incurred to the salvors, as well as the costs of defending the salvage arbitration proceedings.[1] The contracts of carriage were subject to the Hague-Visby Rules (the Rules) and the Owners relied upon defences under Article IV rule 2 (b) and/or (q) which provide that:

> *"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: …(b) Fire, unless caused by the actual fault or privity of the carrier…(q) any other cause arising without the actual fault of privity of the carrier, or without the fault or neglect of the agents or servants of the carrier…".*

The court decided on the preliminary issues of whether the conduct of the chief engineer constituted barratry and whether the Owners were exempt from liability under either the "fire" and/or the "any other cause" exceptions of the above-mentioned Rules 2 (b) and 2 (q).

Following the Supreme Court of New Zealand's judgment in the matter of Tasman Orient V. New Zealand China Clays[2] which dealt with the grounding of the M/V Tasman Pioneer– *"…given that, as in common ground Art 4.2 (a) does not apply in the event of barratry…"* (paragraph [20]), Glencore argued that the conduct of the chief engineer of the Lady M in starting the fire constituted barratry and that the defence of rule 2 (b) was not available where the fire was caused by the barratrous act of the master and crew.

What is Barratry?

As regards the concept of Barratry, in Glencore V. Freeport holdings, the Court used the definition of barratry stated in paragraph 11 of the schedule of the Marine Insurance Act 1906, "Rules for the Construction of Policy":

> *11. The term 'barratry' includes every wrongful act*

1 Glencore Energy Uk Ltd Vs. Freeport Holdings Ltd, The 'Lady M', [2019] EWCA Civ 318 Case No: A4/2018/223

2 Tasman Orient Line Cv Vs. New Zealand China Clays Limited and Others, SC 39/2009 [2010] NZSC 37.

willfully committed by master or crew to the prejudice of the owners, or, as the case may be, the charterer".

Carver's "Carriage by Sea"[3] describes "barratry" as

"any willful act of spoliation, or violence to the ship or goods, or any fraudulent or consciously illegal act which exposes the ships or goods to danger of damage, destruction or confiscation, done by the master or crew without the consent of the shipowner."

For example – if goods are lost or damaged by the master willfully running the ship upon rocks, or attempting to scuttle her, or through fraudulent delay or deviation upon the voyage, for the master's private purposes; or by the ship and cargo being fraudulently sold by the master. Also, according to Carver's "Carriage by Sea", Barratry implies an intention but an act *"need not to amount to a crime to constitute barratry … nor is it necessary that the person doing it should desire to injure the owners if in fact there is an intention to do an act which will cause injury, although its primary purpose is simply to benefit a person doing so. Therefore, the act of the crew of a ship in refusing to permit stevedores to discharge her until the balance of their wages was paid has been held to be barratrous".*

In the case of Tasman Orient V. New Zealand China Clays (*The Tasman Pioneer*) because the vessel was behind schedule, the master of the vessel took a risky shortcut and decided to pass through a narrow channel between Biro Shima Island and the mainland of southern Japan, rather than going around the island. In poor weather the *Tasman Pioneer* struck rocks on the island side of the channel while steaming at about 15 knots. Motivated by a concern for his own position if the truth emerged, the Master did not notify the nearby Japanese coastguard and the owners and instead, he steamed for some hours towards a point where he would have rejoined the course he would have taken had he gone outside the Biro Shima Island. Only at that point he called for assistance, while meanwhile the flooding of the vessel by sea water continued and was increased and the by the time salvage assistance was finally sought, the claimant's cargo was a total loss. The master also instructed the crew to lie and to cover up what had happened. The Supreme Court of New Zealand held that the carrier was exempt from liability under Article VI rule 2 (a) of the Rules, which provide that: *"*

2. Neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from- (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".

The Supreme Court also held that *"It follows that, unless the respondents are able to establish barratry, their claims are defeated by art 4.2 (a)*". The Supreme Court further held, that, the claimants did not plead that the actions of the master amounted to barratry and that the intention of the master as described by the claimants in their pleadings was "*an intention to derive personal benefit, which cannot possibly be construed as intention to cause damage to the cargo or as recklessness with knowledge that damage to it will probably result.*" and therefore, the Supreme Court added, "*where an essential element of barratry not having been pleaded, the respondents cannot now argue that the Master's actions constituted barratry*".

In the matter of Glencore V Freeport (*The Lady M*) both the Commercial Court and the Court of Appeal found the conclusion in the matter of Tasman Orient V. New Zealand China Clays (The *Tasman Pioneer*) as if the exception in favor of the carrier under article 4 2 (a) applies provided the conduct did not amount to barratry, as not persuasive and unfounded. The Court of Appeal held that in cases of barratry the carrier's agents are acting contrary to the carrier's interests and in breach of the trust reposed in them and *"it is in such a situation that the rationale for the existence of the exclusion of liability might on one view appear more applicable".*

In the Commercial Court, the judge went on to examine the 'travaux preparatories" in order to determine the meaning of the wording of the fire exception of Article

3 Carver's, Carriage By Sea, Thirteenth Edition, Volume 1, pages 237-239

IV rule 2 (b) of the Rules. The Commercial Court concluded that the 'travaux preparatories" showed that the participants of the 1921 Hague Conference proceeded on the basis that 'fire' meant fire even if deliberately caused by the shipowner's servants or agents, or resulting from their negligence; and not that they only contemplated fires which were caused accidently or without negligence. It followed, that the travaux preparatoires support the plain meaning of the text of Article IV 2 (b). The Court of Appeal held that the Commercial Court judge was right in his analysis. However, the Court of Appeal was doubtful whether the threshold for (even) consideration of the travaux preparatoires came close to being met and that the proper approach to interpretation was to ascertain the ordinary meaning of the words in Article IV 2 (b) in their context. Glencore's argument necessarily implies an additional wording to the wording of clause – *'Fire, unless caused by the actual fault or privity of the carrier, or the fault or neglect of the crew*' [emphasis added] and the court did not see any proper basis for implying such words into the clause.

The Court of Appeal held that due to the fact that the fire was caused deliberately by the chief engineer, the issue of whether the conduct of the chief engineer in starting the fire constituted barratry is not determinative of whether the Owners are exempt from liability under Article IV 2 (b).

Article IV 2 (b) exempts the Owner from liability if the fire were caused deliberately or barratrously, subject only to (i) a causative breach of article III. 1, or (ii) the actual fault or privity of the Owners.

This decision opened a path for Glencore to argue and prove that the Owners were in breach of their duties to exercise due diligence to make the vessel seaworthy and to properly man and equip the vessel at the beginning of the voyage according to Article III rule 1, or to properly and carefully handle, stow, carry, keep and care for the goods carried during the voyage itself- according to Article III rule 2, as the circumstances may be and according to the specific facts and circumstances of the matter.

Overview

On a broader view, considering the fact that most cases deal with Barratry in view of insurance liability and insurance claims, the Commercial Court and the Court of Appeal provide a comprehensive judgment on the role an act of barratry plays, or does not play, when dealing with Owners and Carriers exceptions from liabilities. The clear deviation from the attitude of the Supreme Court of New Zealand strengthens the legal position that an act of barratry occurs without the actual fault or privity of the carrier, not only under the meaning of the fire exception but also within the meaning of the general exception of Article VI rule 2 (q).

This development should be considered when either arresting or defending an arrest on the causes of 'loss of or damage to goods',[4] especially in jurisdictions where owner's personal liability is required for the claim in rem and the arrest.

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4 International Convention for The Unification Of Certain Rules Relating To The Arrest of Sea-Going Ships, Brussels, 10 May 1952, Article 1 (f).

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