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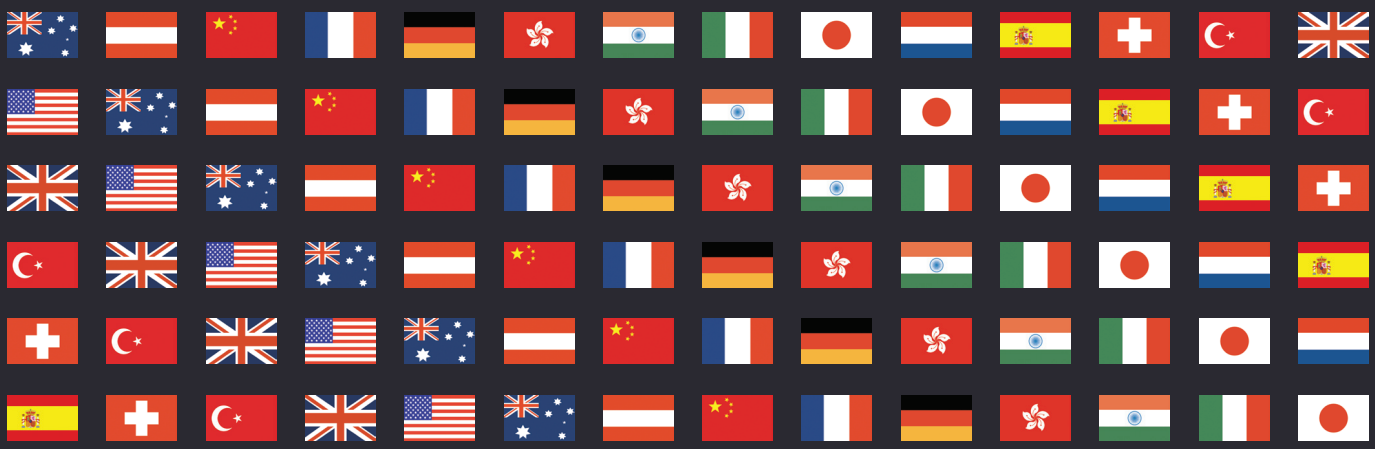
William M Regan, Jon M Talotta and Ryan M Philp



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Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Fax: +44 20 7229 6910

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William M Regan, Jon M Talotta and Ryan M Philp
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Lexology Getting The Deal Through is delighted to publish the second edition of *M&A Litigation*, which is available in print and online at 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 Australia, Austria and China.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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, William M Regan, Jon M Talotta and Ryan M Philp of Hogan Lovells US LLP, for their continued assistance with this volume.

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Getting The Deal Through

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Contents

Germany

Olaf Gärtner and Carla Wiedeck
Hogan Lovells International LLP

TYPES OF SHAREHOLDERS' CLAIMS

Main claims

1 | Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.

Apart from situations in which shareholders are a party to a transaction (ie, as sellers) and have all the respective rights and duties, shareholders typically assert claims in three types of cases: lack of information or disclosure; violation of stipulations that protect the shareholders; and tortious acts.

In particular, shareholders may assert claims for damages if they have not been duly informed about the transaction. Pursuant to the German Securities Trading Act, the management board of a publicly listed stock company has to publish insider information that directly affects the company. This disclosure obligation applies, in particular, to information that is relevant to the further development of the share price. In the case of an M&A transaction, this notification requirement will be triggered if its realisation is sufficiently probable. Further, the shareholder agreement, the statutes of the entity or the rules of procedure of the management board can stipulate certain requirements for M&A transactions: for example, the involvement and consent of an investment committee or a resolution of the shareholders. Shareholders may assert claims if such stipulations have been violated. Further, in certain events potentially following an M&A transaction, such as the conclusion of a profit transfer agreement, in the event of a squeeze-out or, for example, in the event of a transformation of the target according to the German Transformation Act, shareholders have a claim to appropriate cash compensation.

Requirements for successful claims

2 | For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?

To bring a claim for damages for lack of information under the Securities Trading Act, a shareholder must assert that the management board has violated its duty of disclosure. To do this, the shareholder must show that the management board has failed to disclose insider information that directly affects the company. In addition, a claim can be considered if an incorrect ad hoc announcement has been published. However, it is typically difficult to prove in court that the shareholder has suffered a loss, as typically the stock price rises after a transaction.

To assert a claim for a breach of a shareholder agreement, a shareholder must show that the provisions of the shareholder agreement have been violated in an unlawful manner. The shareholder can then try to block the transaction (see question 9) or claim damages in cases where the transaction has already taken place. If the shareholder claims damages, the shareholder has to show he or she suffered a loss.

Further, shareholders have the right to receive appropriate compensation in certain cases (see question 1). In these cases, the shareholder must show that he or she has not been offered compensation or has not been offered such in an orderly manner, or that the cash compensation offered is not appropriate.

A claim for compensation for damages in tortious acts is possible if shareholders are withdrawn from their membership rights. In addition, shareholders are also entitled to a tortious claim for damages if they have been intentionally injured in a manner contrary to good morals. This may be the case, for example, if a member of the management board participates in immoral acts committed by majority shareholders or in connection with the acquisition of shares through deliberately incorrect ad hoc disclosure.

Publicly traded or privately held corporations

3 | Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?

Yes, there are several stipulations that only apply to listed stock corporations. Some of the above-mentioned main claims – for example, the obligation of the management board to disclose insider information in accordance with the Securities Trading Act (see in detail questions 1 and 2) – only apply to publicly listed stock companies.

Form of transaction

4 | Do the types of claims that shareholders can bring differ depending on the form of the transaction?

In general, the form of a transaction has no influence on the type of claim that can be brought. The main exception is the case of a merger: the Transformation Act contains special statutory stipulations for shareholder claims in the event of mergers of companies. For example, shareholders who raised an objection to a merger resolution have a claim to appropriate cash compensation against the acquiring legal entity. Further, the shareholders can challenge a resolution to merge.

Negotiated or hostile transaction

5 | Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?

No.

Party suffering loss

6 Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?

Shareholders can only assert claims if they themselves have suffered a loss. For example, shareholders can assert claims if the shareholder agreement is violated or if the management board has not fulfilled its notification obligation (see in detail questions 1 and 2). If the corporation has suffered the loss, shareholders usually cannot assert any claims. However, in exceptional cases, shareholders can take legal action for the claims of the corporation (litigation in one's own name on another's behalf; see in detail question 8).

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

7 Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?

German law does not provide for class actions. A comparable tool is model litigation: the Capital Markets Model Case Act facilitates the enforcement of claims for damages of shareholders in a stock company by enabling model litigation in cases based on false, misleading or omitted public capital market information. If the same factual and legal questions arise in at least 10 individual lawsuits, a model proceeding can be initiated in which these factual and legal questions are decided. After the decision in a model proceeding becomes binding, the individual lawsuits resume and the courts hearing these cases must take the decision into account as binding. Further, shareholders can bundle and enforce claims via a claims vehicle (ie, assign their claims to another entity that brings a lawsuit). In such cases, the assignments have to be in compliance with the Legal Services Act. In practice, this means that they either sell their claims or that the claims vehicle is registered for collection services.

Derivative litigation

8 Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?

The German Stock Corporation Act provides that shareholders may bring proceedings in their own name for directors' and officers' (D&O) liability on behalf of the corporation (litigation in one's own name on another's behalf). Shareholders whose shares represent 1 per cent of the share capital or a pro rata amount of €100,000 may apply to the district court responsible for the corporation for approval of such an action. The action can only be approved if the facts provide a reason to suspect that the company has suffered a loss as a result of improprieties or gross breaches of the law or articles of association, and no overriding interests of the company exist that would prevent the assertion of such damage claim. Apart from this, shareholder activism for claims of the stock company is not permissible.

In a limited company, shareholders can bring legal action in their own name on behalf of the corporation in accordance with the general principles of an *actio pro socio*. This requires that claims of the corporation against its shareholders resulting from membership (eg, breaches of trust) exist. Furthermore, an *actio pro socio* is subsidiary, and therefore inadmissible if the corporation itself asserts its claims. It shall only be admissible if the competent body refuses to pursue legal action.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

9 What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?

Injunctive or other interim relief can only be awarded if a shareholder can prove that he or she has a certain right or claim and that, without interim relief, the realisation of such right or claim would be thwarted or made significantly more difficult. In particular, an M&A transaction can theoretically be blocked, if, for example, a shareholder resolution is required. In such cases, a court could block the execution of the resolution if the resolution was unlawful, against the corporate by-laws, etc (note that courts are rather reluctant to block the decision-making process itself). Another example would be that third parties that have a pre-emptive right can seek interim relief.

German courts cannot generally enjoin M&A transactions or modify deal terms. However, in cases where the contract has already been concluded and the seller is unwilling to transfer the shares, the buyer can sue the seller for the transfer of the shares (performance) or for damages.

Early dismissal of shareholder complaint

10 May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?

No, early dismissal and discovery only exist in very limited cases, and M&A transactions are not covered by such special relief.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

11 Can shareholders bring claims against third-party advisers that assist in M&A transactions?

In general, only the corporation itself can assert claims against advisers on the basis of its contractual relationship. Individual shareholders are not party to this contract. However, shareholders may assert claims if the contract has some protective effect to the benefit of third parties. This can either be explicitly set out in the contract or can be a matter of interpretation. For example, a contract with a tax consultant advising on the best legal form regarding the tax law implications of a transaction or the corporate structure can have a protective effect to the benefit of shareholders, who then can bring a claim against the consultant. Further, claims based on tortious acts can also be brought by the shareholders.

Claims against counterparties

12 Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?

No, with the exception of claims based on tortious acts.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

13 What impact do the corporation's constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?

According to the Stock Corporation Act, a stock company may not waive or compromise a claim for damages that it may have against a board

member in advance: it can only do so after the expiry of three years after the claim has arisen. The stock company can of course stipulate duties of the board members that go beyond the statutory law. In a German limited company, the parties can go both ways: that is, either limit or extend the liability.

Statutory or regulatory limitations on claims

14 Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?

No.

Common law limitations on claims

15 Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?

German law provides for a 'business judgement rule', which states that a board member or managing director acts in a dutiful manner if he or she holds sufficient information prior to making a business decision, does not have a conflict of interest and may be trusted to act in the best interests of the company.

STANDARD OF LIABILITY

General standard

16 What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?

There are no specific standards in connection with an M&A transaction. As the transaction itself is a business decision, the business judgement rule (see in detail question 15) applies. However, the management board or director has to respect all statutory duties, as well as all obligations laid down in the shareholder's agreement, statutes, etc. Regarding liability for tortious acts, a board member or director must have intentionally and immorally harmed the shareholders, and have also intended that the shareholders suffered a loss.

Type of transaction

17 Does the standard vary depending on the type of transaction at issue?

No.

Type of consideration

18 Does the standard vary depending on the type of consideration being paid to the seller's shareholders?

No.

Potential conflicts of interest

19 Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?

The business judgement rule (see in detail question 15) does not apply if there is a conflict of interest. A prerequisite for the application of the business judgement rule is that the manager's decision is based exclusively on the interests of the company. The managing director must not allow him or herself to be guided by irrelevant aspects (ie, his or her own interests) when choosing between the various alternative courses of action.

Controlling shareholders

20 Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared rateably with all shareholders?

The standard does not vary. However, if a board member agrees on terms with the controlling shareholder that are not at arm's length, or if the board member grants benefits only to a controlling shareholder, the board member can usually be held liable. Further, there might be tax implications (ie, hidden distribution of profits).

INDEMNITIES

Legal restrictions on indemnities

21 Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?

Usually, D&O insurance covers legal and extrajudicial defence costs, and in particular the legal consultancy costs. D&O insurance is usually paid for by the company.

M&A CLAUSES AND TERMS

Challenges to particular terms

22 Can shareholders challenge particular clauses or terms in M&A transaction documents?

Shareholders can at most challenge the conclusion of the contract unless they are a contracting party.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

23 What impact does a shareholder vote have on M&A litigation in your jurisdiction?

A resolution of the shareholders' meeting is binding for the management board.

However, there are only a few cases in which shareholders are required to give their consent, such as:

- in cases of the transfer of registered shares with restricted transferability;
- if the transaction results in a permanent change in the corporate purpose of the stock company;
- if the seller stock company undertakes to transfer the entire assets of the company by way of transfer of individual rights; and
- if a merger is associated with the company transaction in accordance with the Transformation Act.

In addition, the management board can theoretically obtain the approval of the shareholders' meeting for corporate transactions on a voluntary basis. In practice, however, this hardly ever happens.

Insurance

24 | What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

D&O insurance is usually involved in litigation against management. Most policies stipulate that either the board member or director has the obligation to follow any instructions under the insurance policy or that the insurance can directly lead the defence. Further, the board member or director can assign a claim for cover to the company, which then can initiate proceedings directly against the insurance.

Burden of proof

25 | Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

The burden of proof varies depending on a shareholder's claim. As the claimant, the shareholder bears the burden of proof for all facts that are favourable to him or her.

For example, in the event of a shareholder's action for deficiency in a resolution, the shareholder must prove that he or she is entitled to challenge the resolution, ie, that he or she is a shareholder, and that the resolution violates the law or the company's articles of association.

In the case of a claim arising from torts law, the injured party, that is, the shareholder, bears the burden of proof for all liability conditions: in particular, he or she must prove intent on the part of a board member or director, as well as the occurrence of a pecuniary loss. In the more common case of a lawsuit brought by a corporation against its board members or directors, the board members or directors have to prove that they did not violate their duties and that they acted without fault. On the other hand, the corporation must provide evidence of the damaging act, the damage caused by it and the loss.

Pre-litigation tools

26 | Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

Shareholders have a statutory right to information and inspection rights regarding the company. This right includes all information related to the management and the economic situation of the company, and to the company's relations with third parties, and therefore also includes acquisitions and disposals. In addition, shareholders have the right to inspect the company's books and records (eg, all documents, files, films, computer records). The right of access to information and inspection has limitations: for example, a shareholder has to observe the principles of proportionality, and a board member or director does not have to disclose information if he or she would make him or herself liable to prosecution by providing information.

Forum

27 | Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

In the event of an action for deficiency in a resolution, the district court in whose district the corporation has its registered office is competent. In all other respects, the general rules of local jurisdiction apply. Forum selection clauses are generally admissible in contracts between companies.

Expedited proceedings and discovery

28 | Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

No.

DAMAGES AND SETTLEMENTS

Damages

29 | How are damages calculated in M&A litigation in your jurisdiction?

The object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the breach triggering liability had not occurred. The usual ways in which experts calculate damages are normally used in M&A litigation.

However, in particular regarding the value of a company, the following method is applied:

- in the case of non-delivery or non-acceptance of the target company, the target's enterprise value is usually derived from future surpluses by means of the usual valuation procedures; and
- in the case of non-fulfilment, the damage incurred is calculated by deducting the purchase price from this determined enterprise value.

A business valuation is also made in cases of the delivery of a company with an impairment of its value. Consequential damages and loss of profits are also compensated.

Further, if the parties are in dispute as to whether damage has occurred and how much the damage amounts to, the court can estimate the damage. To do so, it is necessary that the plaintiff has presented sufficient facts for the court to have a basis for an estimate.

Settlements

30 | What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

As there are no class actions in Germany, it can be more difficult for shareholders to assert their claims in court. Except for a few exceptions (see in detail question 7), each shareholder must assert his or her own claim and assume the risk of litigation. Likewise, there are no class settlements in Germany, ie, the company or board member has to settle individually with each shareholder. In the case of a settlement, the parties should reach an agreement regarding the costs, particularly in cases in which a claim already has been filed. Otherwise, the party that, following a settlement, withdraws the claim would have to bear the costs of the proceedings.

THIRD PARTIES

Third parties preventing transactions

31 | Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

This is possible in special cases, such as if a third party has a pre-emptive right.

Third parties supporting transactions

32 | Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

No, unless the M&A transaction had already been agreed upon and the third party sues for transfer of the shares.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

33 What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?

In such cases, several duties may arise out of the loyalty obligations towards the shareholders: for example, they have to be informed about the offer.

In addition, there are several statutory provisions in the case of takeover bids regarding stock companies. To mention a few, the management board and the supervisory board have to render a reasoned opinion on the bid; and after the publication of the decision to make a takeover bid and until publication of the result, the management board of the target company may not take any actions that could prevent the success of the offer. This does not apply to actions that a prudent and conscientious manager of a company not affected by a takeover bid would have taken, to endeavours to find a competing offer or to actions consented to by the supervisory board of the target company.

Further, duties and responsibilities of board members and directors are usually defined in the respective articles of association of the company, the employment contract or the shareholders' agreement.

Hogan Lovells

Olaf Gärtner
olaf.gaertner@hoganlovells.com

Carla Wiedeck
carla.wiedeck@hoganlovells.com

Karl-Scharnagl-Ring 5
80539 Munich
Germany
Tel: +49 89 290 12 0
Fax: +49 89 290 12 222
www.hoganlovells.com

COUNTERPARTIES' CLAIMS

Common types of claim

34 Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?

In Germany, disputes between the parties to an M&A transaction are far more common than shareholder claims.

The most common reasons for disputes are impairments of a company. The buyer often tries to assert his or her claims in particular from guarantees, violations of pre-contractual obligations and liability for defects (claims based on tort are possible, but less common). Regarding guarantees, owing to the great importance of disclosures in the annual financial statements for the valuation of the target company, accounts warranties are often the subject of post-M&A disputes, and are therefore a possibility for the purchaser to claim damages. Usually, accounts warranties require that the annual financial statements of the target company provide a true and fair view of the assets, liabilities, financial position, and profit or loss of the target company. Further, the liability system for M&A transactions is usually structured by guarantees; hence, claims based on liability for defects are usually also claims based on breach of a guarantee. In addition to claims arising from guarantees, the buyer often asserts claims arising from a breach of pre-contractual obligations. The pre-contractual information obligations of the seller are particularly relevant. A claim for damages due to pre-contractual breaches of the duty of disclosure is generally only considered if the buyer can prove that the seller has acted with knowledge and will. In the case of a claim arising from a pre-contractual breach of duty, the buyer must state that there was a duty to inform. In addition, he or she must prove that the information provided was incorrect and that the seller was aware of it. It must have been apparent to the seller that the relevant information was essential for the signing of the contract by the buyer (causality). For example, a claim may exist if the seller has not informed the buyer about the company's substantial debts, if the seller has provided false information about the sales made by the company or if the seller has violated the rules of proper accounting.

Further, disputes regarding the calculation of the final purchase price are very common. The parties often agree on a basic purchase price of the company, which is then adjusted on the basis of a fixed purchase price calculation method. For this reason, the purchase price is often not fixed at the time of signing the purchase contract. In most cases, the parties still have to fulfil conditions between signing and closing of the purchase contract. After signing the purchase contract, however, the company often develops further. This means that the purchase price is adjusted and may be higher than expected by the buyer. This in turn leads to the fact that the buyer often accuses the seller of having consciously caused this increase in the purchase price.

Finally, the parties to an M&A transaction often argue about the effectiveness of M&A contracts. In particular, a buyer can assert claims based on fraudulent misrepresentation on the part of the seller. In this regard, it is particularly relevant that the right to challenge a contract on the grounds of fraudulent deception cannot be effectively excluded from the contract.

Differences from litigation brought by shareholders

35 How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?

Disputes between the parties to an M&A transaction are usually contract-based and solved by arbitration (as most M&A contracts contain arbitration clauses). Litigation brought by shareholders is in most cases based on tort and – owing to the lack of a contractual basis, and therefore a lack of an arbitration clause – brought in public courts.

UPDATE AND TRENDS

Key developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

The most remarkable trend over the past 12 to 24 months is the increased number of D&O liability cases stemming from insolvency situations. In these situations the insolvency administrator is suing former board members for negligent or intentional violation of their duties. Although this is a general trend without specific focus on M&A transactions, it also encompasses the latter in that respective violations in M&A transactions (eg, selling a company below its value) can also be pursued.

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