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Comparative developments in ADR

Mediation in Sweden

Bengt Lindell

Introduction

Mandatory mediation is not frequently used in Sweden. This is also true with respect to the other Nordic countries. However, the mediation of labour disputes has a long-standing history in Sweden and many labour disputes *must* be mediated. Labour disputes are heard by a special institute, the National Mediation Office in Stockholm, which is not a part of the court system. Some landlord/tenant and intellectual property disputes must be mediated, and on 1 July 2002 an Act regarding mediation in criminal cases came into effect. The *Paternity Act* also specifies that the local Social Welfare Board shall provide an opportunity to the spouses or cohabitants to participate in conciliation discussions together with a professional social worker.

Coming from Sweden it is amazing to see how common mediation is in Australia (and in all common law countries), how committed people are to this form of ADR, and how determined they are to promote it further. As one delegate said to me at the seventh National Mediation Conference held in Darwin in July 2004, 'we are on a mission'. Indeed, it is impressive for a foreigner to see people from different professions and backgrounds 'glowing' and working hard for a better system for the resolution of conflicts. At the same time it is a little disturbing to hear that some people who are so committed to ADR are reluctant to admit that there are any legal rights anymore, only 'needs and interests'.

In Sweden there was a long-standing debate about the existence of legal rights which started in the 1920s and ended approximately 40 years later. This debate arose out of the predominant scientific idea at the

time that only facts which you can observe and verify actually exist. Transferred to the law, this idea became known as 'legal positivism' or, in our part of the world, 'Scandinavian realism'. This mode of thinking dominated, and the idea of 'rights' became a metaphysical one. Indeed, when we analyse the nature of a right it seems to disappear like bubbles of soap. One consequence of the predominance of legal positivism was that scholars tried to avoid using the term 'right' – not only in writing but also in legal discussions – and those who defended 'rights' were a suppressed minority. A mediator who says 'there are no rights' may mean that rights boil down to something which cannot be verified, and thus, the focus should be on needs and interests instead.

The most common view amongst legal scholars today is that rights, although unable to be verified, can be

increasing impact of the human rights movement. Thus, the legal thinking in this area seems to be developing in the Hegelian manner of thesis – synthesis – antithesis.

Why mediation has not taken off in Sweden

An Australian might wonder why mediation is not used more often in the Nordic countries. Conversely, a Swede may question why mediation *is* used so often in Australia and other common law countries. As usual, comparative studies are complex and there are many economical, political and social issues to address. In the following paragraphs I will attempt to point out some of the reasons which I consider important to explain why mediation has not taken off in Sweden.

1. The Social Democrats have for a long time – more than 70 years – been Sweden's largest political party. With the exception of recent decades it has

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falsified. The prevailing opinion today seems to be that 'rights' and 'obligations' are defined either by the conditions which 'trigger' them or by their consequences and that the concept of a 'right' is shorthand for these conditions and/or legal consequences. However, the view that 'natural rights' do exist has become more and more common, probably because of the

held the majority in Parliament. From its inception the Social Democrats had the ambition to build an equal society based on solidarity; a home for all citizens. Social welfare has been and still is financed through high taxes. In return for high taxes the Swedes receive free education, health care, a relatively good pension, the right for one parent to stay home for the first year with a



newborn baby while retaining 80 per cent of their income, and so on. It has always been central to the Social Democrats' political program that the public sector should provide for the well-being of all citizens. As a consequence, the party has been against the privatisation of infrastructure, including the welfare and justice systems (even though arbitration is well accepted). In the eyes of the Social Democrats, private ADR would probably be seen as a risk to the welfare system since the implementation of substantive rules could be placed in danger.

At the end of the 1980s Sweden suffered an economic downturn. Welfare, it was realised, becomes more expensive over time. Today, privatisation has increased in almost all areas of society and the Social Democrats are no longer so adamant on this issue. Since Sweden joined the European Union (EU), it has realised it cannot continue to act as an isolated nation. Free movement of capital and movement of labour require adaptations in all member countries.

2. A special feature of the public sector in Sweden, as well as in the other Nordic countries, is the large number of boards of different sorts; for example, the Consumer Complaints Board, the Traffic Injury Board and the Insurance Board. There are also many different *ombudsmen*. The oldest is *Justitieombudsmannen* (the JO). The JO supervises the authorities, including the courts, to ensure that cases are heard according to the law. Other ombudsmen are the Discrimination Ombudsman, the Child Ombudsman, the Press Ombudsman, and the Consumer Ombudsman. The boards and the ombudsmen cannot make binding decisions on matters in question but many disputes are resolved through these avenues.

In addition, non-government organisations (NGOs) have significant importance in Sweden. The largest Swedish organisation is the National Labour Union (LO) which is closely linked to the Social Democrats. Other large organisations such as the National Tenancy Organisation are connected to the LO. These NGOs provide free legal services to their

members. Overall, I think it is fair to say that conflict resolution in Sweden is, to a high degree, institutionalised. The public organisations, boards and ombudsmen secure individual rights (or needs or interests) to a large extent, whereas in other cultures conflicts are often handled on a personal level, that is, person against person.

3. In Sweden the judge must attempt to settle disputes between parties and must clarify the parties' statements and what they want to achieve. The judge takes an active role, making the judge a kind of mediator in the case. I will discuss this idea further below.

4. There is no mediation infrastructure in Sweden – there are very few trained mediators and there is no system to educate or authorise mediators. When examining why mediation is relatively unusual in Sweden it is difficult to determine what comes first, the chicken or the egg. However, it is likely that the lack of education about mediation has an impact on the use of the process.

5. The frequent use of mediation in common law countries and the relatively rare use of ADR in civil law countries raises the question of whether or not the civil law tradition with its written laws affects the use of mediation in Sweden. It could explain why ADR is most often used in England, the only common law country within the European Union. It is easy to make the assumption that written laws have an impact on peoples' perceptions of their legal rights and obligations – the law, like a fine gauge net, affects almost all aspects of life and encourages a 'rights based' rather than an 'interests based' way of thinking. However, the gap between civil and common law today is no longer that great. The use of legislation in common law countries has increased and modern legislation requires precedents in civil law systems to almost the same extent as an action-based legal system.

Nevertheless, there are important differences between civil and common law systems. One is the role of the judge, who defines the disputed issue in civil law cases, whereas at common law the adversarial system gives the parties a more dominant role.

6. With respect to access to justice, the Social Democrats introduced a generous legal aid system in 1972 which made it possible, in principle, for anyone to litigate without having to pay more than a small contribution towards their legal costs. However, as mentioned above, the Swedish universal welfare system has gradually become too expensive. The economic downturn of the late 1980s led to budget cutbacks in all areas of government spending, including legal aid. In 1996 a new legal aid Act was passed which shifted responsibility for legal costs from the public to insurers.

This move was possible because 98 per cent of Swedes have legal insurance incorporated into their home insurance.

Before the new Act, a party to a dispute could use legal aid to cover their own legal costs and use their legal insurance to pay the other party's costs. Today, with the exception of certain family disputes, a party may only use their legal insurance.

The legal aid system covers mediation. However, it is not set up in a manner that promotes it.

Settlement in the court

The summons application in Sweden must be very detailed. According to the Code of Judicial Procedure (CJP), the plaintiff must describe in detail the facts which support his or her claim. All evidence supporting the grounds for the claim (if it is contested) must be stated and a thorough description of the evidentiary theme for each piece of evidence given. The defendant must, within a certain time (normally 14 days), answer the claim or face a default judgment. The preparation, which commences with the answer, is either written or oral, or a combination of both. Normally, the judge sets up a conference after the defendant's answer to the claim. It is provided in the CJP that if the matter is amenable to an out of court settlement, the court shall, to the extent appropriate in the circumstances, encourage the parties to reach a settlement. Thus, pursuant to the CJP, the judge is under an

obligation to attempt to settle the dispute between the parties.

During the first conference the judge addresses the settlement issue. How the judge fulfils this duty varies. Some judges only ask the parties if they have tried to reach settlement and move on if the parties say they have tried but not succeeded. Presumably, many judges hold the view that once an action has been instituted the time for a peaceful resolution is over. Others ask the parties if they would like the judge's assistance during the negotiations. There are also judges who

regarding the custody of a child. In such cases, the court acts on its own motion and the dispute must be resolved through a judgment rendered by the court and may not be mediated (non-dispositive cases). According to my understanding, this is a feature of the administration of justice within many European jurisdictions which differs from common law jurisdictions where – in principle – all civil cases may be mediated.

Court-annexed mediation

With respect to mediation, the CJP

Furthermore, a case is said to be particularly suited to special mediation if it involves non-legal issues, for example social factors such as one party being poor or sick, that the court should not consider when attempting to reach a settlement between the parties.

are more direct, who tell the parties to get out of their courtroom until they have discussed the matter together for at least five minutes.

If the parties do not wish to settle, the judge proceeds with the case. The judge is obligated to clarify the statements of the parties and to ensure they allege everything they want to allege in order to form the basis of the judgment. There has been a great deal of debate about how to interpret this provision regarding the intervention of the judge since it is so vague and because heavy intervention could risk the judge's impartiality in the eyes of the parties. Nevertheless, the judge usually narrows the disputed issues, which makes it easier for the parties to understand their position and to attempt a settlement at the end of the session. Around 60 per cent of all cases are settled during the preparation of the case.

It should be emphasised that there are some groups of cases which involve a public interest, for example, cases

provides that if, considering the nature of the case, it is thought to be appropriate that special mediation occurs, the court may direct the parties to appear at a mediation session before a mediator appointed by the court. A typical situation in which special mediation is suitable would be where the dispute is only one of numerous disputes being litigated between the parties. Furthermore, a case is said to be particularly suited to special mediation if it involves non-legal issues, for example social factors such as one party being poor or sick, that the court should not consider when attempting to reach a settlement between the parties. Mediation often leads to settlement, which is confirmed as a judgment by the court on the request of the parties.

Few cases are referred to a mediator pursuant to the abovementioned rule. Moreover, it should be observed that conciliation is seldom used in Sweden and when it is used it seems to have the same meaning as mediation.



Beginning mediation and the task of the judge

According to the CJP a case is referred to mediation after an action has been instituted and normally after the first preparatory conference has been held. A case should not be referred to a mediator if one party opposes it. If the parties agree to mediation and to the mediator, the case rests while the mediator entertains the

It is not common practice for the courts to maintain a list of mediators. The reason for this is that mediation under the CJP (Code of Judicial Procedure) is unusual. Nor are there any requirements with respect to education or registration in order to be appointed a mediator.

case. Since mediation presupposes that an action has been instituted, the summons will interrupt a period of limitation. The mediator may be a judge, a lawyer, an engineer or another person with the required skills. As stated above, legal aid may be granted for mediation, which is also covered by legal insurance.

It is not common practice for the courts to maintain a list of mediators. The reason for this is that mediation under the CJP is unusual. Nor are there any requirements with respect to education or registration in order to be appointed a mediator. This is true also for the Stockholm Chamber of Commerce (SCC) Mediation Institute in Stockholm (see below).

The mediation procedure and the task of the judge

Once the case has been referred to a mediator the judge will not deal with the case until it returns to the court, either because the parties have made an agreement or because they have failed to do so. Normally, the judge sets a time limit for the mediator to mediate the case.

The CJP is silent with respect to the

court-referred mediation process. When a case has been referred, the mediator, together with the parties, decides how to structure the procedure. Thus, there is no provision, for example, on confidentiality with respect to a mediator in the CJP or in any other Act. However, the prevailing opinion is that both the mediator and parties have a duty of confidentiality. Rules about confidentiality can be found in the SCC Mediation Rules. According to the SCC rules, the parties, and any other person participating in the mediation, must respect the confidentiality of the mediation, unless otherwise agreed by the parties. The need for appropriate confidentiality undertakings should be taken into consideration.

The CJP does not contain any provision making it possible for a mediator to avoid testifying in a subsequent court case.

However, if the parties make an agreement in relation to confidentiality, the court should respect it in a subsequent dispositive case. The mediator is assumed to be impartial and independent. If, in the eyes of a party, the mediator is not impartial or independent, the likely consequence will be that the party walks away from the mediation.

Since there are no legal requirements governing the mediation process it is difficult to define its nature. The prevailing opinion is that the mediator should hear the case in a speedy manner and observe the adversarial principle. If it is provided in the law that a case *must* be mediated the assumption is that Article 6 of the European Convention on Human Rights (ECHR) will apply.

The result of mediation

If the court-referred mediation is successful, the agreement between the parties will – on their request – be confirmed as a court judgment. It will then have the same legal consequences as an ordinary judgment; that is, it will have *res judicata* effect and may be enforced. As far as extra-judicial

mediation is concerned, the agreement cannot be confirmed by the court since an action in such cases has not been instituted. The remedies available against a settlement confirmed by the court are reopening the case or instituting an action claiming that the agreement is invalid.

Mediation is seldom used in Sweden except in labour disputes, disputes between landlords and tenants and some disputes with respect to intellectual property where the law requires it. It seems that the provision for mediation in the CJP has generally been overlooked. One reason for this could be that judges believe that the risk of an unsuccessful mediation would be too costly. Another reason might be that if judges have failed to settle a case they may think that a mediator would also fail. A third reason could be that there is no network of trained mediators in Sweden, as in many other countries.

Extra-judicial mediation

As far as extra-judicial mediation is concerned, the SCC Mediation Institute was established in 1999. According to the SCC rules, a sole mediator is appointed unless otherwise agreed by the parties. The mediator may be appointed by the parties jointly or by the Institute. The time limit for the mediation is two months, unless otherwise agreed. After having reached a settlement agreement, the parties may agree to appoint the mediator as arbitrator in order to enable the settlement agreement to be confirmed in an arbitral award. Unless the parties have agreed otherwise, the Institute shall decide the fee for the mediator in accordance with a table. To date the SCC Mediation Institute has heard very few cases.

Ordinary arbitration with a panel of three arbitrators – as opposed to expedited arbitration – is expensive. However, in Sweden most commercial disputes are arbitrated by a panel of three arbitrators, each charging around SAUD600 per hour. Mediation clauses

simply do not exist in commercial contracts in Sweden.

Arbitration in Sweden has old roots and Sweden is an oft-chosen venue for international arbitration under the SCC rules, as well as *ad hoc* arbitration. Arbitration is usually chosen because it is confidential, quick and the parties have the option of constituting the panel with specialists. Often the chairman of the panel is a Supreme Court judge, in most cases retired. Parties perhaps think that an award made by a Supreme Court judge as the chairman of the arbitration board will make it less likely to be challenged, although reality shows that this is not the case. On the contrary, the increasing number of challenges to arbitral awards in Europe is a problem which concerns the international market. The problem has been addressed in Swedish law journals where it is said that large Swedish companies like Volvo, Saab and Sony Ericsson are increasingly showing a

procedure took place, it can always be attacked pursuant to the New York Arbitration Convention of 1958 if the claimant seeks to enforce it in another jurisdiction.

If a mediated agreement becomes an award and one of the parties challenges the procedure, the question of what to do arises. Some might say that the New York Convention would not apply since it presupposes that there is a dispute. However, the moment the agreement is transferred to an award *there is no dispute*. Others might say that the Convention does apply *per se* but that it cannot be applied because there is no arbitration procedure to challenge – here the only remedy for a party would be to institute an action claiming that the agreement is invalid on contractual grounds, for example due to fraud or deception. A third possibility would be to say that some analogous ground for challenging an award would apply, for instance, if the mediator had seriously disregarded the

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tendency to prefer negotiations.

The possibility of appointing the mediator as an arbitrator is important, since a written agreement between the parties cannot be enforced in Sweden. However, the legal construction is a little odd. Although most arbitration Acts around the world are not very extensive (in order to maintain flexibility and not create more conflicts) there are some mandatory rules.

In some jurisdictions in Europe it is possible to challenge an arbitral award, albeit the grounds for such a challenge varies. Even if an award may not be attacked in the country where the

adversarial principle.

For an Australian mediator, this discussion is somewhat academic. This would be true also in Sweden if it were not for the European Convention on Human Rights (ECHR) which, as in all EU countries, overrides national legislation. In fact, the ECHR must be applied directly in Swedish courts. Pursuant to Article 6 of the Convention, everyone has the right to a fair trial; the parties have the right to be heard by an impartial tribunal; and, in accordance with the adversarial principle, have the right to present argument and evidence which, amongst other things, requires that the tribunal



must ensure there is no power imbalance between the parties with respect to procedure – the principle of ‘equality of arms’.

There are many cases regarding the application of Article 6 which have been heard by the Court of Human Rights in Strasbourg. Since the wording in the Convention is vague, many precedent cases are necessary to establish guidelines on how to apply its provisions. Anecdotally, it is not unusual for Swedish lawyers to claim that a certain application of the CJP would violate Article 6. This is rarely the case, but such objections invariably give the judge a headache.

The crucial question in the context of this article is whether Article 6 would apply to the mediation procedure. In other words, is it possible that a mediator could be regarded as a tribunal according to the Court of Human Rights? To date, this has not been determined but the question has been posed.

With respect to arbitration, the Court of Human Rights has found that the Convention does not apply since the arbitration agreement makes conflict resolution a private matter

According to the EC report, some member states including Belgium, the Netherlands and Austria, are working hard to increase the use of ADR while other member states, such as Sweden, Greece and Portugal, seem to be almost disinterested.

between the parties. Consequently, if arbitration is mandatory according to the law and the parties have no choice, the Convention will apply. This would also be true in mediation if the mediator could pass judgment, but in such a case the mediator would in reality be an arbitrator. Thus, the crucial question is how to assess the situation where mediation is mandatory and the mediator facilitates the negotiations between the parties.

ADR in the EU

Some years ago, the European Commission (EC) initiated an examination of the use of ADR in member states. On 1 April 2001 it submitted a report containing recommendations on the use of ADR. In its report the EC encourages a more frequent use of ADR because it is friendlier, quicker and cheaper than litigation. In addition, the parties do not have to worry about which forum is competent. The latter is a considerable advantage with mediation and prevents forum shopping. According to the EC report, some member states including Belgium, the Netherlands and Austria, are working hard to increase the use of ADR while other member states, such as Sweden, Greece and Portugal, seem to be almost disinterested.

Common views about mediation

If one were to ask a Swedish lawyer what he or she thinks about mediation the answer would in most cases be vague. Swedish judges hold the view that *they* mediate cases and have been doing so for decades. Of course, one could say that what Swedish judges do is not true mediation. The judge does not try to find out the parties' interests and needs and certainly does not perform brainstorming or try to find non-legal options to resolve the problem. No! The judge narrows the dispute to legal factors and pressures the parties to accept a compromise as quickly as possible.

A survey by one of my students shows that many judges feel that they, acting as an appointed mediator, are liberated from the straightjacket which the role of judge imposes on them. When a judge attempts to settle the dispute between the parties, he or she must always be careful to avoid being regarded as partial. If the judge was regarded as partial he or she could not continue to hear the case and another judge would have to take over. Obviously, this would cause much inconvenience for

the court and for the parties while, at the same time, litigation costs would increase and judgment would be delayed.

As a mediator, on the other hand, the judge can tell the parties what he or she really thinks about their positions. Unfortunately Swedish lawyers in general have the opposite view. They do not want the mediator to give recommendations.

The never-ending discussion about whether or not the mediator should be a lawyer has a clear answer in Sweden: *the mediator must be a lawyer*. At least this is the prevailing opinion of the Mediation Institute, which refers to the option to retain a co-mediator who is not a lawyer or to use an expert. Some might wonder why this firm view that the mediator must be a lawyer prevails. Even if lawyers in general do not want the mediator to give recommendations, they feel that it is important that mediators know not only the law but also the substance of the dispute so that they can intervene if one party is talking nonsense or abusing the process. The general opinion seems to be that a legally trained person can bring the discussions back on track again. Certainly whether or not the mediator is in reality an arbitrator could be discussed. If one asked a sole arbitrator, he or she would probably not be able to tell the difference because the roles merge into each other.

Conclusions

Mediation in Sweden must find its own path and develop in accordance with legal traditions and ingrained views about how the administration of justice should be organised. Developments have occurred in Norway, where there is a law on court-annexed mediation, and a similar act will soon be passed in Finland. The Norwegian Act states that after an action has been instituted the judge must ask the parties whether they wish to mediate the case. If both parties want mediation, a judge working at the

court will step in and mediate without charging a fee. If the mediation fails, the case will be heard as an ordinary case by another judge. The parties are not required to use a judge for the mediation. However, if they would prefer someone other than a judge to mediate, they have to pay the

However, if the parties wish to mediate a dispute without a court order, the insurance companies seem to be reluctant to pay since the mediation process has not been authorised. If the judge has referred the case to a mediator and the mediation fails, all the money from the legal insurance could be consumed.

mediator's fee. The parties in most cases prefer a judge to mediate since it does not cost them anything.

As mentioned earlier, 98 per cent of the population in Sweden have legal insurance which covers legal costs up to approximately SAUD20,000. If the judge refers a case to a mediator, the insurance company pays the mediator's fee from the legal insurance. However, if the parties wish to mediate a dispute without a court order, the insurance companies seem to be reluctant to pay since the mediation process has not been authorised. If the judge has referred the case to a mediator and the mediation fails, all the money from the legal insurance could be consumed. As a consequence, the parties may not be able to afford to have the case heard by the court. This, no doubt, has an influence on judges' willingness to refer cases to mediators unless they know that they have good records. Obviously, the legal aid system and the way in which legal insurance is set up do not promote the development of mediation in Sweden. ●

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diary and happenings

- The **Institute of Arbitrators and Mediators Australia** has expressed a **call for papers** for their **30th Anniversary Conference 2005** to be held in Canberra in May 2005. The three streams in the conference are general ADR innovation, consensual processes, and decisional processes. Expressions of interest must be received by COB Friday 31 December 2004. Visit <www.iama.org.au> for more information.
- The Victorian Chapter of the **Institute of Arbitrators and Mediators Australia** is actively seeking expressions of interest in the 5-day mediation training course for the **Practitioner's Certificate in Mediation and Conciliation** to be held in Melbourne on 16, 17, 18, 22 and 23 March 2005. Call (03) 9602 1711 or email <vic.chapter@iama.org.au> to register. Visit <www.iama.org.au> for more information.
- The **Australian Institute for Relationship Studies**, the professional training division of Relationships Australia, is offering a post graduate course in mediation. The **Graduate Certificate in Mediation** consists of four units and the first unit will be commencing in February 2005. This course provides opportunities for students to choose from two specialities – Workplace Dispute Resolution and Family Dispute Resolution. Please contact (02) 9806 3288 or visit <www.relationships.com.au> for more information.
- The **Australian Commercial Disputes Centre** has released the dates for its forthcoming **training courses** up to June 2005. Training courses to help ADR professionals to develop their skills through a series of stages are available, as well as a number of one-day options including two new one-day courses – 'Mediation/Conciliation: Advanced Negotiation Techniques' and 'Concilio-Arbitration and how do you do it'. Visit <www.acdcltd.com.au> for more information.
- **The Trillium Group** is conducting **4-day ADR Certificate Workshops (Level 1) and Advanced ADR Certificate Workshops (Level 2)** in Sydney, Melbourne, Canberra and Townsville throughout 2005. For more information call 1-800-636-869 toll free or 02 9036-0333 or visit <www.thetrilliumgroup.com.au>.
- **LEADR** is holding its **8th Australasian Dispute Resolution Conference** on 10-11 March 2005 at the Swiss Grand Hotel, Bondi, Sydney. For more information, or to express interest, visit <www.leadr.com.au>.
- The **Centre for Effective Dispute Resolution (UK)** is holding its annual **Spring School** on 4-9 March 2005 at De Vere Carden Park, Chester, England. The cost of the program is GBP 4200 + VAT which includes all training materials, a copy of the CEDR Mediator Handbook, six nights four-star accommodation and all meals. For more information or to register call +44 (0)20 7536 6000, email <training@cedr.co.uk> or visit <www.cedr.co.uk>.
- **Creative Facilitation: A Manual for Group Leadership and Conflict Management** is an essential resource for managers, mediators, human resources officers, teachers and all those who regularly work in groups. It provides new ways of analysing and managing conflict as well as working with resistance. The author, **Peter Condliffe**, is a Barrister (Victoria), specialist mediator and facilitator, and Director of Mediate and Facilitate Australia. RRP is \$75 (GST and postage included). Contact the author at <pcmediate@bigpond.com> or 03 9225 6888 to order your copy.

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