



Construction

in 21 jurisdictions worldwide

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2008



Published by
GETTING THE DEAL THROUGH
in association with:

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Joint ventures

- 1** Must foreign contractors enter into a joint venture with a local contractor in order to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

Foreign contractors frequently enter into joint ventures or consortia with local Swiss contractors for the purpose of joint bidding and performance. However, there is no requirement for the foreign contractor to do so, or for the local contractor to control the joint venture. In federal projects the adjudicating authority may exclude bids by joint ventures and require bidders to adopt a specific corporate form, eg, a Swiss limited company. Such requirements must be notified in the tender documents (article 21 of the Regulation on Public Procurement (Collection of Federal Laws [RS] No. 172.056.11)).

Foreign pursuit of the local market

- 2** If a foreign contractor wanted to set up an operation to pursue the local market, what are the key concerns you would counsel them to consider before they took such a step?

Public tenders in Switzerland are regulated by federal, cantonal and municipal laws. Methods are adapted to WTO standards. Relevant information about the legal framework can be found on the following website: www.simap.ch. Useful material for foreign bidders can also be found on the website of the Swiss Society of Contractors, including a checklist for tender proceedings: www.baumeister.ch/html_sbv/1home/_pdf/Checkliste_Submission.pdf.

For sizeable projects, foreign contractors regularly participate in Swiss public tenders, mainly in joint ventures with local Swiss contractors or engineers. In the largest infrastructure project – the longest railway tunnel in the world (the 57km Gotthard tunnel through the Alps) – numerous foreign contractors were awarded contracts.

Public procurement by federal and cantonal (state) authorities is subject to distinct rules. The Federal Law on Public Procurement (RS 172.056.1) governs federal projects exceeding certain value thresholds. It

complies with the WTO Government Procurement Agreement of 15 April 1994 that has been incorporated into Swiss law (RS 0.632.231.422). Foreign bidders are admitted provided that they are established in countries that grant reciprocity to Swiss contractors (article 4). As a rule, all bidders must be treated equally. According to article 8 I/a, “the Federal authority launching the tender ensures the equal treatment of Swiss and foreign bidders throughout the tender process”.

Projects on a cantonal (state) level are subject to a treaty among the cantons: the Intercantonal Treaty on Public Procurement (AIMP). Equal treatment applies. Access to the market is further addressed by the Federal Law on the Domestic Market (RS 943.02) and numerous other regulations.

Bilateral treaties between the European Union and Switzerland extend the WTO treatment to procurement by municipalities, to private companies exercising public functions in the areas of water, electricity and gas, as well as to procurement by Swiss state-owned telecoms and railway operators.

Foreign contractors who wish to establish themselves in the Swiss market usually tie up on an ad hoc basis with a local contractor. Possible obstacles for the acquisition of a Swiss contractor by a foreign contractor include the Swiss legislation restricting the acquisition of Swiss real estate by foreign parties. As major Swiss contractors sometimes have a large real estate portfolio, the acquisition of control in the Swiss contractor may be subject to restrictions.

Foreign contractors wishing to set up a more stable organisation usually establish a limited liability corporation – normally a share company (*société anonyme/Aktiengesellschaft*). The rules governing corporations are federal and thus no driving factor for the choice of location within Switzerland. The minimum share capital is 100,000 Swiss francs, at least half of which needs to be paid in at the time of the establishment of the corporation. The majority of the board of directors must be Swiss nationals domiciled in Switzerland; and at least one of the executive

directors on the board must be domiciled in Switzerland. If the corporation is administrated by a single individual, he or she needs to be Swiss and domiciled in Switzerland.

As of 1 January 2008, the nationality and residence requirements of members of the board of a Swiss limited company will be abolished. As a result, the board of directors of a Swiss limited company may be composed entirely of foreigners who are not resident in Switzerland. The only requirement will be the new article 718, section 3 of the Code of Obligations, providing that at least one individual (director or manager) with residence in Switzerland must be in a position to bind the company without requiring a co-signature of one or more non-Swiss residents. This Swiss resident signatory may, but does not have to be, a board member. The amendment to Swiss company law coming into force on 1 January 2008 also provides, *inter alia*, that members of the board of directors no longer need to be shareholders of the company.

Geographic factors usually play a role in the selection process. Switzerland has three linguistic areas (German, French and Italian). The major cities are Zurich, Geneva, Basel and Bern.

Taxes are levied on federal, cantonal and municipal levels. Some cantons are well known for investor-friendly tax regimes. Tax deals are available in most cantons, though, usually subject to the creation of sustainable employment in the region.

Licensing procedures

- 3** Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences of working without a licence?

There is no general need for a local licence. However, the adjudication authority will evaluate the professional capacities of the bidders. To this end, the production of the relevant certificates and licences of the bidders' key personnel may be required (annex 3 to Regulation on Public Procurement, RS 172.056.11).

Local licences may be required for applications for construction permits. For this reason, foreign contractors or design professionals usually tie up with local professionals to liaise with the authorities.

Labour requirements

- 4** Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project? At the end of a project will there be termination payments assessed against a foreign contractor?

There is no obligation to employ a certain amount of local labour. For contractors established in Switzerland and hiring locally, the Swiss legislation on foreigners applies. Non-Swiss employees must obtain permits (work and residency) which are subject to

regulations. The future employer must show that no Swiss national or national of a state with which Switzerland has treaties guaranteeing the free movement of workers (eg, EU, with some exceptions for new member states) is available for the position. Small severance payments may be due if individual employment contracts that are governed by Swiss law and are not limited in time (by the duration of the project, for instance) are terminated. For mass lay-offs, see question 7.

Local labour law

- 5** Are there any labour laws applicable to construction and infrastructure projects?

The Federal Labour Act (RS 822.11) and the Federal Act on Dispatched Employees (RS 823.20) provide general provisions on working conditions. The Act aims at preventing salary dumping by foreign contractors seconding employees to construction projects in Switzerland. Most individual employment contracts in the construction industry are governed by collective contracts of employment jointly elaborated by employers' associations and trade unions. They contain provisions on minimal hours and wages which prevail over the Labour Act if they have been declared applicable to the relevant industry by the Federal authorities (see the website of the Ministry of Economy for a listing of collective contracts: www.seco.admin.ch/themen/00385/00420/00430/index.html?lang=fr). The Federal Act on Dispatched Employees also extends the social benefits (contributions to pension funds, to continuous education programmes) in such collective contracts or Swiss employment legislation to dispatched employees. The foreign-based contractor must guarantee the dispatched employees accommodation that is in line with local standards of comfort and hygiene. Prior to dispatching its employees to Switzerland, the contractor has to notify to the competent Swiss authority the location and nature of the works, and identify the seconded personnel.

Irrespective of their domicile, contractors that use subcontractors are obliged to obtain a contractual undertaking from the subcontractors to the effect that they will comply with the Federal Act on Dispatched Employees. Without such an undertaking, the contractor is jointly and severally liable with the subcontractor for the latter's failure to abide by the Act.

Health and safety regulation

- 6** Are there any specific health and safety rules regulating the construction industry?

There are many such regulations, including in the Federal Labour Act (RS 822.11), the Federal Law on Accident Insurance (RS 832.20), the Regulation on Accident Prevention (RS 832.30) and

collective contracts of employment. In federal projects, the adjudicating authority is duty-bound to ensure that the contractor who is awarded the contract abides by employee safety regulations (article 6 of the Regulation on Public Procurement RS 172.056.11).

Close of operations

7 If a foreign contractor, who has been legally working, decided to close its operations, what are the legal obstacles to closing up and leaving?

Notice periods applicable to employment contracts of terminated employees must be respected. If the contractor is a company with more than 20 employees on its payroll, special provisions governing mass lay-offs apply (article 335d of the CO). If the company is dissolved by means of a voluntary liquidation, statutory rules must be observed (article 739 et seq of the CO). Pension funds legislation may also be relevant.

Standard forms of construction contracts

8 What standard-contract forms that apply to multinational construction projects are used?

In Swiss domestic contracts, the construction conditions prepared by the Swiss Society of Engineers and Architects (Société suisse des ingénieurs et des architectes; SIA) are widely used. General conditions only apply if specifically agreed by the parties. As an exception, the Swiss Supreme Court ruled (Decision 4C.261/2005 of 9 December 2005) that two Swiss companies active in the construction business were deemed to have tacitly accepted the SIA standards.

In international construction projects outside Switzerland the most frequently used conditions of contract are the various sets of conditions issued by FIDIC, often combined with Swiss law.

Allocation of construction risks

9 In typical construction contracts, who assumes the risk of material price escalation and shortages?

In fixed-price contracts (unit price or lump sum), the contractor bears the risk of cost increases (article 373 of the CO). If the contract does not determine the price for the works, it will be calculated by the courts based on the value of work performed and the contractor's actual expenses (article 374 of the CO). In such instances, as well as in cost-plus contracts, the owner carries the risk of price escalation and of cost increases due to shortages. There are only few exceptions to the rule that the price remains fixed:

- in case of extraordinary circumstances (which are admitted only very rarely by case law), impossible to foresee or excluded by both parties, the

contractor may be entitled to an increase of the lump sum under the doctrine of *clausula rebus sic stantibus* (article 373(2) of the CO);

- if the owner directly orders a variation in the scope of work, the contractor has a variation claim. In Swiss law, as in the FIDIC E&M Conditions, the parties must agree on the price increase and the time extension. However, the owner may, in the contract, reserve his right to order variations at a fixed price; and
- if the works are varied, either as a result of the owner's change of mind or because a need arose to change the works due to circumstances for which the owner is responsible (eg, unforeseeable soil conditions, cf article 365(3) of the CO), the contractor has a claim for additional payments.

Another exception is found in the SIA Norm 118, article 45(2), which regulates the contractor's right to extra payment in relation to necessary variations, which are carried out by the contractor without a prior agreement with the owner. Outside the scope of the SIA Norm (which, as mentioned above, is not a binding text unless agreed by the parties), the contractor will under certain circumstances be able to support a variation claim on the general principle of *negotiorum gestio* or based on the rules concerning unjust enrichment. In case of doubt as to whether or not a variation has been ordered (or whether it is necessary) the burden of proof rests with the contractor. If the variation has become necessary due to circumstances for which the contractor is responsible, he cannot claim extra payment or time extensions.

Competition

10 Do local laws provide any advantage to local contractors in competition with international contractors?

According to the Federal Law on Public Procurement, all bidders must be treated equally (see question 2).

PPPs and PFIs

11 In certain forms of construction such as PPP and PFI, where the contractor has a private obligation to long-term quality control and maintenance, how is the risk of additional future costs for quality control and maintenance considered and mitigated?

Forms of cooperation between public and private entities as have become common in many countries, in particular in the UK, are rare in Switzerland. However, federal authorities and municipalities observe international developments closely and it is expected that PPP and PFI projects may become more frequent in the future.

Payment of fees

- 12** How may a contractor secure payment of its fees by an owner?
May the contractor place liens on the land or the property itself?

If the owner does not comply with its obligation to pay the contractor, the contractor may terminate the contracts or insist on payment before continuing the works (article 82 of the CO). Liens can be placed by all contractors (including subcontractors) in accordance with article 839 of the Federal Civil Code, for the value of material and works.

Tort claims and indemnity

- 13** Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even if the general contractor is negligent?

As a rule a party is liable for any damages resulting from non-performance unless it shows that it has no fault at all in the non-performance (article 97 of the CO). Negligence is sufficient to trigger liability. Absence of fault or negligence of the injured party which is entitled to compensation is not a prerequisite for its entitlement. A concurring fault of the injured party does not limit the non-performing party's liability, but may result in damages not being fully recoverable (for tort claims see article 44 of the CO).

In its relationship with the owner, the contractor is solely liable for the performance of the contract, and thus for the work of the subcontractors (article 101 of the CO).

Liability for gross negligence and wilful intent cannot be excluded (article 100 of the CO).

If instructions by the owner risk causing delay or defects, or increasing the costs of the work, the contractor is duty-bound to immediately and specifically notify the owner of such risk. Failing such notice, the contractor may be liable for any consequences (article 369 of the CO). The same principle applies in the relationship between contractor and subcontractor, with the subcontractor being obliged to notify the contractor.

Insurance

- 14** Do local laws require the maintenance of any specific type of insurance on construction projects?

Workers must be insured against accidents both for work and private accidents. Cars must be insured against civil liability claims. Both the contractor and the owner of the construction site typically take insurance coverage for civil liability relating to damages resulting from the construction works or the site. Tender conditions may require that the bidders show proof of such insurance and maintain coverage throughout the project.

Insolvency and bankruptcy

- 15** If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor instated to prevent delay on the project?

Under Swiss law, the parties are free to agree in their contracts that insolvency is a ground for termination. In any event, the solvent party is entitled to request security for performance from the insolvent party. According to article 83 of the CO, the solvent party may withdraw from the contract if no such security is provided within a reasonable time.

In any event, the owner may terminate the construction contract for convenience at any time before completion of the works against full payment of works and damages (article 377 of the CO). If the works are delayed the owner can also avail itself of the remedies of article 366 of the CO. If the contractor does not cure the situation upon request, the owner can withdraw from the contract, have a third party perform the works at the contractor's cost and risk. If the owner chooses to terminate for convenience, without giving the contractor a chance to cure, the owner must compensate the contractor in full.

As a practical matter, owners should ensure that the contractor pays its subcontractors, since the latter have a right to place a lien (839 of the CC) on the property for any unpaid work. Payment by the owner to the contractor does not avoid the risk of a lien, even if the funds are earmarked for payment to subcontractors. Unless the payment reaches the subcontractor, a lien can be registered.

Contracting with government entities

- 16** Have government agencies that deal with contractors ever sought refuge under sovereign immunity and avoided paying a contractor disputed amounts on that basis? If so, is there recourse in the local courts?

All contract claims against agencies can be pursued in court or, if so agreed, in arbitration.

Bribery

- 17** If it is proved that a contractor has delivered something of value or bribes to facilitate the award of a construction contract to that company, will the contract be enforceable under local law? Will that contractor suffer any other adverse consequences?

Bribery of Swiss and foreign public servants is a criminal offence that will trigger criminal prosecution (article 322ter et seq of the Criminal Code). Contracts that cover the payment of bribes are null and void (article 20 of the Code of Obligations). Individuals who have accepted bribes can be dismissed forthwith. Contracts obtained through bribery are not automatically void, but only if their content has also been affected by the act of corruption (SCD 129 III 320).

Arbitration

18 Can a government agency commit to arbitrate disputes privately or must matters go to court?

Under Swiss law, most disputes are arbitrable (article 177 of the PIL Act for international arbitration; article 5 of the Concordat for domestic arbitration). Compulsory jurisdiction of the courts exists in a few limited areas, such as lease and employment contracts. Commercial contracts are, as a rule, arbitrable. Outside these cases, government agencies are allowed to commit to arbitration (but rarely do). Once it consents to arbitrate disputes with a foreign contractor, the agency cannot renege on its undertaking. Article 177(2) of the PIL Act prohibits a state or state organisation from relying on its own law to contest its capacity to be a party to an arbitration, or the arbitrability of the dispute.

Foreign corruption

19 What are the prohibited acts that your laws limit? What may your jurisdiction's contractors do locally and abroad, and what is prohibited?

Corruption of foreign officials is specifically prohibited by article 322 septies of the Federal Criminal Code. The provisions cover any person who offers, promises or grants an undue advantage to a person acting for a foreign state or an international organisation as member of a judiciary or other authority, public servant, expert, translator, arbitrator, or member of the military, in favour of such person or of third parties in relation to his official capacity. Likewise, the person who accepts or solicits such undue advantage is punishable under the Criminal Code.

Force majeure and acts of God

20 Under local law, are contractors excused from the obligations of the contract if they cannot work because of events beyond its control?

The contractor remains liable for non-performance unless he demonstrates that performance is no longer possible because of reasons that are not his fault (article 97 of the CO). If performance of the works becomes impossible due to circumstances for which the contractor is not responsible, the contractor's obligation to perform is extinguished (article 119 of the CO). If the works are temporarily delayed for reasons within the contractor's sphere of risk (which include force majeure events affecting the contractor's performance), the rules on delayed performance will apply (article 366 of the CO). These mechanisms are not mandatory law, and the parties can agree on different solutions (for instance, by adopting the SIA model contract).

Under article 376 of the CO, the contractor car-

ries the risk for the destruction of the works prior to taking over due to a fortuitous event (which includes but is not limited to force majeure). In such event the contractor will not be reimbursed for its costs.

Dispute resolution mechanisms

21 Other than contractual international arbitration, what dispute resolution procedures are used successfully to solve construction disputes?

Contrary to many common law states, there is no court-ordered adjudication regime in place in Switzerland. Domestic construction disputes are usually referred to the local courts, and less frequently to arbitration (see question 27). However, Switzerland is a major seat for international arbitration, including many arbitrations involving infrastructure projects outside Switzerland. The most frequently used arbitration rules in Switzerland are the uniform arbitration rules of the Swiss Chambers of Commerce (Swiss Rules) and those of the International Chamber of Commerce (ICC Rules). Switzerland regularly ranks first or second in the annual statistics of arbitration seats published by the ICC.

Courts and tribunals

22 Are there any specialised courts or other tribunals that resolve construction disputes?

The construction industry has established arbitration rules whereby disputes may be referred to specialised tribunals (see www.sia.ch/download/rd_sg_reglement_f.pdf). There are no state courts specialised in construction disputes. There are state commissions dealing with public procurement disputes.

Dispute review boards

23 Have dispute review boards been used with success or failure?

Disputes boards are not widely used but were established with success in one of the largest infrastructure projects – the ongoing construction of the railway tunnels through the Alps (see question 2).

Mediation

24 How is mediation defined and is it commonly used to resolve project disputes?

There is no federal law on mediation defining the mediation process. Mediation is not commonly used yet, although recently industry associations have adopted mediation and arbitration rules. For an overview of dispute resolution proceedings in Swiss construction projects, see Dominique Brown-Berset & Matthias Scherer, 'Les modes alternatifs de règlement des différends dans le domaine de la construction', *Journées suisses du droit de la construction JDC*, 2007, pp265-287.

Confidentiality in mediation

- 25** If a party participates in mediation, will the statements made therein be absolutely confidential or are the parties at risk that their statements can be used against them?

There is no statutory federal law on confidentiality in mediation. The parties are free to adopt institutional or ad hoc mediation rules that address confidentiality. For instance, articles 7 and 18 of the ICC ADR Rules and the Mediation Rules of the Swiss Chambers of Commerce provide that statements made in the mediation are confidential at all times, even in subsequent litigation or arbitration.

Arbitral award

- 26** Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Enforcement of foreign arbitral awards in Switzerland is governed by the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which considerably limits the grounds on which enforcement may be refused. Switzerland has a good track record of abiding by the Convention's terms and spirit.

Governing law and arbitration provider

- 27** If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Contracts for domestic construction projects usually provide for the jurisdiction of the local courts, especially if the owner is a public entity. In recent years, arbitration has become more popular, as illustrated by a new set of arbitration and mediation rules adopted by a number of leading industry associations (see www.sia.ch/download/rd_sg_reglement_f.pdf).

Foreign contractors should note that arbitration among Swiss entities (which include local project companies of foreign contractors) is subject to domestic Swiss arbitration law, whereas contracts to which at least one foreign contractor is a party, are subject to the Swiss international arbitration law (PIL Act).

International environmental law

- 28** Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and its wildlife while advancing infrastructure and building projects?

The environment is protected by a multitude of laws and regulation, mainly due to the Federal Law on Environmental Protection (RS 814.01). This law provides for compulsory studies to be prepared to assess the impact on the environment of projects of a certain

size. Construction site waste needs to be separated into normal and hazardous/special waste (Regulation SR 814.600).

Other international legal considerations

- 29** Are there any other legal considerations that will present a difficulty or obstacle for a foreign contractor attempting to do business?

Federal legislation on public procurement explicitly guarantees the equal treatment of foreign bidders, but foreign contractors will be guided by general market opportunities rather than by legal considerations. As the Swiss market for low-margin work is fairly saturated, foreign contractors will usually only bid for large projects with higher margins. Most foreign contractors who regularly bid in Switzerland have acquired local Swiss contractors or entered into joint ventures with local partners.

Switzerland is a multilingual country. Depending on the project, the official language may be French, German or Italian. The bidding documents must be prepared in the applicable language.

Contractors from common law countries should be aware that Switzerland is a civil law country and that the rules governing contract interpretation may differ from common law. In case of a dispute over the proper construction of a contract provision, the courts will establish the real and common intention of the parties. The wording of the contract is the starting point, not the end of the interpretation. Contrary to common law courts, civil courts will look at evidence outside the four corners of the contract to determine the parties' intentions. There is no prohibition on parol evidence. Oral witness evidence is an important feature in contract disputes.

International treaties

- 30** Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Switzerland has adhered to the ICSID Convention and has one of the largest bilateral investment protection treaty (BIT) networks, with over a hundred worldwide. There is no publicly available model BIT. Arbitration (mainly under UNCITRAL or ICSID Rules) will be available to the investor in most instances. Each treaty will have to be looked at individually to assess whether infrastructure projects qualify as a relevant investment. ICSID precedents show that projects of a certain size and duration regularly qualify. ICSID arbitration is available in the event of a breach of protection granted in a BIT (eg, discrimination against or expropriation of a foreign contractor).

Update and trends

- Swiss substantive law is frequently chosen for construction projects outside Switzerland, for joint venture and consortium agreements, the main contract, as well as subcontracts, in particular FIDIC-type contracts (for further discussion see Schneider & Scherer, 'An Analysis of International Construction Contracts: Switzerland', in *FIDIC: International Construction Contracts*, The Hague, 2005, and other publications at www.lalive.ch/e/publications/index.php?id=123).
- PPPs are not widespread in Switzerland but are expected to become more common, with opportunities for those contractors who have gathered experience in other countries.
- Bilateral treaties with the EU are now in place which allow the free movement of persons within the EU and Switzerland (transition periods apply to new EU member states). This greatly facilitates the hiring of specialised non-Swiss personnel for projects in Switzerland.

A mere contract violation will only exceptionally qualify as a treaty breach sufficient to establish jurisdiction of the ICSID arbitral tribunal (for instance by operation of an 'umbrella clause'. For a discussion see the awards in two ICSID cases based on a Swiss BIT: *SGS v Pakistan* and *SGS v Philippines*).

Tax treaties

- 31** Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Switzerland has concluded numerous income tax treaties to avoid double taxation. These treaties usually provide for reduced withholding rates on dividends, interest and royalties. To benefit from a reduced treaty withholding rate, the foreign recipient must generally apply to the Swiss tax authorities for a refund. Certain treaties may provide a direct reduction at source under certain conditions.

Currency controls

- 32** Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

No.

Removal of profits and investment

- 33** Are there any controls or laws that restrict removing profits and investments from your jurisdiction?

Taxes may apply on dividends as indicated under question 31, at rates varying depending on the jurisdiction of residence of the investor deriving a profit from an investment in Switzerland.

Contractual matrix of international projects

- 34** What is the typical contractual matrix for a major international project in your jurisdiction in terms of the contractual relationships among various parties?

The owner will regularly appoint an engineer. Such engineers are the owner's representative. They do not function as certifier or 'neutral' administrator of the contract; nor do they decide disputes between the contractor and the owner, contrary to some common law jurisdictions. On the contractor's side, large-scale projects usually involve consortia or joint ventures, which may include foreign contractors. Often, the owners choose a general contractor, who retains sub-contractors.

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