CHAPTER 6

# Moving Beyond Diversity Toward Inclusion in International Arbitration

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## §6.01 THE INCREASING FOCUS ON DIVERSITY IN INTERNATIONAL ARBITRATION

Where it used to be argued that there was an international arbitration "mafia"[1] cornering the market in dispute resolution work, it is now recognized that the reality is much more nuanced. Rather than a "mafia," in fact the international arbitration community is a small community working in a young and developing field. It is important to recall that the New York Convention, once memorably described as the "single most important pillar on which the edifice of international arbitration rests,"[2] only celebrated its sixtieth birthday earlier this year. Of course, the New York Convention was not born with the 159 signatories it has today. Ten years after the New York Convention was concluded, only 32 countries had ratified it, and it was not until the late 1980s that critical mass was starting to be attained.[3] The first edition of the

1. *See*, for example, the list of "top arbitrators" published by Focus Europe in its 2009 Arbitration Scorecard, in which only 11 individuals were listed, http://www.law.com/jsp/article.jsp?id=1202431821301&thepage=2. Nine years later, this had risen to 34 individuals listed by Chambers and Partners as the most in demand arbitrators in 2018, 3 of them are women, https://www.chambersandpartners.com/15649/1245/editorial/2/1. Most are white and US/Anglo-European. Generally, there is a shallow pool of international arbitrators, known as the international arbitration club, or, more pointedly a few years ago, as the international arbitration mafia.
2. Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 91, 93 (1990). Lord Mustill considered that the New York Convention "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law." Mustill, *Arbitration: History and Background*, 6 JOURNAL OF INTERNATIONAL ARBITRATION 43 (1989).
3. *See* www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Around 65 countries had signed the New York Convention by the late 1980s.

seminal work on international arbitration by Redfern and Hunter was published in 1986 and by the beginning of the 2000s there were only around 40 completed International Centre for Settlement of Investment Disputes (ICSID) arbitrations. Given that the industry is such a young one, it is only to be expected that it lags behind other industries in terms of gender, ethnic and geographic diversity. It was only in around 2010 that the arbitration community began to talk openly about the homogeneity of those who were part of it,[4] although there had been earlier and generally isolated comments to this effect.[5] Back in 2003 Sarah Francois-Poncet posited that most international arbitrators are "pale, male and stale," a phrase that has been seized upon and often repeated.[6] In 2010, Michael McIlwrath and John Savage asked, "In a discipline that prides itself on being transnational and designed for the resolution of cross-cultural disputes around the globe, is it acceptable that the vast majority of prominent international arbitrators are white, male lawyers or law professors over the age of 50?"[7] Suddenly, from being a topic that was never discussed at the numerous conferences on international arbitration, diversity, or more accurately, the lack of diversity, was discussed at length at conferences across the globe.[8] The 2017 Berwin Leighton Paisner survey on diversity in arbitration confirmed that practitioners and users of international arbitration were concerned about the lack of diversity. Eighty percent of respondents thought that tribunals contained too many white arbitrators, 84% thought that there were too many men and 64% felt that there were too many arbitrators from Western Europe or North America.[9]

## §6.02 THE OVER-REPRESENTATION OF ANGLO-EUROPEAN MEN

International arbitration tribunals are mainly composed of Anglo-European men, counsel in international arbitrations are almost invariably men (particularly when it

4. Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 Arb Int'l 653 (2012).
5. One of the earliest and most powerful pieces of commentary on this issue is found in 2000 in the opening paragraph of the article, Dr. K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, 15 Mealey's International Arbitration Report 24 (July 2000), "An observer from planet Mars may well observe that the international arbitral establishment on Earth is white, male and English speaking and is controlled by institutions based in the United States, England and mainland European Union. For the most part, arbitrators and counsel appearing actively in international arbitral proceedings originate from these countries. The majority in a multi-member international arbitral tribunal is always white. The red alien from Mars will be puzzled in his own way because the majority of the published disputes before international arbitral tribunals involve parties from the developing countries and nearly three-quarters of the people on Earth live in those countries and are not white and more than half the total population are women."
6. *See* Michael Goldhaber, *Madame La Presidente*, 1(3) Transnational Dispute Management (July 2004).
7. Michael McIlwrath & John Savage, International Arbitration and Mediation: A Practical Guide 5-079 (Kluwer Law International 2010). *See* the article, for a different point of view, Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 Journal of International Arbitration 13–22 (1997).
8. It is now rare to find a conference that does not have a panel on diversity. Five years ago, it was rare to find any mention of diversity during any panel discussion on any subject.
9. BLP 2017 survey, *Diversity in Arbitration: Are We Getting There?,* http://www.blplaw.com/expert-legal-insights/articles/diversity-on-arbitral-tribunals-are-we-getting-there.

comes to first chairs arguing cases),[10] and in terms of ethnic, geographic, age and socioeconomic factors, the situation in the international arbitration community generally is almost laughable.[11] In the past, statistics in relation to diversity have been presented as the under-representation of women and the under-representation of certain nationalities. This chapter takes a different approach in presenting the available data and the chapter looks at the data in relation to the over-representation of Anglo-European men. To frame this issue, it is helpful to revisit Professor Susan Franck's research into delegates attending the biennial Congress of the International Council for Commercial Arbitration (ICCA) in 2014. Franck conducted detailed research into the backgrounds of 262 international arbitrators attending ICCA and concluded that "the 'median' international arbitrator was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases."[12]

Turning first to the data on gender collected from the major international arbitration institutions in 2017, the proportion of total arbitration appointments of men in 2017 are set out in Table 6.1.

*Table 6.1 Total Arbitral Appointments of Men in 2017*

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|---|---|
| London Court of International Arbitration (LCIA) | 76% |
| American Arbitration Association (AAA) | 77% |
| International Centre for Dispute Resolution (ICDR) | 78% |
| The Arbitration Institute of the Finland Chamber of Commerce (FAI) | 81% |
| Stockholm Chamber of Commerce | 82% |
| CEPANI (Belgian Arbitration Institution) | 82% |
| Vienna International Arbitration Centre | 83% |
| International Chamber of Commerce | 83% |
| Hong Kong International Arbitration Centre | 84% |
| Swiss Chambers' Arbitration Institution | 84% |
| Chamber of Arbitration of Milan | 85% |
| ICSID | 86% |
| DIS (German Arbitration Institution) | 87% |

10. The discussion by Judge Shira A. Scheindlin in *Female Lawyers Can Talk, Too,* https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judge, is equally true of international arbitrations.
11. "The first thing anyone notices when they drop out of the legal profession and into the "neutral" business is the time warp. It's not exactly an old folks' home or an assisted living facility, but it is populated primarily with the people who were already practicing law when I entered the profession in 1980. These people were in their 30's then. Now they're mostly over 60. They're white. And they are male." Victoria Pynchon, *Diversity Is Not a Toxic Topic*, 30 ALTERNATIVES 83 (April 2012), cited in *"Old, White, and Male": Increasing Gender Diversity in Arbitration Panels*, https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels.
12. Susan Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration,* Washington & Lee University School of Law.

The institutions' data further shows that in 2017 men were significantly more likely to be appointed by the parties[13] and by co-arbitrators[14] while women were more likely to be appointed by institutions—although the two institutions which appointed the highest proportion of women, the Stockholm Chamber of Commerce and the London Court of International Arbitration, still appointed men two-thirds of the time.[15] Whilst it is heartening to see that the top three arbitral institutions in terms of total appointments of women are also amongst the busiest arbitral institutions and thus can have a more significant impact in this area than smaller institutions, the statistics are still sobering.

In relation to the geographic origins of self-identifying arbitrators attending ICCA in 2014, Professor Franck determined the following:

> Although highest in world population (60.27%), Asian arbitrators were the second least represented (10%) of ICCA arbitrators. Notably, although China and India together contain approximately 33% of the world's population and roughly 30.4% of global GDP, less than 3% of participating arbitrators were from those states. Meanwhile, despite Africa's second highest population (15.41%), only two African countries were in the twenty countries with the highest global GDP (Egypt and Nigeria—2.5%) and Africa exhibited the lowest level of representation (0.4%). Other nationalities were arguably over-represented. Europe has 10.37% of the world's population and roughly 12.8% of global GDP, but 48.2% of the arbitrators were European nationals. Similarly, the United States and Canada have 4.93% of the world's population and 14.5% of global GDP, but 27.9% of the ICCA arbitrators were from North America, and of the seventy arbitrators from North America, only one was from Mexico.[16]

Franck's research at ICCA further found that 82% of arbitrators were from an "OECD or High Income" state.[17]

Further, the statistics above do not address the related notion of "intersectionality". This refers to the overlapping effect of different aspects of diversity in a single individual.[18] Joshua Karton and Ksenia Polonskaya[19] carried out research into the

13. Over 90% of the arbitrators appointed by the parties in 2017 at DIS (the German Arbitration Institution), Swiss Chambers' Arbitration Institution, the ICC, the Stockholm Chamber of Commerce and the Finland Arbitration Institution were male.
14. In Stockholm Chamber of Commerce arbitrations and Finland Arbitration Institute arbitrations in 2017, every arbitrator appointed by co-arbitrators was male.
15. Sixty-three percent of Stockholm Chamber of Commerce's appointments and 66% of the LCIA's appointments in 2017 were men.
16. Susan Franck et al., *supra* n. 12.
17. Defined by Franck as follows: "OECD Status—that derived from a state's membership in the Organisation for Economic Co-operation and Development (OECD). OECD membership is generally, but not always, associated with higher levels of development and therefore is a blunt proxy … development was also operationalized using a four-category variable—World Bank Status—that derived from a World Bank classification system grouping states as High Income, Upper-Middle Income, Lower-Middle Income, and Low Income."
18. The term was apparently coined by Kimberlé Crenshaw, an American Law Professor, in a 1989 paper, *see* Joshua Karton & Ksenia Polonskaya, *True Diversity Is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity,* http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/.
19. Joshua Karton, Associate Professor at the Queen's University Faculty of Law, Canada. Ksenia Polonskaya, postdoctoral fellow at the Centre for International Governance Innovation, Canada.

composition of ICSID arbitrator appointments between 2012 and 2017. From a total of 951 appointments made, Karton and Polonskaya noted, as have others previously, that the majority of all appointments of women to ICSID panels were of two women, *Brigitte Stern* or *Gabrielle Kaufman-Kohler*. Out of 951 appointments reviewed by Karton and Polonskaya only 106 (11%) were female arbitrators, and of these Stern obtained 53 appointments and Kaufman-Kohler 15. Only 38 appointments (4% of the total) went to other female arbitrators. In relation to intersectionality, out of the 951 appointments Karton and Polonskaya determined that only three appointed arbitrators were female, non-white and from a developing state: *Bertha Cooper-Rousseau* (Bahamian), *Tinuade Oyekunle* (Nigerian), and *Dorothy Udeme Ufot* (Nigerian). All three were members of annulment committees, and all three were appointed by ICSID. Karton and Polonskaya found no arbitrators appointed to ICSID panels, and no arbitrators appointed by parties or by other arbitrators who had these characteristics.[20]

## §6.03 WHY IS THERE SUCH POOR REPRESENTATION OF NON-TYPICAL ARBITRATORS?

There are a multitude of factors that combine to make it less likely to be appointed as an arbitrator if the individual is not male, Anglo-European or, ideally, both. First, and perhaps most obviously, there are fewer non-typical arbitrators to choose from. In relation to women, the effect of so-called pipeline leak[21] must not be underestimated. In 2015–2016, of the UK students accepted to study Law at undergraduate level in England and Wales, 67.3% were female. Sixty-one percent of the newly qualified solicitors in 2015 were female. By the time these lawyers reach partner level, the figure has dropped to less than 20%.[22] The disproportionate rate at which women leave the profession is probably the major cause of the under-representation of women in the senior ranks of the international arbitration world. The factors behind pipeline leak include diverse issues such as office climate, difficulties in managing dual careers, lack of female role models and mentors, lack of flexible work options and attitudes to flexible working, the significant differential in earnings between spouses and discrepancies between the treatment of male and female associates.

Second, even considering the fact that there are fewer women to choose from, there are other factors that affect the arbitrator selection process and may hinder the appointment of women, one of which is the effect of the unconscious mind upon decision-making. Gender-stereotyping plays an important role in this issue. From the time they are walking, small children of different sexes are given different toys, different clothes, different opportunities and different messages. Research shows that

20. Joshua Karton & Ksenia Polonskaya, *supra* n. 18.
21. "Pipeline leak" refers to women leaving the profession at a greater rate than men.
22. *See*, Mary Thomson, *Will the Pipeline Leak Be Mended in 2017?* http://arbitrationblog.practicallaw.com/will-the-pipeline-leak-be-mended-in-2017/.

there are no differences in girls' or boys' brains, although differences can be found in adult brains.[23] The reason for this is the different way in which girls and boys are socialized and the contrasting messages that they receive from parents, teachers and the media. While these messages have an early impact on girls turning their backs on science, technology, engineering and mathematics (STEM) subjects after grade school,[24] they have a delayed impact both on who is chosen as an arbitrator and, just as importantly, who is available to choose from.

When people discuss arbitrators they use words like "gravitas," "assertive," "influential," which are generally used to denote male characteristics and may confirm existing biases against appointing women in leadership roles.[25] The other issue is that studies have shown that when it comes to promoting candidates, men tend to be promoted on potential, whereas women tend to be promoted based on their experience.[26] So in a situation where inexperienced arbitrators of both sexes are under consideration for an appointment, the man may be more likely to be appointed. Societal influences and upbringing all have an impact on our attitude to appointing diverse arbitrators. The impacts of these influences are far reaching. For example, one study evaluated the attitudes of science faculty from research-intensive universities and investigated how they rated the application materials of a student—who was randomly assigned either a male or female name—for a laboratory manager position.[27] Faculty participants considered the "male" applicant to be significantly more competent than the (identical) "female" applicant.[28] Interestingly, the sex of the faculty participants did not affect responses at all, such that male and female faculty members were as likely to rank the "male" applicant more highly. The study also found that there were differences in the salary offered to the applicant, the female applicants were offered an annual salary of approximately USD 26,500, whereas male applicants were offered a salary of about USD 30,200. On average, female faculty offered female

23. *See*, Lise Elliot, *"Girl Brain? Boy Brain?"*, https://www.scientificamerican.com/article/girl-brain-boy-brain/.
24. A study commissioned by Microsoft of 1,000 girls and young women in the UK aged between 11 and 30 showed that, on average, there is just a five-year window to foster their passion for STEM subjects. The research also found that gender stereotypes hold young women back the most. Seventy percent of girls in the UK said they would feel more confident pursuing STEM careers if they knew men and women were equally employed in these professions, https://edtechnology.co.uk/Article/why-arent-more-girls-in-the-uk-studying-stem-subjects.
25. *See*, in particular, the pyramid at http://www.catalyst.org/publication/132/us-women-in-business, March 2012, which shows women at 51% of management, professional and related occupations, 14% of Fortune 500 Executive Officers, 16% of Fortune 500 board seats, 7.5% of Fortune 500 top earners and 3.4% of Fortune 500 CEOs. *See also*, http://www.pwc.com/en_GX/gx/women-at-pwc/assets/leaking_pipeline.pdf, *The Leaking Pipeline: Where are our female leaders?* March 2008.
26. *See*, *The Promise of Future Leadership: Highly Talented Employees in the Pipeline*, Catalyst.
27. Dovidio, J.F., and S.L. Gaertner, *Aversive Racism and Selection Decisions*: 1989 and 1999, 11 PSYCHOL. SCI. 315–319 (2000), Valian, V., *Why so Slow? The Advancement of Women* (Cambridge 1998); Wenneras, C., and A. Wold, *Nepotism and Sexism in Peer Review*, 387 NATURE 341–343 (1997), as cited in Chesler, Naomi C. et al., *The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*, ANNALS OF BIOMEDICAL ENGINEERING (February 2010).
28. Corinne Ross-Macusin, *Science Faculty's Subtle Gender Biases Favors Male Students*, http://www.pnas.org/content/109/41/16474.abstract#aff-1.

students the lowest salary (USD 25,000) while male faculty offered male students the highest salary (USD 30,520).

In another study, resumes and journal articles were rated lower by both male and female reviewers when they were told the author was a woman.[29] A further study of postdoctoral fellowships awarded showed that female awardees needed substantially more publications to achieve the same rating as male awardees. In this study, the peer reviewers over-estimated male achievements and/or underestimated female performance.[30] In evaluating the qualifications of men and women assistant professors, reviewers were four times more likely to ask for supporting evidence about the woman, such as a chance to see her teach or proof that she had won her grants on her own, than they were for the man.[31]

Turning to the issue of the lack of ethnically and geographically diverse arbitrators, and considering the additional layer of intersectionality, many of the points made above are equally relevant to this issue. For example, in relation to the point that there are fewer non-typical arbitrators to choose from, women, and particularly white women, are in the pool of available arbitrators but are not being appointed as frequently as men, but ethnically and geographically diverse arbitrators of both sexes are barely dipping their toes in the water. Whilst male ethnically and geographically diverse arbitrators may not suffer from pipeline leak in the way that women do, they may suffer from a lack of available information, an absence of role models and, often, from socioeconomic constraints. The most established route to arbitral appointments is experience as counsel in arbitral proceedings. Counsel tend to be from European or US law firms—even where a party is from Africa or Asia. This means that all the expertise tends to build up in Europe and the US, which result in a commensurate geographic concentration of arbitral appointments. Addressing this issue therefore may be more about improving the pathway to an international arbitration career through mentoring, shadowing and access to information.

## §6.04 WHAT IS BEING DONE TO ADDRESS THE LACK OF DIVERSITY?

It could be argued that the lack of diversity in the international arbitration community is not, per se, a problem. However, the lack of diversity poses a problem in relation to the legitimacy of the process. There must also be recognition that diverse parties deserve to have the opportunity to select diverse arbitrators. Yet the way in which arbitrators are selected militates against appointing a diverse arbitrator. According to the Berwin Leighton Paisner survey, the most important qualities in an arbitrator were "expertise" (according to 93% of respondents) and "efficiency" (according to 91%).[32]

29. Paludi, M.A., and W.D. Bauer, *Goldberg Revisited: What's in an Author's Name,* 9 Sex Roles 387–390 (1983), Steinpreis, R., K.A. Anders, and D. Ritzke, *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 Sex Roles 509–528 (1999) as cited in Chesler, Naomi C. et al., *supra* n. 27.
30. Wenneras, C., and A. Wold, *supra* n. 27, as cited in Chesler, Naomi C. et al., *supra* n. 27.
31. *Beyond Bias and Barriers: Fulfilling the Potential of Women in Academic Science and Medicine* National Academy of Sciences 4-28 (2006).
32. BLP Survey, *Diversity in Arbitration Tribunals: Are We Getting There?*

Expertise and efficiency are difficult to measure objectively and can be easily distorted by, for example, the "halo" effect. This is where a candidate comes "highly recommended" from a trusted source, placing a "halo" around the candidate and distorting the candidate's other characteristics, and over-shadowing other potential candidates. The current way in which arbitrators tend to be identified, namely by telephoning or emailing an acquaintance to ask their advice is a prime example of encouraging the "halo" effect.[33] The more that trusted acquaintances recommend white, middle-aged men, the more comfortable the brain is that the correct decision has been made. The brain's implicit stereotyping has an enormous impact on the decision-making process.

There are things that can be done to improve the odds of selecting a non-typical arbitrator and to counteract the brain's efforts to take a particular direction. The first is to start with a list of objective characteristics which are required in an arbitrator, rather than a list of names. These must be objective and more detailed than simply "expertise" or "influence" and be as descriptive as possible in relation to the criteria. Time should be taken to evaluate and weigh the criteria before matching the criteria with possible candidates. Multiple sources should be used to identify possible candidates and reference should be made to databases rather than individual recommendations. This will result in a wider pool of possible candidates which can then be critically rated against each criterion.

On a voluntary basis, the community has risen to the challenge of addressing diversity in several ways. The most well-known of the initiatives to increase the number of women appointed as arbitrators is the Equal Representation in Arbitration Pledge.[34] Signatories to the Pledge commit to increase, on an equal opportunity basis, the number of women appointed as arbitrators, with a view towards reaching the goal of full parity. In particular, signatories promise to take steps to ensure that, whenever possible, committees, governing bodies and conference panels in the field of arbitration include a fair representation of women; that lists of potential arbitrators or tribunal chairs include a fair representation of female candidates; and that entities in charge of arbitral institutions include a fair representation of female candidates on rosters and lists of potential arbitrator appointees and appoint a fair representation of women to tribunals. The Pledge has met with an enthusiastic response from the community, with almost 3,000 signatories as of September 2018. Other initiatives and organizations are springing up to support existing and established organizations like ArbitralWomen.[35] One such organization is the Alliance for Equality in Dispute Resolution[36] which was launched in 2018 with the aim of promoting "inclusivity in all aspects of the dispute resolution world" and striving "for equality of opportunity regardless of sex, location,

33. Contacting acquaintances rather than looking at objective data is probably the single most likely way to encourage our latent unconscious biases against appointing diverse or younger arbitrators. *See*, Lucy Greenwood, *Tipping the Balance—Diversity and Inclusion in International Arbitration*, 33 Arbitration International 99–108 (2017). Seventy-seven percent of respondents to the Queen Mary University of London (QMUL) survey used "word of mouth" as their primary source of information on arbitrators.
34. www.arbitrationpledge.com.
35. www.arbitralwomen.org.
36. www.allianceequality.com.

nationality, ethnicity or age." It focuses on "addressing the lack of diversity in relation to ethnicity and geography in international arbitration" through training, mentoring and access to online discussion fora.

## §6.05 BECOMING AN INCLUSIVE RATHER THAN AN EXCLUSIVE CLUB

The barriers to entry to practice international arbitration are, rightly, extremely high. There is a reason why arbitrators tend to be of a certain age, and it is quite simply because international arbitration requires a vast amount of experience and knowledge. A major selling point of arbitrations is the fact that all the major international arbitration institutional rules are not lengthy tomes, but slim pamphlets. The discretion of the tribunal in addressing procedural issues is key and to have confidence in the person whose discretion is being relied upon requires that person to have had experience of the issues before them. The intellectual challenges inherent in an international arbitration are also extremely tough. There are no law clerks to write the awards or carry out the research: all this responsibility falls on one or three people. When co-arbitrators are tasked with the responsibility of appointing a chair, not only are the parties counting on the co-arbitrators to get it right, but the co-arbitrators are risking their reputations, as the chair will wield huge influence not only on the ultimate decision but also on the quality of the award. The same is true when counsel appoint arbitrators on behalf of their clients. It is no wonder that lawyers, already a highly conservative group of people, are particularly conservative when it comes to arbitral appointments.

Given this obvious conservatism in addressing the lack of diversity in international arbitration, one way of approaching this issue is to focus on inclusion. The "inclusion" part of diversity and inclusion should not be ignored. Inclusion is an organizational effort in which diverse groups or individuals having different backgrounds are culturally and socially accepted and welcomed, and equally treated. In international arbitration, these differences would include national origin, age, race and ethnicity, sex and socioeconomic status. "Inclusion" can take two forms: first, facilitating access to a group and second, working to ensure that new members integrate into the group. The international arbitration community is good (certainly in relation to women, less so in relation to ethnically and geographically diverse participants) at the second part and less good at the first part.