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MEDIATION AFTER THE SINGAPORE CONVENTION

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(1) Introduction

1. It is an honour to have been asked to give this year's President's Circle Lecture at the start of 2025. 25 years since the turn of the millennium.

2. Over the course of the last quarter of a century, national and international dispute resolution has evolved significantly. From a national perspective, as we approached 2000, we all imagined that the Woolf reforms would be the most significant change that we were likely to see over the next couple of decades. How wrong we were, as the past ten years of digitisation have demonstrated – being introduced first relatively cautiously and then somewhat faster, not least given the imperatives brought about by the Covid-19 pandemic. From an international perspective, we have seen major developments in international commercial litigation, not least through the development and promotion of multiple international commercial courts across the world, notably in Singapore, Dubai, and Qatar.[1]

3. Mediation, though, is my particular focus today. But it is not just my focus, it is a central focus for anyone engaged in dispute resolution, as CEDR's 10th Annual

[1] See, for instance, X. Kramer & J. Sorabji, *International Business Courts – A European and Global Perspective*, (2019, Eleven International Publishing).

Mediation Audit makes clear. Since 1990, when mediation began in earnest in England and Wales[2], disputes totalling a value of £195 billion have been mediated, with at least £20 billion of disputes now being mediated a year. The savings to business from this are noted as being worth around £5.9 billion; not to be sniffed at.[3] That benefit, as Lord Phillips CJ put it in 2008, stems not from saving parties to a dispute '*the cost and trauma of litigation*' but also through enabling them to '*preserve, or restore good relationships with the other party to the dispute*'.[4] Importantly, it enables them to expend their time, effort and resources on their commercial activities and not litigation. This is, of course, a point well-recognised by BICCL. Its emphasis on the need to encourage mediation – or as it called it 'conciliation' – to help promote the continuing viability of contracts during the Covid-19 pandemic highlighted the important role mediation had to play at that time.[5] What is good for business in times of crisis, is just as beneficial in the ordinary course of events.

4. There has, as is well-known, been something of a perceived tension between mediation, or perhaps its promotion, and litigation. This was particularly acute during the first two decades of this century, when the promotion of mediation, and alternative dispute resolution more generally, really started to get underway. Professor Hazel Genn, for example, wrote cogently of concerns about the over-promotion of ADR and the risk that this posed for our commitment to an effective civil justice system.[6]

5. Any sense of friction between litigation and ADR has somewhat cooled now. Lord Neuberger, when Master of the Rolls, rightly noted the need to ensure that ADR, and hence its promotion, must be viewed as playing a '*supplementary and*

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[2] Practice Statement (Commercial Cases: Alternative Dispute Resolution) [1994] 1 WLR 14.
[3] CEDR 10th Annual Mediation Audit (2023) at 17.
[4] Lord Phillips CJ, *Alternative Dispute Resolution – An English Viewpoint*, (2008), which is available here: https://www.bailii.org/uk/other/speeches/2008/0VSY5.pdf.
[5] BICCL, Breathing Space, Concept Note No. 1 (2020), which is available here: https://www.biicl.org/documents/10694_concept_note_1_on_the_effect_of_the_pandemic_on_commercial_contracts_bd.pdf.
[6] H. Genn, *Judging Civil Justice*, (CUP, 2009).

complementary role' to that of litigation.[7] Similarly, as Chief Justice Menon noted in 2015, when discussing the development of mediation in Singapore, it was necessary to move away from the view that ADR was:

'. . . *an alternative to traditional court systems and processes . . . [on the contrary, it was necessary to see it] as an essential element in a range of tools that are able to be found in a complex and rich tool kit that is available to resolve disputes.*'[8]

Developments over the last ten years have seen that shift in mindset. We have, for instance, seen the integration of mediation into our civil procedure here through the HMCTS modernisation programme and, most recently, through the Court of Appeal's decision in *Churchill v Merthyr Tydfil*,[9] where we confirmed that the court has the power to mandate the use of ADR. We have also seen it with the promotion of early neutral evaluation and, in family disputes, financial dispute resolution hearings. Internationally, we have seen that shift through the increasing promotion of international commercial mediation, particularly through the recent introduction of the Singapore Convention on Mediation[10] and the refurbished Model Law on International Commercial Conciliation of 2002, now the UNCITRAL Model Law on International Commercial Mediation.[11]

6. In today's lecture I want to explore how mediation may evolve in the light of the Singapore Convention. In particular, I want to consider the idea that such development is likely to play an important role in promoting the rule of law, both domestically and internationally – as is happening with the promotion and development of international commercial courts. Finally, I want to consider what lessons we here can learn from the Convention and the approach of other jurisdictions to mediation. Suitable topics, I hope, for a BIICL audience.

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[7] Lord Neuberger MR, *Equity, ADR, Arbitration and the Law: Different Dimensions of Justice*, (2010) at [43], which is available here: https://www.bailii.org/uk/other/speeches/2010/JBP72.pdf.

[8] Chief Justice Sundaresh Menon, *Building Sustainable Mediation Programmes: A Singapore Perspective*, (2015) at [57], which is available here: https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/documents/asia-pacific-international-mediation-summit---speech-by-cj.pdf.

[9] *Churchill v Merthyr Tydfil BC* [2023] EWCA Civ 1416, [2024] 1 W.L.R. 3827.

[10] See <https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf>.

[11] See <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf>.

(2) The Singapore Convention

7. The background to the Singapore Convention is the recent boom in international arbitration. It is well-known that the primary means through which international commercial disputes are resolved is via arbitration. While that is a long-established position, it is perhaps not as rooted in history as one might think. Prior to the Second World War, the primary means by which such disputes were resolved was via mediation, or as it was also called then conciliation.[12] It has also been said that the birth of international commercial arbitration post-War had a focus on arbitrators actively seeking to resolve disputes not via arbitral awards but through mediation. As Pierre Lalive once put it, '*One of the major purposes of arbitration is . . . to encourage conciliation.*'[13] Leading arbitrator as he was, he is noted as hardly ever having actually determined an arbitration through an arbitral award. His great skill, and that of many of the early generations of international arbitrators, was to bring the parties to a consensual resolution.[14]

8. In one sense, there was nothing new about the approach taken to arbitration in its early years. This was the Platonic ideal in action: in considering the best type of judge (in the dialogue between Cleinias and an Athenian in *The Laws*), Plato singled out the one who could arbitrate between the parties. And by arbitration he meant conciliation rather than adjudication. As the Athenian put it,:

   '*with our eye to excellence, there is a third (type) of judge . . . the one who would be able to take this single family which is at odds with itself and not destroy of them, but reconcile them for the future, and given them laws to keep them on good terms with one another.*'[15]

9. Excellent an approach it may have been, it was overtaken from the 1970s by an equally attractive one, which saw the transformation of international commercial

[12] S. I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 Wash. & Lee L. Rev. 1973 (2016) at 1980.
[13] Cited in Y. Dezalay & B. Garth, *Fussing about the Forum: Categories and Definitions as Stakes in a Professional Competition*, Law and Social Inquiry (1996) (Vol. 23) at 286.
[14] Y. Dezalay & B. Garth (1996) at 296.
[15] Plato, *The Laws*, Book 1 (CUP, 2016) at 37.

arbitration into what we know today: a form of private, international, litigation.[16] No doubt there were many reasons for this shift: a change in the nature of international commercial disputes, such as the arrival of arbitrators more familiar with US and English litigation, for example. One key factor though was undoubtedly the ease with which arbitral awards could be enforced across borders, not least as a result of the growth of international treaties that facilitated cross-border enforcement. In the absence of comparable mechanisms rendering mediated settlements straightforwardly enforceable across borders, the relative advantage of an award over a settlement is clear to see. Or, as Professor Strong put it, the blame for the decline of mediated settlements and the comparable increase in arbitral awards can be laid at the door of the New York Convention, which played the most significant role in rendering arbitral awards easily recognisable and enforceable across borders.[17]

10. But success all too often brings its own problems. That has particularly been true of international arbitration. Its growth has seen it mirror the problems that persistently trouble courts.[18] As the 2021 QMUL International Arbitration survey noted, '*Time and cost are perennially acknowledged as the biggest concerns for arbitration users.*'[19] In tandem with such concerns, there was, understandably, a growth in interest in alternatives to arbitration, just as similar concerns where the civil courts are concerned has led to a growth in interest and use of alternatives to litigation. From the 1990s, where international commercial disputes are concerned this led to greater interest in international mediation, with offers from international arbitral centres, such as the ICC in Paris and the LCIA in London, as well as primarily national dispute resolution providers, such as CEDR here or JAMS in the United States.[20] Such growth, however, continued to run up against the same problem as

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[16] Y. Dezalay & B. Garth (1996) at 296; T. Stipanowich, *Arbitration: The 'New Litigation'*, University of Illinois Law Review, Vol 2010, No 1, 2010.
[17] S. I. Strong (2016) at 1981.
[18] S. I. Strong (2016) at 1980-1982.
[19] QMUL International Arbitration Survey 2021 at 13, which is available here: https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
[20] N. Alexander, *Ten Trends in International Mediation*, Singapore Academy of Law Journal (2019) 31 Singapore Academy of Law Journal 405 at 407-408.

led to the shift towards actually making arbitral awards in arbitration: the problem of cross-border enforcement.[21]

11. Given this, it was perhaps unsurprising that the United States would, as it did in 2014, propose the creation of a new international treaty, one that would facilitate the renaissance of mediation as an effective means to resolve international commercial disputes.[22] That proposal, after significant discussion and detailed empirical study [23] (in stark contrast to many attempts at the reform of civil justice systems) resulted in the development of what in 2019 became the United Nations Convention on International Settlement Agreements Resulting from Mediation – the Singapore Convention. It has been in force since September 2020 and has currently been signed by 58 countries, including the UK. Of those countries, 14, including Singapore (unsurprisingly), Japan, Nigeria, Qatar and Saudi Arabia have ratified it.[24]

12. The Convention's purpose is straightforward. Through promoting greater use of mediation, it is intended to increase international trade, to maintain commercial relationships through the promotion of amicable settlement, while reducing the cost of dispute resolution to States.[25] Fundamentally, the Convention provides that where an international commercial dispute has been resolved by the parties via mediation and that agreement is set out in writing, it can be enforced by a State that is party to the Convention.[26]

13. It is, of course, early days for the Convention. It might be thought that only 14 countries ratifying it, is less than auspicious a start. But we should take heart: the New York Convention started out with just ten contracting parties. So not perhaps so inauspicious.

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[21] S. I. Strong (2016) at 2014-2015; N. Alexander, S. Chong & V. Giorgadze, *The Singapore Convention on Mediation, A Commentary*, (Wolters Kluwer, 2nd edn, 2022) at 0.36.
[22] S. I. Strong (2016) at 1989.
[23] The background and nature of the empirical work is set out in S. I. Strong (2016). Also see, S. I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 Wash. U. J. L. & Pol'y 011 (2014)
[24] See <https://www.singaporeconvention.org/jurisdictions>.
[25] Singapore Convention, preamble.
[26] Singapore Convention, articles 1 to 5.

14. While time could be spent on the correct interpretation of the Convention's articles, I want to turn to consider what its wider benefits might be. My starting point is the potential role that the Convention has in promoting the rule of law.

(3) International Commercial Mediation and the Rule of Law

15. Although it may be trite, the importance of the rule of law cannot be underestimated. It is the bedrock of democratic governance. It is the means by which just law is given effect. It forms the basis on which individuals and businesses thrive within the framework of rights and obligations imposed by legislation and, here, the common law; a point that has been most recently reiterated by the Attorney-General, who noted that not only had the case been made for the point by Lord Burnett and Lord Hodge, but also by the last year's three joint-winners of the Nobel Prize for Economics.[27]

16. Over the last ten years we have seen a number of States promote the rule of law through the development of International Commercial Courts. The promotion of international mediation might, on one level, be thought to undermine the role of International Commercial Courts and thereby also the rule of law. International Commercial Courts, like domestic courts, need a healthy diet of disputes. Promoting a further method to compete with litigation, which along with international arbitration may deprive commercial courts of the means to give the judgments necessary to deliver their objectives might be viewed as self-defeating.

17. To take that approach would, however, be to fall back into old and bad habits: to view litigation, arbitration, mediation and other forms of consensual dispute resolution as standing in opposition to each other: as competitors, with the success of one harming or hindering the success and efficacy of the others. The better view is that the rise of mediation does not mean the fall of litigation. Quite the contrary: mediation can only exist so long as litigation leading to judicial decision-making flourishes. Past judgments form the basis on which individuals are advised as to whether they have a claim, whether they should settle their claims, and hence the

[27] Lord Hermer A-G, *Speech to the Standing International Forum of Commercial Courts*, (15 January 2025), which is available here: https://www.gov.uk/government/speeches/attorney-generals-speech-to-standing-international-forum-of-commercial-courts.

basis on which they should properly settle. In other words, both the decision to pursue a claim and whether to settle via negotiation or the use of ADR, depends upon there being an effective civil justice system that individuals can access.

18. Additionally, the promotion of international mediation, specifically consequent to the Singapore Convention, is likely to prompt practical developments in our legal landscape that will enhance the rule of law. I will highlight four potential developments.

19. First, and most obviously, it may do so through the development of International Commercial Mediation Centres in those jurisdictions that ratify the Convention. Such centres may be standalone ones. They may form part of already established International Commercial Courts or Arbitral Centres in those jurisdictions. An obvious example of the standalone option is the Singapore International Mediation Centre, which was established just over ten years ago. An example of the integrated approach is the London Court of International Arbitration, which provides mediation services. A similar point could be made about the London Chamber of Arbitration and Mediation. The development of such centres, like the development of International Commercial Courts, could act as a signal that a State is committed to the rule of law.

20. Secondly, skilled mediators will need to be trained, with high standards set and enforced, to ensure that mediation can be carried out effectively and in a way that parties can have trust and confidence in the process.

21. Thirdly, courts will need to be in a position to assist international mediation where necessary, as they do for international arbitration. There will need, therefore, to be ready access to either domestic or international commercial courts, where – as Lord Thomas CJ put it concerning arbitration, they can offer '*maximum support [with] minimum interference.*'[28] This will require investment in courts and judiciaries.

22. In this we can see the complementary, mutually reinforcing relationship between litigation and mediation. Courts, ready access to and respect for them and their

[28] Lord Thomas CJ, *Commercial Dispute Resolution: Courts and Arbitration*, (2017) at [25], which is available at: https://www.bailii.org/uk/other/speeches/2017/GS3QN.pdf.

judgments, are needed to provide the framework for giving effect to rights. They are necessary to support arbitration proceedings. They are also necessary to support mediation through providing the legal framework within which its form of facilitated negotiation takes place.

23. Finally, international mediation's promotion ought also to produce benefits for international arbitration. As I mentioned earlier one of the Convention's purposes is to reduce pressure on the administration of justice. Its promotion can equally play a positive role in reducing pressure on international arbitration. This could be promoted in several ways. Most obviously, this could be done through wider promotion and use of hybrid processes, such as, Med-Arb and Arb-Med-Arb. Such methods could result in disputes settling earlier and more cost-effectively than via a normal arbitral process, in just the same way that the promotion of mediation as part of the pre-action and post-issue litigation process can do so where litigation is concerned. In this way, some of the cost and delay now associated with international arbitration could be ameliorated, which in turn would increase its utility for those disputes that call for resolution via an arbitral award.

24. So, if all of these benefits are to be secured, what steps need to be taken? Here there are lessons to be learnt from jurisdictions across the world.

(4) Future Developments

25. The starting point will be to take a considered approach. Historically, this has not always happened. Sir Ernest Ryder noted this when discussing the approach that ought to be taken to digitisation reforms, '*Far too often in the past . . . we have approached modernisation as an exercise in ad-hocery.*'[29] If those States that ratify the Convention are to take optimum advantage of its opportunities, a wiser approach will need to be taken. Examples of such approaches can be drawn from, for instance, Singapore and India.

[29] Sir Ernest Ryder SPT, *What's Happening in Justice: A View from England & Wales*, at [26], which is available here: https://www.judiciary.uk/wp-content/uploads/2018/05/speech-ryder-spt-ucl-may-2018.pdf.

26. If we take Singapore, it has adopted what could be described as a deliberate and holistic approach to the development of its approach to mediation. Deliberate because, as long ago now as 1996, its government established a Committee on Alternative Dispute Resolution. This made detailed recommendations concerning the establishment of mediation. Recommendations included the establishment of community mediation schemes as well as Singapore's Mediation Centre and the Singapore International Mediation Institute. Complementing these measures was the support of the judiciary in the establishment, within the courts, of Singapore's Primary Dispute Resolution Centre, the focus of which was also to promote mediation. Its initial group of mediators were specially trained judges.[30] Finally, the creation of Singapore's International Mediation Centre complements its International Arbitration Centre and, more recently, its International Commercial Court. Hence holistic.

27. Several points can be taken from this. First, as I have said before, could we see the establishment of a London Dispute Resolution Committee to make recommendations on how best we can provide a holistic approach to international mediation, arbitration and litigation. Such an approach would mirror the considered approach taken in Singapore. Such a body could draw its membership from those engaged in commercial mediation, arbitration and litigation, international mediators, arbitrators and commercial court judges, the Judicial ADR Committee, the Civil Justice Council and Civil Mediation Council, as well as users of the three forms of dispute resolution. This would make it well-placed to make well-considered recommendations about how best London could develop a more fully holistic approach to the three forms of international dispute resolution, one that views the three as forming a coherent ecosystem.[31]

28. Here consideration might be given to whether and by what means ease of transfer between the three forms might need to be put in place. If the Commercial Court, for instance, is to provide properly effective support for international mediation, and

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[30] Chief Justice Sundaresh Menon (2015) passim.

[31] A point Chau makes concerning Singapore's approach to mediation, see E. Chau, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, Asian Journal of International Law 9 (2019) 195 at 204.

particularly enforcement of mediated settlements, what amendments might be needed to the CPR. If arbitration and mediation are to work in a complementary fashion through the provision of Med-Arb and Arb-Med-Arb what processes need to be put in place. What training, for instance, needs to be given to arbitrators and mediators so that they can carry out both processes to an equally high standard. I know, of course, that very many arbitrators and mediators are well-versed in both fields, Lord Neuberger being a prime example. If we are to expand our provision of international mediation in the light of the Convention, we will undoubtedly need, however, to increase the numbers of such expert arbitrator-mediators, as well as those who focus on mediation. That will call for increased training and the maintenance of high standards, particularly high ethical and professional ones. This will be particularly important as one of the grounds that the Convention provides for a State to decline to enforce a mediated settlement is a serious breach by a mediator of applicable standards, as well as non-disclosure by a mediator of matters that could call into question their independence or impartiality.[32]

29. In that latter regard we can also look to Singapore, and particularly its International Mediation Institute. It was established to regulate mediators, securing and maintaining high standards.[33] We can also look to India. It introduced a specific Mediation Act last year, the aim of which is to promote community mediation as well as civil and commercial mediation.[34] It makes provision for the creation of a Mediation Council of India. The Act obliges it, amongst other things, to '*lay down the guidelines for the continuous education, certification and assessment of mediators by the recognised mediation institutes*'.[35] It also requires the Council to adhere to specific professional and ethical standards for mediators, as well as their training and registration.[36] The Act then makes provision for the recognition of independent

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[32] Singapore Convention, article 5(1)(e) and (f).
[33] Chief Justice Sundaresh Menon (2015) at [39].
[34] Mediation Act 2023 (India), which is available here: https://www.indiacode.nic.in/bitstream/123456789/19637/1/A2023-32.pdf
[35] Mediation Act 2023 (India), s.38(c).
[36] Mediation Act 2023 (India), s.38(e), (f) and (g).

mediation institutes, which will be responsible for the implementation of such guidelines.[37]

30. Might we wish to introduce a formal Council with a similar role, as a means to not just maintain standards, but enhance them. A lot of the work that they carry out is, of course, already carried out here by the Civil Mediation Council, the Family Mediation Council, and organisations like CEDR. Might there be a need, however, to broaden out their work along the lines taken in India or those in Singapore? This might be particularly important given the growth in international mediation, and in ensuring that England and Wales is best able to operate as a leading international mediation centre.

31. One of the more recent developments in Singapore might also be something we can draw on. 2016 saw the establishment of the Singapore International Dispute Resolution Academy, which is based at Singapore Management University.[38] Amongst other things it promotes training in negotiation and dispute resolution. It also carries out empirical research on negotiation, international mediation and future developments in dispute resolution. Similar work has, of course, been at the heart of Harvard University's Program on Negotiation.[39] One thing that could be considered, to add to our dispute resolution ecosystem, would be the establishment of such an institute within one of our universities, to ensure that ongoing development of mediation and the other two forms of dispute resolution (as well as others) were subject to detailed theoretical and, importantly, empirical research.

32. Finally, I want to stress the importance of the legal profession to the effective future development of mediation. It is sometimes suggested that lawyers are not an essential feature of the mediation process. There is, however, a significant body of research – particularly in the arena of family disputes – which demonstrates the importance and need for lawyers to be integral to the process: to ensure that their

[37] Mediation Act 2023 (India), s.38(j) and (k) and s.42.
[38] See <https://sidra.smu.edu.sg>.
[39] See < https://www.pon.harvard.edu>.

clients are fully appraised of the merits of any proposed mediated settlement and are able to consider them in the light of the merits of their claims or defences.[40] Where international mediation is concerned, it is highly unlikely that lawyers would not be involved, just as is the case of international litigation or arbitration. Given that different approaches and understandings of the nature and importance of mediation are likely to be taken by mediating parties from different jurisdictions, it is, however, likely to be particularly important for legal teams to be well-versed in cross-cultural issues.[41] Diverse legal teams with a broad range of experience will no doubt be an important feature of the future development of international mediation.

(6) Conclusion

31. To realise fully the opportunities that the Singapore Convention has to offer, there is, I believe, much that could be done and, if done, much that would benefit the future development of effective dispute resolution both here and in other jurisdictions.

32. I want to end by recalling something that was said in *The Water Margin*, one of the great works of Chinese literature. The point was made that '*If enmity is not settled amicably there is no end of it*'.[42] That idea could stand at the heart of the Convention and its promotion of international commercial mediation. More broadly, it could find its expression in the wider idea that the development of co-ordinated approaches to litigation, arbitration and mediation could better promote the amicable, peaceful, resolution of domestic and international disputes, whether through adjudication or by consent.

33. At the domestic and international level, steps can be taken to further such co-ordination. It is also likely that the growth in ratification of the Singapore Convention will promote the need for greater co-ordination both within States and between them. No doubt such promotion will be facilitated through the increasing digitisation of all forms of justice, something which, although I have not touched on it, is ever

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[40] See, for instance, H. Rhoades, *Mandatory Mediation of family disputes: Reflections from Australia*, Journal of Social Welfare & Family Law, (2010) Vol. 32.2, 183 at 191.

[41] See, for instance, C. Menkel-Meadow, L. Love & A. Kupfer Schneider, *Mediation, Practice, Policy and Ethics* (Wolters Kluwer, 3rd edn 2020), Chapter 7, Section A.

[42] Shi Naian, *The Water Margin*, (Tuttle, 2010) at 398.

present where the future of justice is concerned. Just as the first quarter of this century has produced significant evolution in dispute resolution, it is all too likely that its second quarter will see equally significant change. The Convention will undoubtedly play a major part in that.

34. Thank you[43].

[43] And with grateful thanks to Dr John Sorabji for his assistance in the preparation of this lecture.