Nelson: My name is Tim Nelson from Staten Island, New York. With me are Hew Dundas, Sophie Nappert, Mark Feldman and Bart Legum and we are conducting a Round Table on the Future of International Arbitration. We hope to have a free-flowing discussion where participants can interject at any time because the five speakers are not going to bring lengthy presentations. I would like to start off with an anecdote: last week I was contacted by a journalist who asked me for an international arbitration practitioner’s view on the recent NAFTA plans to explore space in a search for water resources. I thought, “well, this is what it has come to in international arbitration, they think of us as space cadets”. I answered the question trying to provide a serious analysis based on what investors would want if they were put into a remote environment, i.e. what assurances, what legal protections and what framework they would need. I discussed comparable situations, such as the Antarctic sea, and the ways in which those situations have been dealt with. Ultimately my question was so substandard and boring, it was brilliant. I will now come back down to work with a more earthly set of questions on the immediate future of international arbitration. One issue is the future of arbitrators in facilitating settlement between parties; this has been the subject of ongoing debate in the community and opinions tend to differ based on cultural background.

Dundas: One of the topics Thomas and I discussed over the years is the extent to which arbitrators should get involved, if at all, in facilitating settlement. My proposition is that the future of arbitration lies very much in the direction of German arbitration. This is derived from the German judicial system whereby in Article 278 of the Civil Code, a judge has the statutory obligation to engage the parties in settlement discussions. In contrast, the traditional English approach is that of an arbitrator as a remote
person imitating a stone statue sitting at the far end of the room, utterly dead, never remotely giving any suggestion on anything but at the end of the day, this arbitrator makes the decision. My colleagues in London are adamant that the concept of arbitrators being at all involved in any system of settlement is a penalty offense but I am siding utterly and totally with our German and other civil law colleagues on this. In a major arbitration conference in Hamburg last week, an English judge almost had steam coming out of his ears at the thought that an arbitrator should engage in settlement discussions. But in the future, arbitration is going to evolve into a much more broad-ranging, expansive, pro-active, problem-resolving style compared to the old-fashioned English approach of a stone-faced judicial figure making a decision at the end of the day.

Stéphane: There is a wide variety of different cultural practices and expectations as to what an arbitrator or a judge is going to do to promote settlement during the course of proceedings. In some cases it may be a good idea for an arbitrator to get involved in settlement discussions but in many cases it would send absolutely the wrong message and undermine the faith of the parties in the process. One of my first contacts with Thomas was when I worked as the Chief of the NAFTA Arbitration Division at the State Department and Thomas wrote an email proposing his services as a mediator stating that the Methanex case against the United States under NAFTA would be a case well-suited for settlement. It was a very interesting proposition, albeit one that I had a great deal of difficulty even beginning to imagine. Had the arbitrators in that case suggested that the parties settle, I think that it would have really caused a lot of issues.

Nappert: My own difficulty with getting involved with settlement is the following: in case of failure, how do you go back to your former role? How will the parties perceive you and more importantly, how about the things in your head? It is an almost impossible task to achieve and what this knowledge does to your decision-making ability is something that no one is able to control exactly. That would be my only reservation to what is otherwise, if things go forward, a happy settlement.

Dundas: In Germany, at the appropriate moment, the judge summons the parties to his chambers but if the settlement session goes nowhere, they just go back ten minutes or an hour later so to exclude from the discussion the one-on-one discussion with parties. The German system has a very nice twist to it in that the parties’ loyalists are entitled to be present at the conference with the judge in chambers.