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Panel Discussion: International Tort Litigation Involving the United States and Mexico

Larry Waks

Carlos Loperena

Leonel Pereznieto Castro

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SMALL SCHOOL.
BIG VALUE.

PANEL DISCUSSION: INTERNATIONAL TORT LITIGATION INVOLVING THE UNITED STATES AND MEXICO*

MODERATOR: LARRY WAKS**

PANELISTS: LIC. CARLOS LOPERENA AND
LIC. LEONEL PEREZNIETO CASTRO

LARRY WAKS: This panel will focus on U.S.-Mexico tort litigation. I will start with the proposition that all torts are not necessarily created equal. There are different types of torts, all of which are treated differently when it comes to suits brought by Mexican nationals in the United States or vice versa. My expertise is litigation, particularly international litigation and arbitration in Latin America and Europe, the Far East, and all over the world. I wonder about the panelists' experience and how different torts have been treated.

Most people, when they think of torts, particularly in the United States or in Mexico, think of personal injuries. For example, some of the cases claiming personal injury involving Ford Explorer and Firestone tires where Mexican nationals were injured or where U.S. citizens were injured in Mexico, were taken to court in the State of Texas.¹ But there are also commercial torts which involve U.S. and Mexico constitutional issues, such as tortious interference in contractual relations, conversion, fraud, misrepresentation, libel, slander, disparagement. There is a huge difference between Mexican law, U.S. federal law and U.S. state law in this area. The first question I have for the panel is: what has been your experience in various types of torts and how have you seen the Mexican courts react to different types of torts?

CARLOS LOPERENA: In principle, all kinds of torts are recognized by Mexican courts, but usually a court recognizes only what it knows. Tortious interference is a good place to start. Earlier this year I declared before a federal court in the United States that Mexico's courts do not recognize the concept of tortious interference. Of course, if the tort is an illegal behavior that is contrary to public law, the court may consider it, but it is normally nonexistent in the Mexican courts. I have never seen a case of tortious interference in Mexico. But other kinds of torts such as defamation, libel, or slander are recognized.

Recently there was a famous case of defamation in which a journalist was sued for civil liability for writing something against a well known former actress and current wife of a former President of Mexico. Finally, the last court of appeals ruled in favor of the former actress. The journalist claimed that because one of the justices of the circuit used to be an actor, he helped the actress, but of course it was a false accusation. The journalist also claimed that his opponent influenced the judiciary due to her status as the wife of the former President, which I think was absolutely false. With this case, the Mexican court dared to rule against the media. This case is important because journalistic libel has been common practice in Mexico. Finally, the Mexican courts have begun to punish the libelous journalists.

* The views expressed here are those of the panelists, and should not be taken to represent the views of their employers or other organizations with whom they may be affiliated.

** A summary of the panelists' background appears on the last page of the panel discussion.

1. See, e.g., *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.2d 665 (5th Cir. 2003).

I recently had a tort case that consisted of a breach of intellectual property rights. The plaintiff sued an American company that rented land to a person to establish a business that allegedly violated intellectual property rights of a Mexican company. The plaintiff served the American company in the United States. The case was then litigated in Mexico. It also involved companies that allegedly were breaching intellectual property rights. The judge in Mexico accepted jurisdiction and started the case against all these companies. The parties settled and the court accepted the settlement. Mexican courts have also accepted cases of intellectual property rights and industrial property rights. Mexico has seen disputes that were considered torts because there was no contractual relationship between the plaintiff and defendant.

LEONEL PEREZNIETO CASTRO: Do you remember a case with an American carmaker? There was a case in which a Mexican businessman registered a brand for one of the cars. The American carmaker subsequently introduced the car into the Mexican market. This gentleman claimed that the American carmaker violated his brand in Mexico by producing cars that it exported to the United States, and the damages he claimed were huge because the intellectual property law in Mexico says that those who violate the brand have to pay 40% of their income.² Finally, the American car company settled with this gentleman, but at the beginning it was very contentious. Those are the types of cases that are common. In Mexico, because there are so few recognized torts, it really is not an interesting area of the law.

WAKS: How have the Mexican courts thus far dealt with Internet jurisdiction issues? I have had several cases in the United States with international aspects. The court had to decide whether there was jurisdiction over someone in another country that perhaps posted a libelous statement on an Internet site. But the web servers were perhaps in Germany. Have there been any cases in your experience that deal with whether a Mexican court has jurisdiction when the torts, or the act complained of in Mexico, took place elsewhere, particularly on the Internet?

LOPERENA: In Mexico the general rule for determining jurisdiction is the following: submission, place of fulfillment of the obligation, or domicile of the defendant will establish jurisdiction.³ On the Internet, if the defendant is in Germany or the server is in Germany, it is difficult to take jurisdiction. If there is no place of fulfillment of the obligation, it is the same problem. Finally, if there is no written submission to any court, we have a problem with jurisdiction. In my opinion, Mexican courts are not as open to accept jurisdiction as the American courts.

WAKS: For example, in the case we were talking about earlier, if the reporter had libeled a U.S. citizen on a website it is possible that a Mexican court would not have jurisdiction over the issue. For relief then, they would have to go to the United States, which has very different rules with regard to the First Amendment and media liability.

2. "Infracciones y Sanciones Administrativas de la Ley de la Propiedad Industrial," D.O., 27 de junio de 1991.

3. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [MEX. CONST.] ch. IV, art. 107.

LOPERENA: Even though the First Amendment of the U.S. Constitution is very similar to our Article 6 of the Mexican Constitution, what differs is the interpretation given by the courts to these provisions.⁴ However, regarding intellectual property, mainly industrial property, the Mexican Supreme Court recently stated that before going to civil court to raise a claim for damages for infringement of industrial property rights, the plaintiff has to obtain an administrative declaration by the Mexican Institute of Industrial Property (*Instituto Mexicano de la Propiedad Industrial*).⁵ If the claim is against somebody, then there will be a declaration that there was an infringement. A person can then go to the civil court to recover losses and damages. And as Lic. Leonel Pereznieto said, the losses and damages are a minimum of 40% of the income, so it could amount to lots and lots of money.⁶

PEREZNIETO: There is also an exceptional antitrust case. Mexican antitrust law provides that a final decision of Mexico's Federal Competition Commission can serve as a basis for a claim of losses and damages.⁷ The law does not limit the amount of damages; they could be very high and the decision could serve as proof that there is a legitimate claim.

WAKS: Over the last twenty-five years, potential Mexican plaintiffs in personal injury cases, environmental cases, and health-related cases, have tried to get their cases heard in a court in one of the states in the United States, even though the plaintiffs would have absolute access to Mexican courts. I was wondering if that is what you have seen and if you think that plaintiffs with a choice prefer a U.S. jurisdiction.

PEREZNIETO: This is a question that Lic. Carlos Loperena and I consider as one of the major issues Mexican lawyers are faced with. We are often asked how to avoid the Mexican courts and how to get cases to the United States.

WAKS: Why do you think that is?

PEREZNIETO: Because the remedies for claims on damages and losses are more plaintiff-friendly in the United States.

LOPERENA: The price of a human life is the main issue. Human life may be worth U.S. \$70,000 in Mexico, but in the United States only a jury knows the answer.⁸ And the monetary damages for pain and suffering are very limited in Mexico but are larger in the United States. The jury verdicts are huge amounts, mainly in poor counties. So the answer is just a matter of dollars and cents.

4. MEX. CONST. art. VI. and U.S. CONST. amend. I.

5. More information about the Mexican Institute of Industrial property is posted on its official website, available at <http://www.impi.gob.mx/impil/jsp/indice.jsp> (last visited Apr. 25, 2005).

6. See *supra* note 2.

7. More information about Mexico's Federal Competition Commission is posted on its official website, available at <http://www.cfc.gob.mx/EsIndex.asp> (last visited Apr. 25, 2005).

8. See generally Michael W. Gordon et al., *Part Five: A Serious Accident Occurs in the Mexican Plant: Problems of Corporate and Product Liability*, 4 U.S.-Mex. L.J. 125 (1996).

WAKS: In a tort claim in Mexico, can one potentially recover attorney's fees or interest on the award?

LOPERENA: Attorney's fees are recoverable in Mexican litigation, but there are also court costs. In Mexico City court costs are a percentage of the principal amount claimed. If the complaint is for a given amount, the court should grant to the prevailing party a certain percent—in trial court 6% and in appellate court 2%.

PEREZNIETO: Let me give you an example of a very sad issue that practitioners are dealing with now. A hypothetical American corporation, with subsidiaries in Mexico, produces a product used in Mexico. This product is then found to have hurt people in Mexico. The Mexican plaintiffs must find a way around the jurisdiction of the Mexican subsidiary. They will try to claim that they are not under the jurisdiction of Mexican courts because the product was designed in the United States, and the subsidiary only manufactured it under the direction of the U.S. corporation. The plaintiffs' attorneys will argue that Mexican courts cannot have jurisdiction over U.S. corporations when all the Mexican subsidiary did was manufacture the product.

In a case I worked on the Mexican judge agreed that the Mexican court had no jurisdiction over that product liability, and with that decision we went to the U.S. courts. The U.S. courts took jurisdiction because we showed that the Mexican courts would not grant relief. Part of the Mexican lawyer's job today is being able to prove to U.S. courts that Mexican courts will not grant relief.

ERNESTO VELARDE: I concur with Lic. Carlos Loperena and Lic. Leonel Pereznieto that in some instances, plaintiffs in Mexico that can choose jurisdiction will bring the suit in the United States because damages are very limited in Mexico. Additionally, most litigators in Mexico distrust the Mexican judiciary system because of the corruption. Trust and confidence in the Mexican Supreme Court has only recently been growing. People believe the Mexican Supreme Court has become an honest and impartial body, as have the federal judges and the courts of appeal. But there is a traditional distrust of the local courts, and the border states are no exception. So under those circumstances, litigants are faced with the dilemma of where to go. If there is a chance, it makes more sense to go to the United States.

PEREZNIETO: I concur that distrust of Mexican courts still plays a role in an attorney's decision of where to go.

LISA GRAY: I am curious about the tort of material misrepresentation. Is that a recognized tort in Mexico? I will give you what I consider to be a real-life example. In Santa Fe, New Mexico there are two realty companies. Many of the residents of Santa Fe enjoy the San Miguel de Allende area in Mexico and are interested in purchasing real estate there. Entrepreneurial real estate companies have opened up subsidiaries in Mexico to sell property around San Miguel. My observation is that the brokers in Santa Fe are barely conversant with U.S. property laws, much less Mexican property laws. I anticipate material misrepresentations will arise. How would something like that be handled in a Mexican court?

PEREZNIETO: If a problem arises with real property in Mexico, it probably has to be decided in the Mexican courts. If not, a judgment that you get in the United States cannot be recognized and enforced in Mexico.

WAKS: There are causes of action in Mexico for misrepresentation. Breach of warranty in the sale of real property is one example. Depending on the state, there may be a statute that deals with misrepresentation. Recently there has been more litigation on misrepresentation. It depends upon what part of Mexico the suit is brought, because there has been a greater reliance on the consistency of decisions and the ability to achieve a judgment and actually enforce it. As best as I can tell, it looks like things are becoming more normalized.

KATHRYN PEARSON: When you were discussing the enforcement of judgments in Mexico, you mentioned the problem of personal jurisdiction of a foreign judgment. When you see problems with enforcement of foreign judgments are they usually default judgments from outside Mexico?

PEREZNIETO: No.

PEARSON: So they are litigated judgments?

PEREZNIETO: There is no problem enforcing litigated judgments. It is just a matter of time because proceedings in Mexico are very slow. Mexican courts are very formal.

PEARSON: Frequently in commercial litigation one of the most important steps in the United States is the ability to get injunctive relief, and particularly preliminary injunctive relief. That ability often dictates what happens in the remainder of the litigation if you have litigation. Is preliminary injunctive relief obtainable in Mexico?

LOPERENA: It is very limited. We Mexican lawyers think that it is much easier to get temporary restraining orders or similar relief in an American court because in Mexico we have a provision that says that only a precautionary attachment of assets is available as pre-judgment relief.⁹ The most usual injunctive relief in commercial cases is when you have a promissory note or a bill of exchange and you go to what we call "executive action," and you obtain attachment at the beginning.¹⁰ But these restraining orders are not available in Mexico.

Recently a very capable attorney obtained a strange form of injunctive relief against some American bankers. The bankers were not to collect the promissory notes, not to trade the promissory notes, not to endorse them, and to deposit them before the Mexican judge. All of these actions were to occur while litigation was pending in order to obtain an extension of time for the payment of those promissory notes, although the promissory notes had a kind of autonomy from the original

9. "Providencias Precautorias del Código de Comercio," D.O., 15 de septiembre de 1889.

10. *Id.*

transaction. It was a big scandal because it was an imaginative and creative litigator with a judge that was also creative and imaginative, and they granted the injunction. Because of what happened, clients in New York immediately consulted many law firms in Mexico.

Is this type of injunctive relief actually possible? The answer is no. Corporate clients were concerned because of the judgment, duly authenticated, which was followed by an order. Before it was served formally, the plaintiffs obtained a certified copy and sent it to the bankers in New York City, who were really mad about it. Finally, the appellate court reversed this holding, and the judge was dismissed from his charge. It was a big scandal that did not pay off for the client and certainly did not help the reputation of the plaintiffs' lawyer.

WAKS: I represent most of the major English-language and Spanish-language record labels in entertainment litigation. One of the reasons why the legal or legitimate sale of music in Mexico has nearly come to a complete halt is because no new artists are being signed and because most people are almost pulling out of the market. This is because of the inability to obtain injunctive relief to enforce U.S. or Mexican copyrights. It is impossible to get what we think of as a temporary restraining order, both from a timing standpoint and a legal standpoint, let alone injunctive relief. It is a very difficult issue for owners of intellectual property such as trademarks and copyrights.

LOPERENA: I would say that in commercial cases it is very difficult to obtain injunctive relief, although the Federal Rules of Civil Procedure provide some injunctive relief that is not normal in Mexico. But for copyright infringement, the only injunctive relief I know of is the one that is issued by the Federal Attorney's office or a criminal judge. This injunctive relief pertains to the issue of illegal "pirated" merchandise.¹¹

PEREZNIETO: There is another form of injunctive relief in Mexico for arbitral matters. It is what we call a *provisoria* or precautionary measure.¹² But as far as I know, no judges have had to issue this kind of measure. It is very clear in the commercial code that *provisorias* can be requested from the courts, even prior to the arbiter's claim, as the modern law says.

JOHN ROGERS: Suppose you have a multinational Mexican company with properties and operations in Mexico, but also properties, including real estate, in other countries such as the United States or Guatemala. This company enters into a loan agreement governed by New York law with each party submitting to the jurisdiction of the New York courts and the courts of its respective domicile. If there is real estate in Mexico and in the United States, how would you advise the bank upon default as to what route to take in terms of enforcing their rights? Should they initiate an action in the New York courts, get a judgment there, and then try to

11. "Delitos en Materia de Derechos de Autor del Código Penal para el Distrito Federal en Materia de Fuero Común y para toda la Republica en Materia de Fuero Federal," 24 de diciembre de 1996.

12. See *supra* note 9.

enforce it against the real estate and other assets in the various jurisdictions? Or would you recommend starting in Mexico by getting a judgment there and trying to enforce that in the other countries, including the United States.

WAKS: I would say do both. There is no question that the general rule in Mexico is that to affect title, foreclosure, or anything dealing with real property in Mexico, you have to have a Mexican proceeding and a Mexican judgment.¹³

LOPERENA: If there is a mortgage, I would draft a clause saying that in order to foreclose on the mortgage the Mexican courts would have jurisdiction.

WAKS: The collection of the debt itself could be governed by New York law, but remember that the New York courts require U.S. \$250,000 minimum for choice of law and U.S. \$1,000,000 for choice of venue unless there is some other relationship of the defendant to New York, or some kind of a presence in New York.¹⁴ There are also some jurisdictional hurdles under New York law. But usually for any significant transaction, that is not a problem. So I would recommend doing both. Get your New York judgment because that is a collection of the debt. There may be other assets in other places where you do not have that same issue pertaining to real property in Mexico. But in your scenario, I would also commence the appropriate proceeding in Mexico dealing with the real property.

LOPERENA: If you are going to foreclose on real estate located in Mexico, there is exclusive jurisdiction for the Mexican courts. If you do not have a mortgage but you have a judgment against a Mexican company that owns assets, even if it is real estate or personal property in Mexico, you can then try to enforce the foreign judgment, given all the requirements in civil procedure court that Lic. Leonel Perezniето mentioned.

JOHN STEPHENSON: If you try to do an executory action in this kind of a situation, do you have to have the original promissory note in Mexico to take an executory action? And then what happens in the other places where you want to go?

LOPERENA: The general principle in negotiable instruments is that they are the necessary documents to exercise the rights included in them. That is a European theory that the right is incorporated into the paper. They call it *derecho cartular* (paper law).¹⁵ If a promissory note is to be collected, it has to be surrendered at the time of collection. If it is endorsed, it has to be transmitted materially to the endorsee. To sue with a promissory note the note has to be produced to the court at

13. See generally Frederick W. Hill, *Practice Tips: Creditors' Rights in Secured Transactions Enhanced in Mexico: Recent Changes in Mexican Law Have Improved the Climate for Secured Lending*, 27 Los Angeles Lawyer 19 (March 2004).

14. N.Y. GEN. OBLIG. LAW § 5-1401 (2005).

15. The rights incorporated into commercial paper can be traced back to Roman times. See generally Boriz Kozolchyk, *Transfer of Personal Property by a Nonowner: Its Future in Light of Its Past*, 61 Tul. L. Rev. 1453 (June 1987).

the beginning of the action. If there is a certified document in substitution for that promissory note, it is not acceptable. Mexican law says it is a necessary document.

WAKS: An issue of concern is that sometimes it is hard to tell whether a document has been done recently on a computer or a couple of decades ago on something else.

PEREZNIETO: Mexican law is very archaic in that field.

ROLAND PELLETIER: It seems after what we have heard today that in some circumstances there is a lack of enforcement, or a lack of rule of law in Mexico. For example, it was mentioned that plaintiffs are trying to flee the Mexican courts and come to the United States. Another example is that there is a lack of jurisdiction over certain cases in tort litigation, and sometimes due to this lack of jurisdiction, the problems are resolved in favor of the defendants. As Lic. Loperena mentioned, plaintiffs seek redress through penal or criminal actions. For example, it is a kind of joke, but one of the major firms to obtain collection is the *Procuraduría General del Lícito Federal* (Mexican Justice Department).¹⁶ So due to the fact that there is no real execution of the law, plaintiffs and lawyers try to make a civil case a criminal case in order to execute the law. We have a legal system in Mexico that is not being very active or protective of plaintiffs.

On the other hand, it was mentioned that plaintiffs try to go to the United States because there is a consistency of the rule of law. But what I have heard from Mexican investors doing business in the United States, and from other foreign investors, some of whom are French, is that the complexity of U.S. law creates problems. Sometimes there is no consistency because U.S. courts have struck legislation (e.g., by finding it unconstitutional), or there is a very complex interpretation in the case law. So my question is how would you compare the lack of rule of law on one side of the border with the other side of the border, where there is possible uncertainty, at least from a foreign investor perspective, due to over-legislation or a complex interpretation of case law?

WAKS: Certainly that is the case. Oftentimes, foreign investors and foreign entities are extremely careful about where they conduct their operations in the United States for fear of being sued in the wrong place. For a long time, Texas was a place that foreign businesspeople steadfastly avoided because they were so afraid of runaway verdicts, juries, and so on. The Texas Legislature and a majority of the voting public came to recognize this and ultimately made Texas law much more consistent and investment-friendly. The law became much more conservative and predictable with regard to business-related matters.

There is no question that one of the reasons why New York is chosen by most international business transactions for choice of law and choice of venue is because it has a very consistent, very supportive and guarded jurisprudence with regard to commercial matters and litigation. When you are dealing with people overseas, if you start talking about making an agreement subject to Texas law, or Nebraska or

16. For more information about the Mexican Justice Department, see <http://www.pgr.gob.mx/> (last visited Apr. 25, 2005).

some place they probably have never heard of, they will say absolutely not. It is usually New York or nothing. That is one way that we tried to ameliorate that concern. But there is no question it is a federalist system; it is a patchwork of fifty states, each with its own law.

We always say it is common law, but really there are many statutes, regulations, and cases interpreting those statutes. Then there is Louisiana, which is completely different and based on the French Civil Code. It is a difficult situation. The solution is usually an agreement among the parties to litigate in New York under New York law.

VELARDE: This question is for Lic. Carlos Loperena and Lic. Leonel Perezniето. If it is true that in Mexico most courts are distrusted, then what is being done or what can be done to promote arbitration of cases? It seems that there are some Mexican lawyers that have never even heard of or contemplated the possibility of going into arbitration as opposed to resorting to the judiciary.

PEREZNIETO: Well, there are many things that have to be done in Mexico to increase arbitration. First, promotion of arbitration is necessary. We have to talk about arbitration in order that the lawyers and judges know what arbitration is. We need to promote arbitration so that Mexican lawyers understand what arbitration means. If lawyers learn that arbitration works well in Mexico, they will include it in their contracts. This is part of the larger picture.

When I studied in Spain for my first master's degree in 1969, Spain was in the same condition regarding arbitration that we have now in Mexico. Today, Spain is one of the top countries in the world in arbitration activity. We have to promote arbitration, especially in business matters, because the Mexican economy is closely linked to the U.S. economy. If you see how the American Arbitration Association (AAA) has been developed in recent years, it is incredible. My first contacts with the AAA were twenty years ago when it was very domestic and looked only at American cases. But it was not international like the International Chamber of Commerce Court.¹⁷ But now, AAA in New York through the International Centre for Dispute Resolution is very active.¹⁸ As lawyers we have to do our part to encourage arbitration over litigation.

LOPERENA: The way to promote arbitration agreements and arbitration proceedings is to obtain enforcement of arbitral awards, which is a matter for the courts. Also the current arbitrators in Mexico, which is quite a small group of about twenty-five people, should render good awards, handle arbitration cases properly, and inspire confidence and trust among the public that arbitration is a trustworthy means of resolving disputes. Recently we had a ruling by the Supreme Court of Mexico declaring Article 1435 of the Mexican Commerce Code constitutional.¹⁹ That article is the cornerstone of arbitration in Mexico. That ruling came about when the

17. For more information about the International Chamber of Commerce Court, see http://www.iccwbo.org/index_court.asp (last visited on Apr. 25, 2005).

18. For more information about the International Centre for Dispute Resolution, see <http://www.adr.org/> International (last visited Apr. 25, 2005).

19. "Sustanciación de las Actuaciones Arbitrales del Código de Comercio," D.O., 15 de septiembre de 1889.

disgruntled loser of an arbitration fought for the annulment of Article 1435 in order to set aside the award. His case was taken to the Supreme Court. The Mexican Supreme Court ruled that the Article is constitutional and that the statutory powers of the arbitrators are not unconstitutionally broad. The court ruled this way because the arbitrators are limited by other provisions of the same set of rules on arbitration, namely the rule that says that the arbitrators must treat the parties equally and must give full opportunity to each party to present its rights.

PEREZNIETO: There is an interesting statistic on arbitration from the International Chamber of Commerce Court of Arbitration.²⁰ In the last twelve years arbitration has developed in Latin America from one percent of arbitration around the world to 9%. And of this 9%, Mexico accounts for 60%, which means that arbitration is developing rapidly in Mexico.²¹ I remember twenty-five years ago when I worked on arbitration matters with the old Mexican arbitrators. They were very happy if they had one arbitration every two or three years. Today, in my office, we have three or four arbitrations per year. That means that arbitration is increasing in Mexico and there is a growing need for it.

20. See *supra* note 17.

21. For facts and figures on the International Court of Arbitration, see http://www.iccwbo.org/court/english/right_topics/stat_2004.asp (last visited on Apr. 25, 2005).

BIOGRAPHICAL SUMMARIES

Lawrence A. Waks, is a partner in the firm Jackson Walker, LLP, Austin Office, 100 Congress Ave., Suite 1100, Austin, TX, 78701. Telephone: 512-236-2222. Fax: 512-236-2002. Email: lwaks@jw.com. Mr. Waks works in the Business Transactions and Litigation sections of Jackson Walker. He represents a broad range of domestic and international clients in the entertainment, media, advertising, high tech, energy, transportation, environmental, and communication industries. Mr. Waks also represents clients' interests in the area of international business and trade. His experience includes international contract and dispute negotiation, licenses, joint ventures, distribution agreements, and counter- and barter-trade and loan agreements. Mr. Waks is particularly familiar with the financial and business markets of South America, where he lived for several years. His practice areas include Transactions, Energy, Environmental, International, Internet/e-commerce, Media, Corporate & Securities, Technology, Intellectual Property, Entertainment & Sports. Mr. Waks was named a "Texas Super Lawyer" in the November 2003 and October 2004 issues of Texas Monthly magazine. He is also listed in The Best Lawyers in America under Entertainment Law. Mr. Waks was admitted to the Texas Bar in 1978, admitted to the New York bar in 1985, and is admitted to federal bars for the Eastern District of Texas, the Northern District of Texas, the Western District of Texas, the Southern District of Texas and United States Court of Appeals for the Fifth Circuit. Mr. Waks received his B.S., Environmental Studies and Geology, with honors, from Trinity University (TX), and he received his J.D. from St. Mary's University School of Law (TX).

Lic. Carlos Loperena Ruiz is a partner in the Mexico City law firm of Loperena, Lerch y Martin del Campo, S.C., Campeche 315 Piso 3, Esquina Nuevo Leon, Mexico, D.F. 06170, Telephone: 52-55-5286-3961, Fax: 52-55-5286-7668. E-mail: loperena@mail. internet.com.mx. Lic. Loperena's practice includes corporate law, civil litigation and arbitration in domestic and international cases. He has acted as party-appointed arbitrator and also has been appointed by the Court of Arbitration of the International Chamber of Commerce. He serves as secretary of the board of the *Barra Mexicana* (Bar Association) and is a former chairman of the Civil Law Section of said bar association. He has taught Civil Procedure I for the last twenty-one years at *Escuela Libre de Derecho* in Mexico City where he also teaches International Commercial Arbitration in the graduate program. He has taught Commercial Arbitration at *Universidad Panamericana* in Mexico City in the graduate program. He has lectured in Mexico and abroad about Mexican Law and enforcement and recognition of judgments and arbitral awards. His legal training and education include the following: Law degree from *Escuela Libre de Derecho*, Academy of American and International Law, The Southwestern Legal Foundation, Dallas, Texas, and other legal education seminars in Mexico and the U.S. He is a member of the International Advisory Board of the Center for Conciliation and Arbitration of St. Mary's University of San Antonio and of the Advisory Board of the Institute for Transnational Arbitration and other arbitrations centers. He has been a member of the 2022 NAFTA Committee on Private Commercial Disputes. He has been a visiting professor at the *Universidad Autónoma Metropolitana*, UNAM,

Universidad Bonaterra and University of Florida. He is a member of the Board of Directors of the United States-Mexico Law Institute, Inc.

Dr. Leonel Pereznieto Castro is of Counsel in the Mexico City law firm of Von Wobeser y Sierra, S.C., Guillermo González Camarena No. 1100, Piso 7, Col. Santa Fe Centro de Ciudad, Deleg. Alvaro Obregón, 01210 México, D.F. Telephone: 52-55-5258-1016. Fax: 52-55-5258-1098. E-mail: lpereznieto@vwys.com.mx. Dr. Pereznieto Castro practices in the areas of foreign investment, antitrust, international arbitration, and banking securities law. He is a member of the Mexican Bar Association. He is an International Arbitrator at the American Arbitration Association and a member of the London Court of International Arbitrators. Dr. Pereznieto is also a former President of the Texas-Mexico Bar Association (1998-1999). He is Professor of Private International Law at *Universidad Nacional Autónoma de México* (U.N.A.M.), and a lecturer on Arbitration at the *Escuela Libre de Derecho*. He received the *Licenciatura en Derecho* from the U.N.A.M. Mexico, D.F. (1968), a Master's Degree from the *Escuela Nacional de Administración Pública*, Spain (1970), a Master's Degree from the *Institut International d'Administration Publique*, France (1971), and a Doctorate Degree in Private International Law from Paris University (1975).