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ARGENTINE JURISPRUDENCE: THE PARKE DAVIS AND DELTEC CASES

MICHAEL W. GORDON*

Two decisions of the Supreme Court of Argentina in 1973 adjudicated several interesting issues which, with the addition of subsequent legislation, affect investors receiving royalty payments from Argentine holdings and, of greater impact, challenge both the separate identity of parents and subsidiaries as well as the individuality of different subsidiaries of the same foreign parent.¹ The judicial decisions have since been further confirmed by legislation, although the concept of fusing lawfully chartered separate business entities under a theory of an economic unit is not to be welcomed by the investment sector.² The theory possesses some parallels to the United States concept of piercing the corporate veil where one corporation is the alter ego of another. The United States theory is generally based on some fraudulent, or at least unfair, use of the corporate entity.³ While the Argentine economic unit concept does not require the establishment of any traditional wrongful purpose, it is imposed where there is some undefined measure of economic or commercial dependence by the subsidiary on the parent. The view is designed to obtain some control over the foreign parent which controls the operations of the subsidiary through the commercial relationships of the two entities, the parent heretofore being free to conduct its relations with its subsidiary, and consequently govern its operations, without submitting to any controls of the host nation. The new view will not give the Argentine courts jurisdiction over the foreign parent, but the effects may be significant where the parent owns other subsidiaries in Argentina.

The two decisions involved, first, Parke Davis of Argentina and its United States parent, Parke Davis of Detroit, and second, *Compañía Swift de La Plata (Cía. Swift)*, the Argentine subsidiary of Deltec International Limited, a multinational Bahamian based meat processing company.⁴

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In *Parke Davis*, decided in July, 1973, the Argentine Supreme Court ruled that formerly deductible royalty payments paid by Parke Davis of Argentina to Parke Davis of Detroit, owner of 99.95 percent of the stock, were to be considered profits which were subject to corporate income taxes. Argentina had previously interpreted its tax laws to define cash payments for technical advice or services as royalties or service fees subject to an income tax, but with a 20 percent allowance applied to the gross due, in recognition of the nature of the expense as an obligation due in return for the acquisition of the technical advice. The tax rate for payments qualifying as royalties thus was effectively lower than applied to repatriated profits and dividend payments.⁵

The justification for disallowing the deduction was not a total judicial rejection of special treatment for royalty payments. It was rather a challenge to the recognition of royalty status for payments by a subsidiary to a parent. The tax authorities in Argentina had refused to acknowledge that a traditional licensor/licensee relationship existed because the subsidiary/licensee was economically dependent on the parent/licensor. Had there been a clear diversity of ownership, the issue would not have been raised.⁶ Since the parent can control the subsidiary's operations, it can dictate all of the terms of a technical services licensing agreement. By requiring a very high royalty payment, a portion of the gross received by the parent which is labelled as royalty payments may actually be a profits remittance. The Argentine view ignores the fact that legitimate licensing arrangements do take place between parents and subsidiaries; the disallowance of *all* deductions from subsidiaries to parents does not seem to be the most rational one. Where companies are unable to achieve a resolution of the problem, such as through increased profits to make up the difference, they may be unwilling to export their more valuable technical properties, or may enter into some cross-agreement with other companies to avoid the parent/subsidiary status.⁷

The case reached the Supreme Court after the Tax Court upheld the government's position in a 2-1 decision,⁸ a ruling subsequently supported by the Court of Appeals without dissent.⁹ The issue before the Supreme Court was, as agreed to by Parke Davis in the Tax Court, the legal justification for disallowing the deduction on economic unit grounds.

Parke Davis, perhaps foreseeing the further adoption of the economic unit concept, and additionally aware of the greater hostilities involved in the pending *Cia. Swift* case, emphasized in its defense the special status granted to royalties for tax purposes, attempting to distinguish the tax

area from other situations which might be more appropriate for the application of the economic unit theory. This approach was unsuccessful. Although focusing upon tax issues,¹⁰ the Supreme Court developed the economic unit doctrine. It first referred to the earlier *Refinerías de Maíz S. A.* decision,¹¹ establishing a parallel between that case, which involved a *sociedad de responsabilidad limitada* with local and foreign members,¹² where royalty deductions had been denied as being within the same economic unit, and the current facts, involving a corporate structure with shareholders in both the host and foreign nations. Establishing the separate identity of shareholders of separate incorporated entities was not relevant, particularly where the intent in forming the "independent" local subsidiary is to obtain economic benefits for the multinational structure as a whole. The Court ruled "economic reality" rather than structural formalities to be the guide.

Rather than emphasizing the multinational control exercised from abroad, the Court concentrated on the lack of an independent status of Parke Davis of Argentina. The Court found that no recognizable licensing agreement was actually in effect between Parke Davis of Argentina and Parke Davis of Detroit, implying that Parke Davis of Argentina had no power to even demand that the commercial relations between the companies be reduced to written contracts, that any such contracts were in fact part of the capital of the whole multinational structure and could not be recognized as commercial relationships between independent entities.

Almost as an afterthought, the Court referred to the application of the theory of penetration, a view used to avoid abuses which may evolve from the complexity of corporate structures. The Court was cognizant of the increasing scope of the multinational enterprise and the "grave legal problems which their expansion presents." The *Cía Swift* case was to focus more strongly on this area, although also avoiding an in depth analysis of the economic entity concept.

The effect of the decision as judicial precedent is limited; decisions of the Supreme Court of Argentina apply only to the particular case before the court. Any pronouncement by the Supreme Court, however, has some tangible precedential value. Argentina, as other Latin American nations, has developed the theory of *jurisprudencia*, whereby repeated decisions on similar facts gain some persuasive standing. Indeed, the Court in *Parke Davis* cited the previous ruling in *Refinerías de Maíz*, in support of its reasoning. Whatever precedential value the decision

might have evinced, however, was diminished in importance by the subsequent enactment of the investment law incorporating the *Parke Davis* rationale.

The impact of *Parke Davis* is not as severe as the *Compañía Swift de La Plata* decision, since there has long been a developing trend in Argentina to reduce the distinction between repatriated profits by a parent and other currency transfer methods which resulted in tax benefits to the foreign entity. While the issue could have been resolved by eliminating the fixed deduction for royalty remittances, the problem lay with parent-subsidiary transfers, not with technology transfers. Indeed, to eliminate royalty deduction preferences would be in direct conflict with the acknowledged need for and desire to encourage increased transfers of technology. The issue to be faced was rather the resolution of detrimental effects to Argentina from the interrelationship of a parent and subsidiary, where the parent's economic power over the subsidiary allows the former to arrange its relationships with the latter to achieve the maximum beneficial result for the shareholder of the parent. The disallowance of royalty payments was a not unexpected partial resolution of the overall problem, although it might have been less unsettling to the business sector had the matter waited for the expected legislative action. While the royalty payment disallowal answered this one persistent problem with predictable results, the *Cía. Swift* case was a far greater shock to the foreign investment community as a whole, and clearly illustrated that the concept of an economic unit has the potential for broader application than was easily discernible from the *Parke Davis* decision.

Compañía Swift de La Plata was the largest meatpacker in Argentina and the major earner of foreign exchange through its substantial exports. It was the largest subsidiary of Deltec International Limited.¹³ The firm had spun-off its meat processing facilities in several nations, part of a plan to obtain local equity participation in international subsidiaries. Deltec was also intending to spin off *Cía. Swift*, particularly as it had been unprofitable for years, paying neither dividends since 1962 nor interest on obligations to the parent company since 1967. From 1969 until *Cía. Swift* petitioned for *convocatoria* in December, 1970,¹⁴ the company experienced substantial business fluctuations, due primarily to economic and political movements within Argentina. The Company was unable to form a purchasing group of Argentine investors, a move increasingly necessary as the Argentine government began to favor domestic corporations through such actions as limiting credit to companies more than 51 percent Argentine owned. Although *Cía. Swift* expected the

convocatoria process to offer a sufficient resolution of its problems to make the company more marketable, it was actually the beginning of a complex series of conflicts within the Argentine judicial structure.

In the *convocatoria* proceedings, the presiding judge in the National Commercial Court of Buenos Aires rejected the proffered *concordato* after a small general creditor, alleging fraud and deceit, requested the disallowance of all claims by other Deltec group companies,¹⁵ and the judge had determined that there was evidence that *Cia. Swift* was selling products to other Deltec group companies at lower prices than offered to other buyers.¹⁶ The court appointed referee had valued the assets at 556,230,360 new Argentine pesos, listed 143,480,787.75 of liabilities, and recommended the non-recognition of Deltec group claims on the theory of "penetration of the corporate personality."¹⁷ The court had earlier removed the Board of Directors and, along with denying claims of the other Deltec group companies and rejecting the *concordato*, decreed *Cia. Swift* in bankruptcy and designated the Federal Government as receiver-liquidator.¹⁸ Deltec International and other members of the group appealed the order and asked for the removal of the lower court judge for prejudice. The Court of Appeals denied the removal petition and confirmed the bankruptcy on the grounds that the judge had broad statutory authority to deny approval of the *concordato* in the "general interest." The Court of Appeals, however, reversed the lower court's ruling which had extended liability to other Deltec group companies. The decision was made on procedural grounds, essentially that those companies had not had their day in court.¹⁹

The Court of Appeals next, sitting *en banc*, affirmed its panel's interpretation of "general interest," based primarily on the extensive discretion granted to lower court judges in composition proceedings, rather than a correct legal interpretation of the concept of an economic unit.

The Company then applied for a writ of error to the Supreme Court charging that the bankruptcy ruling was arbitrary and in violation of the due process provisions of the Argentine Constitution. While the case was pending before the Supreme Court, another creditor petitioned to the National Commercial Court judge to also rule bankrupt Deltec International, Deltec Banking, and all companies in Argentine in which Deltec or *Cia. Swift* possessed a significant interest. Service of process was purportedly carried out by telegram to the foreign offices of Deltec International and Deltec Banking. This new petition was dismissed by the Court of Appeals shortly prior to the Supreme Court's final decision.

The Court of Appeals ruled that a case involving the bankruptcy of one corporation was not the proper proceeding in which to rule on the bankruptcy of another corporation, and that the service of process on the foreign corporations was invalid.

In September, 1973, the Supreme Court rendered its decision.²⁰ The Court affirmed the decision of the Court of Appeals in so far as it had upheld the lower court's determination of bankruptcy of *Cia. Swift*, but reversed the Court of Appeals ruling exonerating Deltec International and Deltec Argentina²¹ from the "collective" bankruptcy decision of the Commercial Court.²² The Supreme Court again used the economic unit theory, finding the entire Deltec group to be a single economic enterprise.

The Supreme Court restated elements noted by the Court of Appeals of the close relationship of the entities in the Deltec group as a whole, and with *Cia. Swift* in particular. These included findings that more than 80 percent of *Cia. Swift's* sales were to group members, and that there was a "tendency" to sell to non-group members at higher prices.²³ Also noted were financial transfers among the group to meet needs "in difficult moments." The Supreme Court found these facts inconsistent with the Court of Appeals decision that other Deltec group members should not also be adjudicated responsible, notwithstanding that the Court of Appeals decision was based on procedural grounds. The Supreme Court did not reach the day-in-court reasoning of the Court of Appeals. The fact that Deltec International was a dominant factor in the governance of *Cia. Swift* does not justify holding it liable for *Cia. Swift's* obligations without its own opportunity to be heard. The Court was properly concerned, however, with the Deltec group's possible abuses in using corporate structures, although those abuses should have been the subject of a direct attack, as held by the Court of Appeals.²⁴

The Supreme Court's own findings of the interrelationship of the Deltec group do not necessarily lead to the conclusion of the presence of abuses. It referred to Deltec International's annual report of 1970 which had commented on principles of consolidation of corporate activities and the offering for sale of its subsidiary *Cia. Swift*. The Court read more into the wholly owned subsidiary status than was appropriate. It is not the organizational strata, but the substantive manner of utilization of the strata which may justify an amalgamation of several corporate entities. The Court made clear a sense of frustration over the lack of national control over the multinational entity, where the power is centralized abroad and the host nation of a subsidiary feels its im-

pact, often to its detriment. The decision is a reaction to this frustration, a rejection that only one member of the group should be responsible for commercial liabilities when that entity "appears" subject to external manipulation. The Court cited an earlier judicial declaration that "the excessive attachment to legal traditionalism has been classified as one of the most serious obstacles to the success of the promotion of economic expansion and social justice," and observed that one should not confuse principles of justice with judicial ritual. It would appear that any "excessive attachment" to legal traditions which are undermining a nation's growth are appropriate subjects for legislative refutation. When the traditions are not only long established, but have become norms the rejection of which will have serious international implications, abrupt judicial rejection does little to advance "economic expansion and social justice."

While the Court found that the Deltec group's use of traditional concepts of corporation strata was detrimental to the needs of the Argentine society, it did not elucidate. No specific acts of any Deltec member were tied to any identifiable damage to the Argentine economy.²⁵ The Court's inability to more clearly identify the abuses is noteworthy. It is a view which raises a presumption of potential wrongdoing when there is an economic unit, thus eliminating the need for proof of specific acts. Yet, it is also further evidence of the sense of frustration in dealing with the multinational entity, a reaction perhaps no less lacking in specific reasoning than the world legislative organizations' identification of the multinational corporation issues with no offer of control solutions.

The absence of clarity as to the structure of the Deltec group was illustrated by the Court's remand of the proceeding to the Commercial Court to determine which Deltec group entities should be included in the responsible group. That determination was quickly made by the earlier censured judge in the Commercial Court.²⁶ Two days after the Supreme Court decision, without the record of the Supreme Court and without any evidence of serious consideration as to which companies were within the scope of the Supreme Court pronouncement, the lower court Judge ruled 13 Deltec group companies bankrupt.

Both of the above cases lack adequate analysis of the important economic unit theory. This absence of analysis should not be justified because of the traditional "conclusion oriented" mode of civil court decisions. Those decisions are interpretive of specific laws, infrequently containing more than a conclusion of a violation or compliance with a

stated law. The Argentine cases, contrastingly, dealt with a concept not codified in the Argentine law, nor clearly established in earlier judicial decisions. Perhaps the disappointment this writer has in reading the decision is that the economic unit theory offers substantial potential for some measure of national control over multinational organizations. Concepts of piercing the corporate veil or disregard of the corporate fiction are familiar to United States corporate counsel. While normally decided on the basis of the fraudulent utilization of the corporate form, United States courts have also adopted an "instrumentality" or alter ego theory to reach behind the fiction of corporate protection. The instrumentality theory may or may not include fraud; it may be based on little more than such domination of the subsidiary by the parent that the former has no separate existence of its own, but is a mere puppet or tool. This concept has been used,²⁷ and criticized,²⁸ in the United States in a manner not inappropriate to an analysis of the Argentine decisions. Yet the Argentine situation poses a more frustrating task than the domestic setting, since the nation of the subsidiary is unable effectively to reach the assets of the parent. In the *Cia. Swift* litigation, however, the existence of other Deltec group companies in Argentina brought within the control of the Argentine authorities assets of the group in addition to those of the subsidiary. *Cia. Swift*. The decision, and the subsequent legislative adoption of the economic unit theory, may discourage multinational corporations from diversification of their activities within a particular nation.

The new Argentine foreign investment legislation, to be clarified with new regulations in the Spring of 1974, considers all subsidiary to parent transfers to be profits, and transfers from the parent to the subsidiary are stipulated as contributions. The economic unit concept must be refined to determine how extensive transfer restrictions will apply to mixed companies, classified as those with between 51 and 80 percent local equity participation. The law does apply to subsidiaries with majority foreign ownership. Since the economic unit theory relies substantially on control rather than ownership, it would appear that further "penetration" decisions will be likely to involve entities where there is not only substantial equity participation by the foreign organization, but such absolute control over the operations of the host country entity that some viability is granted to the economic unit theory. Presumably, further focusing upon this theory will be directed toward the multinational entity with substantial ownership interests in a host country entity and a clearly dominant controlling role. The view represents a new direction of host country nations in controlling the quality of foreign investment within their

countries. If the practice becomes more widespread among individual nations or, more importantly, if it is adopted on a regional level by economically integrated areas, the economic unit theory may develop into an important element of control over the multinational organization. There are grantedly substantial problems of jurisdiction over foreign parents and other members of a multinational group. The concept is nevertheless one which must be unsettling to the centralized management of many multinational organizations, where governance of the network of foreign subsidiaries was believed to be partially premised on an internationally accepted theory of liability limited to the traditional strata of corporations. The Argentine Supreme Court has at least loosened, if not removed, a lower block in the pyramidal structure of multinational corporations operating in Argentina.

NOTES

¹P. 306. XVI. Parke Davis v. Cía. de Argentina S.A.I.C. s/ recurso de apelación. Corte Suprema de Justicia de la Nación, Buenos Aires, 31 Julio 1973. C-705-XVI. Compañía Swift de La Plata S.A., Frigorífica s/ convocatoria de acreedores. Corte Suprema de Justicia de la Nación, Buenos Aires, 4 Sept. 1973.

²The Argentine legislature passed a foreign investment law in early November of 1973, incorporating the economic unit concept and disallowing royalty payments between a parent and subsidiary. *Business Latin America*, Nov. 14, 1973, p. 361. The economic unit theory is intended to resolve cases when the subsidiary is not wholly owned by the parent, essentially determining unity on the degree of commercial reliance of the subsidiary on the parent. The law also includes allowance of government intervention in certain sectors, with nationalization as a goal, and additionally fade-out provisions and profit remittance limitations.

³See, e.g., Henn, *Law of Corporations* 250 (2d ed. 1970).

⁴Deltec International Limited was formed by Deltec Panamerica, S.A., multinational investment and merchant banker, and IPL, Inc., the successor of Swift International, S.A., an Argentine incorporated holding company for Swift & Company's international operations.

⁵While the rate of tax is the same in each case, the 20 percent deduction allowed for royalty remittances resulted in a lower tax than for profits and dividends. Additionally, adding the royalty gross to profits and thus net worth, the corporation paid a 1.5 percent substitutive inheritance tax on a larger base amount.

⁶The new law limits the disallowance of royalty payments to relations between a parent and its subsidiary, *not* where there is a clear economic independence on the part of the licensee obligated to pay royalties.

⁷Increasing profits will be difficult in Argentina; part of the new foreign investment law limits profit repatriation to 12.5 percent of registered capital, or four percentage points above the current 180 day money lending rate in the currency in which the foreign investment is made, whichever is greater.

The availability of a foreign tax credit to the United States companies reduces the impact of the Court's ruling. Royalty payments are deducted only as ordinary expenses, whereas foreign payments for income taxes receive a direct tax credit. The

result is not a higher tax to the United States company, but a partial change in who receives the tax, from the United States to Argentina.

⁸Parke Davis y Cía. de Argentina S.A.I.C. Tribunal Fiscal de la Nación, 14 Marzo 1970, fallo C-420. XXI Derecho Fiscal 99.

⁹Parke Davis y Cía. de Argentina S.A.I.C. Cámara Nacional en lo Federal, Sala 11 en lo Contencioso Administrativo 31 Agosto 1971. XXI Derecho Fiscal 623.

¹⁰Argentine tax procedure law directs the court to disregard formalities in interpreting this law and consider the "economic reality," making a focus upon tax issues evolve into a consideration of the economic unit doctrine. Art. 11-12, Law 11.683.

¹¹Refinerías de Maíz, S.A. Fallos: 259:141.

¹²The *Sociedad de Responsabilidad Limitada* is a limited liability company, essentially a parallel to the English limited liability company, and to a lesser degree, the close corporation in the United States.

¹³See note 4, *supra*.

¹⁴*Convocatoria* is a form of reorganization. When granted, the company ceases payment of non-secured and non-preferential debts but continues business under its own management with a court appointed referee who determines the amount of assets and liabilities. A concordato follows; a creditor's agreement for the repayment of the debts which must be approved by the court.

¹⁵An 86 percent majority of creditors had approved the *concordato*. The objecting creditor also asked that the liability of Cia. Swift be extended to the other Deltec group companies and that a protective order be issued restraining Deltec from transferring other investments from the country. The judge denied the specific protective order, but later issued a similar order on the basis of the court appointed referee's report.

¹⁶The Company was attempting to negotiate sales of its meat extract to Deltec group members in Europe, at prices stated by Deltec to be higher than similar contracts of other Argentine meat producers. The sales of other producers were approved by the Argentine government, which denied Cia. Swift's request for permission to export the meat extract.

¹⁷The Case of Compañía Swift de La Plata, S.A.F. at 8. Non-published material supplied by Deltec International in the author's files.

¹⁸The bankruptcy ruling itself was surprising, since the referee's report showed assets far in excess of liabilities. These facts made the further declaration of all Deltec Argentine subsidiaries as bankrupt even more surprising and certainly unnecessary to protect creditors. More recent events, including the intervention of Ingenio La Esperanza, a sugar mill and one of the Deltec group local holdings, and the introduction of a bill in Congress to expropriate Cia. Swift, lead to the suggestion of judicial involvement in a preconceived plan to nationalize Deltec holdings. A further subsidiary, Argentaria, a major Argentine *financiera*, has been intervenered by the Central Bank under authority of a law regulating financial institutions.

¹⁹The Court of Appeals, a week later, censured and fined the National Commercial Court Judge for improper conduct in commenting on the case publicly at banquets and during television appearances.

²⁰The members of the Supreme Court had been replaced after the March, 1973 election, at which time the Peronist regime returned to power. The new government was not expected to be particularly sympathetic to many businesses which had operated with reasonable freedom under General Onganía and, to a lesser degree, General Lanusse.

²¹Deltec Argentina is the holding company for Deltec's investments in Argentina.

²²The Court additionally ruled that Deltec International and the Argentine Deltec group companies were joint and severally liable, rather than the more moderate ruling of the lower court that those companies were contingently liable.

²³The Company strongly opposed the price discrimination charge, challenging both the actual prices and the source of the Court's information. The latter was objected to on the grounds that the Court accepted a report of the National Meat Board of Argentina which was not subjected to an evidentiary hearing and which contained its own refutation.

²⁴The appearance of members of the Deltec group as creditors does not subject them to affirmative liability, but rather only to a denial of their claims as creditors. The Supreme Court seemed to feel that their involvement in the case somehow subjected them to the obligations of the bankrupt Cia Swift.

²⁵The Court stated that "the benefit of exclusion would not be allowed when the entity could not be distinguished," essentially refusing to accept traditional distinctions which left Argentina without any mode of control over the entities.

²⁶See note 19, *supra*.

²⁷See *Zaist v. Olson*, 154 Conn. 563, 227 A.2d 552 (1967). See generally 38 ALR 3d 1102.

²⁸Case Note, *Zaist v. Olson*, 42 Conn. B. J. 127 (1968).

Editor's Note: Following is a translation of the Deltec decision prepared by the Editor-in-Chief for Deltec International Ltd. Deltec's permission to publish the translation in the *Lawyer of the Americas* for the benefit of the legal profession is gratefully acknowledged, also the assistance of Doctors E. Elejalde and O. Salas.

The explanatory notes and the bracketed material in the body of the text were added by the translator to facilitate understanding the English version. They are not included in the original Spanish version.

C-705-XVI. Compañía Swift de la Plata, S.A.
Frigorífica Creditor's Proceeding (*Convocatoria*)¹

Supreme Court of the Nation

Buenos Aires, September 4, 1973

And, having reviewed the records, to wit: "Direct appeal (*recurso de hecho*)² presented by Cia. Swift de la Plata, S.A. Frigorífica" in the case "Compañía Swift de la Plata, S.A. Frigorífica re creditor's proceeding" (file C-705); "Direct appeal presented by José R. Zurdo in the case Compañía Swift de la Plata, S.A. Frigorífica re creditor's proceeding (now

a bankruptcy) file C-665"; "Direct appeal presented by DELTEC INTERNATIONAL, INC., Deltec Argentina S.A.M. and F. and ARGENTARIA S.A. Cía. Financiera" in the case "Cía. Swift de la Plata S.A.F. re creditor's proceeding" (file C-724); "Direct appeal presented by José R. Zurdo in the record Cía. Swift de la Plata S.A.F. re *incidente*³ within the creditor's proceeding, art. 250 Argentine Code of Civil and Commercial Procedure, challenge of (*impugnación*)⁴ José R. Zurdo (Deltec International S.A.-file C-725"; "Direct appeal presented by Carlos R. S. Alconada Aramburu et al in the case "Compañía Swift de la Plata S.A. Frigorífica re *incidente* art. 250, para. 2 of the Argentine Code of Civil and Commercial Procedure, file 156.919." (file C-695); and "Direct appeal presented by José R. Zurdo in the case "Compañía Swift de la Plata, S.A. re *incidente* art. 250, para. 2 Argentine Code of Civil and Commercial Procedure, appeal of José R. Zurdo, file C-683.

And Whereas:

1. The scope of the conflicting interests involved, as well as the characteristics of this proceeding — originating in a *convocatoria*, but ultimately resulting in a bankruptcy — and its multiple *incidentes* have produced an unusual accumulation of documents in numerous files and annexes, in which the issues raised, debated and resolved are not always set out clearly, but, on the contrary, are often obscured by copious and repetitious presentations requiring detailed clarification.

2. The various legal *recursos* submitted directly to this court will be ruled upon separately, subject to the caveat that it has been necessary, as a preliminary matter, to reconstruct the overall picture of the issues raised on appeal.

3. The complaint⁵ on fs.⁶ 71/4 of Record C-705 will be considered first. The above complaint refers to an extraordinary *recurso* filed by Swift de la Plata S.A. Frigorífica on fs. 11.347 in the main case, which *recurso* was denied on fs. 11.405 on 5 September 1972. Swift's *recurso* was filed against a decision of Section "C" of the Commercial Court of Appeals of Buenos Aires, dated 6 June 1972 (fs. 11.250), in which said Commercial Court confirmed the bankruptcy of the movant [Swift].

Swift's extraordinary *recurso* was presented as a supplement to still another *recurso* (fs. 11.336). The latter was based on inapplicability of the law,⁷ but had the same objective as the former. This fact [the supplementary filing], as indicated by the *Procurador General*,⁸ is sufficient to declare inapplicable the remedy sought. This is in accordance with well

established jurisprudence,⁹ shared by this particular Court (Decisions 237:547; 239:195; 240:50; 259:288; 261:28, among many others). These decisions confirm the insufficiency of the extraordinary *recurso* when it is conditioned upon, or supplementary to another [*recurso*].

And, neither is the arbitrariness attributed to the decision of 6 June 1972 well founded, as alleged in the supplementary pleading presented by the movant. Movant's allegations are limited to reciting differences in interpretation from those reached by the judges below with respect to the applicable civil law (Decisions 119:114; 123:375; 134:309; 194:394), and with the conclusions reached by those judges in the exercise of their official functions (arts. 100 and 101 of the National Constitution; Decisions 187:291; 189:307; 218:278; 238:186; 241:40, among many others.)

The jurisprudence of the Court is well established with respect to the limits which must be exceeded in order to annul the rulings of inferior judges. These limits have not been exceeded in the instant case inasmuch as there is no evident departure from the solution contemplated by the law. The judges *a quo* have substantiated amply the exercise of their judicial powers with respect to the approval or rejection of the *concordato*¹⁰; they have also substantiated adequately their interpretation of art. 40 of Law 11.719. And, neither does the decision challenged fail to deal with the defenses raised, nor with the proven facts. With respect to the doctrine¹¹ established by the decisions of the Court (among them Decision 276:132), the allegation made re issues not dealt with is not relevant, e.g. the difference claimed between the assets and liabilities of the *convocatoria* [*sic*].¹² This is so for two reasons. First, because trial judges are not required to consider exhaustively all matters raised by the parties (Decision 272:226). A judicial decision does not lose its foundation through the failure of the judge to deal with an issue raised by a party if it is obvious that consideration of such an issue would not have affected the conclusion reached (Decision 205:513). Secondly, because the interpretation given by the Court *a quo* to its own powers under art. 40 of the controlling Bankruptcy Law, and its opinion relative to the responsibility of the bankrupt for the causes which motivated its bankruptcy render superfluous any other consideration.

Accordingly, the complaint [Swift's] on fs. 71/74 of Record C-705 does not lie, and the deposit made on fs. 1 of the above record is forfeited. The *Procurador General* shares our conclusion.

4. Secondly, the Court will review the complaint on fs. 75/96 of Record C-665 relating to the extraordinary *recurso* presented by José R.

Zurdo on fs. 11.286 in the main case. In this *recurso* Zurdo challenges the decisions of the Commercial Court of Appeals *a quo* on fs. 11.263, 11.268 and 11.270.

Review of Zurdo's complaint forces this Court to detail certain previous matters relating to each one of the cases appealed. These will be considered below:

a) The Commercial Court of Appeals *a quo*, in a decision on fs. 11.263/6 declared null the *aclaratoria*¹³ (fs. 10.613) of the National Judge in a Court of First Instance. The original ruling on fs. 10.553 rejected the *concordato* proposed by the insolvent [Swift] and decreed the company bankrupt.

In the above mentioned *aclaratoria* the Bankruptcy Judge, at the request of the already named creditor José R. Zurdo and in conformance with the terms of his original decision [fs. 10.553], ruled that it was proper to extend responsibility for the debts of Frigorífico Swift S.A.F. to "all companies which comprise the group" (refers to the "Deltec Companies") subject "to prior discussion (*excusión*)¹⁴ of the assets of the bankrupt company."

But, if the decision on fs. 11.263, as stated by the *Procurador General* in his report on fs. 129 et al, Record C-665, does not have the nature of a final ruling within the terms of art. 14 of Law 48, a realistic appraisal of the matter forces the conclusion that said decision [11.263], rendered on the basis of the decision on fs. 10.553, results in irreparable damage to the extent recognized by the jurisprudence of the Court. The above is based on the extent of the economic prejudice it [i.e. 11.263] induces (Decisions 188:244; 194:401); also, on the fact that the decision goes beyond the individual interests of the parties and affects that of the community. All the above forces this Court to recognize the existence of a major institutional interest which justifies disregarding the formalistic aspects of the case (Decisions 248:189 and 232).

Thus, recognizing the sufficiency of the federal issue presented, it is proper to review the complaint. Based on the fact that the issues have been sufficiently debated in the totality of the records reviewed, it is now proper to proceed to the merits and rule on the complaint presented.

The decision on fs. 11.263 places special emphasis on the inviolability of the right of defense in a trial. In this connection the first thing to bear in mind is that the protection afforded by such a right is assured when

the interested party is given the opportunity to present his defenses at the appropriate procedural stages of the proceeding (Decisions 235:104; 241:195). The protection afforded by the right of defense does not cover the negligence of the litigants (Decision 247:161). And, much less can the right be invoked to delay judicial proceedings (Decision 193:847, Whereas No. 6). The exercise of the right found in art. 18 of the National Constitution must be compatible with the rights of other intervenors in the proceedings, and principally with the social interest inherent in the efficient administration of justice (Decision 190:124).

The decision of the Court *a quo* [Commercial Court of Appeals] on fs. 11.250 states: "The existence of the so-called group (refers to the "Deltec group") in the economic-financial and commercial spheres is plainly evidenced in the record."

"This has been highlighted by the Office of the Referee in extensive and detailed reports, and in abundant and authentic documentation (fs. 3902 rev.: 4115/27; 4.135 rev.; 4.306 rev.; 4.308; 3.981/86).

"Truthfully, the above matter has not been put in issue by the bankrupt company. It is of no interest, insofar as the matter under consideration is concerned, to delve into history nor to analyze in detail the interrelationships to which the Referee refers. It is sufficient to point to the existence of a group of companies headquartered in this country and abroad whose shares—practically in their totality—remain the property of the entities which form the group, and to their direct and indirect linkages, ultimately resulting in control by Deltec International. This is clearly evident in the report of the Referee (in accordance with fs. cited) and annexed documentation, in the Prospectus of Deltec International to its shareholders and in the Report and Balance Sheet of Deltec International 1970, translated on fs. 4017/77 and 4078/94. It is also evident in Deltec International's communication to its shareholders relative to the *convocatoria* (translation page 4096) in which that company refers to the fact that the financial arrangements of 'our' company Swift de la Plata in Argentina failed, and that 'we' are forthwith addressing ourselves to the pertinent Argentine tribunal to seek a *convocatoria*."

"It should be observed that in the above mentioned documentation Deltec International repeatedly refers to 'its' subsidiaries, to 'our property' (per special fs. 4030 rev., fs. 4087/8), etc. Swift, 99% of whose shares Deltec International owns, is listed as one of the above; also listed are many other companies in Argentina and abroad, owned either directly

or indirectly through other subsidiaries. By way of example it should be noted that Swift is one of the subsidiaries which, directly or indirectly, controls other subsidiaries, such as Compañía de Navegación Ganadera y Comercial de Ganados (S.A.), Provita (S.A.), Tranvías Eléctricos de Tucumán (S.A.), Avícola y Ibrí (S.A.).” Subsequently, the Court *a quo* [Commercial Court of Appeals] states “a first thought suggested by the situation described is that the bankrupt [Swift] is severely circumscribed in regard to its freedom of action and in its commercial policies. This is so because Swift — as already demonstrated — is closely linked to and within the framework of a group of vast projections whose interests must logically predominate and in whose commercial policies it [Swift] is involved. This is clearly evident from the facts stated previously in this paragraph; also from other concrete facts, e.g. more than 80% of Swift’s sales have been to the entities of the ‘group,’ including the totality of the sales of cooked and frozen meats (fs. 3984 rev.), report of the National Meat Board (Junta Nacional de Carnes) on fs. 10.030/1. In sales made outside the ‘group’ there is noted a tendency to arrive at prices substantially higher than those negotiated with members of the ‘group’ (fs. 3964/4 rev.; report of the National Meat Board, fs. 10.200/204). Other facts follow: the policy followed with regard to the transfer of funds to Provita (S.A.), the indebtedness of the latter for sums in excess of \$11,000,000, and its [Provita’s] financial difficulties to liquidate the debt (fs. 4135, 4135 [sic.] and 10.127); guarantee and discount of commercial [documents] papers to Ibrí in times of difficulty for Swift (fs. 4135, 4308, in accordance with memorial No. 1361 of 4-14-70 in annex attached); credit of Deltec Argentina (S.A.) in the amount of U.S. \$3,093,000.69 to guarantee the bankrupt’s (Swift) loan with ‘Deltec Banking Corporation Ltd.’ (fs. 4317/8); the requests of the entities of the group to recognize their claims which amount to 37.66% of the totality of the claims (fs. 3962 and 4168); a notable reduction of debts with respect to the Deltec group, and the withdrawal of funds by the latter in the last period (report of the National Meat Board, fs. 10033 and 10123).”

These conclusive statements by the Court of Commercial Appeals are in conflict with its resolution on fs. 11.267, where the same tribunal *a quo* states, with excessive ritualism (Decision 268:71) that the facts mentioned in the paragraph immediately above only call for a ruling with respect to the bankrupt [Swift] and not with respect to the potential responsibilities of the other entities of the group, especially Deltec International which is mentioned as the predominant entity in the group. These statements by the Commercial Court of Appeals totally omit consideration by that Court

of the true nature of the juridical personality which, as this Court has decided, must be taken into account "not only because of the abuses which may arise from the complex relationships existing in certain social structures, but also from the growing scope of numerous groups of international companies and the serious problems arising from their expansion" (in re: Parke Davis y Cia Argentina S.A.C.I., appeal — Record P. -306-XVI).

Deltec International Limited recognizes that interrelationship in official submissions in these proceedings, i.e. in the objection (*incidente de impugnación*) filed by Mr. José R. Zurdo; and especially in the 1970 Annual Report wherein Deltec International sets forth, in Notes 1 and 2, the "principles of consolidation" and the offer to sell "the Argentine subsidiary (Swift de la Plata)." In that report Swift is described as "the subsidiary in which it [Deltec International] has a majority interest and which carries out the meat operations in Argentina."

In the above objection, in which creditor José R. Zurdo challenged the claims presented, Deltec International on fs. 278, Deltec Food Beneleux (fs. 285 id), Deltec Foods Limited (fs. 280 id.) and Deltec Argentina S.A. (fs. 279 id.) received official notifications.¹⁵ The last named company answered that it was not a "debtor to which the objection applied"; the others, that they were "not represented nor had an agency in Argentina." Likewise they state that Mr. Ernesto Campos, a party to the proceedings, answered "for himself" and "not in behalf of his principals," inasmuch as he was only authorized to examine and verify claims, and to intervene in the meeting of creditors (Junta).¹⁶ In essence, the above named companies submit that the notifications should have been made to the companies at their domiciles, i.e., Belgium, London and the United States, and not to those parties present at the proceeding where claims were examined and verified.

This allegation is accepted in the decision on fs. 11.263. However, contrary to that holding, it is noted, from a reading of the powers attached to fs. 100/101, 111/113, 119, et al (authenticated on fs. 399, original documents presented to the Office of the Referee) that the mandate to Mr. Campos grants him more powers than those recognized in the decision being challenged. Each mandate granted was given "to represent [the principal] in all matters relating to the meeting of creditors re Swift de la Plata S.A.F., with broad authority to request examination and verification of claims, to offer and submit all types of evidence, represent the undersigned in all types of *incidentes*, submit written documents and petitions, participate and vote in meetings of creditors, challenge, reject

and object to the claims of third parties, approve and reject *concordatos* and compromises between Swift de la Plata S.A.F. and creditors, grant and accept postponements and remission of debts, and, in general, carry out all acts considered necessary or suitable to safeguard the interests of the undersigned in any such acts.”

This grant of powers, which was accepted and on the basis of which the examination and verification of claims of the principals took place, produces the results contemplated in arts. 49-51 of the Code of Civil Procedure (arts. 1869, 1879 of the Civil Code), and with respect thereof the doctrine established by the decisions of the Court, to wit: Decision 250:643 is applicable. In that case a mandate was granted to act in behalf of a principal in a certain legal proceeding. The mandate included the normal powers granted in a case of this nature, including the right of appearance of the agent in the proceeding in question. The lower court nevertheless ordered that the notification to the principal be made abroad. An appeal was taken on this issue and granted on the grounds that there was evidence of arbitrariness on the part of the lower court. The Supreme Court found that the effects of the mandate granted served to vitiate the ruling of the lower court on the grounds of excessive formalism, and revoked the decision below because it did not rest on proven facts, not questioned in the course of the proceeding.

The above leads to the conclusion that the denial mentioned in the decision on fs. 11.263 does not result from an unlawful, substantial or effective restriction of the right of defense (Decision 189:306) but from the sole negligence of the interested parties (Civil Code art. 1905). Thus, the constitutional argument fails (Decision 239:51).

It is also well to bear in mind that when the Bankruptcy Judge in his decision on fs. 9904, pursuant to art. 12 of Law 11.719 rejected the claims of the Deltec group companies, he expressly declared that the responsibility of the said companies would attach “only in the event of bankruptcy, in which case all obligations become due” (Whereas No. 6).

Notwithstanding the above, the key factor to consider in deciding the issue presented is that the legal regime of the juridical personality can not be used to prejudice the paramount interests of society, nor the rights of third parties. The means used by the State to prevent business associations from existing as mere corporate shells vary and have different names, but they all conform to economic and social realities and proclaim the supremacy of the law. It is obvious that the above acquires special relevance

when the judges have to face the complex legal problems created by business associations in the modern world. Today these associations are characterized by their interdependence, linkages and their multi-national nature. These factors, together with the difficulties attendant upon their control, the increase in their influence and the interrelationships of their administrative organizations—through real or apparent affiliates—strengthens their power of concentration.

In the instant case the varied legal forms used by different factions of the group [Deltec group], structurally merged under the control of *Deltec International Limited*, should not produce a result in which only one of the factions (Swift S.A.F.)—only formally different from the other factions—should be the only entity affected by the judicial decision under review. The Court has declared “that excessive reliance on juridical traditionalism is one of the most serious obstacles to economic expansion and social justice.” (Decision 264:410). Accordingly, the rationale of the law, always an objective of justice, should not be confused with juridical ritualism which tries to substitute and supplant the former.

These guidelines force this Court to take cognizance of the intricate case under review, but prohibit it from accepting, through the formalistic use of the legal structures constituting business associations, a concept foreign to the objectives sought or to the social realities which should legitimize such objectives.

These principles gain in importance when the economic interests of the nation, seriously threatened by the interests and activities set forth in the decision on fs. 11.250, become an issue. That decision reveals that the economic and financial policies of the controlling group follow norms, not only harmful to commercial interests but to the community in general. The legal structures which the laws of Argentina provide for lawful activities can not legalize economic and financial policies contrary to the needs of our society, effectively recognized by the judiciary of the country.

Accordingly, the consequences of the bankruptcy decreed in the case of Swift S.A.F. should also be imputed to *Deltec International Limited* as the real debtor and responsible for the debts of the obvious bankrupt whose property it owns and over which it exercises control. (Decision on fs. 11:250; report of the Referee on fs. 3961/63; 3981/86; 3987/4113/24; report of the National Meat Board, fs. 10.033 and 10.123/4). We find there exists a fusion of patrimonies even though the assets are in the name of other title holders, yet to be determined in the appropriate proceeding, but already singled out in the report of the Office of the Referee, particu-

larly the assets of the affiliate Deltec Argentina S.A.F. and F., domiciled in Cangallos 564, Buenos Aires, with respect to which the extension of responsibility is fully applicable. This conclusion is unavoidable from a review of the record in the instant case which evidences the certainty of the facts in accordance with the precedents of the Supreme Court (Decision 275:389) which can not be ignored if fraud, the prevention of which is the primary duty of judges, is to be avoided.

Upon declaring void, with the consequences set forth above, the decision on fs. 11.263, it is well to also establish that the benefits of discussion (*excusión*)¹⁷ which the Judge of First Instance improperly granted should not be allowed to stand. This is so because having decided that the companies forming the so called "Deltec Group" comprise, insofar as the bankruptcy is concerned, a unified socio-economic entity with the bankrupt company, the supplementary ruling found in the *aclaratoria* on fs. 10.613 conflicts with the main conclusion of the decision to such a degree that it destroys its very substance. This is so because the decision under review departs from the joint responsibility imposed by the Commercial Code (arts. 304, 417, 443 and 480); also because recognition of the benefit of discussion (*excusión*) implies recognition of the "Deltec Group" as a third party, either as an assignee or guarantor. This can not be because one can not be a self-guarantor; also, because as previously declared by the Court (Decision 273:111), the benefit of discussion (*excusión*) is not available when the individual assets can not be distinguished because the patrimonies have become intermingled. Lastly, because the commercial nature of an act of warranty, as well as the consequences of the bankruptcy decreed would call for a different legal solution (arts. 480 Commercial Code and 2013, para. 5, Civil Code).

In view of the above, the Court admits the complaint and decrees that the *recurso* presented on fs. 11.286 of the main case, insofar as it pertains to the decision of the Commercial Court of Appeals on fs. 11.263, was improperly denied. And no further substantiation being necessary, this Court revokes the decision of the Commercial Court of Appeals on fs. 11.263 to the extent that it failed to extend to Deltec International Limited and to Deltec Argentina S.A.F.M. responsibility for the bankruptcy of Swift de la Plata S.A.F. (arg. art. 165, so called law 19.551).

And, in conformance with the express powers conferred by art. 16, part 2 of Law 48 (Decisions 235:554 and 245:533) this Court decrees:

I. That the inclusion of the assets of Swift de la Plata S.A.F. in the bankruptcy estate should also include the assets of the companies compris-

ing the "Deltec Group," especially those of Deltec International Limited and Deltec Argentina S.A.F. and M. (arts. 1, 3, 6, and 104 of Law 11.719) report of the Referee fs. 3161/63, 3981/86, 4113/24; report of the National Meat Board fs. 10.033 and 10.125/4).

II. That in the proper proceeding, there should be determined what other persons or companies comprise the mentioned group [Deltec group] to the extent that the latter comprises an economic unit with the bankrupt company.

III. That joint execution should be carried out with respect to all the named assets without prior discussion (*excusión*) of the assets of Swift de la Plata S.A. Frigorífica (art. 73 et al and 104 Law 11.719 and arg. art. 170, so-called Law 19.151).

IV. That the natural or legal persons mentioned in Sections I and II above, once having been designated as therein decreed, may exercise those rights to which they are entitled through proceedings in *exclusión*¹⁸ or restitution of assets. (arg. arts. 81 et al of the so-called Law 19.551).

Let there be notification and return of the deposit on fs. ½ of Record C-665.

b) The appellant also complains against the ruling on fs. 11.268 in which the Commercial Court of Appeals revoked the ruling on fs. 9979 which imposed on the creditors being challenged [members of the Deltec group] the costs pertaining to the *incidente* in question.

We now refer to the complaint grounded on the failure of the court *a quo* [Court of Commercial Appeals] to resolve the issue in the appeal of the movants dealing with that part of the decision on fs. 9979 pertaining to costs. That decision ruled that the costs of the *incidente*¹⁹ in question, insofar as these pertained to the bankrupt, should be paid by that company [Swift] in the order of priorities established. On this issue this Court concurs with the *Procurador General* that the complaint should be dismissed. In effect, the complaint does not lie because subsequent to the filing of the *recurso* on fs. 11.263, the Commercial Court of Appeals on fs. 188 of the *incidente* which resulted in Record No. 156.730 of the Register of the said court ruled on the matter. This ruling was challenged opportunely by the same appellants through another extraordinary *recurso* which will be considered below (Whereas No. 8, *infra*).

The remaining objections seek a revision of the interpretation given to arts. 18, 26 and 27 of Law 11.719; they also question the arbitrariness of the decision.

We share the opinion of the *Procurador* with respect to the first objections. We rule that these objections only raise matters of interpretation respecting the civil law, with the well-known results regarding the *instancia* of art. 14 of Law 48.

But, it is believed that a federal question is raised by the remaining objections. There is ground for complaint insofar as the decision on fs. 11.268 admits an interpretation under which costs should not be imposed with regard to the issue raised in the challenge (*incidente de impugnación*) initiated by Mr. José R. Zurdo relating to the claims presented [by Deltec group] (Record 31.503).

A review of the records reveals that there took place a total rejection of the claims questioned by the movant [Zurdo] in accordance with art. 18 of Law 11.719. In the pertinent proceeding not only were the creditors challenged legally defeated, but there was also a reaffirmance—recognized in the final decision—of collusion by those who sought to establish their particular claims. The parties were the subject of a ruling on fs. 9904 which rejected their claims because these “violated the concept of the juridical person; were based on a simulation of juridical acts rejected by the legal order, etc.”

The matter decided by the court *a quo* is found among the exceptions to the principle that matters pertaining to costs, to whom they should be charged and the amount thereof is procedural and not subject to review (Decisions 251:233 and others), except for alleged arbitrariness (Decisions 250:431; 254:506). We find such arbitrariness in the instant case. We therefore admit the complaint and rule that the costs of the *incidente* initiated by Mr. José R. Zurdo (Record C-503 of the Registry of the Trial Court) should be borne by the creditors challenged and legally defeated in the proceeding. We so decree and order that the deposit made be returned.

Finally, the ruling on fs. 11.270 which nullified the implementation of fs. 10.609, also challenged by the movant Zurdo, is without legal effect in accordance with the above ruling. The Court *a quo* should proceed opportunely to set the fees. It is so decreed.

5) Thirdly, the Court will consider the complaint presented by Deltec International Limited, Deltec Argentina S.A.F. and M., and Argentaría S.A. (Record C-724) relating to the extraordinary *recurso* filed on fs. 242 of Record No. 156.57 of the Registry of the National Commercial Court of Appeals.

This Court shares the opinion of the *Procurador General*, also in conformance with well established jurisprudence of this Court, to the effect that procedural matters, such as the one under review, are not, in principle, within the ambit of an extraordinary *recurso*. Additionally, it does not appear that the complaint involves any of the exceptions subsequently considered in item 7 below. These exceptions permit a departure from the rule under which rulings pertaining to preventive measures are not available in the special proceedings provided for in article 14, Law 48 (Decision 247:553).

Accordingly, the complaint is dismissed and the deposit made by the movant is forfeited.

6) Fourthly, the Court will consider the complaint presented by Mr. José R. Zurdo in Record C-723 relating to the *recurso* presented on fs. 260 of the Record "Cía. Swift de la Plata S.A.F. re *incidente* involving article 250 of the Code of Civil Procedure which arose during the *convocatoria*." (Record 156.657 of the Registry of the National Commercial Court of Appeals).

As properly pointed out by the *Procurador General*, the well established jurisprudence of this Court holds, as a matter of principle, that matters relating to the responsibility for costs are not within the ambit of extraordinary proceedings (*instancias*). (See Whereas 4c. *supra*.) There is nothing in the case under review which would justify a departure from the general rule above. Accordingly, the complaint is dismissed and the deposit made is forfeited.

7) Fifthly, the Court will consider the *recurso* appearing on fs. 915 of Record C-695 presented by Carlos R. S. Alconada Aramburu and Federico G. Polk, in their own names, re the challenge presented on fs. 67 of Record 156.919 of the Registry of the National Commercial Court of Appeals. The above challenge was directed against a ruling on fs. 64 of the above record which revoked the rulings on fs. 10.052 rev. and 10.054 rev. concerning measures ordered to safeguard the payment of costs and contained in the ruling on fs. 9979 of the main case.

The matter already decided with respect to the federal question raised by the ruling on fs. 11.268/9 of the Commercial Court of Appeals, and pertaining to the decision on the subject of costs in the *incidente* in which Mr. José R. Zurdo challenged the claims of other creditors (Record 31503), is controlling here. This is in accordance with the ruling of the *Procurador General*. Accordingly, the complaint lies and we resolve the *recurso*

presented by nullifying the ruling challenged for legal insufficiency. In effect: the preventive measures decreed to safeguard the payment of costs do not require the fixing of costs (art. 34 of Decree - Law 30.439, ratified by Law 12.997), nor payment (arts. 63 and 212 para. 1 Code of Civil and Commercial Procedure). Additionally, the terms of decision 11.268/69 do not exclude costs. Similarly, the imposition of costs in the decision on fs. 64 appears unreasonable inasmuch as the petitioners had the right to request such costs. In the light of the above, the complaint is admitted; the decision appealed is revoked; and the deposit made is ordered returned.

8) Sixthly and finally, this Court will examine the direct appeal filed by Mr. José R. Zurdo on fs. 13/22 of Record C-683 re the *recurso* presented on fs. 194 of Record 156.730 of the Registry of the National Commercial Court of Appeals against the decision on fs. 188 of the same record. The latter decision ruled on the appeal taken against that part of the decision on fs. 9979 in the main case which “declared that costs should be borne by the bankrupt in the order of priorities established, subject to the provisions of art. 71 of the Code of Civil and Commercial Procedure.”²⁰

This refers to the issue already considered in Whereas 4b, second paragraph of this decision. This Court shares the ruling of the *Procurador* in the sense that the decision raises a federal question inasmuch as it rules on costs relating to the *incidente* in which the claims of creditors challenged were dealt with in Record 31.513.

The ruling of this Court in Whereas 4a supports our holding that the system (*régimen*) of costs, as a matter of principle excluded from federal remedies, finds in the instant case an exception to the general rule. It is not only the fact that the decision which declares the payment of costs per the order established, and charges the costs of appeal to the movant can not find support in the decision on fs. 11.268/9 (different parties and procedural situations), but that decision [11.268/9] has been annulled in this decision, Whereas 4b. Accordingly, the complaint should be admitted and with regard to the *recurso* presented, this Court decrees that the decision appealed should be nullified on the grounds of arbitrariness, inasmuch as the costs of the *incidente* challenged should be imposed on the *convocatoria*. (sic)²¹ Notify and return.

MIGUEL ANGEL BERCAITZ - AGUSTIN DIAZ BIALET - MANUEL
ARAUZ CASTEX - ERNESTO A CORVALAN NANCLARES.

TRANSLATOR NOTES

¹*Convocatoria* — A proceeding in which a merchant requests from the competent court, among other things, a meeting of creditors in order to prevent a declaration of bankruptcy.

²*Recurso* — A formal written statement presented to a court in which the movant seeks modification, revocation or interpretation of a judicial decision from the court which rendered the decision, or a superior tribunal. *Recursos* are, as a rule, specifically designated to indicate the purposes they serve. For example, a *recurso de aclaración* (*recurso* to clarify) seeks clarification of a ruling or decision which the movant finds obscure, ambiguous, etc.; a *recurso de apelación* is an appeal.

In civil law tradition an appeal is normally addressed to the court which rendered the decision, i.e., it is a request to that court to allow the case to be brought before a superior tribunal. If the request (appeal) is denied, the aggrieved party has the right to resort to the higher tribunal directly. In certain jurisdictions this remedy is called a *recurso de hecho*, i.e. a direct appeal to the higher court.

³*Incidente* — A collateral issue or controversy arising during the course of a judicial proceeding. The nature of the issue raised may be used to further describe the *incidente*, e.g., an *incidente de nulidad* arises when a party questions the validity of a ruling by the Court. The issue may then be formally raised through the appropriate *recurso*. In this instance, a *recurso de nulidad*.

The phrase *convocatoria—incidente* means that the *incidente* in question arose during the course of the *convocatoria*.

⁴*Impugnación* — A formal challenge; objection.

⁵*Queja* — Here translated as complaint in the absence of any modifying term in the Spanish text. Legally, the term is narrower and is usually associated with *recurso*, e. g. *recurso de queja* which has varied meanings in different civil law jurisdictions.

⁶fs.—Abbreviation for the Spanish word *fojas* (archaic) meaning pages. It is customary in certain civil law jurisdictions to cite to the appropriate page. The abbreviated Spanish term will be used throughout this translation.

⁷*Inaplicabilidad de Ley* — Grounds for a specific *recurso* complaining of violation or misapplication of the law by a court.

⁸*Procurador General* — Official of the State representing the latter in the proceeding.

⁹*Jurisprudencia* — The case law of the Court. It should be recalled that the principle of *stare decisis* does not prevail in the civil law tradition to the extent that it does in the common law tradition. In this instance the Supreme Court is stating that this particular Supreme Court shares the opinion of prior Supreme Courts. In essence, it is affirming prior decisions on point, but with the fine distinction that — if it took a contrary view — it could do so without distinguishing prior cases. Thus, throughout the translation the use of the term "this Court (esta Corte) when referring to the Supreme Court now sitting vis-à-vis "the Court" (la Corte) when referring to previous Supreme Courts.

¹⁰*Concordato* — The proposal by the management to the creditors for the payment of debts which must be approved by the Court to avoid bankruptcy. It is a stage within the *convocatoria*. Rejection by the creditors or the Court results in bankruptcy.

¹¹*Doctrina de Fallos* — The pronouncements of the court prior to reaching the resolutive part of a particular decision.

¹²There appears to be a typographical error in the Spanish text. The word *convocatoria* has been apparently substituted for *convocatoria*, i. e. the bankrupt [Swift].

¹³*Aclaratoria*—A decision or ruling by a court, at the request of one of the parties, to clarify a previous decision or ruling. See *recurso de aclaración*, note 2, *supra*.

¹⁴*Excusión* "Discussion," Black's Law Dictionary, 554 (4th ed., 1951).

¹⁵*Notificación*—Notice; service of process.

¹⁶*Junta*—A meeting of creditors contemplated by the *convocatoria*, i. e. a particular stage within the *convocatoria*. It is at the *Junta* where, among other things, the examination and verification of the creditor's claims take place.

¹⁷Note 14, *supra*.

¹⁸*Exclusion*—A remedy looking to the separation of entities, joined for any particular reason or as a consequence of a legal act or decision, from each other.

¹⁹"This *incidente* is found in Record No. 31.505 of the Registry of the Trial Court." This particular wording is included in the text of the decision, but is placed here to avoid confusion which may result from the translation of a very compressed and complex ruling by the Court. The wording apparently is introduced in the decision to complete the record, but is deemed not to have any substantive value.

²⁰Art. 71, Code of Civil and Commercial Procedure. "If the results of the trial or *incidente* were partially favorable to both litigants, the costs will be shared, or will be equitably assigned by the judge in proportion to the success obtained by each of the parties."

²¹Note 12, *supra*, is applicable.