

The transfer of company shares in Venezuela

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1. Introduction

a. The Venezuelan Commercial Code and the “sociedad anónima”

The regulations regarding corporations of the Venezuelan Commercial Code have been in force, in their present form, since 1955, when the 1904 Commercial Code was last amended.

Although major parts of the Commercial Code have been superseded by more recent legislation, for instance, regarding insurance and capital markets, the provisions which regulate the privately traded limited liability company, named *sociedad anónima*, have remained almost identical since 1955 (and many of them remain unchanged since 1904). Although there are other kinds of corporate entities in Venezuela, the most common and useful is the *sociedad anónima*, the “company”.

The Commercial Code’s provisions regarding companies set the framework, within which such proven, practical vehicles have allowed their participants to develop their business interests, in a modern, integrated economy which the legislators of 1955 (let alone 1904) would hardly recognize.

The company is an autonomous legal entity, with “juridical personality” (*personalidad juridica*). Its shareholders (who initially must be at least two) must agree to the bylaws, and register the act of incorporation and bylaws before the Commercial Registry and publish them in a local periodical publication (normally a specialized journal). Certain resolutions taken by the company after its incorporation must also be registered and published, according to the Commercial Code. For instance, every year the company must hold an ordinary shareholders meeting for the approval of the company’s financial statements, and other administrative matters; and, occasionally, the company may hold extraordinary shareholders meetings to take certain decisions. The minutes (*actas*) of the ordinary shareholders meeting, as well as the minutes of some other shareholders meetings which contain certain resolutions (such as changes to the bylaws, mergers, the dissolution of the company, the designation of the administrators¹, etc.) have to be filed in the Commercial Registry.

The main rules regarding the company are set in the Commercial Code, but not all are mandatory. In general terms, the shareholders have ample freedom to establish their preferences in the many situations in which the mandatory rules do not apply, and set such preferences in the bylaws, which they then may modify.

We may briefly summarize the Venezuelan companies’ structure as follows: Its governing body is the shareholders meeting (*asamblea de accionistas*); it is managed by the administrators, who may be individuals or a collective body (the board of directors or *junta directiva*), designated by the shareholders meeting; and there is an internal auditor (*comisario*), also designated by the shareholders meeting.

There is a large body of doctrinal work on the law of corporations, and specifically on companies, regarding which Venezuelan authors have written many books and essays.

b. The transfer of company shares

The flexibility of the rules regarding the company has produced an efficient instrument for the development of businesses of all kinds. One of the reasons for the lasting success of the company as a corporate entity in the Venezuelan legal system is the ease with which its shares may be transferred. Indeed, one of the essential rules regarding shares of companies is that they must be transferable. In Venezuela, there is general agreement that any provision in the bylaws which forbids the transfer of company shares is null and void. The shareholders may agree to a right of preference or to other additional requirements, but in the end the shareholder must be allowed to sell his/her shares.

The main provision regarding the transfer of the shares of a company is set in the first part of article 296 of the Commercial Code, which establishes the following:

¹ Although not required specifically by the Commercial Code, it has become customary and agreed to by Venezuelan doctrine, that subsequent designations of administrators must also be registered and published, in order to produce effects before third parties.

Article 296.- Ownership of nominative shares is proven with the inscription in the books of the company, and their transfer is made by a declaration in the same books, signed by the transferor and the transferee or by their proxies².

The text of article 296 has not changed since 1904, when article 285 of the Commercial Code contained the same provision. The “books of the company” are the books required by article 265 of the Commercial Code, which specifically mentions the book of shareholders or shareholders’ registry (*libro de accionistas*).

Therefore, the Commercial Code establishes that in order to prove that a transfer of shares has occurred, a declaration of such transfer must be inserted in the book of shareholders, and it must be signed by the transferor and the transferee. The Commercial Code further indicates that such book of shareholders must contain the name and domicile of each shareholder, the number of shares the shareholder owns, the amounts contributed initially and by any subsequent capital increase, as well as any transfer of shares³. The book of shareholders is kept by the company, and it must be available to the shareholders⁴.

As stated above, very few provisions of the Commercial Code regarding companies have been changed since 1955. One of the changes regards bearer shares. The Commercial Code allowed the issuance of bearer shares, the transfer of which was by means of the delivery of the certificates representing such shares. However, bearer shares are no longer legal in Venezuela, since our country joined the Andean Community (formerly the Andean Pact), which forbids bearer shares. Therefore, in Venezuela all company shares are nominative. Even though Venezuela is no longer part of the Andean Community, it is generally accepted that the Andean legislation which became law in Venezuela, after being approved by the Venezuelan legislator and duly published in the Venezuelan Official Gazette, is current and in force (except when derogated by the normal legislative channels).

If the company is publicly traded, and the transfer regards a “significant majority” (10%) of its shares, then the transaction is subject to a strict procedure under supervision by the National Superintendence on Securities (a topic not covered in this article).

This work shall refer to the opportunity when the effects of the transfer of shares are produced. That is, when does the transfer occur, and when does it produce effects, from the point of view of (i) the parties; (ii) the company and (iii) third parties.

² Commercial Code, Article 296: “*La propiedad de las acciones nominativas se prueba con su inscripción en los libros de la compañía, y la cesión de ellas se hace por declaración en los mismos libros, firmada por el cedente y por el cesionario o por sus apoderados.*”

The author has freely translated the texts which were originally in Spanish. In some cases, the author has considered appropriate to quote the original text in a footnote.

³ Commercial Code, Article 260: “*... El libro de accionistas, donde conste el nombre y domicilio de cada uno de ellos, con expresión del número de acciones que posea y de las sumas que haya entregado por cuenta de las acciones, tanto por el capital primitivo, como por cualquier aumento, y las cesiones que haga.*”

⁴ Commercial Code, Article 261.

2. Effects between the parties

In order to assign shares in a company, the assignor and the assignee must agree to the terms of the assignment. The agreement may be an informal verbal deal or a written contract, and –if the latter– may be subject to formalities such as notarization and/or registration.

Indeed, in certain cases, the parties may wish to have evidence of the exact date the agreement was executed (*fecha cierta*). In this case, the parties may sign a written agreement before a Notary Public, who will certify the identity of the persons subscribing the agreement as well as the date. If, for instance, as part of the negotiations the shares are going to be pledged, it is necessary that the document where the pledge is granted should have a certified exact date.

The question has arisen as to when the transfer of shares becomes effective between the parties, especially when analyzing the formalities attending the transfer.

As stated above, the transfer must be recorded in the book of shareholders. Certificates representing the shares may have been issued by the company. The Commercial Code establishes what elements should be contained by the share certificates; however it establishes no obligation to issue such certificates, so many companies do not issue them. If share certificates have been issued, then, if the shares are transferred, the declaration regarding the transfer must be recorded in the book of shareholders, and the share certificates must be endorsed by the transferor and the transferee and delivered to the latter.

So, with regard to the moment when the transfer of the shares is perfected between the parties, the question is if such formalities are necessary for the transfer to be effective?

We are of the opinion that the transfer of the shares is effective between the parties from the moment such parties have agreed to the transfer of the shares. The formalities regard the effects before third parties, including the company itself. The transfer between assignor and assignee is perfected by their mutual consent, with no need for the inscription of the entry regarding the assignment in the book of shareholders. Such inscription is *ad-probationem* and not *ad-substantiam*.

Equally, if share certificates have been issued, there is no need for them to be endorsed and delivered in order for the transfer of the shares to produce effects between the parties

Most of the Venezuelan authors who have written upon this subject agree⁵.

⁵ For, among others: José Loreto Arismendi, *Tratado de las Sociedades Civiles y Mercantiles*, 1950, pág. 397-8; Roberto Goldschmidt, *Curso de Derecho Mercantil*, 1964, p. 285; Pedro Pineda León, *Principios de Derecho Mercantil*, 1964, p. 418; Alfredo Morles Hernández, *El sistema registral de la transferencia de acciones nominativas de la sociedad anónima*, 2005, p. 3; Luisa Acedo de Lepervanche, *El traspaso de las acciones de una sociedad anónima*, 2011, p.451. Against: Leopoldo Borjas, *Concepto y Clasificación de los Títulos de Crédito*, 1968, p.36.

3. Effects before the company and before other third parties

As stated above, article 296 of the Commercial Code establishes that in order to prove the transfer of the shares, such transfer must be recorded in the book of shareholders. And the delivery of the certificates is an additional formality, to be complied with if such certificates have indeed been issued (however, if there is a contradiction between the certificate and the book of shareholders the latter must prevail).

So, we may conclude that the transfer of the shares is effective between the parties from the moment of the agreement; and that in order for such transfer to be effective before third parties (including the company itself), it must be recorded in the book of shareholders. There are no additional formalities required by law; for instance, there is no need to register the transfer of the shares before the Commercial Registry, or authenticate such transfer by means of a public official document.

There is a virtual unanimous agreement of the many Venezuelan authors who have written upon this subject⁶.

As we have seen above, certain resolutions taken by the company after its incorporation must be registered and published, according to the Commercial Code. The minutes of the shareholders meetings which take such resolutions have to be filed before the Commercial Registry. Therefore, the Commercial Registry's file on each company contains a historical record of owners of the company shares, limited to the shareholders present at such company's shareholders meetings. But such historical record only reflects the shareholders present at those meetings which treat subjects that the law requires to be registered. And since there is no legal requirement to register the transfer of the shares, the Commercial Registry's file may show that a company had certain shareholders when the ordinary shareholders meeting was held, and had other shareholders at the next registered shareholders meeting minutes; but there does not have to be evidence at the Commercial Registry of the transfers of shares which may have occurred in between, or after the last registered minutes. So in order to have evidence of the current owners of the shares of a company, the book of shareholders of such company must be consulted.

4. Jurisprudence regarding the effects before the company and before third parties

a. Before 2005

Until 2005, in general terms, the jurisprudence of the former Supreme Court of Justice and the current Supreme Tribunal of Justice agreed with the almost unanimous opinion of

⁶ For, among others: José Loreto Arismendi, *Tratado de las Sociedades Civiles y Mercantiles*, 1950, pág. 398; Roberto Goldschmidt, *Curso de Derecho Mercantil*, 1964, p. 285-6; Pedro Pineda León, *Principios de Derecho Mercantil*, 1964, p. 418; Benito Sansó, *Sociedades Anónimas en Venezuela*, 1968, p. 136-37; Alfredo Morles Hernández, *Curso de Derecho Mercantil*, 2004, p. 1236; Luisa Acedo de Lepervanche, *El traspaso de las acciones de una sociedad anónima*, 2011, p.452. Against: Leopoldo Borjas, *Concepto y Clasificación de los Títulos de Crédito*, 1968, p.36.

Venezuelan writers, regarding the moment when the transfer of the shares produces effects, and the requirements in order for such transfer to be effective before third parties.

In 1964, the Supreme Court of Justice expressed the following: “the inscription in the book of shareholders is the legal means to prove the ownership of nominative shares and therefore the right to possess them,”⁷ when rejecting a lower court’s opinion that a public official document was needed.

In 1967, the Supreme Court of Justice seemed to separate the effects of the transfer with respect to the company from the effects before other third parties. In a confusing decision, it stated that “the sale or assignment shall be perfectly valid between the parties by the agreement... even if not recorded in the book of shareholders, and shall produce effects also against third parties, with the exception of the company with regard to the corporate rights and obligations, when it is evidenced in public official documents. But with regard to the company, and only with respect to rights and obligations derived from the quality of shareholder, the ownership of the shares can only be proved in the form provided in article 296 of the Commercial Code.”⁸ This wording has been taken to mean that the transfer of the shares produced its effects (i) between the parties, from the moment of agreement; (ii) before the company, from the moment of the inscription in the shareholders book; and (iii) before third parties, with no need of such inscription, when recorded in public official documents. However, a careful study of the decision reveals that the Court was referring to a specific case, in which the transfer of the shares had not been yet inscribed in the book of shareholders, but the assignment was made by means of a public official document. This public official document allowed the Court to accept that the transfer had not only occurred, producing its effects before the parties, but had also produced its effects before third parties. This is understandable, assuming that said document was public and official as a result of its having been filed at the Commercial Registry, because the purpose of any filing at this registry is, precisely, to grant the registered document effects before third parties. The filing at the Commercial Registry is not necessary regarding the transfer of shares, since the inscription in the shareholders book is enough; but, if said registration is nevertheless made, it makes sense to consider that such transfer has effects between the parties, and also vis-à-vis third parties, in spite of the lack of record in the shareholders book. Under the assumption that said document was public and official as a result of its

⁷ Gaceta Forense, N° 45, p. 425. Judge, Carlos Acedo Toro, 1964. “La Corte observa: que es cierto que, siendo la inscripción en el libro de accionistas el medio legal reconocido por el legislador para probar la propiedad de las acciones nominativas y por tanto su derecho a poseerlas, es claro que el sentenciador incurrió en error al decir que tal libro no constituye prueba fehaciente de ese derecho a poseer, por sólo tener ese carácter, según él, un documento público, autenticado o reconocido. Tal errada declaración implica un desconocimiento evidente de los efectos que la ley atribuye al libro de accionistas, y también del correcto alcance del concepto de prueba fehaciente.”

⁸ Gaceta Forense N° 56, p. 373. Judge, Carlos Trejo Padilla, 1967. “El acto de venta o cesión será pues perfectamente válido entre las partes por el acuerdo de las voluntades contratantes, aunque no se haya inscrito en el libro de accionistas, y producirá también efectos contra terceros, excepto la sociedad, en lo atinente a los derechos y obligaciones dimanantes del pacto social, cuando conste en instrumentos dotados de fe pública. Pero frente a la sociedad y sólo en cuanto respecta al ejercicio de derechos y cumplimiento de obligaciones derivadas de la calidad de accionista, la propiedad de las acciones nominativas no puede probarse en otra forma diferente a la prevista en el artículo 296 del Código de Comercio.”

having been filed at the Commercial Registry, there is no real contradiction between what the Supreme Court of Justice expressed in 1964 and what the Supreme Court of Justice expressed in 1967. Indeed, the effects vis-à-vis third parties of a transfer of shares may result from (i) the record in the shareholders registry pursuant to article 296 of the Commercial Code, as expressed by the Supreme Court of Justice in 1964, or (ii) from the filing at the Commercial Registry pursuant to what the Supreme Court of Justice expressed in 1967. From this perspective, the filing at the Commercial Registry is not required, but may be very useful, particularly if there is no record in the shareholders book. However, in our opinion, such decision should not have said that a public official document that has effects vis-à-vis third parties does not have effects vis-à-vis the company when there is no record in the shareholders book.

In 1968 the Supreme Court of Justice issued a decision in which it agreed with the unanimous doctrinal opinion, and set the issue clearly: "...the way to prove ownership before the company or third parties is... the inscription in the Book of Shareholders, but that does not mean that the mere circumstantial fact that someone should appear as shareholder of a company may not result, as any other fact, [contradicted] by other elements of truth which may be provided."⁹ Said decision does not specify this, but it is obvious that a public official document, such as a document filed at the Commercial Registry evidencing the transfer of the shares, proves this transfer; so, confronted with such evidence, the company must make the corresponding inscription at the shareholders book and recognize the transferee as the new shareholder with respect to the corresponding shares. Accordingly, it is fair to say that, even before the record in the shareholders book, the transfer made by means of a public and official document presented by the transferor or the transferee has effects vis-à-vis the company whose shares were thus transferred.

In 1999, the Supreme Court of Justice ratified the previous decision by reproducing the wording of article 296 of the Commercial Code: "in order for the transfer of the ownership of nominative shares to produce effects before the company and other parties, it is necessary that the Book of Shareholders should contain the declaration, signed by the assignor and the assignee."¹⁰

The Supreme Tribunal of Justice, which substituted the Supreme Court of Justice upon the enactment of the 1999 Constitution, also ratified the criterion expressed above, in decisions of August, 2001¹¹ and February 2003¹², both of which were issued by the Civil Chamber

⁹ Gaceta Forense, N° 60, p. 332. Judge, Carlos Acedo Toro, 1968. "*Cuando alguien se pretende dueño o titular de una acción nominativa, la manera de comprobar su derecho de propiedad, ante la Compañía o ante terceros, es, como lo establece dicho artículo, la inscripción en el Libro de Accionistas, pero eso no quiere decir que el mero hecho circunstancial de que alguien aparezca como accionista de una compañía, no pueda resultar, como cualquier otro hecho, de lo que arrojen otros elementos de prueba.*"

¹⁰ "... para que la transmisión de la propiedad de las acciones nominativas produzca efectos frente a la sociedad y los terceros, es necesario que conste en el Libro de Accionistas la declaración firmada por el cedente y el cesionario." Decision of the Civil Chamber of the Supreme Court of Justice, 14 April, 1999.

¹¹ <http://www.tsj.gov.ve/decisiones/scc/Agosto/RC-0283-100801-00497-00371.htm>. Judge: Antonio Ramírez Jiménez.

and were explicitly based on article 296 of the Commercial Code (and both reproduced the sentence quoted in the above paragraph).

In March of the same year 2003¹³, the Political-Administrative Chamber of the Supreme Tribunal also issued a decision in which the judge quoted article 296 of the Commercial Code, and used its provisions as one of the founding arguments for his decision regarding the ownership of disputed shares. In this decision the judge stated that “the Venezuelan doctrine, in its interpretation of the quoted text [article 296 of the Commercial Code], has mostly supported the thesis according to which the condition of shareholder before the company and third parties is acquired by means of the respective inscription in the book of shareholders.¹⁴” The judge then quotes another decision by the Supreme Court of Justice, of 1989, as stating that “the inscription in the book of shareholders of the assignment of nominative shares is a requirement which must be complied with for the act to be effective before the company and third parties.” It is interesting to note that the judges who issued the March 2003 decision, also issued a contradictory opinion which we shall comment upon below: the Agroflora decision.

As late as 2004, the Constitutional Chamber of the Supreme Tribunal of Justice stated that in limited liability companies the identity of the parties is irrelevant to the credit of the company; and that in view of that fact, the sale of shares is of no interest to third parties, it is therefore not required to inscribe such transfer in the Commercial Registry. The decision continued by quoting article 296 of the Commercial Code in its entirety, and then stating that there is no need to register the transfer of the shares before the Commercial Registry, even if such transfer has meant that the bylaws have been modified, for instance to state the name of the new shareholder, if such information was contained in the bylaws.¹⁵

These are not the only judicial decisions regarding this matter, but they are among the most significant. We can find no decision that contradicts them. So, until 2004, the decisions of the highest court in Venezuela (formerly the Supreme Court of Justice and currently the Supreme Tribunal of Justice) all agreed that in order to prove the ownership of shares of companies, their transfer had to be recorded in the book of shareholders. However, the inscription in the book of shareholders is a circumstantial fact, which may be disproved, as other facts, by other means of evidence, if applicable. And such evidence may be a document filed at the Commercial Registry, which has effects between the parties and third parties, including the company (the company is a third party regarding which a registered document has effects).

¹² <http://www.tsj.gov.ve/decisiones/scc/Febrero/%20RNyC-0001-270203-01682%20.htm> Judge: Carlos Oberto Vélez.

¹³ <http://www.tsj.gov.ve/decisiones/spa/Marzo/00336-060303-2001-0838.htm>. Judge, Levis Ignacio Zerpa.

¹⁴ “La doctrina venezolana al interpretar el precepto transcrito, se ha inclinado mayoritariamente por la tesis según la cual, la condición de accionista frente a la sociedad y los terceros se adquiere mediante la respectiva inscripción en el libro de accionistas.”

¹⁵ <http://www.tsj.gov.ve/decisiones/scon/Marzo/287-050304-02-2992.htm>. Judge, José Manuel Delgado Ocando

The judicial decisions which we have reviewed make no requirement of formalities other than the record in the shareholders book for the transfer to be effective before third parties. Specifically, there is no requirement to register the transfer before the Commercial Registry for it to be effective before third parties. Indeed, the Supreme Tribunal specifically denied the need for such requirement.

b. The Agroflora decision

In March 2009, the Supreme Tribunal of Justice, in its Political-Administrative Chamber, issued a very controversial decision, written by the same judge which had rendered the March 2003 decision. In what has come to be known as the Agroflora decision (the parties were the Tax Administration and a company called Agropecuaria Flora C.A., Agroflora), the judge sentenced that in order for the transfer of shares of a company to produce effects before third parties, such transfer had to be registered before the Commercial Registry and published in a local newspaper.

As stated above, the Commercial Code provides that certain documents regarding companies must be inscribed in the Commercial Registry, and then published in a local periodical publication (normally a specialized journal). The decision quotes the following articles of the Commercial Code, 19(9),19(25), 212, 215, 217 and 221 (none of which refers to the transfer of shares of a company), stating that “the Legislator’s intention” was “the need to leave evidence in the Commercial Registry of all the actions which signify changes or alterations which are of interest to third parties, as well as the publication of such amendments, since it is from the moment of publication that third parties shall be aware of the amendments, that is, of the company’s shareholder conformation, and therefore, of the persons able to oblige such company.”¹⁶ The decision does not refer, even once, to article 296 of the Commercial Code, which specifically regulates the subject matter of the decision.

In the Agroflora case, the taxpayer submitted to the Court the book of shareholders of Agroflora in order to determine who the shareholders were at a certain moment in time. The judges, in their decision, sentenced as follows:

In the case of the evidence presented by the taxpayer, relative to the transfer of the shares by November 20, 1991, in order to show who were its shareholders at that date, this Court must observe that such inscriptions prove the title of the shares between the shareholder and the company itself, but not before third parties;

¹⁶ “De la normativa citada supra, se desprende que la intención del Legislador fue, entre otras, la de hacer ineludible el dejar la debida constancia en el respectivo Registro de Comercio, de todas aquellas actuaciones que signifiquen cambios o alteraciones que interesen a terceros en los documentos constitutivos-estatutarios de las diversas formas societarias reguladas por el Código de Comercio, así como la publicación de dichas reformas, pues será a partir de ésta que los terceros estarán en conocimiento de las modificaciones que puedan haber ocurrido en las sociedades de que se trate, vale decir, de su conformación societaria o accionaria y, por ende, de quiénes están en capacidad de obligar a dicha compañía.”

therefore, such document may not be opposed to the Tax Administration in order to prove the inserted transfer of shares, while its registration and publication have not been made. For that reason, it is necessary for this Chamber to dismiss the alleged evidentiary value of entries inserted in said book of shareholders presented by the taxpayer. Thus it is declared.”¹⁷

Even though none of the articles of the Commercial Code quoted and interpreted at length in the decision refer to the transfer of the shares of a company, and, on the contrary, there is a specific provision –article 296– which rules the matter object of the decision, the judges decided to ignore the correct rule they should have applied (not even mentioning it in the 26 pages of the decision), and applied instead other provisions which are not pertinent.

In addition, in order to try to establish the need to register and publish the transfer of shares, the Agroflora decision wrongly stated that shareholders are able to act on behalf of the company. The decision, in very unclear wording, states that only from the moment of publication are third parties aware of the company’s shareholder conformation, and therefore, of the persons who are able to act on behalf of such company¹⁸. However, in accordance with Venezuelan law it is the administrators (whether a board of directors or individual administrators, as established in the bylaws) who may act of behalf of the company. The shareholders designate the administrators, in a shareholders meeting held within the parameters of the bylaws and the Commercial Code. But the shareholders do not represent the company, and their actions and decisions do not oblige the company, unless (i) properly authorized by the administrators in accordance to the bylaws, or (ii) the shareholders decide something in a shareholders meeting, in which case this decision binds the company, so its administrators must abide by it. So referring to “shareholder conformation” of a company as being “able to oblige such company” (in the sense of the shareholders having the authority to enter into contracts in the company’s name) is simply and clearly wrong (the shareholders may jointly reach decisions that bind the company, but do not represent it vis-à-vis third parties).

In conclusion, the judge in the Agroflora decision (i) did not apply the specific article which rules the transfer of shares (and did not even mention it, even though his decision contradicts such legal provision); (ii) applied certain provisions of the Commercial Code which are not pertinent to the matter being decided; and (iii) wrongly implied that shareholders represent companies.

¹⁷ “*En el caso de la prueba promovida por la contribuyente, relativa al traspaso de las acciones para el 20 de noviembre de 1991, a fin de mostrar quiénes eran sus accionistas para esa fecha, debe esta Alzada observar que tales inscripciones demuestran la titularidad de las acciones entre el accionista y la propia sociedad, pero no así frente a terceros; por tanto, dicho documento no resulta oponible ante el Fisco Nacional para comprobar el traspaso de acciones asentado, mientras no se haya efectuado su registro y publicación, conforme a los términos de las aludidas normas. En razón de ello, resulta forzoso para esta Sala desestimar el pretendido valor probatorio de las inscripciones asentadas en el referido libro de accionistas, promovido por la contribuyente. Así se declara.”*

¹⁸ “*será a partir de ésta que los terceros estarán en conocimiento de las modificaciones que puedan haber ocurrido en las sociedades de que se trate, vale decir, de su conformación societaria o accionaria y, por ende, de quiénes están en capacidad de obligar a dicha compañía.”*

c. Further decisions by the Supreme Tribunal of Justice

At least two subsequent decisions of the Supreme Tribunal of Justice have ignored the Agroflora decision, sentencing in accordance with article 296 of the Commercial Code.

The Civil Chamber of the Supreme Tribunal of Justice, in June 3, 2009, quoted article 296 of the Commercial Code, indicating that it was the “traditional doctrine” of the Supreme Tribunal that “the ownership of shares is transferred by the inscription in the company books”¹⁹. And in July 27, 2010, the Political Administrative Chamber of the Supreme Tribunal of Justice again based its decision on article 296 of the Commercial Code²⁰. Neither decision required the registration and publication of the share transfer in order for such transfer to produce effects before third parties.

However, a few first instance courts have followed the Agroflora decision.

As a consequence of all the above, and in order to avoid problems regarding the effects before third parties (for instance the tax authority), for reasons of practicality many individuals and corporations now formally notify the transfer of shares to the Commercial Registry, or hold an extraordinary shareholders meeting where the shares are transferred, and the relevant minutes are filed at the Commercial Registry. This may be useful, but is unnecessary under the law.

5. Other registration requirements

a. Registration of foreign investment

Even though Venezuela is no longer a member of the Andean Community, the rules regarding foreign investments which were approved by its members, including Venezuela, are still being applied, since they followed the internal legislative procedure, having been approved by the Venezuelan Congress and published in the Official Gazette. According to such legislation, there is an obligation to register foreign investments within 60 days before the Superintendence of Foreign Exchange (SIEX); but the absence of registration is not penalized.

In Venezuela, since 2003, foreign currency may not be freely exchanged; there is a very strict exchange control system. If an acquisition of shares is made in foreign currency, the foreign currency amount used to acquire the shares must be exchanged for local currency (*bolivar*), through the banking system, at the Venezuelan Central Bank, at the official exchange rate. Then a lengthy procedure must be followed in order to register the investment before the Superintendence of Foreign Exchange (SIEX). The registration of the foreign investment gives the investor the right to request the repatriation of dividends, and eventually of capital, at the official exchange rate, by following procedures established by

¹⁹ <http://www.tsj.gov.ve/decisiones/scc/Junio/RC.00311-3609-2009-06-1082%20AC.html>. Co-Judge: Freddy Belisario Capella.

²⁰ <http://www.tsj.gov.ve/decisiones/spa/Julio/00796-28710-2010-2009-0254.html>. Judge: Emiro García Rosas.

the foreign exchange authority (CADIVI) under very strict rules. The foreign currency requested may be granted or not, depending on governmental priorities and availability, according to such rules.

If the shares being acquired are already a registered investment in SIEX, then their assignment must be notified to SIEX.

b. Notice to the tax authorities

If the acquisition of shares implies a “change” of shareholders, it must be notified to the tax authorities (Seniat), within 30 working days, in accordance with the regulations of the tax information registry.

c. Certificate of social security solvency

The Social Security System Law orders Commercial Registrars to request a certificate of social security solvency, in order to register any “sale, assignment, lease, donation or transfer of dominium of enterprises or establishments”. The wording of this provision (which does not use the word “control”, but the more obscure “dominium”) has been taken to mean that in order for the Commercial Registrars to register a shareholders meeting minute which refers to a transfer of shares, the company must present a certificate of solvency issued by the Venezuelan Institute of Social Security.

6. Conclusions

The ownership of shares of a company is proved by the inscription of the transfer in the book of shareholders, in accordance with article 296 of the Commercial Code.

The transfer is valid between the parties from the moment of their agreement; and is valid before third parties (including the company itself) from the moment it is recorded in the book of shareholders.

According to Venezuelan law, there is no need to formally notify the Commercial Registry that the shares have been transferred. Notwithstanding this, the Political Administrative Chamber of the Supreme Tribunal of Justice issued an erroneous decision in 2005 indicating that, in order to be valid before third parties, the transfer must be registered before the Commercial Registry and published. Subsequent decisions of the Supreme Tribunal have ignored this decision, and sentenced following article 296 of the Commercial Code.

However, in order to avoid doubts about the moment when the transfer occurred and was valid before third parties (especially with regard to state entities, such as the tax administration), many individuals and corporations now formally register the transfer of shares in the Commercial Registry. Unfortunately, the Commercial Registry offices in Venezuela do not have standard approaches to legal issues. This is apparent with regard to

the need to register the transfer of shares; for instance, some Commercial Registries have considered that such registration is necessary, so, in order to register a document subsequent to a transfer of shares, it may require that this transfer be registered too. If, for example, the registered minutes of a shareholders meeting show certain shareholders and the minutes of the following shareholders meeting show other shareholders, the registrar may delay the registration of the second minutes, until the transfers that took place between the first and the second minutes are registered. In other cases, and more in accordance with article 296 of the Commercial Code, the Registrar may request to see the book of shareholders, to verify that the transfer has occurred and has been duly inserted in such book.

Foreign investment in shares must be registered before the Superintendence of Foreign Exchange (SIEX); and if the shares have already been registered, the transfer must be notified to SIEX.

The change of shareholders must be notified to the tax authorities.

When the transfer of shares entails a transfer of “dominium” of the company, the Commercial Registrar is obliged to request a certificate of social security solvency of the company in order to register the transfer of the shares.