Transfer of Company Shares in Venezuela

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Introduction

Commercial Code and Limited-Liability Companies

The regulations on corporate structures set forth in the Venezuelan Commercial Code have been in force, in their present form, since 1955, when the Commercial Code of 1904 was last amended.

Major parts of the Commercial Code have been superseded by more recent legislation, such as laws regarding insurance and capital markets. However, the provisions that regulate the privately traded limited-liability company or closed corporation (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 private limited-liability company, referred to as “the company” in this chapter.

The provisions of the Commercial Code regarding companies establish the framework within which such proven, practical corporate structures have enabled 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 jurídica). There must initially be at least two shareholders, who must agree to the bylaws and register the act of incorporation and the bylaws at the Commercial Registry and publish them in a local periodical publication (normally a specialized journal).

According to the Commercial Code, certain resolutions taken by the company after its incorporation also must be registered and published. 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; occasionally, the company
may hold extraordinary shareholders’ meetings to take certain decisions. The minutes (actas) of the ordinary shareholders’ meeting and the minutes of some other shareholders’ meetings which are convened to pass important resolutions — such as changes to the bylaws, mergers, the dissolution of the company, and the designation of the administrators — have to be filed at the Commercial Registry.

The principal rules regarding the company are set forth 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 may subsequently modify.

The governing body of a Venezuelan company is the shareholders’ meeting (asamblea de accionistas). The company 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. An internal auditor (comisario) also is designated by the shareholders’ meeting.

Share Transfers

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. Although shareholders may agree to preference rights or to other additional requirements, a shareholder must always be allowed to sell his shares.

The most important provision regarding the transfer of shares of a company is set in the first part of Article 296 of the Commercial Code, which states:

“Article 296 — Ownership of nominative shares is proven with the inscription in the books of the company, and their

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1 Although not required specifically by the Commercial Code, it has become customary and agreed to by Venezuelan doctrine, that subsequent designations of administrators also must be registered and published, in order to produce effects before third parties.
transfer is made by a declaration in the same books, signed by
the transferor and the transferee or by their proxies.’’

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 share-
holders’ register (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 shareholders’ register and it must be signed by
the transferor and the transferee. The Commercial Code further indicates
that the shareholders’ register must contain the name and domicile of
each shareholder, the number of shares the shareholder owns, the
amounts contributed initially and at any subsequent capital increase,
as well as any transfer of shares. The shareholders’ register is kept by
the company, and it must be available to the shareholders.\(^2\)

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,
which may be transferred by delivering the share certificates. How-
ever, bearer shares are no longer legal in Venezuela since it 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 Commu-
nity, 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 (Gaceta oficial
de la República de Venezuela), is current and in force, except when
derogated by the normal legislative channels.

If the company is publicly traded and the transfer regards a “signif-
ificant majority” of ten per cent of its shares, the transaction is subject to
a strict procedure under the supervision of the National Superintend-
dence on Securities (Superintendencia Nacional de Valores). Publicly
traded shares are beyond the scope of this chapter.

This chapter focuses on the legal effects of share transfers. It discusses
when the transfer occurs and when it produces effects, from the point of
view of the parties to the transfer, the company, and third parties.

\(^2\) Commercial Code, Article 261.
Effects between 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. A contract may be subject to formalities such as notarization and/or registration.

In certain cases, the parties may wish to have evidence of the exact date on which the agreement was executed (fecha cierta). To have this evidence, the parties may sign a written agreement before a notary public, who will certify the identity of the persons signing the agreement as well as the date. If the shares are going to be pledged as part of the negotiations, it is necessary that the document granting the pledge should have a certified 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.

The transfer must be recorded in the shareholders’ register. The company may have issued certificates representing the shares. Although the Commercial Code provides for the elements that should be included in share certificates, it establishes no obligation to issue such certificates, and many companies do not issue them. If share certificates have been issued and the shares are subsequently transferred, the declaration regarding the transfer must be recorded in the shareholders’ register, and the share certificates must be endorsed by the transferor and the transferee and delivered to the latter.

With regard to the moment when the transfer of shares is perfected between the parties, the question that arises is whether such formalities are necessary for the transfer to be effective. The author is of the opinion that the transfer of shares is effective between the parties from the moment the parties have agreed to the transfer of 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 transfer to be recorded in the shareholders’ register. This record is a formal requirement to evidence the transfer (ad probationem) and is not necessary for the validity of the contract (ad substantiam).

Likewise, if share certificates have been issued, there is no need for them to be endorsed and delivered for the transfer of shares to produce
effects between the parties. This opinion is shared by most Venezuelan authors who have commented on this subject.

**Effects as to Company and Third Parties**

Article 296 of the Commercial Code establishes that in order to prove the transfer of shares, the transfer must be recorded in the shareholders’ register. 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 shareholders’ register, the latter will prevail.

It may therefore be reasonably concluded that the transfer of shares is effective between the parties from the moment of the agreement and that for the transfer to be effective before third parties (including the company itself), it must be recorded in the shareholders’ register. There are no additional formalities required by law; for instance, there is no need to register the transfer of shares at the Commercial Registry or authenticate the transfer by means of a public official document. There is virtually unanimous agreement on this subject by the many Venezuelan authors who have commented on it.

According to the Commercial Code, certain resolutions taken by the company after its incorporation must be registered and published. The minutes of the shareholders’ meetings which take such resolutions also have to be filed at the Commercial Registry.

Therefore, the Commercial Registry’s file on each company contains a historical record of the owners of the company’s shares, limited to the shareholders present at the company’s shareholders’ meetings. However, this historical record only reflects the shareholders present at those meetings which treat subjects that the law requires to be registered.

As there is no legal requirement to register share transfers, 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; there does not have to be evidence at the Commercial Registry of the transfers of shares which may have occurred in the interval between the meetings or after the last registered minutes. In order to have evidence of the current owners of the shares of a company, the shareholders’ register of the company must be consulted.
Applicable Case Law

Before 2005

Until 2005, the jurisprudence of the former Supreme Court of Justice and the current Supreme Tribunal of Justice generally agreed with the almost unanimous opinion of Venezuelan writers regarding the moment when the transfer of shares produces effects and the requirements for such transfer to be effective before third parties.

In 1964, the Supreme Court of Justice rejected a lower court’s opinion that a public official document was needed. The Court held that “the inscription in the shareholders’ register is the legal means to prove the ownership of nominative shares and therefore the right to possess them”.

In 1967, the Supreme Court of Justice seemed to separate the effects of the transfer with respect to the company from the effects before third parties. In a confusing decision, it stated:

“... the sale or assignment shall be perfectly valid between the parties by the agreement... even if not recorded in the shareholders’ register, and shall also produce effects 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.”

This wording has been taken to mean that the transfer of shares produced effects between the parties from the moment of agreement; that it produced effects before the company from the moment of its record in the shareholders’ register; and that it produced effects before third parties when recorded in public official documents, with no need of a record in the shareholders’ register.

However, a careful study of the decision reveals that the Court was referring to a specific case in which the transfer of shares had not been yet entered in the shareholders’ register, but where 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

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occurred, producing its effects between the parties, but also had produced its effects before third parties. This is understandable, assuming that the document was public and official as a result of its having been filed at the Commercial Registry, because the very purpose of any filing at the Registry is to grant the registered document effects before third parties.

The filing at the Commercial Registry is not necessary for the transfer of shares, as the record in the shareholders’ register is enough. However, if the transfer of shares has been registered, it is reasonable to consider that the transfer has effects between the parties and also vis-à-vis third parties, even when not recorded in the shareholders’ register. Under the assumption that the document was public and official as a result of its 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 of a transfer of shares vis-à-vis third parties may result from the record in the shareholders’ register pursuant to Article 296 of the Commercial Code, as expressed by the Supreme Court of Justice in 1964; alternatively, it may result from a filing at the Commercial Registry, as expressed by the Supreme Court of Justice in 1967. From this perspective, a filing at the Commercial Registry is not required, but may be very useful, particularly if there is no record in the shareholders’ register.

However, in the authors’ opinion, the Court’s decision in 1967 should not have stated 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’ register.

In 1968, the Supreme Court of Justice issued a decision in which it agreed with the unanimous doctrinal opinion and established the issue clearly, stating:

“. . . the way to prove ownership before the company or third parties is . . . the inscription in the shareholders’ register, 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.”

Although the Court’s decision does not specifically state so, it is obvious that a public official document, such as a document filed at the

Commercial Registry evidencing the transfer of shares, proves the share transfer. Confronted with such evidence, the company must make the corresponding record in the shareholders’ register and recognize the transferee as the new shareholder of the corresponding shares. Accordingly, it is fair to say that even before the record in the shareholders’ register, a transfer made by means of a public official document presented by the transferor or the transferee has effects vis-à-vis the company whose shares were transferred.

In 1999, the Supreme Court of Justice ratified its previous decision by reproducing the wording of Article 296 of the Commercial Code, stating that “for the transfer of the ownership of nominative shares to produce effects before the company and other parties, it is necessary that the shareholders’ register should contain the declaration signed by the assignor and the assignee”.

The Supreme Tribunal of Justice, which replaced the Supreme Court of Justice after the enactment of the 1999 Constitution, also ratified the Supreme Court decision of 1999 in decisions of August 2001 and February 2003. Both decisions were explicitly based on Article 296 of the Commercial Code.

In March 2003, 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:

“. . . 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 status of shareholder before the company and third parties is acquired by means of the respective inscription in the shareholders’ register.”

The judge then quoted a decision by the Supreme Court of Justice in 1989, which had stated that “the inscription in the shareholders’ register of the assignment of nominative shares is a requirement which

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6 Decision of the Supreme Court of Justice, Civil Chamber, 14 April 1999.
must be complied with for the act to be effective before the company and third parties”. An interesting point is that the judges who issued the March 2003 decision also issued a contradictory opinion in the Agroflora decision.

In 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. It further stated that as the sale of shares is of no interest to third parties, recording such transfers at the Commercial Registry is not required. 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 shares at the Commercial Registry, even if such transfer has meant that the bylaws have been modified, such as to state the name of the new shareholder, if such information was contained in the bylaws.10

These are by no means the only judicial decisions regarding this matter, but they are among the most significant. The author can find no decision that contradicts them. Consequently, 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 shareholder’s register. However, the inscription in the shareholders’ register is a circumstantial fact which may be disproved, as can other facts, by other applicable means of evidence. Such evidence may be a document filed at the Commercial Registry, which has effects between the parties and before third parties, including the company (the company is a third party regarding which a registered document has effects).

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

Agroflora Decision

In March 2009, the Supreme Tribunal of Justice issued a very controversial decision, written by the same judge who had rendered the

decision in March 2003. In that case, the judge had held that “the inscription in the shareholders’ register 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”.

In what has come to be known as the Agroflora decision, the parties were the Tax Administration and a company called Agropecuaria Flora CA (Agroflora). In this case, the judge ruled that for the transfer of shares of a company to produce effects before third parties, the transfer had to be registered at the Commercial Registry and published in a local newspaper.

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).\(^\text{11}\) The Agroflora decision quoted Articles 19(9), 19(25), 212, 215, 217, and 221 of the Commercial Code (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 formation, and therefore, of the persons able to oblige such company.”\(^\text{12}\)

The decision does not once refer to Article 296 of the Commercial Code, which specifically regulates the subject matter of the decision.

In Agroflora, the taxpayer submitted Agroflora’s shareholders’ register to the Court in order to determine who the shareholders were at a certain moment in time. The decision stated:

“In the case of the evidence presented by the taxpayer, relative to the transfer of shares by 20 November 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 shareholders and the company itself, but not before third parties; therefore, such document may not be


\(^{12}\) Decision of the Supreme Tribunal of Justice, Political-Administrative Division, March 2009, Judge Levis Ignacio Zerpa.
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 shareholders’ register presented by the taxpayer. Thus it is declared.”

None of the articles of the Commercial Code quoted and interpreted at length in the decision refers to the transfer of shares of a company; on the contrary, the specific provision (Article 296) that governs the subject matter of the decision was not mentioned. In Agroflora, the judges decided to ignore the correct rule they should have applied (not even mentioning it in the twenty-six pages of the decision), and instead applied 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 aware of the persons who are able to act on behalf of the company.

However, under Venezuelan law, it is the administrators (whether a board of directors or individual administrators, as established in the bylaws) who may act on behalf of the company. The shareholders designate the administrators at a shareholders’ meeting held within the parameters of the bylaws and the Commercial Code. The shareholders, however, do not represent the company, and their actions and decisions do not oblige the company, unless these actions or decisions are properly authorized by the administrators in accordance with the bylaws, or the shareholders pass a resolution in a shareholders’ meeting, in which case this decision binds the company, so its administrators must abide by it.

Consequently, 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, because the shareholders may jointly reach decisions that bind the company, but they do not represent it vis-à-vis third parties.

The Agroflora decision was faulty on three grounds: first, the judge did not apply the specific article which rules the transfer of shares (and did not even mention it, even though his decision contradicts that legal provision); second, the judge applied certain provisions of the
Commercial Code which are not pertinent to the matter being decided; and third, the judge wrongly implied that shareholders represent companies.

**Further Decisions by Supreme Tribunal of Justice**

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

In June 2009, the Civil Chamber of the Supreme Tribunal of Justice 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”. In July 2010, the Supreme Tribunal of Justice again based its decision on Article 296 of the Commercial Code. Neither decision required the registration and publication of a share transfer for that transfer to produce effects before third parties.

However, a few first-instance courts have followed the *Agroflora* decision. As a consequence of this case law, and in order to avoid problems regarding the effects before third parties (for instance, the tax authorities), many individuals and corporations, for practical reasons, 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 a useful practice, but is not required by the law.

**Other Registration Requirements**

**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. This is because the rules followed the internal legislative procedure approved by the Venezuelan Congress and published in the *Official Gazette*.

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13 Decision of the Supreme Tribunal of Justice, Civil Chamber, 3 June 2009, Co-Judge Freddy Belisario Capella.
According to such legislation, there is an obligation to register foreign investments with the Superintendence of Foreign Investment (Superintendencia de Inversiones Extranjeras — SIEX) within sixty days. However, the absence of registration is not penalized.

In Venezuela, there is a very strict exchange control system since 2003, and foreign currency may not be freely exchanged. 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. After the exchange, a lengthy procedure must be followed to register the investment before 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 the Foreign Exchange Commission (Comisión de Administración de Divisas — CADIVI) under very strict rules. Under these rules, the foreign currency requested may or may not be granted, depending on governmental priorities and availability.

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

**Notice to Tax Authorities**

If the acquisition of shares implies a “change” of shareholders, this must be notified to the Customs and Tax Administration (Servicio Nacional Integrado de Administración Aduanera y Tributaria — SENIAT). The notification must be sent within thirty working days, in accordance with the regulations of the Tax Information Registry.

**Certificate of Social Security Solvency**

The Social Security System Law stipulates that Commercial Registrars must 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 for the Commercial Registrars to register the minutes of a shareholders’ meeting which refers to a transfer of shares, the company must present a certificate of solvency issued by the Venezuelan Institute of Social Security.
Conclusion

The ownership of shares of a company is proved by recording the transfer in the shareholders’ register, in accordance with Article 296 of the Commercial Code. A transfer is valid between the parties to the transfer from the moment of their agreement. It is valid before third parties (including the company itself) from the moment it is recorded in the shareholders’ register.

According to Venezuelan law, there is no need to formally notify the Commercial Registry that the shares have been transferred. Notwithstanding this provision, 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 at the Commercial Registry and published. Subsequent decisions of the Supreme Tribunal have ignored this decision and passed judgment 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 SENIAT), many individuals and corporations now formally register the transfer of shares at 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 Registry offices have considered that such registration is necessary; accordingly, the registration of a document subsequent to a transfer of shares may require that this transfer be registered as well.

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 shareholders’ register, to verify that the transfer has occurred and has been duly inserted in it.

Foreign investment in shares must be registered before SIEX; and if the shares have already been registered, the transfer must be notified to SIEX. The change of shareholders must be notified to SENIAT.

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 shares.