

Ruling N° 585 of the STJ's Constitutional Chamber Amendment to the Venezuelan Code of Commerce



The Constitutional Chamber of the Supreme Tribunal of Justice (STJ) issued ruling number 585 modifying the contents of the first paragraph of article 291 of the Venezuelan Code of Commerce.

Official Gazette of the Bolivarian Republic of Venezuela N° 40684, dated June 17, 2015.

Below are the most relevant aspects of this amendment:

Effective Date

The Ruling was issued on May 12, 2015 by the Constitutional Chamber of the Supreme Tribunal of Justice (STJ). However, it is understood that it is effective from the date of its publication in Official Gazette N° 40684, **dated June 17, 2015**.

Applicability

In accordance with article 335 of the Constitution¹, the Constitutional Chamber's interpretations of the contents or scope of the Constitutional standards and principles through the application of its constitutional centralized control are binding and their application by the rest of the Tribunals of the Bolivarian Republic of Venezuela is mandatory.

Article of the Venezuelan Code of Commerce subject to application for annulment

The article subject to review by the Constitutional Chamber is quoted below:

*Article 291: In case of well-founded suspicions of serious irregularities in the administrators' compliance with their obligations, and lack of oversight by statutory auditors, a number of partners representing **a fifth of the capital stock may report the facts to the Commercial Court, duly supporting their capacity to proceed.***

If the urgency for acting before the Assembly holds a meeting is proven, the Tribunal may order, after listening to administrators and statutory auditors, the inspection of the company's books, appointing to that end, at the expense of claimants, one or more statutory auditors, and determining the bond to be secured by the claimants for expenses originated by those proceedings. The statutory auditors' report shall be submitted with the Tribunal's Secretariat.

If no evidence supporting the truth of claims exists, the Tribunal shall declare so, thus closing the proceedings².

Otherwise, it shall request the immediate convocation of the Assembly. No appeal with suspensive effects shall be heard against these rulings.

(Text highlighted by us).

Application for annulment of article 291 of the Venezuelan Code of Commerce on grounds of unconstitutionality

On April 7, 2005, lawyer Pedro Luis Perez Burelli, filed with the Constitutional Chamber of the Supreme Tribunal of Justice (STJ), an appeal for annulment against article 291 of the Venezuelan Code of Commerce on grounds of unconstitutionality, together with a precautionary measure.

The writ was based on the restrictive and violating nature of the drafting of article 291 of the Venezuelan Code of Commerce for establishing a shareholding of no less than twenty percent (20%) or a fifth (1/5) of total capital stock, as a requirement for partners to exercise the complaints procedure against the administrators of the Trading Company to which they belong, thus curtailing the Constitutional Principles of effective legal protection, equality of all individuals before the law and due process, set forth in articles 26, 27 and 21³, respectively, of the supreme law.

Allegations of the National Assembly

The National Assembly's representatives, in turn, argued that the standard under review does not collide with the aforementioned Constitutional Principles as the set of standards itself of the Venezuelan Code of Commerce permits restrictions

¹ Constitution of the Bolivarian Republic of Venezuela, Published in Extraordinary Official Gazette N° 5453 on March 24, 2000.

² Article 291 of the Venezuelan Code of Commerce, approved by the National Congress in 1955 and published in Extraordinary Official Gazette N° 475.

³ Articles 26, 27 and 21 of the Constitution of the Bolivarian Republic of Venezuela, Published in Extraordinary Official Gazette N° 5453 on March 24, 2000.

that, according to the Legislator's judgment, are necessary to protect the rights of other stockholders and the normal operations of a company.

Decision of the Constitutional Chamber of the Supreme Tribunal of Justice (STJ)

They also alleged that minority stockholders not representing twenty percent (20%) or a fifth (1/5) of total capital stock count on another complaint mechanism through article 310 of the Venezuelan Code of Commerce, which provides for the following:

Article 310: Actions against administrators for any situation for which they are responsible shall be executed by the Assembly through statutory auditors or individuals specially appointed to that end.

Nevertheless, any stockholder has the right to denounce with statutory auditors those actions by administrators they may deem reprehensible, and statutory auditors shall certify they have received those complaints in their report to the Assembly. When the complaint is filed by a number of partners representing at least a tenth of the capital stock, statutory auditors shall report the situations denounced.

The representation of a tenth is proven through the deposit of shares by the statutory auditors themselves, or other person notoriously empowered according to the statutory auditors' judgement. Shares shall remain deposited until verification of the next assembly.

If statutory auditors consider that the claim of stockholders representing a tenth of the capital stock is well-founded and urgent, they shall immediately convoke an assembly that will decide on the claim.

(Text highlighted by us)

Lastly, the National Assembly representatives concluded that through this procedure set forth in article 310 of the Venezuelan Code of Commerce quoted above, the minority stockholders' right to denounce irregularities in the exercise of functions attributed to the company's administrators and statutory auditor is guaranteed.

On the basis of allegations presented by the appellants and the representatives of the National Legislature, the Tribunal considered that a discrimination against minority stockholders was indeed observed and that their access to justice as set forth in article 26 of the Venezuelan Constitution was curtailed.

Therefore, such regulatory statement, in the opinion of the Chamber, constitutes a flagrant violation of the principle of Effective Legal Protection and collides with the Supreme Law and principles therein established.

Thus, the Constitutional Chamber decided to declare the application for annulment on grounds of unconstitutionality partially founded, and modified the first paragraph of article 291 as follows:

*Article 291: In case of well-founded suspicions of serious irregularities in the administrators' compliance with their obligations, and lack of oversight by statutory auditors, **the partners may report the facts to the Commercial Court**, duly supporting their capacity to proceed. (Text highlighted by us).*

Therefore, the requirement of representing twenty percent (20%) or a fifth (1/5) of the capital stock to report irregularities described in the aforementioned article was eliminated.

Contacts

Alejandro Gómez
algomez@deloitte.com

Marianne Carrillo
macarrillo@deloitte.com

Marketing Department
vmercadeo@deloitte.com

Offices

Caracas
Avda. Blandín, Torre B.O.D.,
Piso 18. La Castellana.
Phone +58 (212) 206 8502
Fax +58 (212) 206 8740

Pto. La Cruz
Avda. Principal de Lechería,
Centro Comercial Anna,
Piso 02, Ofic. 41, Lechería.
Phone +58 (281) 286 7175
Fax +58 (281) 286 9122

Pto. Ordaz
Avda. Guayana, Torre Colón,
Piso 2, Ofic. 1, Urb. Alta Vista.
Phone +58 (286) 961 1383
Fax +58 (286) 962 7234

Valencia
Torre Venezuela, Piso 3,
Oficinas A y D, Av. Bolívar
Norte, Urb. La Alegría.
Phone +58 (241) 824 2790
Fax +58 (241) 823 4119

For further information, see our website www.deloitte.com/ve



Deloitte refers to one or more member firms of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

This publication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this publication.

© 2015 Lara Marambio & Asociados RIF J-00327665-0

© 2015 Gómez Rutmann y Asociados Despacho de Abogados RIF J-30947327-1