

The Value of Minority Stocks in Compulsory Redemption

Valuation and Values

Anders Victorin

1 Introduction

When a company,¹ alone or in cooperation with a subsidiary, has obtained more than nine-tenths of the shares in another subsidiary, there exists a powerful interest for the majority owners to continue the process of buying up the shares so that the parent company will be the sole owner of the subsidiary. The goal is to be able to merge the parent company with the subsidiary. There is a comparably strong interest on the part of the minority owners to leave the company. Owning less than 10 per cent when there is only one other owner that has the rest of the shares is not a very attractive prospect. This is so especially when seen against the background of important provisions of company law on the protection of minority owners, which presuppose an ownership of at least one-tenth of the total number of shares.

This is the primary reason why Chapter 14, Section 31 of the Swedish Companies Act, 1976 (ABL)² provides that if a company alone, or together with a subsidiary, owns more than nine-tenths of the shares representing more than nine-tenths of the votes of all the shares in another subsidiary, the parent company is entitled to redeem the remaining shares from the other shareholders of the subsidiary. Those who own shares that can be redeemed also have the right to have their shares redeemed by the parent company.

It is further provided that arbitrators in a certain order shall decide a dispute on whether the right or obligation of redemption exists, or on the redemption price.³ The costs for the arbitration proceedings shall be borne by the parent

¹ A 'company' is a company limited by shares (BrE) or stock corporation (AmE); Sw. 'aktiebolag'.

² ABL, *Aktiebolagslagen*, The Swedish Companies Act (1976).

³ Why this particular practice involving arbitrators, whose decision can be appealed to a court, has been maintained for such a long time is not readily apparent. It is both impractical and

company, unless the arbitrators declare, for some particular reason, another shareholder to be liable for these costs, wholly or partly. The arbitration decision can be appealed.

The law does not stipulate any specific rules on how the minority shares shall be valued, except for the so called “special rule”, which prescribes that if the parent company has obtained the major portion of its shares in the subsidiary by means of an offer directed to a substantial number of shareholders in the subsidiary to transfer their shares to the parent company for a consideration per share, then the redemption price shall be equal to the said consideration, unless particular grounds require a different price. Questions concerning valuation of shares will be dealt with at length below.

Comparable rules are also found in other countries. Here mention will only be made of the rules in the British Companies Act which stipulate that the right of redemption exists when the parent company has obtained through a public offer nine-tenths or more of the shares targeted by the offer (s. 429(1)). In such a case the parent company has both the right and the obligation to obtain the rest of the shares under the same conditions that have been stipulated in the offer.

Swedish trade and industry have for a long time now been subject to an increasing number of mergers. The buying-up of companies continues, and is a common feature of the concentration process. This is where questions of compulsory redemption become relevant. From the purchasing company’s point of view the question of compensation is, however, frequently the last to be decided. Most often the right of redemption applies unquestionably, which means that the parent company has acquired the right of preferred ownership under Ch. 14, sec. 33 ABL. When seen against the whole transaction, compensation to the minority shareholders constitutes frequently a smaller amount.

The rules in Ch. 14, sec. 31 ABL are generous to the minority shareholders in that the parent company must cover costs of the arbitration. It has even been suggested that individuals can earn money on this, for example, by obtaining a small post of minority shares before the buying up of the company and then asking for compensation in connection with the work and the costs of arbitration. In addition, the rule entices the minority shareowners to bring in extensive reports and evidence to the arbitration.

The rules on compulsory redemption of shares can be seen as an expression of the principle of minority protection embodied in company law, and as a defence against the majority’s abuse. They may be placed in the same category as the rules concerning liability to redeem the shares held by shareholders who suffer damage and risk continued abuse under Ch. 15, sec. 3 ABL. As regards their content and procedure the rules may be more readily compared with the rules on the expropriation of property.⁴ Compulsory redemption of shares must

expensive. Within the law of landlord and tenant it has been abandoned. Cf. SOU 1968:57, *Jordbruksarrende* (The Leasing of Farms), p. 356 ff.

⁴ See the Supreme Court case NJA 1996 p. 293 as well as Pontus Kågerman and Erik Nerpin, *Företagsvärde eller börsvärde vid tvångsinlösen* (The Value of a Company or Company

be seen, as was just hinted, as a means towards a desirable restructuring of a company. The minority needs in this case a certain amount of protection, but it ought to work, and it actually does work, almost as well as it does in the case of a property owner or another subject of expropriation. The property owner is given the right to institute proceedings in the court of first instance free of charge, challenging the amount of expropriation compensation.⁵

2 General Questions of Compensation

As already mentioned Ch. 14, sec. 31 of the Swedish Companies Act does not stipulate any general rule on the amount of compensation that shall be paid under the compulsory redemption of shares. No mention is made of the relevant time of valuation either. Except for the so-called ‘special’ rule these questions have been left to case law.⁶ The intention seems to be, however, to apply the same starting point as before, i.e. the ‘real value’ of the shares. What is meant by this expression must be considered as uncertain. In any case, it does not refer to any formal value, such as the nominal value. Further, in accordance with the *travaux préparatoires* the shares’ value shall be determined “without consideration for their character as minority shares.” In other areas the question is left to legal writing and case law.⁷

For those who are used to the more precise compensation and valuation rules in real estate law the legislator’s position appears as something difficult to understand. The experience of those who are interested in real estate law is that compensation and valuation rules in real estate law give expression to a complicated balancing of interests, where different interests are involved in

Stocks when Redeemed), JT 1995-96, no. 3, p. 688. HD points to the fact, among other things, that the location of the provision in the Act indicates that it has been made to facilitate mergers and in this way make possible the most needed structural changes in the Swedish economy (SOU 1941:9, p. 610, f.)

⁵ See Ch. 7, Sec.1 Expropriationslagen (the Expropriation Act) 1972. One may also note that the Court can make a particular decision to limit the material for the proceedings – see Ch. 5, sec. 12. There even exist other similarities, for example, the right to preferred ownership under Ch. 5, sec. 13 of the Expropriation Act.

⁶ See Flodhammar, *Företagsvärdering vid tvångsinlösen* (Valuation of Companies with Compulsory Redemption of Stock), Dissertation, 1980, p. 37 with references.

⁷ See Bill 1975:103 where the Cabinet Minister presenting the case said the following: “Disputed questions that are usually forwarded to the arbitrator concern, as a rule, the amount of compensation. Under the law in force in the case of a disagreement concerning the amount of compensation, it shall be determined in such a way that it is equal to the real value of the stock. That the arbitrator shall try to determine the real economic value of the stock, and not use something purely formal, such as, for example, the stock’s nominal value, is self-evident. Since this provision is meaningless also in the sense that it gives hardly any suggestions for the determination of the amount of compensation, it has not been taken up in the pre-legislative work or the Department’s proposition. The principles for the determination of the amount of compensation for the compulsory redemption of shares should best be left to legal writing and case law. I should like to point out, however, that when the value of the shares is established, no consideration to their character as minority shares should be given (see NJA 1957, p.1).”

different situations and where the balancing of these interests has been the object of long deliberation.⁸ Even if one can make a distinction between rules on compensation and rules on valuation, it must be admitted that valuation rules affect compensation in a very definite way, just as rules on compensation determine what shall be valued. A complete rule should encompass, however, both that for which compensation should be given and the way in which valuation should be done.

A rule on compensation determines what shall be compensated for and the amount of compensation. The main purpose of such rules is to limit the right to compensation in relation to the starting point when a right to “full” compensation applies. A typical example is the provision on local conditions and general occurrence that can be found in the Environmental Damage Act, Ch. 1, sec. 3 (1986) and in the Expropriation Act (1972).⁹ Another example is the provision in Ch. 14, sec 8 (2), of the Planning and Building Act (Plan- och bygglagen, PBL) 1987 on compensation in the case when permission to demolish a ruined building is denied¹⁰

A rule on valuation indicates the method and the basis for the determination of a value. A well-known example is the rule in Ch. 4, sec 1(2), of the Expropriation Act, under which compensation shall be paid in the amount that is equal to the market value of the property.¹¹ On the other hand, the following provision concerning encroachment compensation in the same paragraph can

⁸ This is naturally also valid outside real estate law. See, especially, Bengtsson’s *Ersättning vid offentliga ingrepp*, 2, 1991 (‘Compensation in Public Encroachment’), for its overview of a jungle of compensation rules and principles applied in public encroachment, from expropriation to emergency slaughter. One can assume that even the drafters of the Companies Act can not have been unaware of the problem. For example, Ch. 15, sec. 3 of that Act states that the amount of compensation shall be determined as an amount that is “reasonable in consideration of the company’s position and other circumstances”.

⁹ “Compensation for damage or injury which is not caused wilfully or through negligence shall be payable only if the disturbance that is the cause of the damage or injury should not reasonably be tolerated, taking into account local conditions or its general occurrence in comparable conditions.” See also Ch. 4, sec. 2, Expropriation Act.

¹⁰ “Right to compensation exists in the cases described in the first section 1, if the building has been destroyed by accident.. In other cases referred to in the first section 1 ... there exists a right to compensation if the injury is considerable in relation to the value of the affected part.” Cf. with what is said later about the “continued use of the land being made extremely difficult.”

¹¹ “For a property unit expropriated in its entirety, and to the extent that none of the other conditions mentioned below apply, the amount of compensation shall be equal to the market value of the property unit.” In the travaux préparatoire to the Act certain instructions are given on how the market value should be determined. With the starting point in the property valuation practice it is stated that in the first hand the property valuation technique of local comparison should be used. In the second hand, and often for the purpose of valuing property for commercial use, the income capitalization approach should be used. For properties where these methods can only be used with difficulty it is recommended that the replacement cost method should be used, which can be applied to churches, for example. The latter is somewhat improper, for it can hardly be said to be an expression of the market value.

even be seen as a provision on compensation.¹² An alternative would have been here to limit encroachment compensation to the value of that part of the property that has been expropriated.

Compensation and valuation rules can take their point of departure either in compensation or valuation. It may seem quite clear that the provision concerning encroachment compensation shall be seen in the first place as a compensation rule, but what the rule on compensation for encroachment really means is that the subject of expropriation shall be compensated for his loss, i.e. the decrease in the market value of his property. Such a rule could have also been expressed in the terms of valuation, where the value would be determined by the loss suffered by the subject of expropriation. The alternative solution mentioned above would then be expressed as a rule on the valuation of the expropriating party's profit. An example of such a solution can be found in Ch. 5, sec.10a (3) of The Act on Real Estate Formation (*Fastighetsbildningslagen*) (1970).¹³

The implication of this rule is that when there is a transfer of property from one property owner to another, involving transfer of land from one property to another, compensation shall be calculated on the basis of the value that the land being transferred has for the property that it is being added to (and not solely on the basis of the value which that land has for the property from which it is taken away). The principle that applies here is thus the opposite of the one applicable in the case of compensation for encroachment in connection with expropriation). This is also a rule of compensation, as it has been described above, but one starts here from the assumption that the value of a given thing can be different for different people.

From what has been said about the rules on compensation it transpires that these rules are far from indifferent even when they are expressed as rules of valuation. There can be a great difference in the amount of compensation to be paid, depending on whether we start our evaluation from the new owner's increase in value ('profit') or the former owner's decrease in value ('loss'). This is why it is hardly a coincidence that the starting point for the Act on Expropriation has been set to the latter, whereas the regulations on property transfer between private property owners use the former as the basis of valuation. In general, it has been a consistent strategy to keep the costs of public purchases of property down by using compensation and valuation rules interchangeably, whereas one can be more generous towards those who are forced to have their land taken away from them, or when private property owners are concerned, who would like to have the boundaries of their property redrawn in order to realise a necessary improvement to their property. They

¹² "If part of a property unit is expropriated, encroachment compensation shall be paid in the amount that is equal to the reduction in the market value of the property unit, resulting from the expropriation."

¹³ "When evaluating property that could not be expropriated in the way stipulated in the second subsection, consideration shall be taken of the special value that the property has to the new owner. In such cases the provisions of Chapter 4, Sections 2 and 3 of the Expropriation Act, stipulating that an increase in value shall not be taken into account in certain cases do not apply."

must pay for the increase in the value of the property that they have acquired, and not for the value of the loss to the other property owner. In other words, they pay in relation to their own enrichment.

It is self evident that one can choose to set compensation at some other level than in the foregoing example, for instance by allowing the parties to split the profit according to some kind of division norm. Such a solution is stipulated in the Act on Co-operation in Development (*Lag om exploateringssamverkan*) 1987 where the property owners divide their costs and profits in accordance with the respective sizes of their properties.¹⁴

What has now been said is intended to illuminate a number of questions that can come to mind when issues of compensation for compulsory redemption of stocks must be determined. It is clear that questions of valuation cannot be seen in isolation from questions of compensation. In the same way as questions of compensation, questions of valuation are dependent on values.

3 Valuation as a Technique; Relativity of Valuation

It is considered nowadays to be trivial to say that valuation of property is a technique and not a search for some higher, generally applicable value. This kind of value is not likely to be found, except by people of strong religious or political persuasion. When evaluating things or rights in our days, consideration is taken of the person and the situation encompassed by the valuation, being aware of the fact that objects and rights can have completely different economic value, depending on their owner and the purpose for which they are to be used. In addition, sentimental value should also be considered, and it is not easy to express it in economic terms. On the other hand, if sentimental value is ignored, the risk for the loss of the well being of an individual whose property has been requisitioned for public or private use is obvious.¹⁵

In more recent literature on valuation it is usually said that evaluation of property, for example, shall be based on the purpose for which the property will be used. When purchasing a property, the purchaser may want to know what the reasonable price will be for him to pay for the property, especially if the picture of the market is confused. An assessor can take such factors into consideration when he makes an assessment of the value of an individual property. In addition to including in his evaluation transaction costs for continued searching, he can also take into account factors such as (to name the extremes):

¹⁴ The Act on Development Cooperation (1987:11), Section 11: "The proceedings shall establish the basis for the division of costs in connection with development cooperation, as well as benefits to be gained therefrom. For this purpose the proportion of each property as part of the whole development collective shall be determined.

The proportion of each property shall be determined according to what is reasonable with foremost consideration for the respective sizes of the properties which comprise the area of the collective."

¹⁵ See, among others, Werin: *Ekonomi och rättssystem* (Economies and the Legal System), 2nd Edition, 1982, p. 346 ff.

- whether there exists a well-functioning market for a property of this kind (only the market price should be paid)

- the purchaser's need for this kind of property in relation to his activities and the available alternatives (a high price ought to be paid because of the risk that the purchaser will suffer losses if the property cannot be purchased).

Between the two a large number of variations exist.¹⁶ It is important to remember, however, that the market is created by the conditions of supply and demand. In a well-functioning market variations in price for non-standard objects may be quite big. The individual actors have their own requirements, and they will make their decisions at different levels, depending on their characteristics and available information. A telling example is the concept of "the most likely rent", which underlies the concept of the "market rent", and which can be found in the current version of Ch. 12, sec. 57a of the Land Code. With regard to the economic importance of rent setting for commercial buildings in the community as a whole there can be no doubt about the importance of this concept.¹⁷

The person who is going to perform the so called official valuation, i.e. who has to establish the value of a property or some other object or right in the context of a compulsory purchase or some other legally defined situation does not get much help from the relativity of the modern valuation technique. Such a judge or arbitrator will have to establish the exact value because of the logic inherent in legal rules, even though the documentation possessed by her or him may be insufficient.¹⁸ Determining a "market rent" is a good example. The property assessor who has to determine the "most likely rent" can hardly achieve greater precision than setting an interval within which most of the transactions take place. But a court that has to decide on a claim for damages in case of breach of tenancy protection in accordance with Chapter 12, Section 58b of the Land Code has to establish the amount of the rent exactly, and by doing this also the borderline between a lawful and an unlawful demand for rent as a condition for prolonging the lease, and therewith whether damages shall be paid or not. It is thus clear that "official valuation" is something else than a valuation performed with the help of regular methods of valuation. It is even more apparent that a person who is obliged to perform an "official valuation" is dependent on clear rules on how the valuation is to be performed, from whose perspective the value shall be established, and especially, what values lie behind the prescribed "official valuation".

¹⁶ Flodhammar mentions that a company's value may need to be determined in a number of different situations, such as sale, fusion, obtaining credit with the company as collateral, introduction on the stock exchange, repurchasing of stock shares, as well as in the case of property tax assessment, inheritance, bequests and gifts, expropriation, etc. Flodhammar, op. cit., p. 94.

¹⁷ Bejrums and Victorin, *Bruksvärdehyra – en sorts högre marknadshyra?* ('Rents based on the Utility Value - a kind of Higher Market Rents?'). JT 1993/94, p 18 ff. As regards shares refer also to Flodhammar, op. cit. pp. 93 ff.

¹⁸ In such a case the principles underlying Ch. 35 sec. 5 of the Code of Judicial Procedure are naturally helpful.

4 Valuation of Shares in Redemption Cases

This presentation has been focused until now on a discussion of problematic questions concerning official valuation, including the importance of guidelines for decision-making as regards such questions, where, at least from the perspective of purely technical valuation, a decision may seem to have to be artificially made. In the following a short account shall be given of how the important *value-directed* questions have been handled in court practice in connection with the valuation of shares in redemption cases.

In accordance with the way in which the problem has been presented in the foregoing one should start with the analysis of the interests of the public in relation to those of the involved parties. Experience shows that one is in need of directions about the way in which the balancing of interests should be done and as to who shall benefit and why, or at least that one should consciously decide upon one's attitude towards such interests.

Various different ideas come to mind immediately here. The first is that the balancing of interests should be based on the assumption that business mergers should be encouraged and protected. It is in the public interest to have strong trade and industry and this should mean that a person who has a minority post should not be able to oppose an otherwise desirable merger of companies, and that his claims to compensation should thus be narrowly judged. In other words, it should be relatively cheap to buy out minority shares.

The second idea is that the parties' economic relationship should remain unaffected as much as possible by the redemption of shares. In other words, neither of the parties should be able to profit from the situation created by the redemption more than what would otherwise have been the case. This idea is more attractive in that it requires a certain amount of neutrality between different economic bargaining alternatives, in contrast to the first idea which stipulates more brutally a certain preference for the party that – in his own, but also more generally, in the public interest – calls in the shares in order to be able to complete a merger.

The third idea is connected to the one presented above, but it is based on fundamental principles of the company law. A primary question concerns here the extent to which the principle of equal treatment in company law should be treated as the guiding force, and what it should be considered to mean in that case.

The fourth idea consists in the one expressed in the “special rule” referred to earlier in this paper, namely to consider the relation between those who have sold their shares in a redemption situation and those who refuse to sell. If a general offer has been made, and if it has been accepted by a large number of shareholders, the price of that offer should constitute a guide for the redemption of the rest of the shares.¹⁹

¹⁹ This principle underlies the British Companies Act. With regard to this question see the case *Re Hoare & Co. Ltd.* [1934] 150 L.T. 374, where it was decided that a very good cause was needed in order to judge the offer that had been accepted by so many minority stock holders

Yet another idea can be to establish that which seems to be reasonable in the relationship between the majority and minority shareholders, and decide how the profit should be divided in a situation of redemption. Different arguments can lead to very disparate results, depending on the point of departure. A purely pragmatic judgement will hardly produce a result independent of values, since the judgement must always be based on a moral or legal values, for example, that all the shares shall always represent equal rights to the company's assets, or, when minority shares lack market value, they have no other value and therefore they will be compensated for by a symbolic sum only.

The different ideas presented here can be combined in various ways and, in addition, refined with different valuation rules in more or less the same manner as the one applied to the redemption and valuation rules in property law presented above. In any case, one should start by making clear the aim of the rules on redemption and valuation before making a choice. In company law, however, the discussions have centred around just a few cases and their importance, namely, in the first hand, NJA 1957 p. 1 (The Gimo Case), and the unreported Appeal Court's judgment in 1983 concerning the dispute of minority owners in Bergvik and Ala. vs. Stora Kopparbergs Bergslags AB.²⁰ In May 1996 the Supreme Court pronounced a judgment in the so called Balken Case, NJA 1996 p. 293. The discussion, which can be found in legal writing, however, only refers to the first-mentioned cases. Further, there is a large number of arbitration decisions, which cannot be discussed here, regretfully, because of limited space.

5 Principles of the Gimo, Bergvik and Ala and Balken Cases

As mentioned above, the *travaux préparatoires* of the Swedish Companies Act of 1976 indicate that when evaluating minority stocks "their character as minority stocks" shall be disregarded. In this connection reference to the Gimo-Case is made. It is interesting to note that the Supreme Court (as well as other courts in the case) does not make an independent statement on the meaning of this pronouncement, saying only that it supports the majority opinion of the Arbitration Tribunal, which expressed the following with regard to this question:²¹...

A fundamental principle of company law is that no difference shall be made with regard to the right of different shares to a part of the company's profit and other assets, except for those differences that have been decided upon by law or the company's by-laws. This principle has received its most significant

as unreasonable. Similarly to Swedish law, the English courts also have a strong belief in the stock market as the instrument of valuation. Further, see *Re Press Caps Ltd.* [1949] 1 All E.R. 1013 and *Re Grierson, Oldham and Adams Ltd.* [1967] 3 All E.R. 192.

²⁰ Bergvik and Ala, the Court of Appeal for Nedre Norrland, DT 45, 1983-12-23.

²¹ One should bear in mind that the Gimo Company was an almost fully owned subsidiary of the Korsnäs Company. The minority shareholders of Gimo had had to accept that Gimo had not made any profits for a very long time, due to the fact that profits were taken by Korsnäs by way of leases for lumbering rights for deliveries of wood for the production of paper pulp and other wood products.

expression in [sec. 76(2) of the Companies Act 1944], which provides that, unless otherwise stipulated by the provisions of the Companies Act or the company's by-laws, the annual meeting of shareholders may not decide upon any such use of the company's assets or any such measures that would clearly benefit particular shareholders to the detriment of the company or other shareholders. It seems clear that the stated principle would be set aside if compensation for minority shares, which is nothing else but the equivalent of their share in the company's assets, was to be calculated in accordance with another, less favourable basis of valuation than the one applied to other shares in the company. The fact that when sold on the open market a minority share may often fetch a lower price than other shares in the company (or in fact may lack any market value at all) should not be attributed with any importance in a case like this when it is the question of a transaction between different shareholders in the same company, due to the principle of equal status of shares. On the grounds of what has been stated this Tribunal has decided that when determining the value of the shares in question one should disregard the fact that they make up such an insignificant part of the total share capital of Gimo that they cannot have any practical impact on the company's operations.

Since the valuation of the shares should be performed without regard being paid to their character as minority shares, it also follows that when valuing the stock one must disregard the fact that due to Korsnäs's having the decision-making powers over Gimo, the company also has the possibility of taking over the profits and instituting other measures that could lead to reducing the value of the subsidiary's stock. On the other hand, it seems that the assessment of the shares' value cannot be based on a simple division of the company's net value of all its assets by the total number of shares of stock, because the value of shares is normally dependent on other factors than the value arrived at by "mathematical" calculation employing the above method. In the Tribunal's opinion one should try instead to establish the price that the shares in the Gimo Company would fetch if the company was run as a completely independent company, considering all the factors which commonly affect the value of shares.

The principle adopted by the Arbitration Tribunal implies thus application of the principle of equal treatment, which is also followed by the courts.²² But this is where the parties' agreement ends.²³ The question then becomes precisely one of deciding in which situation the principle of equal treatment shall be applied.

The Arbitration Tribunal tried to calculate the value of the shares in a hypothetical situation where all of the shares would be sold, and where the

²² In the Gimo case the courts have clearly not taken notice of Håkan Nial's well-founded criticism against the idea of letting the principle of equal treatment have a direct effect. See Nial's statement reprinted in the report. See also the Supreme Court's judgment in the Balken case.

²³ The lack of agreement can most simply be illustrated by an overview of the different prices per share that have been reached in the case by different authorities, the whole time referring to this principle:

The Arbitration Tribunal, majority 465 crowns, minority 125 crowns

The District Court, 700 crowns

The Appeals Court, 1900 crowns

The Supreme Court, majority 900 crowns, dissent 1600 and 2465 crowns.

company was run independently. Two expert accountants, whose statements are found in the report, specified the value as the shares' sales value calculated with respect to their productive value (capitalised earning power), without regard being taken to the majority's possibility of freezing out and similar measures.

Applying a special calculation method, the District Court calculated first the shares' mathematical value and then their productive value, after which it split the difference.

The Court of Appeal took, however, a radically different approach. The Court determined that a consequence of the chosen principle was that the price paid for the shares sold voluntarily during recent years could not be used as a basis for establishing their value. The Court further found that when making a valuation one may choose between the mathematical value and the productive value of shares. In the Court's understanding the first method is used primarily in cases where "the company provides an external shell for the wealth accumulated by the shareholders", or where the profit is mainly taken out in some other form than through dividends. The income capitalisation approach is used in the remaining cases. Considering the circumstances of the case, consisting in the facts that the Gimo Company did not conduct any actual business operations, leasing instead its forest holdings to Korsnäs, which also had a decisive influence over Gimo, and, further, that no dividends had been paid for the last 30 years, the Court of Appeal found that the value of the shares should be calculated according to their mathematical value. What the court has actually done was to look at the value of Gimo's assets to Korsnäs at a later merger. In this way the Court did not need to simulate a liquidation of the company, with the accompanying economic consequences, such as, for example, capital distribution taxes.

The Supreme Court found, in its turn, that due to the reasons stated by the Court of Appeal the shares' value should be calculated in accordance with their mathematical value. On the other hand, it also found, without actually giving any explanation for it, that regardless of the possibilities that Korsnäs had of controlling the assets after the redemption of the shares, one could not disregard the fact that "if the liquidation had taken place" the shares would have been subject to, among other things, capital distribution taxes, and one would have been unable to get a complete share of the total value of the assets. Why the Court came to this conclusion (with a weak majority of 3 to 2) is quite puzzling. Liquidation is surely the least likely result of a redemption procedure, where the real aim is to make a merger possible. Perhaps the Court thought that one ought to disregard the alternative of a merger and look toward a "normal situation" in which the mathematical value is of relevance. Even such a view seems rather peculiar since the minority does not have the possibility of realising the company's assets by forcing a liquidation.

The Gimo case has a weak precedent-setting value. It illustrates that indiscriminate use of the principle that the value of shares should be judged without consideration of their character as minority shares may have quite unpredictable consequences. But the Gimo case must be seen against the

background of the very special situation prevailing in the company. In the Balken case the Supreme Court expressed this in the following way:²⁴

When the Korsnäs company requested in 1951 forced redemption of the minority's 245 voting shares in Gimo, the latter company had been in the possession of 20 000 voting shares and 200 000 preference shares since 1937. Already at the shareholders' annual meeting in 1937 Korsnäs owned all of the preference shares and 19 442 voting shares. This means that during the next 13 years Korsnäs acquired only 313 additional shares in Gimo. Clearly, the amount that Korsnäs paid for these few shares could not be made the basis of the redemption sum. It was further made known in the case that the voting shares had not paid a dividend for 30 years. In addition, the preference shares had not paid any dividend in a long time either, which meant that the voting shares could not be expected to pay any dividend in the foreseeable future, since, in accordance with the company's by-laws, the voting shares would pay a dividend only after the accumulated dividend had been paid. Determining the amount of redemption on the basis of the calculated earnings or the calculated sales price of the stock would result in that no compensation for the minority shares would be paid at all. In such circumstances the valuation of the shares must be made without consideration of their character as minority shares, unless the minority shares would go to the parent company free of charge or for the compensation offered by the parent company, i.e. the nominal value.

This is correct, but it does not meet the criticism that has been directed towards the Gimo case in its role of a precedent. The argument that one should perform valuation according to the substantial value method (which would be equivalent to the calculation of the stock's mathematical value) had been put forward by the Court of Appeal and agreed with by the Supreme Court's majority, and means that the substantial value approach shall be used primarily when "the company represents an external shell for the shareholders' accumulation of wealth, and where the profit is mainly taken out in some other form than through dividends as is normal", whereas the income capitalisation approach is applied in other cases. The argument is not convincing.

First, the principle referred to can hardly be correct. The choice of a valuation method has hardly anything to do with the form of ownership, but rather with the nature of property. When it is the question of, for example, farming, forestry or rental property, the productive value forms the basis of valuation. Even if the yield may not be known because the profit is not accounted for in the regular manner, the productive value is not more difficult to calculate than the substantive value (value of material assets).

Gimo's assets consisted mainly of forest soil. The market value of these assets is based primarily on their yield. The valuation which is made by a purchaser and which decides the price that he is willing to pay for the property, can, naturally, be expressed as either the value of material assets or as the productive value, but

²⁴ Compare Kågerman and Nerpin, *op. cit.*, p. 676

it is, fundamentally, a question of the same type of valuation for this kind of assets.

At the same time the Court of Appeal has not answered the question of why the minority should now receive benefits which would not have been available if the situation had been more normal, i.e. if normal dividends had been paid per share. (Naturally, valuation according to the substantial value method can also be disadvantageous to the minority.) A minority cannot have control over the whole company's value through either a sale or division of its assets. As the Supreme Court's minority found, it would have been a satisfactory solution to calculate the value of the shares in such a situation. The Appeal Court's reasoning contradicts one of the main principles of the valuation of shares in a compulsory redemption, or even expropriation; namely that which says that the minority's economic position shall remain unaffected by the redemption procedure.

Finally, as mentioned earlier, it is difficult to understand why the Supreme Court has calculated the value of the shares with respect to the taxes associated with a liquidation – the least likely alternative.

The precedent value of the Gimo case can therefore be expressed in the following way: in special cases the value of minority shares shall be judged with respect to the company's total assets. This is the case when valuation based on a factual market price is impossible, and when productive value based on actual dividends cannot either be given. No calculation of a market price or productive value shall be done under normal circumstances.

The Gimo case illustrates also another well-known fact, namely relativity of valuation. That which distinguishes the different courts in this case is primarily the situation, which they choose for their evaluation. The courts pay a lot of attention to the description of the situation in which the valuation is made. In this context it is not so strange that the results vary from 125 crowns to 2465 crowns per share. If one looks at the case this way, then the references made by the reporting minister in the proposition on the introduction of the Companies Act into the Gimo case and the principle stated therein are hardly instructive. His pronouncement does not really say anything, except that one must not discriminate against minority owners by refusing them compensation for their shares when they lack market value.

Still, the principles applied in the Gimo case have been followed in a large number of arbitration decisions following the idea that valuation should be based on the mathematical value of the shares, with a reduction for the potential dividend taxation.²⁵ The picture has, nonetheless, never been uniform. Both

²⁵ At the time when Flodhammar wrote his thesis, these principles had clearly not yet been adopted; see Flodhammar, *op. cit.*, p. 142 ff. The fact that the Gimo case seems to have achieved a break-through later on seems to be evident from Lennart Svensson's petition to the Supreme Court in the Balken case: *Kommentarer vid Hovrättens dom den 16 maj 1994 angående Pronators inlösen av minoritetsaktier i Balken* (Comments to the Appeal Court's judgment on 16 May 1994, concerning Pronator's redemption of minority shares in Balken). Svensson's petition ought to be treated with some caution, however, for he is out to show that the "correct" valuation must concern the subsidiary which has been taken over.

before and after the Gimo case arbitration decisions were made in which valuation had been based, among other things, on the market value of the stock.

The “special rule” has its foundation in a completely different circumstance, namely a comparison between the shareholders that have accepted a buyout bid and those who have not. When the parent company has acquired more than half of the shares in the subsidiary through a public offer, then the amount of compensation must be equal to the amount that was specified in that offer, unless there are special reasons to do otherwise. In the legislative history the following statement is found:

The situation is such that a company makes public an offer to purchase stock in another company for a certain price. This offer has been accepted by so many shareholders that the buying company has acquired 90% of the shares in the affected company. It can then seem odd that the shareholders who have not accepted the offer should have a possibility of getting a higher price for their shares in a compulsory redemption procedure. This would namely mean that some sort of blackmail of the new parent company was possible.²⁶

The source of the “special rule” is thus constituted not primarily in a comparison between different shareholders (except for the majority shareholder), but it is rather based on the valuation of the shares rather than of the subsidiary. What is more important is that the purpose of the “special rule” is to make it easier for the parent company to acquire the remaining shares at the same price as the other shares have been acquired in a public offer. The minority shareholders shall know that it is not profitable to continue a dispute by calling for arbitration in order to obtain a higher price (and in addition have the arbitration procedure paid for by the parent company). Still, the “special rule” is carefully used. In order to invoke it a fairly large amount of shares must have been acquired through a public offer – theoretically, a minimum of just over 45%. On the other hand, it can by way of analogy be used in situations where the total number of shares acquired by the parent company is smaller than the number stated in the rule.

What is worthwhile mentioning about the “special rule” is, however, as has just been stated, that the rule rests on another premise than the Gimo case. According to the “special rule” the subject of the valuation is the stock, not the subsidiary. It is also a well-known fact that minority shares are often given a low value in relation to their mathematical value.²⁷ The reasons for this shall not be elaborated upon here, other than to say that it is this very fact that makes the question of “the object of valuation” so controversial. Not surprisingly, the

²⁶ Bill 1975:103, p. 533. The rule has its foundation in an article by Rodhe (*Economisk Revy*, 1973, p. 533 and following). What Rodhe says shall not be analyzed here. The important thing is that the sum of compensation in a compulsory redemption is often higher than the one accepted by the shareholders in the original offer of purchase. Compare Flodhammar, *op. cit.*, p. 174.

²⁷ See, for example, Svensson’s petition, p. 39 ff., Flodhammar, *op. cit.*, p. 180 ff.

principles of the special rule have made an impression on the practice of arbitration tribunals,²⁸ increasing, perhaps, the lack of uniformity.

An expression of this is the case of Bergvik and Ala, which had to do with the buyout of a company listed on the stock exchange from another listed company. The case fell under the old Companies Act, and the formal question was to determine the shares' "real value", possibly influenced by the already applied special rule. In its judgement the Court of Appeal said that:

The question concerns the valuation of shares in a company listed on the stock exchange when redeeming the shares under Section 223, point 2, in the 1944 Companies Act. When it comes to determining the "real value" of the stock in such a case, it is easiest, in the opinion of the Appeal Court, to tie it up to the market price because of the wording of the Act. The "real value" of the stock should thus be considered to be equivalent to the price that the shareholder can expect to get for it in normal circumstances, and it should reflect share prices on the stock market. The stock share can be said to represent this value in the shareholder's hands. The stock market value should be diverged from only if it can be shown that the stock market price has been influenced by extraordinary circumstances, for example the fact that the subsidiary was in a crisis at the time of the parent company's public offer of sale. It has not been established that circumstances of this kind existed in this case.

Based on the stipulated premises, Flodhammar's argument against the stock market value approach cannot be considered to be a sufficiently good reason for establishing another value, such as the so called "company value" promoted by Flodhammar, as the basis of valuation. The circumstances in question refer to a compulsory transfer to the parent company, and do not lend themselves to any other decision. The comparison with the rules on expropriation made by Stora Kopparberg is therefore of interest here. It would be questionable if the transferee of stock was to receive an extra value in the subsidiary – over and above the market value of the shares – mainly with the motivation that a comparable value was not available in a voluntary transfer. For most shareholders in a case like this it is only the question of financial investment.

The Court of Appeal has been unable to establish that the presented outlook concerning the importance of the stock market value in the valuation of the shares is in conflict with the case 1957 NJA, p. 1, or with the information concerning the practice of arbitration tribunals which has been made available through Flodhammar's academic thesis "Företagsvärdering vid tvångsinlösen". From this it follows that the stock market value for shares in companies listed on the stock exchange or the normal sales value for shares in non-listed companies (provided that such a value can be calculated) is always of fundamental interest and should be diverged from only if special circumstances motivate another method of valuation.

Bergvik and Ala fit well into the pattern of judgments and arbitration decisions based on different situations in which valuation had to be made and are even connected to a tradition present both before and after the Gimo case. The basis for valuation here is the share in the owner's hand and its sales value on the

²⁸ Cf. Flodhammar's argument in Bergvik and Ala.

stock exchange at that moment or when it can be sold. In this way the basic premise agrees partly with what is stated in the “special rule”. The Court of Appeal has said itself that this line of reasoning is reconcilable with the Gino case, which is probably true when thinking of the limited scope of the case. The energy with which various writers have later asserted that the basis of valuation must be the material value may therefore point to something else.²⁹

In the Balken case the main question was the same as in Bergvik and Ala, namely whether it should be the market price or the material asset value that should determine the valuation of the shares at redemption. As can be expected, the motivation delivered by the Supreme Court is more complete and more clearly structured here than in most of the earlier cases. Its structure can be presented in the following simplified way:

1. The purpose of the rules is to facilitate mergers.
2. Similarly to expropriation, a compulsory redemption shall produce the same financial results as a voluntary sale of the shares. The minority is not entitled to any extra value when selling the shares. To the extent that there exists a substantial asset value which exceeds the total market price of the company’s shares, the difference can only be realised by a dissolution of the company – something that the minority owners cannot effectuate, since the shares constitute only a financial asset for them.
3. The special rule says that the expression ‘the shares’ real value’ should be understood to be equal to their market value. The special rule can be applied analogously – something that is also done by arbitration tribunals.
4. The Gimo case should be seen against the background of the special circumstances applicable to it. What the Supreme Court meant in this case was that a valuation in a compulsory redemption ought to be based in the first instance on the prices of shares that have been sold; when this was not possible, then valuation according to the material asset value method should be used. This is why references to the Gimo case do not mean that in a compulsory redemption it is the company that is the primary object of valuation and not the shares.
5. Further support for the view that it is the market price of the target company’s shares that should constitute the basis of the compensation sum can be found in the legislative history of legal rules concerning State support to banks and other credit institutions.
6. The principle of equal treatment cannot be applied directly. The fact that minority stocks shall be valued without regard to their being minority stocks

²⁹ Refer here, for example, to Hjerner in the *Festschrift in honour of Lars Welamson*, p. 113: “It is important that when the legislator intervenes through the introduction of expropriation procedures which bring independent price formation to an end, arbitration tribunals, which have to determine the sum of compensation paid therewith, make sure that it is determined in such a way that neither the buying company nor the expropriated minority benefits at the other’s expense. The compensation to be paid can be determined on the basis of the price that would be reasonable to pay for all of the shares of stock in the target company. Such a starting point is also the only one that is in accordance with the heretofore accepted principle that minority shares shall not be paid for less than what is thought to be a reasonable price for the other shares.”

means only that one may not take into consideration actions taken by the majority to press down their value.

7. As a rule, stock market prices are a reliable measure of the shares' value.
8. When the shares have been valued low as a result of the abuse of power or a similar action on the part of the majority, the principles underlying Chapter 15, Section 3 of the Swedish Companies Act can be applied. For example, a valuation based on the company's position can be performed. It is, however, not this method of valuation that shall be used in the first place in a compulsory redemption under Chapter 14, Section 31 of the Swedish Companies Act.

By way of summary, the Supreme Court has stated the following:

“To summarise the considerations with regard to the meaning of the applicable law it can be said that in a situation of compulsory redemption of minority shares the shares' real value shall be compensated for. The term “real value” shall mean that valuation shall be based on the market price of shares listed on the stock exchange, or subject to a similar listing, and in other cases, on the company's financial condition and earnings capacity. If the amount of compensation is to be based on the price of the shares on the stock market or on a similar listing, the value of the listing must be examined as to whether it constitutes a reliable standard of reference. This does not mean that the whole target company must always be valued. Often it may be sufficient to establish that the current price reflects the price that the parent company has paid for its shares in the target company due to a public offer or in connection to such an offer.”

One can certainly not complain that the Supreme Court avoids taking a position on the value-oriented questions that were discussed earlier on and that ought to constitute the real basis for a discussion on compensation and valuation. Here one can find most of the arguments discussed in point 4 above.

Thus we find that:

- ♦ the purpose of the rules is to facilitate mergers
- ♦ the parties' economic situation should remain unaffected by the compulsory redemption
- ♦ a strong interpretation of the principle of equal treatment found in the law of business associations is rejected
- ♦ the relationship between different classes of shareholders in a compulsory redemption is handled in accordance with the provisions of the special rule

On the other hand there is no established argument that concerns the balancing of interests between the majority and the minority shareholders. The question is affected indirectly though by the principle stating that the minority shareholders shall not benefit from the compulsory redemption (see the second argument above about the parties' economic situation).

Finally, the Supreme Court makes the principles operative in a rule of valuation. The term “real value” shall mean primarily that a valuation shall be based on the market price of the shares if the shares are listed on the stock exchange or if they are the object of a similar listing. This is therefore the main conclusion – the precedent itself. It is accompanied by a reservation stating that

if the amount of compensation is to be based on the stock market price or a similar listing, the value of the listing must be examined as to whether it constitutes a reliable standard of reference. This does not mean that the whole target company must always be valued. Often it may be sufficient to establish that the current price reflects the price that the parent company has paid for its shares in the target company due to a public offer or in connection with such an offer. The Supreme Court adopts therewith analogous application of the “special rule”. The Supreme Court is then of the opinion that valuation shall refer to the shares owned by the minority shareholder, which are seen as a financial asset. This conclusion is reached, however, after a thorough discussion of interests involved in the question.

What follows is, however, not equally satisfactory. It is said that the valuation “in other cases [shall be based] on the company’s financial circumstances and its earnings capacity”. The question is how this should be understood. In a normal legal discussion one ought to take it as an *obiter dictum* – a remark which is not essential to the decision in the case. This question has not been either taken up for consideration in the written opinion of the Supreme Court, other than in the form of a short statement concerning the principles underlying Ch. 15, sec. 3 of the Companies Act. It may seem that there is insufficient reason for such a conclusion, but a possible interpretation is that the Supreme Court thinks that one may find support for a useful principle with a certain connection to the Gimo case. This will be dealt with in the following, but already here it must be remarked that if this is the case then the position taken by the Court appears hardly to be consistent with the main principle formulated by the Supreme Court in the Balken case.

6 Value, Valuation and Values

This essay is based on the premise that it is impossible to assert that an object, a right or something else has a “real” value. Values are created because of the existence of human demand and willingness to make sacrifices in order to obtain that that is desired. Values can shift, however, from one person to another and from one situation to another, of which fact one is well aware in modern valuation techniques. A person who has to perform a valuation of a property, for example, can assess the property’s value entirely differently, depending on what that property is going to be used for, who is going to use it, etc. It is clear that even in fairly well developed markets, especially as regards non-standardised products, the prices can vary between different actors and different transactions.

In the absence of guiding rules and proper legislation for compulsory redemption of shares, practitioners of law in courts and, to a certain extent, in arbitration tribunals have fumbled their way in an attempt to find reasonable grounds for valuation. In other words, one must be allowed to use argumentation more freely than it is normally used in legal decisions. As has been shown, the value of applying models and arguments by analogy with other valuation circumstances is limited. One would often choose “normal” valuation circumstances and an accepted valuation method, trying to give reasons for the use of the method of one’s choice. But since this is the question of an official

valuation in expropriation-like circumstances, such 'normal' valuation circumstances cannot be identified. In other words, it is important to find a solution that can be perceived as defensible, or perhaps even just. But it is also necessary to look at the function of compulsory redemption rules in order to decide what it is that one is trying to achieve by allowing redemption and the extent to which this shall affect the balance of interests between the majority and the minority.

The first question should therefore be whether redemption is *desirable or not from a more general point of view*. If the answer to this question is affirmative, which seems reasonable when we consider that the law contains rules which allow this, the conclusion ought to be that the rules should not make the redemption more difficult. Here the most important issue is that a purchase offer shall not be affected by the prospect of generous compensation to those who reject the offer – something that can make it difficult to complete the buyout and the following merger even when the offer is considerably higher than the value of the shares in question. Here it is naturally easier to argue when it is the question of shares, primarily those which are listed, that have a market value.

It is more difficult to argue effectively along these lines in the case of shares that are not in wide circulation. A minority post in a small company with few owners represents frequently only a low market value.

But if one of the shareholders or an outsider manages to successfully complete a buyout, the price paid for the acquired shares should perhaps be an indication of the price for the remaining minority post. In such a case the time-honoured definition of market value (that was referred to by the Appeal Court in the Balken case, for example), characterising it as the price that two well-informed parties have agreed upon in a direct negotiation, can be applied. Even though this definition has been criticised, becoming generally abandoned today, it can all the same give an indication of the amount of compensation that would be reasonable, especially if it is followed up by a comparison with the shares' material value. One can namely imagine that a person attempting to buy out a small company is going to find that negotiations become complicated, since the sellers will even keep an eye on the value of the assets in the purchaser's hand.

Such a discussion can lead the way to the issues of fairness and reasonability. In itself it may be a reasonable point of view, which is also suggested by the case law, to make a distinction between cases in which the shares have a market value and those in which the shares do not have such a value, or where they have only a very low value.

One can then ask why a shareholder whose shares do not have any market value should receive more generous compensation for them than a shareholder whose shares can actually be sold and therefore have a market value. A minority shareholder has very little possibility of gaining access to the company's capital, other than if he can effect a generous dividend distribution, or, even better, a distribution of assets. And if he alone opposes another owner then it is nearly

impossible. In this connection it should be remembered that the principle of equal treatment has only limited application.³⁰

In line with the idea suggesting that mergers are socially desirable, is the idea that buyouts shall be neutral in relation to the minority's financial position. The same concept can be found in the principles stipulated by the law of expropriation. But this concept has an independent basis. It expresses the usual minimum that shall be paid in cases of legal conversion when the situation is such that the person whose property is claimed shall not have to carry any part of the burden.³¹

Of interest here is the Appeal Court's argument in the Bergvik and Ala case – the minority owner shall not lose on the compulsory redemption when the amount of compensation is being decided, neither shall he make any profit: "He shall thereby be given the financial value of his shares as part of the bulk of his property at the time of the valuation." The share shall be viewed as a value to the seller and not the purchaser, even though after the purchase it is the purchaser who is in charge of the whole company and therefore also of the material value of its assets.

From this principle of expropriation it also follows that valuation based on the position of the company, as in the case of compulsory redemption due to the abuse of power by the majority under Ch. 15, sec. 3 of the Swedish Companies Act, is hardly applicable to the cases we have discussed, except regarding the case in which the shares are really valued too low as a result of freezing out or similar actions undertaken by the majority.

It must be kept in mind, however, that the Companies Act gives the majority pretty good possibilities for suppressing the minority, without there being any question of such serious abuse of power as to give rise to the right of the shareholders to have their shares redeemed by the company. The principle of neutrality should therefore take this into account. When it is not the question of power abuse, it can therefore seem to be more appropriate to perform a valuation along the lines applicable in more normal circumstances. The argument used by the minority in the Gimo case seems to be worth looking at.

It is only in the Balken case that the Supreme Court followed a line of argument from the point of view of the question of value, asking whether compulsory redemption was desirable or not from the point of view of society. This must be seen as an important step forward.

Earlier, the courts used to seek guidance in the premises connected to *the principles of the company law*, and later, as will be shown, in the general principles of fairness and reasonableness.

In the Gimo case, due to the special circumstances involved, the Court of Appeal, as well as the Supreme Court, founded their decisions on the principle of equal treatment, preferring to see the stock as a carrier of a portion of the

³⁰ See in this connection Nial's statement in the Gimo case and the Supreme Court's judgment in the Balken case.

³¹ See, for example, the provisions on the adjustment of compensation for causation under Section 10 of the Act on Animal Epizootic, and Bengtsson, *op. cit.*, p. 317 f.

company's wealth, disregarding the idea of the sales value or some other principle of calculation based on a "normal" sales value. This means, however, that the valuation was based on the value that the assets had for the purchaser (without consideration of the special value that they could have for him because of synergistic effects, however), which means that the Courts applied the reverse principle as compared to that applied by the Court of Appeal in the Bergvik and Ala case. As earlier suggested this is an example of two different ways of thinking. The principle of equal treatment does not have any direct connection with the idea of seeing the stock as a carrier of a portion of the company's wealth

Instead, the thought that all of the company's shares should be seen as equal carriers of a portion of the company's accumulated wealth constitutes an independent and substantially attractive idea. It is a seductive thought to value a *company*, according to its earnings capacity, for example, in order to later divide up the company's value among the shares.³² The problem of valuing shares for which there exists no market is, among other things, just that of finding some basis for one's valuation.

The "special rule" helps to consolidate the idea that one should observe the sales value of the stock, at least as regards public offers that have led to the parent company's acquiring at least half of the company's stock. The starting point for this was, as suggested before, a more general comparison from the point of view of the *principles of fairness and reasonableness* between the shareholders who have sold their shares and those who have refused to sell.

Bergvik and Ala pursue and fulfill these ideas. When it is the question of listed shares or shares whose market value can be established, the market value should be, in the opinion of the Court of Appeal, always of primary interest, and ought to be abandoned only if there are special reasons for the selection of another valuation method. The Balken case is based on the same grounds as the Bergvik and Ala case.

It is clear that one can ask *how to motivate the choice of a principle*. It is not given *a priori* which principles should be used. It seems to be pointless to argue along the line suggesting to examine the question of which situation of transfer is the *most similar* to the one applicable in a compulsory redemption of stock in order to come to a convincing solution. The situation of compulsory redemption is so special that the discussion is forced down to a level that applies to fairness and reasonability. And not even here are there any fixed points of reference. The discussion above has showed that as regards the question of different types of compulsory redemption of part of a property the legislator has applied completely different points of departure: with regard to expropriation one has

³² See, for example, as regards a valuation following such guidelines, the arbitration decision concerning Södra Skogsägarna (the Southern Forest Owners) of 17 December 1984, published in *Balans* 6/85, p. 30 ff. See also Hjerner's argument above, note 29. Refer even to the minority opinion in the Gimo case: both Supreme Court Justices Lind and Gyllenswärd purport such an argument. They transfer the company's productive value to the productive value of the shares under certain presumptions of the politics on dividends, etc. What this can entail, shall not be discussed here.

paid attention to the owner's loss (that is to say, the amount of compensation depends on a reduction in market value after partial expropriation), while in some cases of the redrawing of property boundaries one has followed the amount of the purchaser's profit.

The interesting question is thus whether the problem can be solved in a suitable way by a discussion of fairness and reasonability, or if a more fundamental position needs to be taken towards the value of the desirability of compulsory redemption, and thus the ability to perform mergers.

We can say here that, at least as regards listed shares, the argument in support of fairness and reasonability has led to the situation in which the idea of valuation of stock shares according to their market value has received a certain primacy. The alternative, i.e. valuation according to the substantial value appears namely as both unfair and unreasonable.³³ It is not a very attractive thought that a shareholder should be paid according to the higher material value in a company, only to use that compensation the very next day for purchasing shares in the acquiring company. He can now purchase many more shares for the compensation he has received than if he had sold his own shares and bought shares in the acquiring company. Sticking, as far as possible, to the shares' listed price ensures that the shareholder is neither overcompensated nor undercompensated for his shares.

This is, however, not seen as being sufficient, for if the material asset value is different from the shares' market value, then the bidding majority is going to make, in a comparable way, either a profit or a loss. This difference can hardly be defended by another argument than the one stipulating that promotion of mergers is in the general interest of society.

Having come this far, the argument can be applied to non-listed shares as well as to shares that lack sales value completely. As noted above, it is hard to understand why owners of shares lacking any market value should be treated more generously than owners of listed shares, provided that it is correct that valuation according to the substantial value method produces, as a rule, a higher result than the total value of all shares in a given company on the stock exchange. On this point there is reason to go back to the Supreme Court's statement in the Balken case, providing that the valuation "in other cases [shall be based on] the company's financial condition and earning capacity."

In opinion or the present author, the Supreme Court's statement shall be understood to mean that the valuation of shares listed on the stock exchange as well as other shares should follow the same principles. In another case a difficult situation is created, with the different cases of valuation standing in opposition to each other. It is not sufficient either to apply a general test of reasonableness and fairness. What is necessary is argumentation based on more superior principles. As they have been described here, such principles refer to the primary

³³ See, for example, the argument in Bergvik and Ala, where it is purported that in the case of a listed company the idea of a company's value (the value of its material assets) must be seen as fiction. There is no one who is willing to pay for this, unless the company is valued on the stock market. The transfer is made through the transfer of stock.

questions concerning the purpose of the redemption and the reason for its performance. The principles ought to imply that overcompensation should be avoided and minority owners stringently treated. In both cases that should imply market valuation. Starting from the company's financial condition and earning capacity, it seems correct to value the shares as if they had a normal spread on the market with normal demand for small posts, using calculation methods generally applied for the valuation of shares.

The Arbitration Tribunal in the Gimo case used this line of reasoning:

“On the other hand it seems that the assessment of the shares' value cannot be based solely on the distribution of the net value of the company's total assets over all of the shares, because the value of shares is normally dependent on other factors than the 'mathematical' value arrived at in this way. Instead, in the opinion of the Arbitration Tribunal, one ought to seek to determine the price that the shares in the Gimbo Company may be expected to fetch, considering all the factors which commonly affect the value of shares, if the company were to be run as a completely independent one.”

The fact that, due to different reasons, the Arbitration Tribunal's majority got a little lost is another matter. It seems that the Arbitration Tribunal came finally to the conclusion that the shares should be valued as if they were in the hands of Korsnäs.³⁴ They are all in agreement about the principle, however, or, as Nial writes: “The 'real value' that shall be established in accordance with sec 223 (2) of the Companies Act ought to be considered to be a *sales value* calculated under normal conditions.”

Despite certain difficulties, it should also be possible to make a reasonably correct estimate of the shares' value in such a case. The Supreme Court's statement ought to be therefore interpreted in a way which shows that the Court has distanced itself from the judgement in the Gimo case, following instead the argument of the Arbitration Tribunal as regards criticism of this case, expressed, among others, by Nial.

Naturally, this does not exclude the possibility of a more political assessment being made, in this case, by the legislator in accordance with less strict guidelines, in more or less the same manner as was done in real estate law. It is nonetheless not certain that a more open interpretation would be of great use with respect to the purpose of the redemption rules. On the other hand, interests of this kind are hardly at stake when it is the question of redrawing property lines between neighbours, even if the situation as such may be fraught with conflict.

³⁴ Refer here to the strongly critical expert statements of Nial, Löfgren and Sillén in the same case.