

IS ALL FAIR IN SHARE VALUATION?

Is a 'fair value' under s.103 of the 1981 Act the same as a 'fair value' under s.111?

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I. Relevance

- Hot topic because of the perceived undervaluation of Chinese companies listed on US stock markets.
- If a minority shareholder can be compulsorily purchased by a majority (such as occurs under s.103 of the 1981 Act), should that majority be required to pay a market price, or should it be required to pay more, if the market price does not reflect the true value of the shares (i.e. a fair valuation, such as one that would occur under s.111 or s.994)?
- See recent decision of the Court of Appeal of the Cayman Islands in *Shanda Games Limited v Maso Capital Investments Limited and others* [2017] CICA 12 – a mixed answer. Appeal from that decision heard by the Privy Council in March 2019.

II. Appraisal Provisions in Bermuda

- Section 103 of the 1981 Act:

“(1) The holders of not less than ninety-five percent of the shares or any class of shares in a company (hereinafter in this section referred to as the “purchasers”) may give notice to the remaining shareholders or class of shareholders of the intention to acquire their shares on the terms set out in the notice. When such a notice is given the purchasers shall be entitled and bound to acquire the shares of the remaining shareholders on the terms set out in the notice unless a remaining shareholder applies to the Court for an appraisal under subsection (2)...”

“(2) Any shareholder to whom a notice has been given under subsection (1) may within one month of receiving the notice apply to the Court to appraise the value of the shares to be purchased from him and the purchasers shall be entitled to acquire the shares at the price so fixed by the Court.”

- Leading case of *Golar LNG Limited v World Nordic SE* [2011] SC (Bda) 10 Com, at §5:

“There was a question as to the proper approach to valuation. I think that the court should appraise the shares at their fair value. In ascertaining that the court is likely to have regard to the market value, when that is available, but it is also going to have regard to all the relevant

information that is put before it. No prescriptive rule applicable to all cases is possible, and as courts are fond of saying valuation is as much an art as a science.”

- The Judge nonetheless accepted that “*the Company’s quoted share price should be considered as the principal method to assess the market value of the Minority Interest*”: see §12.

III. What is the meaning of ‘fair’?

- Is it the same ‘fair’ as under s.111 or s.994? Probably not: s.111 / s.994 provide discretionary remedies requested by the aggrieved shareholder and take into account prejudicial conduct.
- Is it the same ‘fair’ which is achieved by schemes of arrangement and squeeze-out provisions? Probably not: those provisions do not involve a Court valuation exercise; instead the regimes focus upon share class approval (and thus ultimately shareholder autonomy): see *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123, at 126G-H and *Sovereign Life Assurance Company v Dodd* (1892) 2 QB 573, at 583.
- Is the market approach in *Golar* likely to be the right answer in most cases? *Shanda* suggests not, although consider differences in s.238 of the Cayman Companies Law 2013 and s.103 of the 1981 Act. Also consider approach in *Short v Treasury Commissioners* [1948] 1 KB 116 (Court of Appeal) and [1948] AC 534 (House of Lords). The *Shanda* appeal may provide some guidance, but also may be decided narrowly on its facts.
- Long history of appraisal litigation in Delaware: see *Chicago Corp v Munds* (1934) 20 Del Ch 142, at 149, *Cavalier Oil Corp v Harnett* (1988) WL 15816 and the recent decision in *Veriton Partners Master Fund Ltd v Aruba Networks Inc* (2019) 11448-VCL. Does this line of authority assist? *Shanda* appeal again may provide guidance.