

危机中的基金： “底层损失”争议 概述

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本文解释了英属维尔京群岛及开曼群岛关于基金判例法的重要发展

在全球金融危机爆发后，法院正在重新审查少数股东推翻多数股东决议的情况，保证有清偿能力的公司公正公平地进行破产。这种公正公平方式，关乎英属维尔京群岛和开曼群岛的开放式投资基金，称作“底层损失”争议，正在被越来越多的判例法所认可。要使“底层损失”争议成立，诉请股东必须能够证明该基金无法实现基金成立时的主要目的——即基金的底层。

背景

由于全球金融危机严峻的外部环境，市场流动资金损失严重，许多开放式投资基金普遍采取的保护措施是暂停赎回，以保证投资工具不受影响，并防止资产以过低的折价出售。作为这些保护措施的结果，有相当数量的此类基金得出结论，认为再也无法有效地实现基金的投资策略。因此，这些基金使用非正式破产程序，在一定的时间内变现资产、分配所得，以此反映基金投资组合的本质和流动性。

造成基金与投资者之间紧张关系的原因有很多。首先投资者并非基于此而将资金投入基金，也不希望在没有必要的情况下，由基金延期持有资产，或者简言之，存在更好的方式来进行基金清算。因此，这些投资者直接请求法院指定清算人，并基于底层损失，在公正公平的基础上进行基金清算。

“可存续性”与“不可能性”

虽然每个个案都基于具体的事实，但基金清算的组成文件，甚至是基金本身的特殊结构，似乎都清楚地表明对于“底层损失”争议和基金宗旨，法院采取了两种截然不同的做法。

一方面，开曼群岛法院对一系列案件都进行了“可存续性”测试（Jones 法官在开曼群岛大法院审理的Re Belmont Asset Based Lending案（2010年1月），ICP Strategic Credit Income Fund Ltd案（2010年8月）和Re Wyser-Pratte Eurovalue Fund Ltd案中（2010年11月））。

这些案例表明，开放式投资基金的主要目的是追求其投资策略，在某些情况下一旦基金无法实施其投资策略，当该基金已暂停赎回，在资产变现股东赎回之前，基金只是持有其资产。基金业务（虽然基金具有偿债能力）无法继续下去。在此基础上，法院认为该基金已失去了它的底层，因此准备酌情介入并作出清盘令。

英属维尔京群岛法院采取了一种不同的方法。东加勒比最高法院最近审理的一个案件充分体现了这种方法。在Aris Multi-Strategy Lending Fund Ltd诉Quantek Opportunity Fund Ltd（2010年12月）案中，Bannister法官再次使用了这种更广泛的做法，

此前他曾在Citco Global Custody NV 诉 Y2K Finance Inc (2009年11月)案中使用过该方法。

根据这一更广泛的方法,测试的内容是“不可能性”(这也是一长串英国案例所表明的内容)以及一个观点,即基金的目的是否大于有效推行其投资策略。相反,为证明该基金的底层已经损失,提出诉请的股东必须表明,不考虑董事会目前的和主观的意图,继续实现基金章程大纲所定义的主要目标是不可能的。事实上,开曼群岛审理的一些案件是支持这种做法的(Foster法官在Re Steel Partners II案(2009年11月)中,法院也作出了类似的一审判决)。

在Quantek案中,诉讼申请人是英属维尔京群岛基金的少数投资人。2008年底,为了应对全球金融危机,该基金暂停基金赎回,并向现有股东提出了一个有序变现母基金资产的计划,并得到其中的多数通过。但少数股东要求按照开曼群岛的一系列先例执行,指出这属于另一种有清偿能力的开放式投资基金,该基金无法继续其投资策略,因此已不再具有可存续性,并已失去其底层。

Bannister法官认为可存续性的概念在该情况下不适用。因为一个企业在一些情况下不具有可存续性,包括亏损经营,或者投资资本取得微薄收益,或者其财务报表非建立于一个“持续经营”的基础上等等。他还认为,虽然在一定程度上“可存续性”和“不可能性”的概念可以运用于企业,但这种概念和其应用的原则不应仅限于某个特定类型,即开放式投资基金。这些原则应该是普遍的。

相反,该案例适用的测试是“不可能性”,即必须表明“该公司的业务无法继续,无论是因为(不论该公司处于何种情况)该公司无法实现其创立的宗旨,还是因为条件限制使得基金没有能力来继续经营。基于此,Bannister法官拒绝了清算基金的诉请书。

根据这种方法,Bannister法官还区分了两种清算方式:一是非正式逐步进行的清算,包括出售资产以满足赎回要求,该清算最终导致公司正式清盘;二

是清盘令下的正式清算,将待清算公司比作“灾区动物”,除了等待法院指定清算人来对有关公司执行清算之外别无选择。在权衡法院是否应该允许少数人的意志克服多数意见并行使酌情权,来关闭丧失底层的基金时,这似乎是一个有用的区分。

赢家和输家

必须始终考虑任何此类案件的特定事实和情况。但是,仍然存在一些处于类似情况的基金,基金管理者可以从最新案例中找到一些慰藉。

至于新基金,一些评论家认为,从离岸基金案例法的发展中学到的经验教训可以支持关于底层损失争议。这可能需要专门起草基金的核心文件,防止在类似情况下股东去法院起诉。然而,基金经理和投资者之间的持续紧张关系也需要认真对待,因为这种紧张关系可能不利于吸引潜在的资金来源。

当然,应该指出,即使发现某基金已经损失底层,法院拥有许多相关的补救措施。在英属维尔京群岛和开曼群岛,法院在可能的情况下采取了商业模式,允许公司继续进行非正式清盘。当然,英属维尔京群岛及开曼群岛的基金工具是明显的赢家,因为在基金经理和投资者关系方面,基金工具得益于良好而稳固判例法的指导,并在未来将有更好的发展。

投资基金专家Mona Nainie就职于Harney Westwood & Riegels律师事务所香港分所。Harney Westwood & Riegels律师事务所是一家拥有50年历史的律师事务所,设于英属维尔京群岛、开曼群岛和塞浦路斯,同时在英属维尔京群岛、开曼群岛、塞浦路斯、香港、伦敦和乌拉圭蒙得维的亚都设有分所。Harney Westwood & Riegels律师事务所在亚洲的律师团队来自中国、英国、东南亚及澳大利亚,能够为亚洲客户提供英语、普通话及广东话的咨询等各项专业服务。该事务所在英属维尔京群岛和开曼群岛经营全面的公司和信托业务。该律师事务所还拥有一家Harney亚洲(离岸)有限公司,位于香港,专门从事公司、合伙、信托法团或基金设立服务,并同时提供注册办事处,注册代理及其他行政支持服务。Harney Westwood & Riegels律师事务所还在2010年12月为Quantek处理案件,并在英属维尔京群岛商事审判庭出庭。



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Funds in crisis – the ‘loss of substratum’ argument

By Mona Nainie, Senior Associate, Harney Westwood & Riegels

Mona Nainie explains key developments in fund case law in the BVI and Cayman Islands

In the wake of the global financial crisis, courts are returning to the examination of the circumstances in which a minority shareholder may seek to overcome the will of the majority, because it is just and equitable to wind up a solvent company. One such just and equitable ground around which a growing body of case law is being established in the British Virgin Islands and Cayman Islands is ‘loss of substratum’, in the context of open-ended investment funds. To establish ‘loss of substratum’, the petitioning shareholder must be able to establish that the fund has lost its ability to achieve the primary purpose for which it was established – its substratum.

Background

Due to the severe loss of liquidity in the markets stemming from the extraordinary conditions of the global financial crisis, one common protective measure taken by many open-ended investment funds was to suspend redemptions in an attempt to keep the investment vehicle solvent and ward off a fire sale of the assets at disastrously discounted prices. As a corollary to such protective measures, a significant number of such funds came to the conclusion that they could no longer effectively pursue the investment strategy of the fund. Accordingly, they put into place an informal process of winding down the company by realising assets and distributing proceeds in a timeframe that reflected the nature and liquidity of the fund’s investment portfolio.

Tension between the fund and its investors grew from a perception that this was not the basis on which investors had put their money into the fund, that assets were being held longer than necessary by the fund or, simply, that a more appropriate strategy would be to institute an immediate wind-up of the fund. Accordingly, such investors have directly petitioned the court to appoint a liquidator and formally wind up the fund on the just and equitable ground of loss of substratum.

‘Viability’ vs ‘Impossibility’

While each case turns very much on its specific facts, its constituent documents and perhaps even the particular structure of the fund itself, it appears clear that there are two distinct approaches being taken by the courts to the ‘loss of substratum’ argument and the purpose of the fund.

On one hand, there is a developing line of cases coming from the courts of the Cayman Islands that posit a test of ‘viability’ (Jones J in the Grand Court of the Cayman Islands in *Re Belmont Asset Based Lending* (January 2010), *ICP Strategic Credit Income Fund Ltd* (August 2010), *Re Wyser-Pratte Eurovalue Fund Ltd* (November 2010).

These cases suggest that the primary purpose of an open-ended investment fund is to pursue its investment strategy, and in circumstances where the fund can no longer pursue its investment strategy, where the fund has suspended redemptions, and is merely holding its assets until such time as they may be realised and existing shareholders redeemed out of the fund, the business of the fund (though it is solvent) is no longer viable. On this basis, the court determined that the fund had lost its substratum, and was therefore prepared to exercise its discretion to step in and make a winding up order.

A divergent approach has been taken by the British Virgin Island courts, and has been most clearly highlighted by the most recent case law to come out of the Eastern Caribbean Supreme Court. In *Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund Ltd* (December 2010), Bannister J confirmed the broader approach he had previously espoused in *Citco Global Custody NV v Y2K Finance Inc* (November 2009).

Under this broader approach, the examination turns on the issue of impossibility (in the same sense as that established by a long line of English cases) and a view that the purpose of the fund is much broader than whether it can viably pursue its investment strategy. Rather, in order to establish that the

substratum of the fund has been lost, the petitioning shareholder must show that it is practically impossible to carry on the primary objects of the fund, as expressed in its memorandum of association, without reference to the current and subjective intentions of the board of directors. Indeed, there appears to be some Cayman Islands case law support for this approach (Foster J, in *Re Steel Partners II* (November 2009), another first instance decision of the court).

In the *Quantek* case, the applicant was a minority investor in a British Virgin Islands feeder fund that suspended redemptions in late 2008 in response to the turmoil of the global financial crisis of that year. The fund presented a realisation plan to its existing shareholders, proposing an orderly wind-down of assets held by the master fund, and was approved by a majority of them. The minority shareholder sought to follow the Cayman Islands line of cases to suggest that this was another instance of a solvent open-ended investment fund that could no longer pursue its investment strategy and, thus, was no longer a viable business and had lost its substratum.

Bannister J regarded the concept of viability as being unhelpful as a business may be said to be unviable on a number of bases, including operating at a loss, or making an insignificant profit in light of invested capital, or because its financial statements might not be able to be drawn up on a ‘going concern’ basis, and so on. He was also of the view that to the extent that concepts of viability or impossibility were applied to businesses, such concepts and the principles of their application should not be confined to a particular type of business, i.e. open-ended investment funds. Such principles should be universal.

Instead, the test applied in this case was one of impossibility – i.e. it must be shown that “...it is impossible for the business of the company to be carried on – whether that it is because (regardless of the company’s circumstances) what it was set up to do could never have been done or can no longer be done, or whether it is because the circumstances in which it finds itself means that the company cannot continue its business because it lacks the ability or means to do so”. On this basis, Bannister J rejected the petition to wind up the fund.

In taking this approach, Bannister J also distinguished between the informal winding down of a company, involving the sale of assets to meet redemption requests, which eventually leads to a formal winding up, and the formal liquidation that a winding up order brings about, likening companies to whom liquidators ought to be appointed by the court to ‘stricken

animals’, for whom the only remaining course is to be put down. This would seem to be a useful distinction to make when weighing up whether the court should allow the will of the minority to overcome that of the majority and exercise its discretion to close down the fund on loss of substratum grounds.

Winners and losers

Care must always be had to consider the particular fact scenario of any such case. However, there is arguably sound reason for existing funds in similar circumstances and their managers to draw comfort from these latest cases.

In terms of new funds, some commentators have suggested that lessons learned from the development of the case law of these offshore funds can be applied so as to pre-empt a loss of substratum argument. This may be achieved by specifically tailoring the fund’s constituent documents so as to prevent shareholders from being able to petition the court in similar circumstances. However, the ongoing tension between fund managers and investors is equally relevant to such considerations, and such provisions may drive away potential sources of capital.

Of course, it should be noted that even where a finding is made that substratum has been lost, the courts have at their disposal a wide range of relevant remedies. In both the British Virgin Islands and the Cayman Islands, the courts have taken a commercial approach that would allow where it appeared to be feasible, for the informal winding down of the company to continue. Certainly, one clear winner here is the British Virgin Islands and Cayman Islands fund vehicle, bolstered as it will be, by the development of a sound and solid body of case law around these controversial aspects of the fund manager and investor relationship.

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