

UPDATE

BVI Commercial Court rules that ultimate beneficial interest holders of notes are 'creditors' under the Insolvency Act 2003

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In a landmark decision, the BVI Commercial Court has confirmed that ultimate beneficial interest holders of notes are 'creditors' under the BVI Insolvency Act and so have standing to issue liquidation applications against defaulting note issuers.

Mourant, working alongside Ashurst (Hong Kong) and Counsel, Peter Burgess of South Square, has secured a landmark decision in the matter of *Cithara Global Multi-Strategy SPC v Haimen Zhongnan Investment Development (International) Co Ltd*.

Haimen Zhongnan Investment Development (International) Co Ltd (the **Company**), as issuer, an offshore financing vehicle for the Jiangsu Zhongnan Construction Group, based in the People's Republic of China, authorised the issuance of up to US\$150,000,000 aggregate principal amount of 12 per cent Guaranteed Senior Notes Due 2022 (the **Notes**) pursuant to a New York law governed indenture dated 9 June 2021 (the **Indenture**).

Cithara Global Multi-Strategy SPC (**Cithara**) held the ultimate beneficial interest in the Notes in the principal sum of US\$7,000,000.

The Company failed to pay interest and principal on the maturity date of the Notes. As a result of this event of default, Cithara issued a statutory demand, which was not satisfied or set aside, and subsequently applied for liquidators to be appointed over the Company.

The Company resisted the application on the basis that Cithara had no standing as it was not a 'Holder' of the Notes pursuant to the definition under the Indenture, and as it was not a 'Holder', it was also not a 'creditor' under the provisions of the BVI Insolvency Act.

Cithara's position was that, at the very least, it was a contingent creditor, thereby giving it standing to bring the liquidation application.

Despite a tide of cases from other jurisdictions, including a very recent decision from the Cayman Islands Grand Court *In the Matter of Shinsun Holdings (Group) Co., Ltd* (unreported, 21 April 2023),¹ ruling that the beneficial owners of notes did not have standing to issue liquidation proceedings, the Honourable Justice Ingrid Mangatal found in favour of Cithara, and granted the order to appoint liquidators to the Company.

The Commercial Court granted a two week discretionary stay pending the Company's formal application for a stay pending appeal. That formal application was made but the stay was refused by a three Judge Court of Appeal panel on 4 August 2023. The liquidators are now able to use their statutory powers to commence winding up the Company.

¹ See our update on the Cayman Islands Grand Court decision in *In the Matter of Shinsun Holdings (Group) Co., Ltd* (unreported, 21 April 2023) linked [here](#).

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