

UPDATE

Company withdraws appeal against ultimate beneficial holder's liquidation order

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Following our updates dated 11 July 2023 and 18 August 2023, Haimen Zhongnan Investment Development (International) Co Ltd (the **Company**) has withdrawn its appeal against the Commercial Court's order appointing liquidators to the Company. This means that Mangatal J's landmark ruling remains good law in the BVI, such that ultimate beneficial interest holders of notes have standing as 'creditors' to issue liquidation applications against defaulting note issuers.

On 5 July 2023, the BVI Commercial Court granted Cithara's application to appoint liquidators to the Company, an offshore bond issuer. On 19 July 2023, the Court handed down its judgment,¹ by which it determined that, following the UK Supreme Court decision of *In re Nortel GmbH; Bloom v Pension Regulator* [2013] UKSC 52, the modern trend is to give an expanded definition to contingent obligations, such that the contingent liability owed to Cithara pursuant to its offshore notes was sufficient to make Cithara a creditor of the Company, with standing to issue liquidation proceedings. We reported on the first instance decision of the BVI Commercial Court in our legal update '[BVI Commercial Court rules that ultimate beneficial interest holders of notes are 'creditors' under the Insolvency Act 2003](#)'.

The Company appealed the decision and sought a stay pending appeal, which the Court of Appeal refused by its decision dated 4 August 2023.² We reported on the Court of Appeal's decision refusing to stay the appeal in our legal update '[Eastern Caribbean Supreme Court dismisses application for a stay of the appointment of liquidators over offshore bond issuer](#)'.

The Company's appeal was listed for hearing during the week commencing 20 May 2024 and the parties exchanged their skeleton arguments in December 2023 and January 2024.

Security for Costs

Cithara subsequently issued an application for security for costs against the Company.

There is a general common law rule that a winding up order on the ground of insolvency is a special circumstance that justifies the making of an order for security for costs.³ Since the company will not be in a position to pay any costs that may be ordered against it, an order should be made ensuring that security is provided by an outside source, namely the directors or shareholders who are behind the appeal. That security should not merely be nominal, but an indemnity.⁴

¹ *Cithara Global Multi-Strategy SPC v Haimen Zhongnan Investment Development (International) Co Ltd* (BVIHC(COM) 2022/0183, 19 July 2023). A copy of the judgment is linked [here](#).

² *Haimen Zhongnan Investment Development (International) Co Ltd v Cithara Global Multi-Strategy SPC* (BVIHCMAP2023/0012, 4 August 2023). A copy of the judgment is linked [here](#).

³ *Re Photographic Artists' Co-Operative Supply Association* (1883) 23 ChD 371.

⁴ *In re E K Wilson & Sons Ltd* [1972] 1 WLR 791, 792D-F.

These principles have been followed and applied by the Eastern Caribbean Supreme Court of Appeal in the case of *In the matter of Globe-X Canadiana Limited (in liquidation)* ECSC CA (Anguilla) (unreported, 23 May 2005).

Cithara made an application for security for costs on the basis that, as requested by Cithara in correspondence, the Company had failed to join a party to the appeal to bear its costs upon the appeal being dismissed. That application was listed for consideration on the papers on 20 February 2024.

Following the exchange of skeleton arguments and the security for costs application, the Company has withdrawn its appeal.

Implications – Standing of Ultimate Beneficial Noteholders

This means that the Commercial Court's 19 July 2023 judgment remains the leading authority in the BVI on the standing of ultimate beneficial noteholders to initiate winding up proceedings. Mangatal J's judgment stands in contrast to decisions emanating from other offshore jurisdictions, whereby other courts have held that ultimate beneficial noteholders do not have standing as contingent creditors to issue liquidation applications. In the view of the BVI Commercial Court, there was good reason to not be persuaded by these other judgments which, as submitted by Cithara's counsel Peter Burgess from South Square, instructed by Eleanor Morgan and Sophie Christodoulou from Mourant BVI and Justine Lau from Mourant Hong Kong, were in large part based on cases that had been overruled and/or failed to give adequate weight to *In re Nortel GmbH*.

Consequently, the BVI is uniquely positioned to continue its trend of safeguarding the interests of creditors.

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