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Kirkland Alert

## New York Supreme Court Decides Beneficial Noteholders Have Standing to Sue Under New York Law

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On 31 July 2024, in *BFAM Asian Opportunities Master Fund, LP v. Zhongrong Intern. Resources Co., Ltd., et al.*, Index. No. 654192/2022 (Sup. Ct. N.Y. Cnty. 2022), the New York Supreme Court granted summary judgment in favour of BFAM Asian Opportunities Master Fund, LP, a beneficial holder of USD senior notes held in global note form, against the issuer of the notes, Zhongrong International Resources Co., Ltd.

The standing of beneficial noteholders to bring actions against issuers is the subject of jurisdictional divergence and has been brought into sharp focus in recent years by the spate of defaults in the high-yield bond space by China-based property developers. Subject to the precise terms and structure of the notes in question, the courts of Hong Kong and the Cayman Islands have generally concluded that beneficial holders do not have standing and that proceedings must be instituted via the trustee of the notes, whereas the courts of the British Virgin Islands and New York have concluded that they do have standing and that proceedings may be instituted by beneficial holders in their own names.

In this latest case, the global note was registered in the name of Bank of New York Depository (Nominees) Limited, acting as nominee of the common depository for Euroclear and Clearstream. The New York Supreme Court concluded that BFAM were entitled to rely for the purposes of their claim on authorisation given by Euroclear and did not have to cause the trustee to pursue the action (with the significant associated costs and need to indemnify), because the indenture and offering memorandum for the notes incorporated the Euroclear Operating Procedures, which contemplated precisely this type of authorisation.

This is a positive decision for investors insofar as it concerns proceedings before the

courts of New York. It remains to be seen whether the courts of Hong Kong will be willing to adopt the New York Supreme Court's reasoning on the same facts, particularly in the context of winding-up petitions (note, the Cayman courts have rejected the argument that the Euroclear authorisation conferred the requisite standing, albeit the point has not been considered at appellate level). In any case, it remains open to holders to obtain a judgment in the New York courts and have it recognised and enforced in Hong Kong, the Cayman Islands and elsewhere, including through the pursuit of winding-up proceedings.

The case underscores the importance of a close analysis of the note documentation, including precisely what terms are incorporated, and the procedures of the applicable clearing house, as well as the challenges associated with direct actions by beneficial holders of notes.

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