



The BVI Creates New Opportunities for Offshore Bondholders to Bring Unilateral Claims

How can distressed debt investors who are beneficial owners of bonds enforce their rights against bond issuers? Courts in the BVI, Cayman Islands and Hong Kong are answering this question in diverging ways, with the BVI offering an affirmative answer for creditors forming a cross-border enforcement campaign, as we explain below.

August 3, 2023

Distressed debt investors who are beneficial owners or contingent creditors of bonds face uncertainty when the bond issuer stops paying principal and interest. Holders can use litigation and winding-up petitions against the issuer or guarantors to enforce their rights. As beneficial owners, their ability to use those tools without going through the cumbersome intermediary process of instructing a bond trustee has long been in question.

Recent decisions reveal a deepening tension between courts in the key financial centers of the Cayman Islands, the BVI, and Hong Kong that appear to generate more uncertainty over the rights of beneficial owners. However, the decisions offer cross-border opportunities for creditors to ensure they have the widest possible range of options available.

Fresh Clarity on the Rights of Beneficial Owners

Just recently, courts in the Cayman Islands and Hong Kong rejected a beneficial owner's standing to wind up a debt issuer. Critically, however, the BVI went a different way, opening a path for creditors.

Grand Court of the Cayman Islands: In April, [the court held](#) the beneficial owner of New York-issued bonds lacked standing because there was no contractual relationship between the issuer and the beneficial owners.

Hong Kong High Court: In July, [the court rejected](#) standing for the beneficial owner of New York-law bonds because there was no existing obligation owed by the issuer or any "legal nexus" between the beneficial owner and the issuer.

BVI Commercial Court: The [court held](#) in July that beneficial owners of New York-issued bonds had standing under BVI law because they are "creditors" under New York law. There does not need to be a direct contractual relationship – instead, a debtor must simply take steps which may make it liable to a creditor. The court also found authorization from Euroclear persuasive.

What This Means for Contingent Creditors

The most immediate effect is allowing beneficial owners to wind up BVI issuers without a trustee, while making it harder to do so against Cayman issuers. Looking ahead, the decisions may also affect cooperation between the insolvency regimes in these jurisdictions: it is possible that different courts may take different views as to whether a particular company is solvent or insolvent.

The openness of BVI courts is good news for creditors. Beneficial owners' ability to bring suit or wind up an issuer in the BVI shows that the jurisdiction can offer a path to recover claims against offshore bond issuers. Investors and contingent creditors should consider the BVI as a jurisdiction of choice as part of a cross-border enforcement campaign.

About Kobre & Kim

Kobre & Kim is a conflict-free global law firm focused on disputes and investigations, often involving fraud and misconduct. The firm's team:

- Acts on behalf of creditors to monetize high-value judgments and arbitration awards, with most of our matters involving awards and judgments with face values of US \$100 million+ to several billion USD.

- Has extensive experience handling suits on behalf of distressed debt purchasers in the secondary bond market and understands the unique issues and opportunities in such enforcement campaigns.

KOBRE & KIM

Is able to act in jurisdictions across North and South America, EMEA, Asia, and key offshore financial centers in cases involving closely coordinated, cross-border proceedings.