

Freezing orders, search orders and Norwich Pharmacal orders in aid of enforcement of foreign arbitration awards (ArcelorMittal USA v Essar Steel Ltd and others)

29/03/2019

Dispute Resolution analysis: ArcelorMittal USA v Essar Steel Ltd and others confirms the English court's willingness to assist in the enforcement of foreign arbitral awards, and particularly so in circumstances where fraud (widely defined and encompassing bad faith) is involved. The court took the view that the evidence of bad faith, including sustained attempts to dissipate assets or conceal information, justified a fully reinforced approach. At the without notice hearing Butcher J allowed ArcelorMittal the full armoury of tools to police its worldwide freezing orders (WFOs) (and associated asset disclosure orders), granting ancillary search orders and Norwich Pharmacal relief at the same time as the WFO. At the return date, Jacobs J, with the benefit of the evidence previously before Butcher J and further evidence obtained because of the orders made by Butcher J, fully sanctioned the court's earlier decision. Written by Rachel Turner, senior associate at PCB Litigation LLP.

ArcelorMittal USA LLC (a company incorporated under the laws of the State of Delaware) v Essar Steel Ltd (a company incorporated under the laws of Mauritius) and others [\[2019\] EWHC 724 \(Comm\)](#)

What are the practical implications of this case?

There are a number of practical implications, including:

- the availability of WFOs to parties seeking to enforce arbitration awards. The case provides a clearer pathway through associated potential procedural hurdles, including permission for service of the order(s) out of the jurisdiction
- the application of the 'international fraud' exception is not confined to cases where the underlying cause of action is a claim in deceit or a proprietary claim relating to the theft of assets. Demonstrable bad faith—or actions prejudicial to creditors—, including serious wrongdoing comprising conduct on a large or repeated scale, can bring a matter within the 'international fraud' territory, such that the English court may be more willing to intervene despite a lack of connecting factors to the jurisdiction
- providing examples of what constitutes 'solid evidence' of a risk of dissipation. Notably, the judge considered that he was able to take into account the conduct of different companies within the Essar Group as a whole, without contravening any principles of the corporate veil
- Even where there are no existing or proposed substantive proceedings in the jurisdiction, search order relief is available for the preservation of evidence relevant to WFOs. The judge also noted that *Norwich Pharmacal* relief was available to 'support and make effective' a WFO which the court has granted
- The case also confirms the ability and utility of making individuals party to search orders to prevent them from interfering with the searches (including remotely/electronically), despite their lack of presence in the jurisdiction and that they could not be served personally

What was the background?

ArcelorMittal USA LLC (ArcelorMittal) sought and obtained a WFO, search orders and *Norwich Pharmacal* relief at a without notice hearing in January 2019 in aid of enforcement of an International Chamber of Commerce (ICC) arbitral award with a Minnesota seat.

The underlying arbitration concerned a December 2012 contract for the supply of iron ore pellets by Essar Steel Minnesota LLC (ESML) to ArcelorMittal for ten years. Essar Steel Limited (Essar Steel), the principal defendant, and a Mauritian company, acceded to the agreement as a co-obligors.

ArcelorMittal terminated the agreement in May 2016, culminating in the arbitration. As ESML had filed for Chapter 11 bankruptcy, ArcelorMittal pursued Essar Steel alone.

In August 2017, the tribunal made a disclosure order and Essar Steel withdrew from the arbitration, asking the tribunal to rely on the documents already before it. The tribunal subsequently issued its award, awarding ArcelorMittal circa \$1.3bn as damages plus costs and interest.

The award was unsatisfied. ArcelorMittal commenced recognition proceedings in Minnesota and Mauritius and obtained *Norwich Pharmacal* relief in the Cayman Islands.

In January 2019, ArcelorMittal commenced proceedings in England and obtained:

- permission to enforce the ICC award as a judgment of the High Court;
- a WFO and associated disclosure orders against Essar Steel;
- a search order against a UK group company ('Essar Capital Services') that had provided services directly to Essar Steel, and two individuals: one of the beneficial owners and an individual with a senior role within the group;
- *Norwich Pharmacal* relief against the search order parties and four current and former group employees

The other parties applied to discharge these orders.

What did the court decide?

Among the points decided were:

- an applicant does not need to include its WFO application within the arbitration claim form seeking recognition, and (having obtained permission to serve the claim out of the jurisdiction) does not need to identify and rely upon any jurisdictional gateway in relation to that ancillary component of its claim Jacobs J followed Butcher J's decision in *Eastern European Engineering Ltd v Vijay* in this respect
- evidence of dissipation of one asset was 'sufficient in itself potentially to warrant intervention under the "international fraud" exception,' thereby making it 'just and convenient' to grant a WFO despite the respondent's argument there were no real connecting factors with England. Further, there had been sufficient connection to the jurisdiction to enable ArcelorMittal to act effectively, as it obtained documentation because of the search and disclosure orders granted
- there was a threshold question of whether there were any 'existing or proposed proceedings in the court' for which the search order could secure evidence, per [section 7](#) of the Civil Procedure Act 1997, not least when there was no suggestion of enforcement measures being taken in England. However, the judge saw 'no reason why a search order cannot be ancillary to proceedings, such as the present proceedings, in which a WFO has been granted and which is to remain in place'
- *Norwich Pharmacal* relief is also available to 'support and make effective' a WFO. Although such orders are not usually sought simultaneously with disclosure orders contained in a WFO, where the respondent's conduct was in bad faith or fraudulent, an applicant should not be required to 'wait and see' what the respondent had to say

Case details

- Court: High Court, Queen's Bench Division, Commercial Court
- Judge: Jacobs J
- Date of judgment: 25 March 2019

Rachel Turner is a senior associate at PCB Litigation LLP, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

FREE TRIAL