

# Privy Council dismisses challenge to Cayman Islands Court of Appeal decision on Norwich Pharmacal relief in support of award enforcement proceedings

by *Practical Law Arbitration*, with *Harneys*

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In *Essar Global Fund Ltd and Essar Capital Ltd v ArcelorMittal North America Holdings LLC*, JCPC 2021/051, the Privy Council dismissed a challenge to a Cayman Islands Court of Appeal (CICA) decision, finding that it did not raise an arguable point of law and that the CICA was right for the reasons they gave.

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The Privy Council has dismissed Essar's challenge to the Cayman Islands Court of Appeal (CICA) decision. It found that the appeal did not raise an arguable point of law and the CICA was right for the reasons it gave. The Privy Council's judgment confirms the CICA decision as the most authoritative decision from an offshore appellate court on the availability of Norwich Pharmacal relief in parallel with statutory mechanisms for gathering evidence for use in foreign proceedings.

The parent of the Essar group, Essar Global Fund Ltd (EGFL), and its investment manager, Essar Capital Ltd (ECL), appealed to the CICA against an order that they disclose financial information about Essar Steel Ltd (in administration) to ArcelorMittal. The order was needed to facilitate enforcement proceedings by ArcelorMittal to obtain payment on an ICC arbitral award for over USD1.5 billion made in a U.S. seated arbitration, in circumstances where it was alleged that Essar was wrongly seeking to evade payment on the award.

The CICA dismissed the appeal on 3 May 2021. It provided guidance on two key areas:

- Disclosure pursuant to the Norwich Pharmacal jurisdiction can be obtained in support of foreign proceedings notwithstanding the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (Evidence Order). The Evidence Order only concerns the giving of evidence for the purposes of foreign proceedings. The basis of the Norwich Pharmacal jurisdiction is a duty to provide information about wrongdoing, not an obligation to provide evidence. There is no reason that the duty should be confined to domestic wrongdoing. If proceedings have not been instituted in a foreign jurisdiction and are not contemplated in a jurisdiction with pre-action disclosure protocols, there is no basis for treating the Evidence Order as impliedly excluding the Norwich Pharmacal jurisdiction.
- The test for wrongdoing is the existence of a good arguable case as set out in *The Niedersachsen* case. The applicant must also show that the wrongdoing gives rise to a cause of action, right, or some other form of redress. It was sufficient for ArcelorMittal to establish a good arguable case of wilful evasion of the arbitral award, since most jurisdictions will recognise that such conduct is wrongful.

The Privy Council's decision now requires EGFL and ECL to immediately disclose financial information about the Essar group to ArcelorMittal. This decision ends the series of challenges raised by the Essar group-related companies in connection with the Norwich Pharmacal Order.

Case: *Essar Global Fund Ltd and Essar Capital Ltd v ArcelorMittal North America Holdings LLC*, JCPC 2021/051 (11 May 2022).

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