

Spain fails to unseat ICSID panel over refusal to travel

Sebastian Perry
16 December 2020



Poncet, Greenwood, Oreamuno

Spain has failed to disqualify an ICSID tribunal over its refusal to hold an in-person hearing during the covid-19 pandemic – and the failure of two of the arbitrators to disclose their participation in the Frankfurt Moot.

In a [decision](#) on 15 December, World Bank president **David Malpass** rejected Spain's second attempt to disqualify tribunal chair **Sir Christopher Greenwood QC** of the UK, **Charles Poncet** of Switzerland and **Rodrigo Oreamuno** of Costa Rica from hearing a case brought by a group of German banks.

Malpass said the tribunal's risk assessment amid the "extraordinary circumstances" of the covid-19 pandemic did not show a lack of high moral character and that the participation of Greenwood and Poncet in events organised by the claimants' counsel – **Sabine Konrad** of Morgan Lewis & Bockius – was not evidence of a "relationship" between them.

The three arbitrators are hearing an Energy Charter Treaty claim lodged by Landesbank Baden-Württemberg and three other banks. The claimants issued loans worth a combined €1.76 billion to finance renewable energy plants in Spain and seek compensation for reforms to the subsidy regime for that sector.

Spain first tried to disqualify the tribunal last year after it issued an [interim decision](#) dismissing the state's jurisdictional objections based on the ECT's alleged incompatibility with EU law. The state argued the panel had prejudged aspects of the merits in its decision and had treated it unfairly. Malpass [dismissed](#) the challenge as untimely in October 2019.

The state filed its [latest challenge](#) in August this year, two weeks before the merits hearing was scheduled to begin. It was prompted by the tribunal's refusal to conduct an in-person hearing in The Hague as originally planned and instead hold a virtual hearing in light of the covid-19 pandemic.

Spain contended that the tribunal had made "serious misrepresentations and misleading statements" to justify its decision to hold the hearing virtually. While the panel had said that Oreamuno could not travel to The Hague because Costa Rica's borders were closed, Spain said this was dishonest because the Costa Rican government had already announced that its borders would open on 1 August and that its residents could travel abroad.

The tribunal had also said that Greenwood was undergoing surgery on 4 August and would be required to complete a 14-day quarantine, and that if there was any complication such as the discovery of a covid-19 case in the hospital or the need for additional surgery, the quarantine period would have to be extended.

Spain said this was “speculative and misleading” and demonstrated that the tribunal “prioritized their private interest” at the cost of the state’s basic procedural rights.

The state later added a new ground of challenge: that Greenwood and Poncet had failed to disclose their attendance at the annual [Frankfurt Investment Arbitration Moot](#), organised by Konrad, while the arbitration was pending. Greenwood had participated in the Moot in 2017 while Poncet had attended from 2017 to 2019 and also took part in ancillary events.

Spain said the pair’s conduct violated ethical and disclosure rules including the ICSID rules, the World Bank’s code of conduct, ICSID and UNCITRAL’s [draft code of conduct for adjudicators](#), the IBA guidelines and “rules applicable in any civilized nation.”

The banks argued that conducting the hearing virtually was the only alternative to rescheduling it for a third time and that the tribunal had acted within its discretion. Any impediments of video pleading would be borne by both sides equally, they said.

They further observed that Spain’s covid-19 infection rates were almost 10 times as high as those in Germany, the Netherlands or the UK and that Spain had previously taken the view that the wearing of masks during an in-person hearing should be “up to the will of each attendant”.

As for the Frankfurt Moot, the banks said this was an educational event organised under the auspices of the Max Planck Institute. They observed the event involves over 300 people and dozens of arbitrators every year and is a pro bono project that does not cover travel expenses or other costs of any of the arbitrators.

The banks argued that the challenge was “frivolous” and a “bad faith” attempt to derail the hearing scheduled for 27 August. They urged Malpass to render his decision before the hearing without written reasons and to provide his reasoning later.

However, the briefing schedule for the challenge was extended after Spain raised the Frankfurt Moot arguments, requiring the merits hearing to be postponed. Malpass’ decision comes four months after the challenge was filed and three months after the last communication from the parties.

Malpass refused a request by Spain to seek a recommendation on the challenge from the World Bank’s Integrity Vice-Presidency or the Permanent Court of Arbitration.

In his decision, Malpass said Spain had failed to recognise that the tribunal’s decision not to hold an in-person hearing was based on an assessment of “risk and profitability” rather than “a definitive assertion” about the impossibility of travel.

He said the tribunal had recognised the need to ensure due process to the parties and conduct the proceedings as expeditiously as possible. As a general rule, he said the tribunal is “best placed to assess and balance these risks and considerations.”

He added: “Given the extraordinary circumstances and the multiple uncertainties created by the COVID-19 pandemic, the Tribunal’s decision to conduct a risk assessment certainly does not show a lack of high moral character. Rather, in the eyes of an objective third party, it would appear to be the Tribunal’s duty to do so.”

Malpass also found Greenwood and Poncet’s participation in events organised by Konrad did not justify disqualification. He observed that the Frankfurt Moot was an academic event and the arbitrators had confirmed they received no remuneration for their participation.

Spain asserted that the pair had nonetheless received gifts in the form of “extraordinary visibility, honours, and prestige” and potential “future appointments”. But Malpass said that “speculation about the possible impact of these academic events is no basis to sustain a disqualification proposal”. Nor was it uncommon for academic events to be surrounded by social events open to the participants, he said.

Whatever the extent of Konrad’s role in the organisation of these events, Malpass said “neither the characteristics of the events, nor the frequency of the interaction” demonstrated a “relationship” between Konrad and the arbitrators. The state’s accusation that such a relationship had motivated the tribunal’s partiality towards the claimants was “serious and unsupported”.

It is not the first time Malpass has been asked to review an ICSID panel’s procedural decisions in the wake of the covid-19 pandemic. In July, he [rejected](#) a challenge brought by Germany against the panel hearing a multibillion-euro claim by Swedish nuclear power investor Vattenfall after they refused to delay a hearing. Konrad also represents Germany in that case.

The co-organisers of the Frankfurt Moot, Konrad and **Stefan Vogenauer**, director of the Max Planck Institute for European Legal History, tell GAR: “The unique feature of the Frankfurt Investment Arbitration Moot is that the arbitrators are of the highest calibre and are frequent flyers in real-life treaty arbitration. The students get the most realistic experience possible. Also this makes the Frankfurt Moot the pre-eminent moot for investment arbitration. As of today, it is also the only moot recognised in a real-life ICSID decision. This makes us very proud.”

They add that there are already plans in the making for Malpass' decision on the challenge to be featured at the Moot. "It is an opportunity too good to be missed."

Landesbank Baden-Württemberg and others v Kingdom of Spain (ICSID Case No. ARB/15/45)

Tribunal

- **Sir Christopher Greenwood QC** (UK) (president) (appointed by ICSID secretary general)
- **Charles Poncet** (Switzerland) (appointed by the claimants)
- **Rodrigo Oreamuno** (Costa Rica) (appointed by Spain)

Counsel to Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale

- Morgan Lewis & Bockius

Partner **Sabine Konrad** with associates **Maximilian Pika**, **Nika Rassadina**, **Pierre Trippel** and **Katrine Tvede** in Frankfurt

Counsel to Spain

- Abogacía General del Estado

Jose Manuel Gutierrez Delgado, **Gabriela Cerdeiras**, **Pablo Elena Abad**, **María del Socorro Garrido Moreno**, **Rafael Gil Nieves**, **Elena Oñoro Sainz**, **Mariano Rojo Pérez**, **Francisco de la Torre Díaz**, **Alberto Torró Molés**, **Luis Vacas Chalfoun**, **Eugenia Cediell**, **Javier Comerón**, **Gloria María de la Guardia**, **Estibaliz Hernández Marquinez**, **Juan Antonio Quesada** and **Ana María Rodríguez**

Quantum experts for the claimants

- **Laura Hardin** of Alvarez & Marsal

Expert witnesses for Spain

- [Daniel Flores](#) of Quadrant Economics in New York

Documents

Landesbank Baden-Württemberg et al v Kingdom of Spain - decision on the second proposal to disqualify all members of the tribunal



Sebastian Perry

Author | Editor

sebastian.perry@globalarbitrationreview.com

GAR

Copyright © Law Business Research Company Number: 03281866 VAT: GB 160 7529 10