

Can a claim be filed directly against an expropriating administration to obtain the fair market value that was not paid by a concessionaire, when the latter has been declared bankrupt?

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Yes it can, according to the most recent judgments of the Spanish high courts. The question was addressed in several Judgments issued by the High Court (HC) of Castilla-La Mancha (amongst others, the Judgment issued on 11 February 2013, in Appeal no. 320/2012, and the Judgment issued on 12 February 2013 on Appeal no. 321/2012) and by the High Court (HC) of Madrid in its Judgment no. 41/2012 of 21 January.

The facts were similar in each of these cases: after the expropriation had been processed through emergency proceedings (which implies seizing the expropriated land prior to paying its fair market value) and the fair market value had been claimed through the courts (thus producing a Judgment that established the relevant amount), the concessionaire/beneficiary of the expropriation was declared bankrupt. In light of the situation described, the parties who had suffered the expropriation sought to get the expropriating administration to assume the payment of the fair market value established.

However, the procedural channels used by the expropriated parties to claim payment from the Administration in each case were different:

- In the cases judged by the HC of Castilla-La Mancha, in light of the default on the payments owed by the beneficiary of the expropriation, the plaintiffs brought the appeal before the courts on the grounds of inactivity: they filed a claim against the relevant Administration seeking payment of the fair market value that had been confirmed in the Final Judgment issued and, once three months had elapsed, they filed an appeal before the supreme court, pursuant

to Article 29 of the law on the contentious-administrative jurisdiction, the "LJCA".

- In contrast, the Judgment issued by the HC in Madrid started as a petition filed by the beneficiary of the expropriation, which sought the provisional enforcement of the Judgment regarding the fair market value: having issued its Decision to stop the Judgment's enforcement with regard to the beneficiary, which had been declared bankrupt (pursuant to the provisions established by Article 55 of the Bankruptcy Law), in the end the Court decided that the Administration was liable for the payment at the price established in the Judgment.

Both the judgment laid down by the HC of Castilla-La Mancha, as well as that issued by the HC of Madrid, acknowledged that the expropriating Administration was directly liable for the payment of the fair market value to the expropriated party when the beneficiary of the expropriation/concessionaire is declared to be undergoing bankruptcy/insolvency proceedings. The legal grounds used to judge the cases by both the courts have a common starting point but their respective legal reasoning differs.

The common starting point consists of the constitutional relevance that paying the fair market value has, as a guarantee that the expropriated party's private property will be respected. The HC of Castilla-La Mancha is particularly precise when it states: "*the land damages that should be paid to the expropriated party, in substitution of the asset that was seized for the sake of public interest and social usefulness, now become something GUARANTEED CONSTITUTIONALLY AND A RIGHT*

THAT MAKES THE INTERVENTION OF THE PUBLIC AUTHORITIES JUSTIFIABLE, regardless of the vicissitudes that may arise from the procedure chosen by the Administration to carry out the expropriation, the acts of the Concessionaire, or the insolvency of the latter”.

Although the judgments that are object of our analysis start with this common consideration that a constitutional guarantee exists, which causes the credit owed to the expropriated party to stand out with respect to the other creditors of the concessionaire, they later differ with regard to why the courts deem the Administration to be directly liable for the default.

The Judgments of the HC of Castilla-La Mancha are based on the specificity of the link that exists between the expropriating Administration and the beneficiary/concessionaire; a specificity which exists, in its opinion, because:

- (i) The Administration acquires title to the expropriated property (according to Law 6/1972 on highway construction, maintenance and operation, under concessionary regimes). The expropriated property and rights that are allotted to the concession then form part of the Government's public property from the time the expropriated property is occupied and paid. This means that the position of the concession's beneficiary is always a position that is shared with the Administration itself. Therefore, if payment does not validly obtain the title to and ownership of the property, the Administration “incurs unfair enrichment, being that the owner's dispossession of the property entails a situation where profit was obtained without there being any right to do so”.
- (ii) As an obvious corollary to the foregoing, “the Concessionaire is (...) a “substitute”, a subordinate chosen by the Administration; and the expropriated owners, when faced with the subordinate's breach of the obligation to pay fair market price for the property, then address themselves to the principal, which cannot, upon default by its subordinate, refuse the payment obligation it holds, alleging a situation of insolvency”.

From these two arguments, the HC of Castilla-La Mancha deduces that a type of subsidiary payment liability exists for the expropriating Administration vis-à-vis the concessionaire's insolvency (be it a final or provisional liability), pursuant to which the

Administration must “pay the fair market price and claim whatever is appropriate in relation to the administrative concession from its “curator” or from the meeting of creditors, if a subrogation has taken place”.

In contrast, the Judgment laid down by the HC of Madrid deems that the fair market price to be paid by the Administration is grounded on the general precept of State/Government Liability, without prejudice to, at least in principle, the specificity of the link that exists between the expropriating Administration and the beneficiary/concessionaire. Therefore, this entails an interpretation that has a certain inclination towards generality; towards something that could be applicable to other types of expropriations, if it were consolidated by case law.

Thus, the Decision highlights the fact that the Constitution, in accordance with its case law, has established that the Administration does hold governmental liability and that the term “public service” must be interpreted in its broadest sense; as the actions, management or activities related to performing the administrative function itself (including when such acts are a result of omission or inactivity on the part of the Administration, in cases where it has an obligation to act in a certain manner). Said liability is objective and arises pursuant to the results caused.

Consequently, it considers that “the Administration, as holder of the expropriating authority established under Article 2 of the Law on Compulsory Expropriation and Article 3 of the Regulations, is the guarantor that must ensure that the procedure is concluded with the payment of the fair market value within the term established. And, although it is true that Article 5 of the Expropriation Regulations imposes an obligation on the beneficiary for payment, it does not release the public Administration from its governmental liability”. It implies, therefore, a situation of objective liability for the Administration, being it is the public authority that is responsible for the procedure and for the procedure's being duly concluded with the payment of a fair market value within the stipulated term. The Court's reasoning is that “subjecting the owner of the expropriated property (which was occupied without the fair market value being paid) to the uncertainty that bankruptcy proceedings imply would not be lawful nor would it make sense considering the principle of liability set forth previously, being that, this would imply that the Administration had successfully evaded its responsibility”.

To back up this statement, the judgment puts forward several arguments; such as the line of reasoning that has been consolidated by case law, whereby it is recognized that reversion is a right that may be claimed vis-à-vis expropriating administrations, no matter who the beneficiary is or who the current owner is of the expropriated property, and case law establishes that it is the expropriating Administration's responsibility to pay the relevant compensation in the beneficiary's stead, when the latter has transferred its assets to a third party (Supreme Court judgments of 3 May 1990, 6 April 2005 and 21 November 2005).

It goes on to mention, *"as further grounds"* (but something that is not the decisive argument), the fact that the property and rights that are expropriated and allotted to the concession become part of the Government's public property as soon as they are occupied; therefore, *"not paying the fair market price for such property due to the insolvency of the concessionaire, which is the party that holds the first obligation to pay, would imply a situation of unfair enrichment by the Administration, because it is the owner of the expropriated property and the party that allowed the beneficiary not to pay the fair market value"*.

There was one dissenting opinion in the Decision, which pointed out some of the weaknesses of this judgment, one of which, in my opinion, should be

highlighted here: the appropriateness of enforcing the Judgment whereby the fair market value was declared, to declare the governmental liability that the Administration holds. The Court itself is conscious of this, but it alleges reasons of material justice to back an interpretation of the procedural channels that allows effective court protection to be granted to the actionable party, thus avoiding the excessive delays that would be caused if separate administrative and judicial proceedings were brought. (However, as the dissenting vote points out, the idea that effective court protection is disrupted because the interested party must follow the channels established by law to obtain the enforcement of its rights, is something that does not coincide with the doctrine issued by our courts when interpreting this right).

It goes without saying, therefore, that the judgments examined herein and issued by the High Courts of Castilla-La Mancha and Madrid open a path that greatly improves the position of the expropriated party, who may now claim payment of the fair market value directly from the Administration, in cases where the beneficiary is undergoing bankruptcy. It is also interesting to note that in all the decisions issued, it is understood that the Administration's liability is triggered by the mere fact that bankruptcy proceedings were declared (without it having been necessary for the party to enter the liquidation stage), which makes the beneficiary's declaration of bankruptcy equivalent to its inability to pay.