

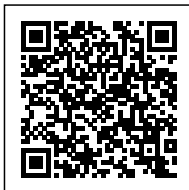
# THE PROTECTION IN DEFINING FINANCIAL TERMS - KPMG

*Posted on 19/04/2010*



Fernando Cuñado

Category: [Corporate](#)



**It may not always seem appropriate for parties in a transaction to plan for their deals to turn bad but the current economic situation is prompting a rise in warranty based claims resulting from somehow unmet expectations or uncertain financial terms, perhaps not 100% properly addressed in the SPA. says Fernando Cuñado, a Director in KPMG's Madrid-based EMEA Forensic Dispute Advisory Services Group.**

'Sale and purchase agreements rely upon the parties ability to agree valuations, price adjustments and the representation and warranties that underpin them. What we are now seeing are disputes increasingly emanating from buyers expectations not having been met, in terms of revenues or cash

flows, or because of a certain room for a subjective interpretation of the financial terms which have been used in the price calculation.'

Warranties only have a limited shelf life, of two or three years, which may explain the dramatic increase in financial claims now being seen, but some deals concluded during the crisis period were clearly based on overoptimistic business projections, he says. The challenge therefore is to put the requisite protections in place before a deal is signed.

'Dealmaking is now much more sophisticated but when it comes to the reps, warranties and undertakings to be agreed it will always be a case of bringing together the interests of two opposing sides. Even in the most amicable of transactions each party still has their own agendas.'

Nowadays what the parties consider very necessary, and are demanding before deals are concluded, is a process of 'agreement vetting', says Cuñado. 'Documents will have been looked at carefully from a legal standpoint but this is not always the case for the financial position or the validity of the definition of the financial terms used.'

What may be a problem in the future is The definition of the financial term used more than the term itself.

The fact that the SPA is governed under Generally Accepted Accounting Principles (GAAP) does not provide absolute assurance that both parties bring the same meaning to the financial terms. In this sense, it is necessary that the SPA states a specific financial terms definition for the particular transaction, so that its meaning is clear to both parties.

Frequently, the Spanish Gaap are not specific enough in the definition of financial terms. 'Grey areas often arise because the terms that define the financial expectations of a deal have no pre-agreed market definition and rely on parties subjectivity. The danger always is that the other sides interpretation differs to your own,' concludes Cuñado.