

Examples of Clauses from real SPAs that deal with Third Party Claims

I. Sample Clause (1)

10.2 Specific Proceedings for Misrepresentation Claims relating to a Third-Party-Claim

(a) General

Claims by a third party actually served (in Court, in arbitration or directly to the addressee) or announced in connection with a specific issue, which, if eventually prevailing, would cause a Misrepresentation (hereinafter, a **“Third Party Claim”**) shall be notified by the Purchaser to the Seller by serving to the Seller a Notice of Claim.

Third Party Claims include tax assessments, social security claims, employment related claims, claims by creditors of the Company, claims of any sort of liability of the Company and sanctions by any competent authority and analogous claims.

Discrepancies between the Parties regarding the existence of a Misrepresentation, the indemnification obligation arising there from and the amount thereof in connection with a Third Party Claim shall be discussed by the Parties for fifteen Business Days seeking to agree settlement.

If no agreement is reached within that period, the dispute shall be dealt with as provided in this Agreement for the resolution of disputes (Clause 14).

(b) Specific Provisions for the Notice of Claim

A Notice of Claim that refers to a Third Party Claim shall be delivered to the Seller no later than fifteen Business Days (or, if the term available to the Purchaser or the Company for responding to the claim is shorter than thirty Business Days, within the first half of the term available to file the appropriate statement of defense) after (a) receipt by the Purchaser or the Company of a notice of a potential claim against either of them (administrative notice or other administrative acts, judicial proceedings, arbitration proceedings, letter of request, etc.); or after (b) notification to the Purchaser and/or Company of the commencement of any proceeding against the Purchaser or Company (specially, the commencement of a tax audit); and, in any event, within 90 calendar days from the time where the Purchaser first knew about the specific potential claim.

(c) Specific Provisions for the Notice of Response

A Notice of Response shall be sent by the Seller to the Purchaser within fifteen Business Days (or, if the term available to the Purchaser or the Company for responding to the claim is

shorter than thirty Business Days, within the first half of such period) after receipt of the Notice of Claim.

The Seller will be entitled to undertake the defense of the Purchaser and the Company in the Third Party Claim. If so decides the Seller shall state in the Notice of Response whether the Seller will undertake the defense of the Purchaser and/or the Company in the Third Party Claim.

Notwithstanding the foregoing, if the Third Party Claim refers to taxes corresponding to periods only partially represented and warranted by the Seller pursuant to this Agreement, the defense with respect to such periods will be carried out by the Purchaser in the terms set out in Clause 10.2 (e).

In the absence of a Notice of Response delivered in time, the Seller shall be deemed to waive the Seller's right to undertake the defense of such Third Party Claim.

(d) Defense of the Third Party Claim by Seller

Assumption by the Seller of the defense of a Third Party Claim shall have the following consequences:

- i. No compromise or settlement of such claims may be made by Seller without Purchaser's consent unless (1) there is no admission of any violation of Laws or any violation of the rights of any person and no adverse effect on any other claims that may be made against Purchaser, and (2) either the sole relief provided is monetary damages that are paid in full by the Seller or the settlement does not prove a Misrepresentation.
- ii. If the Seller decides, or under Clause 9.3 has, to post or to pay, at its expense but on behalf of Purchaser or the Company, any bonds or guarantees posted in courts of laws, and whether applicable, judgments entered into on an interlocutory basis at whichever instance (ejecución de sentencia de primera instancia y dictadas en recurso de apelación y de laudos arbitrales), which shall be posted or paid, such expense shall be reimbursed by the Purchaser to the Seller if eventually recovered by, or on behalf of, the Purchaser or the Company, together with a compensation for the costs incurred by the Seller.
- iii. The Purchaser will be under the obligation to (and the obligation to cause the Company to) promptly execute all powers of attorney (poderes para pleitos) in favor of reputable attorney and solicitors as the Seller may so request.
- iv. The Purchaser may appoint its own co-counsel (at Purchaser's expense), and no result or strategy will be agreed to by the Seller in terms which are not substantially identical to those previously discussed with the Purchaser.

- v. The Purchaser will use all reasonable efforts to make available (at the Purchaser's expense) to the Seller those Company's employees whose assistance, testimony or presence is necessary to assist the Seller in evaluating and defending any such claims.

The Purchaser (at its expense) shall make available to the Seller on a timely basis all documents, records and other material in the possession of the Purchaser or the Company reasonably required by the Seller for its use in defending the Third Party Claim and shall otherwise co-operate on a timely basis with the Seller in the defense of such claim.

Notwithstanding the above, in the event that Purchaser considers that the defense of a Third Party Claim could seriously harm the reputation or public standing of the Company and/or of the Purchaser, the latter may refuse to allow Seller to defend the Third Party Claim, in which case a percentage of the damage resulting from such Third Party Claim, to be determined by the arbitration pursuant to Clause 14 and in any event not less than 50 per cent thereof shall be borne by Purchaser. The arbitrators shall take into account the reasonableness of the Purchaser's refusal to allow a defense by Seller and the likely outcome of such defense.

(e) Defense of a Third Party Claim by the Purchaser or the Company

The assumption by the Purchaser of the defense of a Third Party Claim shall have the following consequences:

- i. The Purchaser shall (or shall cause the Company to) conduct the defense in good faith, resorting to all appeal or redress proceedings that may be applicable, being assisted by reputable counsel if reasonable under the circumstances and in general, taking all reasonable measures that ensure an adequate defense from the Third Party Claim, provided, however, that the specific provision set for the in the last paragraph of Clause 10.2 (d) will prevail.
- ii. The Purchaser shall (or shall cause the Company to) timely inform the Seller of the intended actions by Purchaser of the Company regarding the Third Party Claim and shall (or shall cause the Company to) furnish the Seller with any documents or information filed with or presented to third parties in connection with the Third Party Claim.
- iii. No result or strategy will be agreed to by the Purchaser or the Company without consulting with the Seller.
- iv. No compromise or settlement of such claims may be made by Purchaser or the Company without the Seller's consent.
- v. The Seller (at its expense) shall make available to Purchaser on a timely basis all documents, records and other material in possession of Seller reasonably required by Purchaser for its use in defending the Third Party Claim and shall otherwise co-operate on a timely basis with Purchaser in the defense of such claim.

Notwithstanding the previous paragraphs in this Clause, if the defense of a Third Party Claim is undertaken by the Company or the Purchaser in accordance with the last paragraph of Clause 10.2 (b) and 10.2 (e), the Company or the Purchaser may depart from the obligations in paragraphs (a) and (e) above provided that the degree of fulfillment of such obligations will be taken into account when calculation the reduction in the Seller's liability set forth in the last paragraph of Clause 10.2 (b).

II. Sample Clause (2)

8. Conduct of Purchaser Claims

8.1 Without prejudice to any specific provisions in the Indemnities, if a Purchaser becomes aware of any claim or potential claim by a third party which might result in a Non-Tax Claim, or a potential claim by a third party which can reasonably be expected to result in a Non-Tax Claim (each a **Third Party Claim**), such Purchaser shall, without prejudice to the ability of such Purchaser to make the resulting Non-Tax Claim or to the amount of such Non-Tax Claim:

- (a) promptly and in any event within 10 Business Days of it becoming so aware give notice of the Third Party Claim to the relevant Seller and ensure that such Seller and its representatives are given all information within the possession or control of the Purchaser Group as may be reasonably required to investigate the Third Party Claim subject to such Seller giving confidentiality undertakings in the same terms as those given by the Sellers in clause 31 in relation to any such information and records);
- (b) not (and ensure that each member of the Purchase Group shall not) admit liability or make any agreement or compromise in relation to the Third Party Claim without prior written approval of the Sellers (such approval not to be unreasonably withheld or delayed);
- (c) on request from the relevant Seller, make available to accountants and other representatives appointed by the Sellers such reasonable access (at reasonable times and over a reasonable period) to the personnel, records and information of the relevant Target Company as the Sellers reasonably request in connection with such Third Party Claim subject to the Sellers giving confidentiality undertakings in the same terms as those given by the Sellers in clause 31 including on behalf of their representatives, in relation to any such information and records);
- (d) to the extent reasonably requested by the Sellers, request that the auditors (both past and then current) relating to such Target Company make available their audit working papers in respect of audits of the accounts of the Target company for any accounting period relevant to such Third Party Claim (subject to the Sellers agreeing to such hold harmless requirements that such auditors may require); and

(e) with respect to Third Party Claims that may result in claims under Indemnities, save where the Third Party Claim concerns a Retained Conduct Matter and subject to such Purchaser or the relevant member of the relevant Purchaser Group being indemnified by the Sellers against all Costs incurred in respect of that Third Party Claim arising directly out of the actions taken by or on behalf of the Sellers pursuant to this clause 8.1(e), ensure that it and each member of the relevant Purchaser Group shall:

- (i) take such action as the Sellers may reasonably request to avoid, resist, dispute, appeal, compromise or defend the Third Party Claim;
- (ii) allow the Sellers (if they elect to do so) to take over the conduct of all proceedings and/or negotiations arising in connection with the Third Party Claim; and
- (iii) provide such other information and assistance (including access to appropriate personnel at reasonable times and for a reasonable period) as the Sellers may reasonably require in connection with the preparation for and conduct of any proceedings and/or negotiations relating to the Third Party Claim,

provided that, where the Seller has elected to take over conduct of the proceedings and/or negotiations under sub-clause (ii) above, the Sellers shall keep the Purchasers informed of the proceedings and negotiations and shall not (and shall ensure that each member of the Seller Group shall not and shall not direct any Target Company to) make any admissions of liability or make or enter into any settlement or compromise agreement in relation to the Third Party Claim without prior written approval of the relevant Purchaser (such approval not to be unreasonably withheld or delayed);

(f) with regard to Third Party Claims that may result in any Non-Tax Claim, ensure that (save where the Sellers have taken over conduct pursuant to clause 8.1(e)(ii)) it and each member of the relevant Purchaser Group shall (i) provide a reasonable opportunity to the Sellers to observe or participate in any meetings, negotiations or discussions in relation to the Third Party Claim, and (ii) consult reasonably with the Sellers in relation to the Third Party Claim and any proceedings or negotiations in relation to it, taking into account such reasonable suggestions as the Sellers may make.

With respect to information provided by members of the relevant Purchaser Group pursuant to sub-clauses (a), (c), (d), (e) and (f):

- (i) to the extent that such information is reasonably considered by the Purchaser to be commercially sensitive, the relevant Purchaser shall be entitled to initially limit disclosure of such information to such external senior independent counsel (who has been in practice for not less than ten years) as the Sellers may nominate, on the condition that such counsel shall (acting

reasonably) assess whether the substance of the information requested is directly germane to the expected Non-Tax Claim and, to the extent such counsel confirms that to be the case to the relevant Purchaser, the information shall only then be released to the relevant Sellers, whereupon they shall use its reasonable endeavors to limit disclosure of such information to those directors, employees, advisors, counsel and other representatives of the Seller Group as are reasonably necessary for the purposes of assessing, monitoring, investigating, conducting and otherwise dealing with the relevant Third Party Claim and/or any resulting Non-Tax Claim; and

- (ii) to the extent such information is legally privileged, the relevant Purchaser and Seller shall enter into reasonable and customary joint defense arrangements to preserve legal privilege with respect to third parties.

8.2 For the purposes of clause 8.1, a **Retained Conduct Matter** shall be a Third Party Claim in relation to the Indemnity set out in clause 10.18(c) where the Sellers having conduct of such Third Party Claim is reasonably likely to have a material adverse effect upon the Business.

8.3 The provisions of paragraph 9 of the Tax Covenant shall apply with respect to Tax Claims.

III. Sample Clause (3)

8.5

- (c) Purchaser agrees, and shall cause each Claim Addressee (i) to fully cooperate with Seller in the defense of any Third Party Claim. (ii) to diligently conduct the defense in order to keep the Loss as low as possible, (iii) not to acknowledge or settle the Third Party Claim without Seller's prior written consent that is not to be unreasonably withheld, (iv) to provide Seller's representatives access, upon reasonable advance notice and during normal business hours, to all relevant books and records, other information, premises and personnel of the Group (it being understood that subsections (ii) – (iv) above shall apply, irrespective of whether or not Seller has elected to defend the Third Party Claim). Any costs and expenses incurred by Purchaser in connection with the cooperation or defense in accordance with this Section 8.5 (c) shall be borne by Purchaser, except for any Losses to be indemnified by Seller under this Agreement.
- (d) The failure of any Claim Addressees to comply with any of its obligations under this Section 8.5, which needs to be proven by Seller, shall release Seller from its respective indemnification obligation hereunder, except if (and to the extent that) the Claim Addressee proves that Seller is not prejudiced by such failure.

IV. Sample Clause (4)

5. PROCEDURE FOR CLAIMS AGAINST THE SELLERS

- 5.1. The Buyer shall notify the Sellers, in the form set out in Clause 17 and as soon as reasonably practicable since becoming aware of it, of any event or circumstance that could give rise to a loss for breach of Warranty. The provisions of this sub-clause 5.1 shall be of general application to any Claim, without prejudice to the specific provisions of subclause 5.2.

The notification will include a brief description of the facts and, if possible, an estimation of the amount of the damage.

The notifications described above as well as those which are referred to in sub-clause 5.2 are referred to in this Agreement as "Claims".

Within ten (10) Business Days (as defined in Clause 17) of the date of receipt by them of the notification, the Sellers shall indicate whether or not they intend to compensate the Buyer. If the Sellers admit liability or if they do not give notice of refusal of liability in accordance with this paragraph, then the Sellers shall compensate the buyer by paying the corresponding amount within ten days, unless there are Outstanding Amounts that are due and payable, in which case the Claim will be immediately set-off such amounts as provided for in Clause 2.7 above, and the amounts not covered shall be paid by the Sellers within the referred ten day period. If the Sellers do not admit liability because they consider the Buyer's Claim or the amount of that Claim to be unjustified, any of the parties will be entitled to initiate arbitration proceedings as described in Clause 19.

- 5.2. The Buyer shall notify the Sellers of any claim made by a third party and that could give rise to a loss for breach of Warranty ("**Third Party Claim**" and also a "**Claim**"). The term "third party" will be deemed to include any individual or legal entity, whether public or private, including public authorities and public bodies.

Within ten (10) Business Days of receipt by them of a notification, the Sellers shall notify the Buyer in writing as to whether they undertake the defense of the Third Party Claim. In this case, the Seller shall previously pay or guarantee the Buyer (by means of a first demand bank guarantee by a reputed Bank operating in Spain or the United Kingdom) the amount of the Third Party Claim, unless the relevant amount is retained in accordance with Clause 2.7 above, in which case the payment or guarantee shall be made only for the amount of the Third Party Claim not covered by such retention. The Buyer shall provide all reasonable cooperation for the defense of the Third Party Claim, and shall be given access to any acts and documents related to the Third Party Claim with sufficient advance.

The liability of the Sellers for a Claim include the obligation to provide funds or bonds for any judicial, administrative or arbitral liability in the form of provisional measures, or as a condition to start or appeal a claim, or to suspend the enforcement of Third Party Claims (including the tax authorities) that could give rise to a potential liability of the Sellers. In the event of breach of this obligation, the Buyer may provide such funds or bonds, that shall be then reimbursed (together with any related costs, expenses and damages related thereto) by the Sellers, or retain (or set-off the relevant amount, when it is due and payable) in accordance with Clause 2.7 above.

The Sellers may settle the Third Party Claim only in the case that, prior to the settlement, the Seller pays the Buyer, the Company or the Subsidiaries, as applicable, the necessary funds to pay the amounts due as a result of the settlement, together with any other costs or expenses for which the Sellers are liable hereunder, unless such amounts are retained in full in accordance with Clause 2.7 above, in which case the settlement will be notified to the Buyer and the corresponding amounts immediately set off against those retained.

The Sellers expressly acknowledge that any consequences arising from Third Party Claims and ongoing litigation shall be considered a damage for the purposes of this Agreement, thus being fully liable for the results of them.

In any event, the Buyer and the Company may undertake any urgent decisions and carry out any urgent activities they consider appropriate for the protection of their interest.

The obligation of the Sellers to compensate the Buyer shall be deemed due from the moment when:

- (a) an arbitration award, definitive resolution or non-definitive resolution for which provisional enforcement has been granted, is made or given, ordering the Company to pay a certain amount of money or to undertake or refrain from a certain course of action, or
- (b) a public authority action is ordered for a debt of the Company to be effected or obliging the Company to pay a certain amount or to undertake or refrain from a certain course of action.

The Buyer shall notify the Sellers in writing of any arbitration, judicial or public authority decisions referred to above, delivering to the Sellers at the same time a copy of such decision.

The Sellers shall be obliged to compensate the Buyer by paying to the Buyer, the Company or the Subsidiaries the amount which it has been ordered to pay under the decision referred to above, or by paying the monetary equivalent of the order to undertake or refrain from a certain course of action, as the case may be. Such payment shall be made within ten (10)

Business Days of receipt by the Sellers of the written notification from the Buyer, regardless of whether the corresponding resolution may be appealed and of whether it has been appealed or not.

Any amounts which are payable by the Sellers to the Buyer arising from any liability established under Clause 3 shall accrue interest for late payment equivalent to EURIBOR plus four per cent. from the date on which the relevant notification is served.

The Buyer shall set off the amount which is owed to it by the Sellers against the amounts which it owes to the Sellers by way of the Escrow Funds (which shall, accordingly, be released to the Seller in the corresponding amounts within two (2) days from the date on which the Sellers receive the relevant notification) and the Variable Price. If the amount of the Deferred Price and the outstanding Variable Price is lower than the amount owed by the Sellers to the Buyer, the Sellers shall pay such difference to the Buyer within ten (10) Business Days from the date on which the Sellers receive the relevant notification.

In the event that the Sellers' liability for a Claim, as established in a final resolution not subject to appeal, is less than that already paid to the Sellers to the Buyer, then the Sellers shall be entitled to recover any amounts recovered by the Buyer, once the costs incurred in the defense have been deducted.