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참고자료 – covenant, representation, warranty 의미, 위반책임 및 차이점



A **covenant** is a promise by a party by which it pledges that something is either done, will be done or shall not be done.

- Example 1: "Licensee shall pay Licensor a flat royalty based on 2.5% of Gross Revenues received from the sale of Licensed Products."
- Example 2: "Company A hereby covenants not to sue Company B under any patent listed in Exhibit A for infringement based upon any act by Company B of manufacture, use, sale, offer for sale or import that occurs after the Effective Date."

A **representation** is a statement of fact that induces a party to enter into the contract. The statement, made before or at the time of making the contract, regards a past fact or existing circumstance related to the contract which influences such party to enter the contract.

- Example 1: "Licensor represents to Licensee that it has the full and unencumbered right, power and authority to enter into this Agreement and to grant the license rights granted by Licensor to Licensee hereunder.
- Example 2: "Company A hereby represents that it owns full legal and equitable title to each patent listed in Exhibit A."

A **warranty** is an undertaking or stipulation that a certain fact in relation to the subject of the contract is or shall be as it is stated or promised; and refers to an agreement to protect the recipient against loss if the fact is or becomes untrue (i.e., an implied indemnification).

- Example 1: "Licensor warrants to Licensee that it has not received any written notice or claim, and is not otherwise aware that the Licensed Technology infringes or misappropriates the proprietary rights of any other Person."
- Example 2: "Company A warrants to Company B that the Technical Information

provided hereunder will be the same as that used in the design, production, installation, and maintenance of Licensed Products produced in its own factories.”

A claim for **breach of a covenant** may be for damages or specific performance. When a breach of a covenant is “material” (i.e., a breach that destroys the value of the contract for the non-breaching party), however, it excuses the non-breaching party’s performance. This often is subjective and can be expensive to prove in later litigation. (Thus, the more specificity drafted into a contract – i.e., a listing of the specific and most-likely events that trigger a termination event – the better that contract protects the parties.)

Upon a **false representation (or misrepresentation)**, however, the defrauded party may elect to void the entire contract and recover any sums paid.

When a **breach of warranty** occurs, the damages recoverable are the difference in the value as warranted (i.e., how they should have been) and the value as received.

This is because “representations” should be statements made by a party after investigation and with a belief that such statements are true, and “warranties” should be statements a party makes while willing to accept financial responsibility if the statement turns out to be untrue, regardless of whether they actually (or should have) investigated.

In sum, upon a breach of a covenant or breach of warranty, the contract remains binding and damages only are recoverable for the breach; whereas, upon a misrepresentation, the defrauded party may elect to void the entire contract.

국제계약, 영문계약, 계약분쟁, 손해배상, Claim, License, R&D 제휴계약

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