

A Farmer's Guide to Production Contracts in Saskatchewan

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General

Purpose of this booklet

Farmers deal with contracts every day, and the majority of these agreements occur without a second thought. Things like ordering fuel or buying parts are some of these simple contracts.

But like most businesses, producers need more important agreements. Production contracts are some of the biggest. Unfortunately, those contracts are usually full of legal jargon. There may also be time pressures, so that proper thought cannot be given to the contract's consequences.

This booklet is intended to answer some of the questions producers have when signing production contracts. It is not a substitute for proper professional advice, but it can at least help establish what questions to ask.

There are many different contracts in agriculture, depending on the products, location, type of farmer, and so on. This booklet will concentrate on crop production contracts, but various points can also apply to other farm agreements.

Purpose of contracts

Contracts are crucial to any kind of business, including farming. Despite their importance, they are simple in principle: an agreement is reached between two or more parties, with consideration flowing both ways. "Consideration" means the value given up to enter into an agreement. It might be money, grain, a promise **not** to do something, or anything else of value.

Contracts fill three roles:

- *They provide certainty.* A properly worded contract lets each party know what they will be obtaining, and what they will be surrendering. How much detail this requires is up to the parties.
- *They help avoid and settle disputes.* Contracts force parties to think about issues beforehand. This means that they can turn their minds to avoiding problems, or setting up methods to resolve disagreements. This often avoids arguments altogether. Contracts may also include a way of quickly resolving disputes, such as mediation or arbitration.
- *They balance the risks.* In an ideal contract, each party should feel it has received at least as much as it has given away. This is not always accomplished, of course, but an important role of a contract is that each side can decide what is most important to them.

Every contract needs to balance risk and reward. If there is one thing to be taken from this booklet, it should be this: **expect that an advantage in one area will mean getting less in another.** Contracts are a complex blend of variables, and it is up to the contractors to determine which are the most important to them.

Here is an example. A producer has two potential buyers of grain. One buyer has been in business for 60 years, is financially solid, but has a reputation of paying the bare minimum price. The other buyer was formed only a few months ago, and is paying a 10% premium over spot grain prices. Which one should the farmer sell to?

There is no right or wrong answer; it is the producer's choice whether it takes the stability of the first buyer, with less risk of default. Alternatively, it can choose the higher prices of the second company, realizing that without a track record, there may be a higher risk of the company not being in business after harvest to pay the contract.

What the producer should **not** do is expect to get everything, in this case, high prices **and** financial stability. Almost everything in life involves scarce resources, and offering more in one area usually takes resources away from another. Parties will distinguish themselves by promoting certain aspects of their product or business practices. This almost always results in a cost somewhere else. This is nothing more than the principle that “there is no free lunch”, but it definitely applies to contracting.

More importantly, a contract that is completely one-sided rarely works out. Any party that gains nothing from an agreement will have little incentive to complete its obligations. The lack of a reasonable return may even threaten its very existence. Recognize that the other party needs to get something out of the contract as well.

This does not mean that anybody should surrender and accept everything that is proposed in a contract. Be tough when bargaining – but be fair.

Contract categories

This booklet cannot cover all types of agreements, but will concentrate on crop production contracts. Other types of agreements may include similar provisions, but will differ in significant ways.

Even within the category of crop production contracts, there are many different forms. Here are some common ones. Note that these titles are not exact, and depending on the company, the definitions may not fit precisely.

- *Marketing Contract.* This agreement includes a commitment to deliver a certain quantity of grain or seed with particular characteristics or quality. The contract will sometimes specify growing practices that need to be used. The price is usually locked in at the time of signing. These contracts are often called deferred delivery contracts.
- *Production Contract.* Like a Marketing Contract, this agreement requires delivery of product. The difference is that it is based on seed (and maybe other inputs) provided by the buyer, so that particular characteristics can be guaranteed. It is also different in that a delivery quantity is not usually specified; most often it will simply be all of the production from the seed provided (although the price may only be guaranteed for a smaller portion).
- *Basis Contracts.* Similar in some ways to a Marketing Contract, but instead of locking in a price, the producer locks into a *basis* (basis is the difference between the local cash price and the prices on a corresponding futures market). A Basis

Contract, like a Marketing Contract, manages risk, but gives rise to different considerations, advantages and disadvantages.

- *Technology Licence Agreements.* These have become widespread with the introduction of genetically modified seed. Not really a production contract, they are a licence, or a permission, to use particular seed. In most cases, the entire output must be sold back to the provider, similar to a Production Contract, so that the special seed does not go into general distribution.

There are many other types of production contracts, but this booklet will primarily refer to production and marketing agreements.

Rules to remember when contracting

Some basic rules should be kept in mind when entering into any contract. They include:

- *Get it in writing.* A verbal agreement, or "handshake deal", is just as much a contract as one that is written down. The difference lies in proving the terms. Because memories dim over time, or there can be outright dishonesty by parties, written agreements provide better evidence of what was intended.

This does not mean that every written contract must be signed as-is. Be particularly careful when handed a "standard form contract", with a statement that no changes can be made. Simply because it is professionally typeset and **looks** intimidating does not mean that it cannot be amended. Remember also that one can simply walk away if the contract terms are too severe. In some cases, there may not be many alternatives, but consider whether the consequences are just too harsh to accept.

- *Ensure accuracy.* Read the contract carefully to be sure it matches what has been promised. If something is missing, or requires clarification, have it included or amended before signing (how to make those changes is discussed below).
- *Consult experts when necessary.* If parts of the contract are confusing, contact a lawyer or other person who can provide independent advice. Even where the language seems straightforward, a review can point out risks which may not be obvious, and can save thousands of dollars.
- *Keep the channels of communication open.* If problems arise during a contract's term, talk to the other party as soon as possible to try and find a solution. Whether it is due to embarrassment or anger, it is often human nature to avoid talking to the other side when difficulties occur. It is remarkable how many problems can be solved or kept from escalating just by communicating and working through the issue.

Dangerous clauses

There are common traps in contracts. These are sometimes a matter of degree, in which case, it is up to the producer to decide if they are reasonable. They include:

a) Evergreen clause

This refers to a provision that automatically renews an agreement, or renews obligations under an agreement. They are rare in crop production agreements,

since those are usually limited to one year. Be on the lookout, however, for clauses that state a contract is automatically renewed. Sometimes they are renewed unless notice is given otherwise, which can be dangerous if the deadline date is missed.

b) **Unilateral changes permitted**

Contracts sometimes include details in a separate schedule, or in a “Rules and Regulations” addendum. This is acceptable, but they are occasionally accompanied by a clause that allows the buyer to change those terms without the consent of the producer. This is obviously dangerous. Both parties should have to agree to any changes, and the revisions should be in writing.

c) **Hidden security interests**

A security interest is the right of a creditor to enforce its claim against specific property. That property is called collateral or security. A land mortgage is a common example of a security interest. The owner mortgages, or charges, his/her land to the lender, usually in exchange for a loan. If the loan is not paid as agreed, the lender has the right to seize the land to satisfy the debt.

Most security interests are obvious, and farmers will know when they are granting them. They can be buried within contracts, however. For example, a production contract might provide that the buyer has a security interest in all crops grown under the contract. This gives the buyer many more rights to seize that crop, even where the producer has a valid reason for not delivering. Every contract should be carefully reviewed for security interests.

d) **Unilateral grading clauses**

Again, anything that can be unilaterally done by the buyer is troublesome. Grading of a crop can raise many problems, and is a prime area of dispute. A producer should ensure that grading is done fairly, and as openly as possible. In the event of a dispute, there should be an opportunity to have a third party review the issue, rather than accept the buyer’s opinion alone.

e) **Unreasonable sampling clauses**

It is impossible to test an entire crop, so samples are taken to indicate the quality and characteristics of the delivery. When thousands of bushels of wheat are being delivered, a few ounces for samples is not a concern. Where there is a specialty crop that is grown in small quantities, however, the size of a sample can be more significant. For instance, if a spice is being grown where the entire crop is only 50 pounds, giving 10 or even 5 pounds as a sample is a major concern. Dishonest buyers may use this as a way to obtain product for free in the guise of a “sample”.

f) **Illegal terms**

Never agree to a contract that is illegal. This should be obvious, but wherever there is doubt, consult a lawyer. No contract is worth the chance of a criminal

record, a fine or jail. If that is not convincing enough, remember that an illegal contract is unenforceable. There is a good chance of the other party ending up with the farmer's grain **and** the money.

g) Personal guarantees

Personal guarantees are sometimes a necessary evil. The purpose of a guarantee is to expand the number of people responsible for performing a contract; adding those who have to make payments, for instance. Therefore, a shareholder of a corporation might have to give up the limited liability that incorporation offers, or someone may have to co-sign a loan for another if the borrower is not credit-worthy.

It may be impossible to avoid signing a guarantee, but do not sign one by mistake. A guarantee can literally be as small as one sentence. Whenever there is uncertainty over additional or personal liability, see a lawyer.

How to amend contracts

As mentioned earlier, a contract does not have to be accepted as-is. Changes can be requested, and if the other side agrees, the written contract should be revised to reflect the changes.

The change is usually made by striking out the portion to be deleted and/or writing in new terms. These changes should be made in ink, and be clearly legible. If there is not enough room to add the changes, refer to an attached schedule and put the amendments there. To confirm the changes, have each party place their initials next to the amendments.

Do not rely on verbal changes to a written contract. They have the same problems as verbal contracts that were mentioned earlier, and most written contracts will contain a clause that excludes verbal changes.

If the buyer gives an explanation about a clause, consider including that explanation in the contract itself. This should be initialed as noted earlier. A judge will be able to make a much better decision if the written materials contain the complete understanding of the parties.

A common question is "What can and cannot be negotiated?" As the saying goes, everything is negotiable...if the price is right. It never hurts to ask, but the chances of successful negotiating depend on how many alternatives the other party has, and how eager both sides are to complete a deal. Do some investigation and research beforehand. Does the other side need a quick cash infusion? Are there other sellers in the market? Can anything else be included to sweeten the offer? These are just some of the things to consider.

Sample Contract Terms

This section contains sample clauses found in typical production contracts. In truth, there are no "typical" agreements - they differ according to the company presenting them, the type of crop, and a number of other factors.

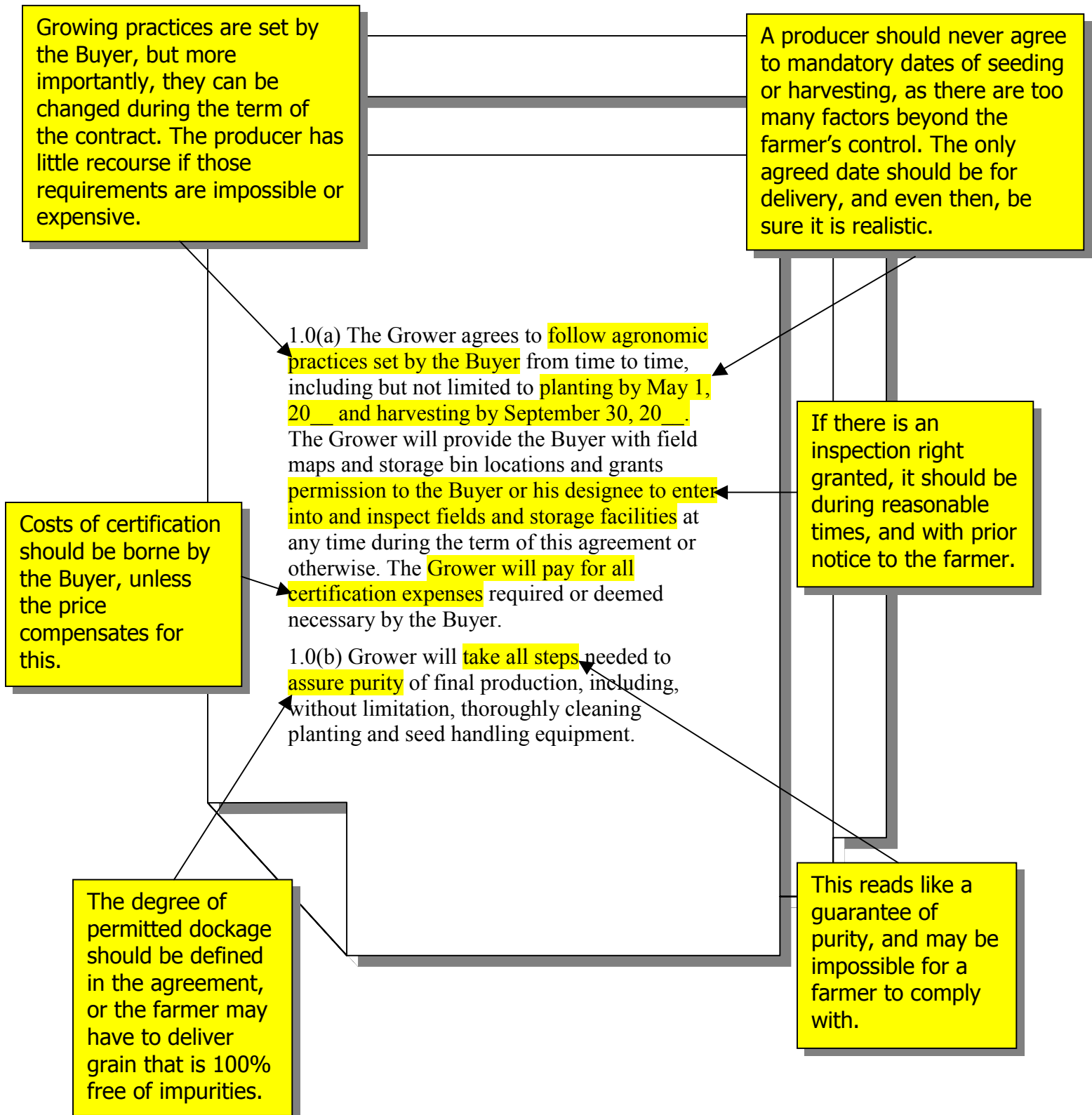
Where possible, two examples of contract language will be presented: one which is drafted from the buyer's point of view, and the other which is more producer-friendly (This does not mean that the contract is completely in favour of the farmer, it just means that it is "fairer"). There can, of course, be endless variations on these, but the purpose is to provide real life examples of how small wording changes can lead to different obligations and rights.

In some cases, there is only one example given, but the notes will show how it can be changed, or whether it should be resisted altogether.

Also remember the risk/reward trade-off that was mentioned earlier. In cases where parties are truly bargaining (as opposed to where a contract is imposed as a take it or leave it proposition), each side will have to be prepared to give in on some points in order to gain compromises on issues that are important to them.

Finally, the explanatory comments are not hard and fast. Some may disagree with the suitability of particular language. Only the producer can make the final call on whether the risks are acceptable.

Growing Obligations (Buyer Friendly)



Growing Obligations (Buyer Friendly)

"Immediately" can be impossible to comply with, so there should be a reasonable time period permitted

This implies open-ended storage requirements. The producer should ensure that delivery or pick-up will occur by a particular date to avoid ongoing storage costs.

A farmer should not guarantee against gene flow, especially for crops such as canola which currently have significant cross pollination issues. At most, there should be a defined percentage of GM contamination permitted.

1.0(a) Harvesting will be performed by the Grower with a thoroughly cleaned combine **immediately** after the crop reaches ___% moisture. Grower will also clean all wagons, trucks, elevators, augers and other equipment used in harvest to prevent varietal mixture and contamination from other crops. Grower guarantees that **no genetically modified crops**, seeds or grains will be mixed with the crop delivered hereunder.

1.0(b) Grower will store entire production in bins where there is no possibility of contamination with other grain **until the contractor calls for the grain**. Storage bins must be accessible in all weather conditions. Storage facilities with aeration must be used.

1.0(c) Contract quantity shall equal all of the year's production from the land described in Schedule A. **If Total Production is less** than ___% of Grower's annual historical yield as established and agreed by the parties, then Grower shall be liable for the deficiency. **Excess production will be priced** at the price in effect on the day of delivery.

1.0(d) A **service fee** of \$___ per bushel will apply on the first 100 bushels per acre delivered to Buyer for each delivery under this Contract.

This leaves the entire risk of lower production on the grower, no matter what the reason

Service fees are sometimes levied to discourage several smaller deliveries by the farmer. If the producer will want to make multiple deliveries, this kind of clause needs to be deleted or adjusted appropriately.

The option is given to the buyer to take more crop, and prevents the farmer from shopping around.

Growing Obligations (Buyer Friendly)

This gives the producer no assurances at all – if it suits the buyer, it can take whatever quantity it wants, or none at all.

1.0(a) The Buyer shall have the **right, but not the obligation**, to buy all of the crop produced by the Grower hereunder. The Buyer shall have the **further right to buy**, at the prices named in this contract, all other crop of similar type and kind grown by the Grower, whether originally covered by this contract or otherwise.

It also extends to crops outside of the production contract itself, and is therefore completely unacceptable

Many contracts offer "incentives" amounting to higher prices if they buy inputs from the buyer. Beware of being boxed into a requirement to buy inputs from the buyer. They may be of inferior quality, or more expensive.

1.0(b) The Grower warrants that it will not use or allow to be used during the period of this Contract any feed, medication, herbicides, pesticides, rodenticides, insecticides or any other item **except as supplied** or approved in writing by the Buyer. In no way limiting any default provision herein, the Grower agrees that any breach of this section will result in **immediate default** by the Grower of this Contract and the Buyer may take action so provided for herein.

It is better if there is some time given to remedy a breach before the contract is cancelled.

Growing Obligations (Grower Friendly)

1.0(a) The Buyer agrees to **provide technical advice** at no cost to the Grower. The Buyer's Technical Advisors shall visit the Grower periodically to give advice and assistance as required. The Buyer will provide the Grower with a written guideline of recommended practices that optimize production, known as the **Buyer's Growing Guide**. This guide is not a guarantee of successful results or profits, but contains those management practices that, in the Buyer's opinion, will prove most effective.

Ensure that separate documents such as this are informational only, and are not a binding part of the contract.

These clauses are unfortunately rare, but if there is the opportunity to take advantage of the buyer's expertise, it should be exercised. It might mean that the price is lower (it has to come from somewhere), but if yields increase, the benefit could be significant.

Delivery (Buyer Friendly)

Without more, this can mean that the buyer is free to change delivery requirements at will. These should be tied down before signing the contract.

2.0(a) The Grower will deliver the wheat in bulk in accordance with the Buyer's delivery instructions **from time to time**

Giving the buyer sole discretion is dangerous

2.0(b) The Grower shall be responsible to arrange delivery of the Crop as and when required by Buyer to the Nominated Delivery Point, or such other delivery point stipulated by Buyer as permitted below. The Grower acknowledges that whereas Buyer will endeavour to require delivery of the Crop in the project delivery month, Buyer nevertheless has **complete discretion** as to when it calls for delivery of the Crop and as to how much of the Crop it requires to be delivered at any particular time.

Note that all costs are for the account of the grower. This is common, but consider what happens if the delivery point changes

2.0(c) **Costs for delivery** to the Nominated Delivery Point shall be for the Grower's account. Where Buyer calls for delivery to some other place there will be an adjustment to the account between the parties, such adjustments to represent the difference between the cost of delivery to the Nominated Delivery Point and the costs of delivery to the actual delivery point, but **only where the difference in delivery distance** exceeds 100 kilometers.

The place of delivery clause puts more risk on the grower, because there can be up to another 100 km. of costs.

2.0(d) Product will shipped/delivered **on buyer's call**.

Any clause which allows the buyer to call for delivery, without some restrictions on dates, should be resisted.

Delivery (Grower Friendly)

2.0(a) Happy Valley Elevator is **designated** as the nominated delivery point.

2.0(b) Seed stored on the Grower's farm and used by the Buyer will be hauled by the Buyer at **no charge to the Grower**. The Grower may elect to haul the seed with the same rate to apply that the Buyer pays a trucker to haul them. The Grower must furnish personnel to help load the seed and power to operate the auger or vac used to fill the truck.

2.0(c) The delivery period shall be September, October, and November, at the option of the Grower. Harvest delivery will be available **at any terminal or elevator location** of the Buyer. Any storage or Price Later Fees are between Elevator and Grower. Transportation costs paid by Grower.

2.0(d) Buyer shall have the right to designate any **reasonable alternate delivery points** if necessary to expedite or facilitate Grower's performance of this Contract but shall have no obligation to do so. Increased shipping charges under this provision shall be for Buyer's account, reductions in shipping charges shall be for Grower's account; provided, however, if the designated alternate delivery points are solely for Grower's convenience, increased shipping charges shall be for Grower's account.

This is better than an unstated, or subject to change, delivery point, in that the producer knows exactly what the obligations will be.

This is not common, and is usually seen where there is a specialty crop, or something highly desired by buyers.

This provides flexibility to the grower, especially where the Buyer has a large number of delivery points. The time is also flexible, and favours the grower.

This provides protection to the farmer if the delivery point is changed, since extra costs are the buyer's responsibility, and lower costs benefit the farmer (unless the reason for the change is solely to suit the farmer).

Payment terms (Buyer Friendly)

3.0(a) Payment for the Crops grown under this agreement shall be calculated at the price for such grade of crop on the date of signing this agreement, or on the date of delivery, **whichever is lower**. Payment shall be made within **60 days** of delivery.

The 60 days is too long to wait for payment. It should be immediate. Keep in mind that relying on bonding provisions with the Canadian Grain Commission may require a claim within a short time from delivery.

In this case, the benefit is entirely the buyer's, since it will be the lower price that prevails.

Payment terms (Grower Friendly)

Note that the price is locked in, rather than dependent on fluctuating markets.

This provides for a more objective measurement process, and also includes a premium for extra oil or protein (sometimes buyers will simply take the higher quality crop without extra payment).

4.0(a) The compensation for a load of delivered _____ Crop shall be \$8.00 per bushel, plus a premium based upon the oil/protein content as per the Scale below.

4.0(b) Oil/protein content shall be determined by the Elevator, utilizing a grain analyzer with a _____ approved calibration for the Crop, on a representative sample drawn from each load.

4.0(c) In the event of a disagreement or dispute related to oil/protein content, the Grower may request that such sample be re-analyzed. The oil/protein content for determining the premium due shall be the average value of the two sample measurements.

4.0(d) Final price adjustments for moisture will be made using the calculation procedure shown on Attachment 1 of this contract. Scale tickets will be presented by Buyer to Grower for each load that is weighed. Any costs of weighing the Crop will be shared equally by both parties. Crop testing below _____% moisture will not be accepted by Buyer.

4.0(e) Both parties reserve the right to have moisture tests independently analyzed for the purpose of determining a final price per tonne. If moisture samples taken by each party differ, an average will be computed to determine a final price. Samples will be submitted to the XYZ Independent Company Lab for final moisture determination. Each party to this contract will pay for the cost of having their own samples analyzed.

This can still allow an artificially low sample to skew the final result, but it is better than having to accept the buyer's testing only.

The testing equipment should be certified by an independent third party, such as the Canadian Grain Commission.

An independent lab is used to measure moisture, rather than just the buyer's.

General Terms

Indemnity (Buyer Friendly)

Indemnities are best avoided wherever possible, because of the undefined and open-ended liability that can arise (they can particularly be a problem with food adulteration lawsuits, which can involve everyone in the supply chain)

8.1(a) The Grower hereby agrees to indemnify and save harmless the Buyer of and from all actions, suits, charges, losses, damages and expenses whatsoever to which the Buyer is subjected as a result of the Grower breaching any term or condition of this agreement, or if the Buyer incurs any costs to a third party as a result of this agreement.

This section is particularly unpleasant because it includes any claims, whether they are the farmer's fault or not.

Indemnity (Grower Friendly)

This section is reciprocal, applying to each party equally.

8.1(a) Each party agrees to indemnify and save harmless **the other party** (“the Indemnified Party”) from all actions, suits, charges, losses, damages and expenses whatsoever to which the Indemnified Party is subjected **as a result** of the other breaching any term or condition of this agreement.

This is restricted to claims caused by a breach. That is better than including anything, even where the other party caused the loss.

Termination of contract (Buyer Friendly)

Unlike a case where the grower wants to terminate, the buyer does not have to give the grower an opportunity to correct the breach.

9.2(a) The Buyer may **forthwith** terminate this Contract upon the failure of the Grower to comply with the terms and/or conditions of the Contract, or if for any reason **the Buyer believes that its position** under this Contract is in jeopardy. The Grower may exercise any rights available to it **under Delaware law** to terminate for cause upon the failure of the Buyer to comply with the terms and conditions of this contract; provided that the Grower shall give the Buyer written notice specifying the Buyer's failure and a reasonable opportunity for the Buyer to cure the defect.

Foreign law may be quite different from that in Saskatchewan, and will entail extra costs to obtain advice.

Even if there is no breach, the buyer can terminate at its discretion if it feels at risk. This gives little assurance to the grower that the contract will be completed.

Termination of contract (Grower Friendly)

9.01(a) The Buyer may terminate this Contract upon the failure of the Grower to comply with the terms and/or conditions of the Contract; provided that the Buyer shall give the Grower **written notice** specifying the Grower's failure. If within thirty (30) days after receipt of such notice, the Grower shall not have either corrected such failure or thereafter proceeded diligently to complete such correction, then the Buyer may, at its option, place the Grower in default and the Contract shall terminate on the date specified in such notice. **The Grower may exercise any rights** available to it under Saskatchewan law to terminate for cause upon the failure of the Buyer to comply with the terms and conditions of this contract; provided that the Grower shall give the Buyer written notice specifying the Buyer's failure and a reasonable opportunity for the Buyer to cure the defect.

In this example, the farmer will be given notice of a breach, and a chance to correct it.

The rights of termination are more or less equal, whether it is by the grower or the buyer.

Penalties and Liquidated Damages (Buyer Friendly)

Liquidated damages are the estimated damages that will accrue from a breach, and are used when the parties know that measuring actual damages will be difficult.

10.1(a) The Grower agrees and acknowledges that in the event of a breach of this contract by it, there will be damages suffered by the Buyer. In such event, it is agreed that the Grower will pay to the Buyer as **liquidated damages**, and not as a **penalty**, the sum of \$1,000 per day during which the breach continues. The parties acknowledge that the said sum is a genuine pre-estimate of damages, and is reasonable.

10.1(b) Nothing in this agreement prevents the Buyer from taking action to recover and **collect any further damages** suffered as a result of a breach by the Grower in excess of those mentioned in paragraph 10.1(a).

The purpose of using liquidated damages is to let the parties plan what liability they could face. By allowing higher damages at the whim of the buyer, this purpose is lost, and therefore, this type of clause is unacceptable.

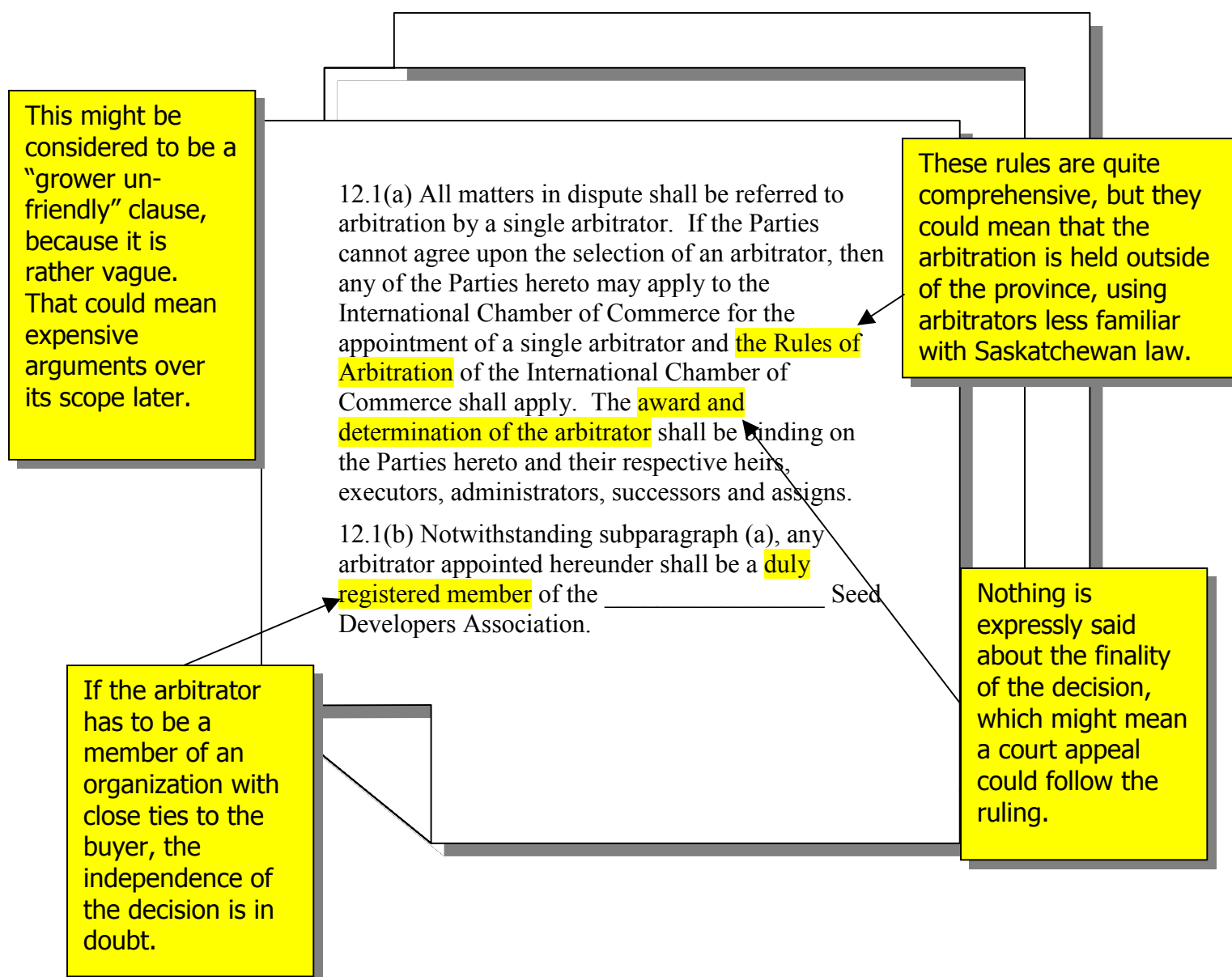
While liquidated damages are enforceable, penalties are usually not. Whether a sum is punitive is for a court to decide, but in any event, declaring any significant amount as damages can hurt the financially weaker party more than the other.

Arbitration (Buyer Friendly)

Note: There is debate over whether arbitration clauses help or hurt producers in production contracts. They certainly have advantages: they can solve disputes more cheaply and faster with more expertise brought onto an issue. There are downsides, however, such as procedural changes, possible application of foreign rules and location, and even restrictions on who the arbitrator can be.

Mediation is another possibility. It does not lead to a ruling, as arbitration does. In mediation, a mediator assists the parties to come up with their own consensus agreement. The mediator will not force a solution, though.

Because the advantages and disadvantages of alternative dispute resolution are not universal, pay special attention to this to determine if it is worthwhile.



Arbitration (Grower Friendly)

13.01 If a dispute arises between the parties relating to this Agreement, the parties agree to use **the following procedure** as a condition precedent to either party pursuing other available remedies:

- (a) A meeting shall be held promptly between the parties, attended by individuals with decision-making authority regarding the dispute to attempt in good faith **to negotiate a resolution** of the dispute.
- (b) If, within 20 days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to mediation and to bear equally the costs of the mediation.
- (c) The parties will jointly appoint a mutually acceptable **mediator**. If they have been unable to agree upon such appointment within 15 days from the conclusion of the negotiation period, then they will seek the assistance of Mediation Saskatchewan in obtaining a mediator.
- (d) The parties agree to participate in good faith in the mediation and negotiations related thereto for a period of at least thirty (30) days. If the parties are not successful in resolving the dispute through mediation, then the parties agree that the dispute shall be settled by arbitration by a single arbitrator in accordance with *The Arbitration Act* of Saskatchewan. The decision of the arbitrator shall be final and binding and shall **not be subject to appeal** on a question of fact, law or mixed fact and law.
- (e) If the parties are unable to agree on the single arbitrator, then the Dean of Law, University of Saskatchewan shall appoint that arbitrator.

This is a comprehensive dispute resolution clause, involving negotiation, mediation and arbitration.

It is difficult to overstate the importance of first talking to the other side once a dispute arises. Many problems can be resolved at this stage without wasting time and money.

Mediation can be effective if the parties are committed, but it also adds to the cost of the overall process.

This clause, called a "privative clause", tries to ensure that one party cannot drag out the process by appealing an unfavourable ruling to court.

**Governing law
(Buyer Friendly)**

Assuming that the producer resides in Saskatchewan, it will not want to have a contract governed by foreign law. Not only is there more trouble enforcing it, but out of province lawyers and advisors will need to be hired, which can be expensive.

14.1 This agreement shall be governed by the laws of the State of **Minnesota**

**Governing law
(Grower Friendly)**

14.1 This agreement shall be governed by the laws of the **Province of Saskatchewan**, and no party shall commence or continue any action, suit or proceedings of any kind except in a court of competent jurisdiction within Saskatchewan.

This allows Saskatchewan law to apply, and also ensures that court proceedings will be held within the province.

Ownership of product (Buyer Friendly)

16.1 The Grower acknowledges that the seed provided to grow the Crop is **provided under license**, and ownership in whole or in part is not transferred by the Buyer. The Grower will take **all necessary steps** to protect the Buyer's intellectual property rights in the Crop and its inputs. Grower agrees that all Crops produced from seed supplied by the Buyer shall be the Buyer's property, and Grower **shall not retain any part** of the Crops, whether for seed or otherwise.

With genetically modified ("GM") crops, this type of clause is more common, and is often accompanied by a separate Technology Licensing Agreement reflecting the fact that the producer has no ownership rights to the crop. Such a clause might be a necessary part of being allowed to grow these kinds of crops.

There is no definition of what these "necessary steps" might entail. They should be tied down before signing the agreement.

While it is the norm for owners of GM crops to prohibit retention of seed, it bears emphasis that this means nothing can be kept for planting next year.

Glossary of Terms

<i>ADR</i>	See <i>Alternative dispute resolution</i>
<i>Alternative dispute resolution</i>	A variety of procedures that are used to resolve conflicts without resorting to traditional litigation or court systems. Some examples include <i>mediation</i> and <i>arbitration</i> .
<i>Arbitration</i>	A process in which a disagreement between two or more parties is resolved by impartial individuals, called arbitrators, to avoid costly and lengthy litigation.
<i>Basis</i>	The difference in price between current deliveries, and what the crop is worth at a particular date on the futures market.
<i>Boilerplate</i>	A standard form or clause used in a legal contract
<i>Collateral</i>	The property that is pledged as security (and which can be repossessed) under a <i>security interest</i>
<i>Consideration</i>	The value or benefit that is granted by a party to a contract
<i>Gene flow</i>	The term used when genetic material from one field (usually genetically modified) drifts to and taints another crop. Sometimes called genetic drift.
<i>GM</i>	Genetically modified crops. Sometimes called GE (genetically engineered) and GMO (genetically modified organism).
<i>Guarantee</i>	A contract where one person agrees to assume some or all of the legal obligations of another.
<i>Liquidated damages</i>	An amount agreed by the parties to be a genuine pre-estimate of damages should there be a breach.

<i>Marketing contract</i>	Sometimes called a deferred delivery contract. This allows a producer to lock in a price for crop in exchange for a promise to deliver it by a certain date
<i>Mediation</i>	An informal, voluntary process intended to resolve conflicts, without resorting to arbitration or litigation, by using an impartial third party.
<i>Production contract</i>	Although it can refer to any kind of grain delivery contract, it is sometimes restricted to an agreement to grow a crop on behalf of a person who provides inputs and other assistance.
<i>Security</i>	See <i>Collateral</i>
<i>Security interest</i>	An interest taken by somebody in another's property (the <i>collateral</i>) to secure the performance of an obligation. If the obligation is not performed, the security holder has the right to seize the collateral.
<i>Technology licensing agreement</i>	Permission granted to a producer to use particular technology, usually genetically modified crops, under specific conditions. Sometimes called Technology Use Agreement, or a license.
<i>Unilateral action</i>	A right that can be exercised by one person to a contract, without the consent of the other(s).